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1	(Court in recess.)	1	Q That I've marked as Defendant's Exhibit 23 for
2		2	identification.
3	5:45 p.m.	3	(Whereupon, Defendant's Exhibit
4	JUNE 2, 2010 7:30 a.m.	4	Number 23 was marked for
5	PROCEEDINGS	5	identification.)
6	*****	6	Q Can you just flip through and make sure that
7	THE COURT: Have a seat. Good morning.	7	it's a complete copy of your CV that you provided
8	IRA MARK BLOOM,	8	to me previously?
9	having first been duly sworn, was examined and	9	A Yes, it is.
10	testified as follows:	10	Q All right.
11	MR. WOOTEN: Your Honor, this morning they	11	MR. WOOTEN: And Judge we would offer it.
12	wanted to swap out a copy of the collateral file to	12	THE COURT: It's admitted, Number 23.
13	get one that had those dates across the top.	13	(Whereupon, Defendant's Exhibit
14	THE COURT: Yes.	14	Number 23 was received into
15	MR. WOOTEN: We're just verifying that	15	evidence.)
16	right quick.	16	Q Professor, we have been working off of a
17	THE COURT: All right. We can do that	17	document which is -- and I know you have a notebook
18	after.	18	that I provided you that has the SEC filings. We
19	MR. WOOTEN: All right.	19	marked this one as Exhibit 22.
20	DIRECT EXAMINATION	20	A Okay.
21	BY MR. WOOTEN:	21	Q And it has the same SEC filings that we have
22	Q Professor, if you would, please state your full	22	provided to you, and I know that you've made some
23	name for the record.	23	notes and stuff in the margin of your notebooks,
24	A Ira Mark Bloom.	24	but this was -- when I refer to Exhibit 22, I'm
25	Q And Professor, how are you currently employed?	25	referring to the SEC filings that we've given you
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1	A Albany Law School in Albany, New York.	1	in this case. Okay?
2	Q And how long have you been so employed?	2	A Okay.
3	A I've been in Albany since 1970.	3	Q And I'll just sit this right here.
4	Q All right. And if you would, would you tell	4	The defendant (sic.) stipulated that you are an
5	the Court the emphasis of your teaching and	5	expert in New York law. Can you tell the Court why
6	training?	6	the agreement in this case is governed by New York
7	A Yes, sir.	7	law?
8	MR. RAGSDALE: Excuse me. I don't mean	8	A Yes. I looked at the trust agreement and
9	to --	9	specifically Section 11.04 is entitled Governing
10	MR. WOOTEN: Sure.	10	Law, and reads: "This agreement and the
11	MR. RAGSDALE: Although you are welcome to	11	certificate shall be governed by and construed in
12	go through these preliminaries, we will stipulate	12	accordance with the laws of the State of New York,
13	that Professor Bloom is an expert in New York law.	13	without regard to the conflict of law principles
14	THE COURT: Excellent.	14	thereof. Other than Sections 5-14.01 and 14.02 of
15	MR. RAGSDALE: Qualified to give his	15	New York's general obligations law and the
16	opinion.	16	obligations, rights, and remedies of the parties
17	THE COURT: Thank you.	17	hereunder shall be determined in accordance with
18	MR. WOOTEN: Okay.	18	such laws."
19	THE COURT: What do you teach?	19	Q Okay. And in reading that clause, is it clear
20	THE WITNESS: I teach trust and estates,	20	to you that under New York law this trust and all
21	estate planning, property.	21	of its activities are governed pursuant to New York
22	THE COURT: All right.	22	law?
23	Q Professor Bloom, let me show you, just for the	23	A Yes.
24	record, a copy of your CV --	24	Q Does that include the matter by which the trust
25	A Yes.	25	acquires its assets?

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1 A Yes.
2 Q Would you, please, tell the Court what the
3 requirements are for this trust to be funded with
4 its assets under New York law.
5 A Sure. Well, just by way of explanation. New
6 York is kind of idiosyncratic in many ways. And we
7 have a large body of statutory trust law which is
8 contained in the New York estates, powers, and
9 trust law. And we typically refer to that as the
10 EPTL. And Section EPTL 7-1.18, which was enacted
11 in 1997 and applies to all lifetime trusts,
12 provides in part as follows: "A lifetime trust
13 shall be valid as to any assets therein, to the
14 extent the assets have been transferred to the
15 trust."
16 So essentially -- this is really a codification
17 of New York law to the effect that in order to have
18 an asset be part of a trust, it actually has to be
19 transferred to the trust.
20 Q So when we say "transfer," does that encompass
21 a delivery that complies with New York law of the
22 asset to the trust?
23 A Yes. It contemplates sufficient transfer under
24 New York law, and then, in turn, what is sufficient
25 transfer under New York law depends on a particular

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1 asset being transferred.
2 Q Okay.
3 A So --
4 Q With respect to a promissory note, how is a
5 transfer accomplished?
6 A Okay. Well, it's necessary to really look at
7 New York's Uniform Commercial Code which governs
8 the transfer of negotiable instruments, and I'm
9 assuming and I think it's pretty clear that the
10 note here was a negotiable instrument under the
11 New York Uniform Commercial code. And so in order
12 to accomplish a transfer, it's necessary to comply
13 with New York's Uniform Commercial Code Section
14 3-2.02. And in effect, there has to be a
15 negotiation of the instrument. And not only must
16 there be in effect a transfer of possession, but
17 there has to be an endorsement on the instrument to
18 effectuate a transfer.
19 And I should add, again, New York being
20 idiosyncratic, New York, along with South Carolina,
21 is the only state that has not adopted the revised
22 Uniform Commercial Code. So Section 3-2.02 in New
23 York is going to be different than what you would
24 have, say, in Alabama or other states.
25 Q All right. Now, with respect to this case, you

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1 were not able to be present yesterday, but we had
2 testimony about the fact that there was a
3 promissory note which was endorsed in blank in a
4 previous trial. And you saw that as part of your
5 initial opinion, correct?
6 A Yes. I saw the promissory note that was
7 endorsed in blank.
8 Q And it was your opinion that that, based on
9 what we had between the mortgage assignment and the
10 promissory note from the previous trial, that that
11 was not trust property?
12 A Well, I mean, I think it depends on when, in
13 fact, the -- it depends on whether, in fact, the
14 trustee actually got physical possession of the
15 note and when that occurred.
16 Q Okay.
17 A And so I think you've asked me to assume that
18 that occurred after the closing date in the
19 agreement.
20 Q Okay. And in this trial we've been presented
21 with a collateral file for this case and -- is this
22 the swap?
23 MR. WOOTEN: Your Honor, I'm going to
24 enter the new 18 that has the dates on it and a
25 cover sheet off of the collateral file.

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1 MR. RAGSDALE: Aren't we going to
2 substitute it?
3 MR. WOOTEN: Yeah, substitute it. That's
4 fine. We'll just give them back the one we're
5 substituting.
6 THE COURT: Let the record show that
7 physically the first one has been removed from the
8 record and that this one will be substituted.
9 Q (BY MR. WOOTEN:) This is the collateral file
10 which has been given to the Court as an accurate
11 representation of the ownership file of the trust.
12 A Okay.
13 Q Will you flip through that file and take a look
14 at the documents in that file, Professor.
15 A All right. I see an adjustable rate note and
16 on the last page of that I see an endorsement to
17 EMAX Financial Group by Mortgage Lenders Network.
18 Q All right. And will you take a moment to flip
19 through the complete file --
20 A Sure.
21 Q -- and verify --
22 A Sure.
23 Q -- and see what all contents are in there?
24 A All right. Well, I don't know how much time
25 you want me to spend, but I see that there's a

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1 mortgage here and title insurance. Let's see. I
2 guess at the end I see an adjustable rate rider,
3 and that's signed by a Erica Sumter Congress. And
4 the final page is entitled Allonge to Promissory
5 Note.
6 Q When you looked at the entire contents of that
7 file taken together, do you have an opinion as to
8 who the owner of that promissory note is under New
9 York law?
10 MR. RAGSDALE: I'm sorry. I missed the
11 that question.
12 THE COURT: He's asking if he has an
13 opinion about who is the owner of the promissory
14 note under New York law.
15 MR. RAGSDALE: Thank you.
16 A You know, I do. And I guess what my opinion is
17 is that EMAX -- EMAX Financial Group is -- this
18 note was endorsed to EMAX Financial Group.
19 Q Okay.
20 A And the question, I think, becomes the
21 effectiveness of this document at the very end of
22 the file called the Allonge to the Promissory Note.
23 And basically, New York, again, because it has the
24 original UCC 302.2, that provides that an
25 endorsement must be written by or on behalf of the

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1 holder and on the instrument. And the instrument,
2 of course, being the promissory note. Or on a
3 paper so firmly affixed thereto as to become apart
4 thereof.
5 And so I guess the question is whether this
6 paper, which is at the end of the file, and it
7 complies with the New York requirement that the
8 paper is so firmly affixed as to become part
9 thereof. And my conclusion is that it is not --
10 does not -- the allonge, purported allonge does not
11 comply with New York law because it is not firmly
12 affixed thereto.
13 And I think there are comments to the UCC, the
14 original UCC, which, in fact, are included in
15 New York statute analysis. And basically, the
16 original UCC, which provides us part of the
17 following comments, and I think comments under the
18 UCC are very important. That Subsection 2 follows
19 decisions holding that a purported endorsement on a
20 mortgage or other separate paper pinned or clipped
21 to an instrument is not sufficient for a
22 negotiation. The endorsement must be on the
23 instrument itself -- and it's clearly not here --
24 or on paper intended for the purpose which is so
25 firmly affixed to the instrument as to become an

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1 extension or part of it.
2 And as I understand that, I think what they're
3 talking about is some type of, for example, gluing
4 the paper on that would make it apart of the
5 original document. And I would feel a stapling
6 would be sufficient. But I don't see any in this
7 file, any act that firmly affixes the purported
8 allonge to the instrument.
9 And, you know, I think that the reason for this
10 requirement, the original reason, you know, was to
11 prevent fraud.
12 And the final point that I think you might find
13 of interest is that the UCC comment says that such
14 paper is called an allonge. And Black's Law
15 Dictionary defines an allonge as follows: A slip
16 of paper sometimes attached to a negotiable
17 instrument for the purpose of receiving further
18 endorsements when the original paper is filled with
19 endorsements. Former UCC 320.2, which is actually
20 what New York law is, required that endorsements be
21 made on the instrument unless there was no space,
22 and only then could an allonge be used.
23 Current UCC is different. Of course, in
24 Alabama, it would be different. But -- so, I'd
25 also, on the basis of that conclude that even if

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1 the allonge was firmly affixed, it would not
2 satisfy New York law because you can only use this
3 additional paper if there isn't any space on the
4 instrument. And when I look at the -- when I
5 looked at this promissory note, there's plenty of
6 space. There's space on the front and there's a
7 total blank on the back. So, you know, on the
8 basis of New York law, my opinion is that this
9 purported allonge is not effective -- is not an
10 effective endorsement. And because it's not an
11 effective endorsement, then there hasn't been --
12 there was no transfer of the asset to the trust
13 with respect to what's on the allonge. And that's
14 why my opinion was that EMAX Financial is the
15 holder of the instrument because that is on the
16 original instrument, assuming that's the original
17 instrument.
18 Q Right. And I will tell you that I reviewed the
19 collateral file and the promissory note in the
20 collateral file did have Ms. Congress's original
21 signature on it. So that is a representative copy
22 of the collateral file.
23 So with respect to having that discussion,
24 Professor, you are satisfied that this trust who is
25 the plaintiff in this action is not the owner of

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1 this promissory note?
2 A Assuming that this is the -- I'm going to
3 assume this is the promissory note?
4 Q Yes.
5 A The actual promissory note. Well, it was
6 endorsed to EMAX Financial. It was not endorsed
7 over to the trustee. So I don't see that the
8 trustee is the owner of the -- of that document.
9 Q With respect to the possibility that the trust
10 might have a remedy or affix, you've reviewed the
11 trust instrument, correct?
12 A What do you mean remedy or affix?
13 Q Does the trust instrument expressly state that
14 if the assets are not conveyed by the closing date
15 to the trust that the trust is not to accept any
16 further action?
17 A Oh, yeah. Yeah. So, I mean, I guess here
18 before we move on, I would just simply state that
19 my opinion, the asset was not -- did not become an
20 asset of the trust. But I've also looked at
21 Article 10 of Subparagraph (i) that essentially
22 says that the trustee cannot accept any
23 contributions of assets after the March 12th date.
24 If -- well, I'll maybe read this. Following
25 the start up date, neither the necessary -- nor the

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1 trustee shall accept any contributions of assets to
2 any REMIC unless -- and then subject to Section
3 10.01(f) -- the master servicer, certificate of
4 insurer, and the trustee shall receive an opinion
5 of counsel to the effect that the inclusion of such
6 assets in any REMIC will not cause any REMIC
7 created to fail to qualify as a REMIC at any time
8 and subject the REMIC to any taxes, et cetera, et
9 cetera. (As read.)
10 So, again, in effect, this part of the
11 agreement specifically prohibits the trustee from
12 accepting an asset if by accepting the asset there
13 would be adverse tax consequences.
14 Q And that is if there's a possibility of adverse
15 tax consequences, right?
16 A Yes.
17 Q And your understanding is that a defaulted
18 mortgage loan is not a qualified asset for this
19 trust?
20 A That's my understanding, so that if, in fact,
21 there was an attempt after the closing date to
22 transfer this asset into the trust, for example,
23 today, this is not permitted. And, in fact,
24 New York -- under New York law a trustee is not
25 permitted to contravene the terms of trust

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1 agreement.
2 Q Okay.
3 MR. WOOTEN: Professor, I'll tender the
4 witness now. I believe the other side is going to
5 have some questions for you.
6 THE WITNESS: Thank you.
7 **CROSS-EXAMINATION**
8 **BY MR. RAGSDALE:**
9 Q Hi, Professor. I'm Barry Ragsdale. I don't
10 think we've met before.
11 A No. Nice to meet you.
12 Q Nice to meet you. I appreciate you coming down
13 to Birmingham.
14 You're not an expert in Alabama law or you
15 don't purport to be?
16 A No, I do not.
17 Q Never been licensed in Alabama?
18 A No.
19 Q Certainly never foreclosed on a house in
20 Alabama?
21 A No.
22 Q Or participated in that?
23 A No.
24 Q You would recognize that Alabama law is much
25 different than New York law in a variety of ways,

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1 right?
2 A Yes.
3 Q For example, New York law is a lien state as
4 opposed to a title state, right?
5 A Yes.
6 Q Can you briefly explain that difference?
7 A Yeah. Well, in terms of mortgages originated
8 on a middle ages, and originally the person
9 borrowing the money in order to get the loan had to
10 convey title to the property. And so that's kind
11 of a title situation. But over time, the mortgage
12 note is treated more in the nature of a lien as
13 security for the payment of the loan. So, you
14 know, I think that's the difference.
15 Q Okay. And are you aware that Alabama is a
16 title state still?
17 A No, I'm not aware of that.
18 Q Okay.
19 A But --
20 Q Are you aware that Alabama allows for
21 non-judicial foreclosure and that that's the
22 primary means by which foreclosure occurs?
23 A I am aware of that.
24 Q Okay. New York primarily is a judicial
25 foreclosure state?

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1 A Primarily, yes.
2 Q Okay. In addition to that, I think you pointed
3 out that New York has not adopted the newer version
4 of the UCC; is that correct?
5 A That's correct.
6 Q Let's talk generally about trust law, which I
7 think may be uniform around the country on some of
8 the things we're going to --
9 A Okay. Sure.
10 Q But you would agree with me that there are
11 differences in trust and property law from state to
12 state?
13 A Oh, yes.
14 Q And that, in fact, those vary sometimes
15 greatly?
16 A Sure.
17 Q Okay. Generally, when interpreting and looking
18 at a trust agreement, the intent of the parties to
19 that agreement is what governs the interpretation
20 of it?
21 A Yes.
22 Q That's true everywhere?
23 A Yes.
24 Q And generally when courts are looking at a
25 trust agreement, they indulge in certain

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1 presumptions, don't they?
2 A It depends. What do you mean by a certain
3 presumption?
4 Q Well, for example, they -- there is a
5 presumption that the trustees intent is to get the
6 assets into the trust if that's stated in the trust
7 agreement.
8 A I would think that would be the case.
9 Q Okay. How about this? If a party comes into
10 court and challenges the actions of a trustee as
11 being in contravention of the trust agreement, the
12 court starts out with the presumption that the
13 trustee acted in conformity there with.
14 A I'm not sure that's the case.
15 Q Well, who has the burden in that case? If a
16 party comes into court, such as Ms. Congress, and
17 alleges that the trustee acted outside the standard
18 of the trust, isn't that Ms. Congress's burden of
19 proof?
20 A Well, I think that the burden is to show that,
21 in fact, the asset got transferred to the trust.
22 Q Well, who -- you say we have to prove that
23 before Ms. Congress has to prove the first part of
24 her allegation that we violated the trust?
25 A I think that from, you know, my looking at

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1 cases in New York, the question is really whether,
2 in fact, the asset got transferred to the trust.
3 Q Okay. And if there's equal amounts -- there's
4 no evidence either way, you're saying that's our
5 burden, not Ms. Congress's burden?
6 A I don't know that I'm saying that I can give
7 you an opinion on that.
8 Q Either way?
9 A Yeah.
10 Q Okay. Have you actively litigated trust cases
11 in New York?
12 A I have been involved in a lot of trust cases in
13 the capacity as an expert, so assisting counsel.
14 So I haven't been the actual litigator on the case,
15 but, you know, I've been involved with trust cases,
16 and, you know, I've certainly been involved in some
17 trust litigation, but not as the lead litigator. I
18 assume you are the lead litigator, but I'm not in
19 that position.
20 Q You might get in trouble assuming I'm the lead
21 litigator.
22 A No. I think that's a nice thing to do.
23 Q Well, let me ask this question: Are you
24 familiar with a case out of New York called the
25 Application of Muratori. It's a 1944 case from the

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1 Supreme Court.
2 THE COURT: How do you spell it?
3 MR. RAGSDALE: M-u-r-a-t-o-r-i.
4 THE COURT: Thank you.
5 A I am, actually.
6 Q Okay.
7 A You know, this is a 1944 case?
8 Q Yes.
9 A Okay.
10 Q You are familiar with that case?
11 A I am.
12 THE COURT: You're not going to have to
13 stand up and recite it.
14 A Okay. Yeah. Yes.
15 Q You can say I'm prepared.
16 A I have the case in front of me.
17 Q Excellent. Footnote 6 in that case. I don't
18 know if you have the footnotes out of West.
19 A I don't see that I have the footnote here.
20 Okay. Maybe you can tell me the footnote.
21 Q Can I show you?
22 A Oh, yeah. Please do. That's not a footnote.
23 That's a headnote.
24 Q I'm sorry. I get confused on that.
25 A Yeah. So, yes.

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1 Q Would it be accurate to say that the court
2 there said that in the instances where many years
3 have passed and there have been a number of
4 transfers that a presumption will be indulged that
5 the trustee in fact made the transfer in compliance
6 with the trust?
7 A I mean, I think the statement says what it
8 says, and so, neither is this case to be confused
9 with one where success of transfers from the
10 trustee's grantee have taken place and many years
11 have elapsed, making it difficult, even impossible
12 to determine whether the trustee acted in
13 contravention of the trust. In which case the
14 presumption may arise that the trustee acted within
15 the trust powers. Yeah, I think that's a fair
16 statement of what I just read.
17 Q Do we know this 1944 case is still good law as
18 far as you know?
19 A As far as I know it's still good law, and, you
20 know, I guess maybe I would -- since you asked me
21 about that case --
22 Q Well, I'll tell you what, can I move on to
23 something else and your counsel will get to ask you
24 to elaborate?
25 A Sure.

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1 Q Let me read a statement of law to you and see
2 if you agree with that. "A trustee is presumed to
3 have acted in good faith and to have performed his
4 or her duties under the trust, the burden of
5 proving a breach thereof being on the one
6 asserting." Would you agree with that statement of
7 law?
8 A I'm sorry. Can you just read that again?
9 Q Sure. I'm sorry.
10 "A trustee is presumed to have acted in good
11 faith and to have performed his or her duties under
12 the trust, the burden of proving a breach thereof
13 being on the one asserting it."
14 A What are you reading from?
15 Q I'm reading from Corpus Juris Secundum.
16 A Okay.
17 Q Would you agree that that's a statement of
18 trust law that would be applicable?
19 A I would, but I would certainly make some
20 explanations on a particular case --
21 Q I would be disappointed if a professor didn't
22 have some exceptions to statements of law.
23 A Okay. Fine.
24 Q But, generally, that's true, is it not?
25 A Generally that's true.

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1 Q Now, in the event that the intent of the
2 drafters of the document governs its
3 interpretation, who are the parties to the PSA in
4 this case?
5 A Okay. Well, the parties go back to the
6 beginning of the document. Obviously, your client
7 is one of the parties and we have Residential Asset
8 Securities Corporation, Residential Funding and, of
9 course, U.S. Bank.
10 Q Okay. Clearly Ms. Congress is not a party to
11 this PSA, right?
12 A Clearly she's not.
13 Q Clearly she's not a third party or an intended
14 third-party beneficiary of this PSA, right?
15 A That is correct.
16 Q So she is essentially a stranger to this
17 agreement, right?
18 A Yes.
19 Q Generally, under both New York law and the law,
20 as far as I can tell, everywhere, only parties to a
21 trust or intended third-party beneficiaries have
22 standing to rely on provisions of the trust to
23 challenge the actions of the trustee; isn't that
24 true?
25 A I don't think that's true. I think that --

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1 Q Can you give me an example of where a --
2 A Yeah. I think what's -- I think what's
3 important to understand is -- again, the New York
4 law being idiosyncratic.
5 Q Can I stop you right there. What do you mean
6 by that?
7 A Well, I mean that New York hasn't adopted the
8 revised UCC. New York's -- the estates, powers and
9 trust law 7-118, a funding provision is unique in
10 terms of requiring in certain instances, certain
11 funding to be done in order for a trust to be
12 valid. New York doesn't recognize oral trusts -- I
13 mean, I could go on and on.
14 Q Please don't.
15 A Okay.
16 Q Let me say this: You would agree with me that
17 New York law generally in this area that you're an
18 expert in --
19 A Yes, sir.
20 Q -- is more restrictive on acts of trustees, on
21 negotiation of commercial paper, those kind of
22 things?
23 A Yes. New York, and I think -- yeah, New York
24 law is -- does not particularly like trusts and
25 wants to make sure the trust -- that the I's are

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1 dotted and T's are crossed. One of the
2 idiosyncratic aspects is estates, powers, and trust
3 law Section 7-2.4. And that is if the trust is
4 expressed in the instrument creating the estate of
5 the trustee. And this clearly is the case here,
6 where we have the trust in creating -- trying to
7 attempt to create the agreement. Every sale,
8 conveyance, or other act of the trustee in
9 contravention of the trust is void.
10 Q Okay. And that's relatively New York -- or
11 unique to New York law?
12 A That's relatively unique to New York. It's
13 been in the New York statute since 1830. And it
14 really says that when a trustee oversteps his or
15 her or its authority, the act is void, period. And
16 so that's, again, a very significant difference
17 from other states in terms of this statute.
18 And, in fact, the case that you cited to me --
19 Q Uh-huh.
20 A -- involved the forerunner of 7-2.4.
21 Q Right.
22 A And, in fact, the question is whether if the
23 act contravenes the trust, it is void, period.
24 Q And again, that's more onerous than certainly
25 it would be in Alabama or elsewhere?

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1 A Yes.
2 Q Okay. Now, let's look back at the choice of
3 law provision if we could.
4 A Oh, sure.
5 Q And can you find it.
6 A I've got it here.
7 Q Okay. It states, does it not, that this
8 agreement and the certificates are governed and
9 construed in accordance with New York law, right?
10 A Yes.
11 Q Okay. It doesn't say anything about whether or
12 not the laws of other states are supplanted to
13 govern foreclosure proceedings, for example?
14 A No.
15 Q No. And it doesn't say anything about the fact
16 that when involved in a foreclosure on an ejection
17 proceeding in Alabama, Alabama law can't govern
18 that, does it?
19 A It does not.
20 Q And your contention, then, is that the drafters
21 of this trust --
22 Well, let me ask you this: What do you think
23 was the intent of the drafters of this trust?
24 Well, let me restate that.
25 Don't you believe it was the intent of the

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1 drafters of this trust to make sure that these
2 assets were marshalled and put into the trust, and
3 that they then could be negotiated properly and
4 securitized? Wasn't that the purpose of the trust?
5 A Sure.
6 Q Okay. Now, it's your position, then, that in
7 doing so, in drafting a trust agreement that was
8 intended to make sure that the assets got
9 marshalled, put into a trust so that it could be
10 sold, securitized, that the drafters of that trust
11 chose to apply across the board the most onerous,
12 restrictive laws in the United States? That's your
13 position?
14 A My position is they chose to apply New York
15 law.
16 Q To the interpretation of the agreement, right?
17 A For all purposes of the agreement. Whether the
18 asset was validly transferred. Whether, in fact,
19 an act of the trustee contravened the trust and was
20 therefore void under New York law. The parties,
21 for whatever reasons, chose New York law. I mean,
22 I could speculate as to why they did.
23 Q Please don't.
24 A Okay.
25 Q But wouldn't you agree with me that applying

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1 the most restrictive, onerous, antiquated,
2 idiosyncratic laws in the country, appears to
3 contradict their intent of trying to make these
4 assets easily marshallable, negotiable, and
5 securitized?
6 A Well, not necessarily because I don't think the
7 New York law is particularly onerous in regards to
8 the transfer.
9 Q Well, let's take an example. Are you familiar
10 with New York -- I mean, excuse me -- Alabama law
11 regarding the ability to use an allonge and whether
12 it has to be glued or stapled to an assignment?
13 A I'm not specifically familiar with Alabama law,
14 but I -- the answer is I'm not specifically
15 familiar with Alabama law on this point.
16 Q Okay. And so you don't have an opinion under
17 Alabama law whether a rubber band around the
18 assignment -- excuse me -- around the note and the
19 allonge is sufficient to satisfy Alabama law?
20 A No, I don't.
21 Q Okay. But your opinion is that violates New
22 York law?
23 A My opinion is absolutely it violates New York
24 law.
25 Q So then, it's your opinion that the drafters of

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1 this trust, knowing that notes and mortgages were
2 going to be marshalled from all over the country,
3 intended to apply the restrictive, antiquated, and
4 idiosyncratic New York law regarding the use of
5 Rubber Cement to attach an allonge to a note;
6 that's your opinion?
7 A My opinion is that the parties agreed that
8 New York law applies in all instances.
9 In fact, let me point out to you in this 11.04,
10 it says that the agreement shall be governed by
11 New York law without regard to the conflict of law
12 principles.
13 Q Sure.
14 A And that to me is a clear indication that the
15 parties intended that the local law of New York
16 apply, and even though there might be real property
17 in Alabama, they're not going to look to New York
18 conflict of laws. The only exception is these two
19 general obligation principles. And 5-14.01
20 basically says the parties can agree that New York
21 law governs even if there isn't a reasonable
22 relationship to the state with respect to that
23 agreement.
24 And, you know, so I think it's whether the
25 parties understood all of New York law, they agreed

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1 to New York law and New York law is clear on
2 various points. And --
3 Q There's a New York case that says rubber
4 banding doesn't count?
5 A No, there's no -- I've not seen any New York
6 case on that. But what I do is I first go -- if
7 there's a statute, I first go to the statute. And
8 the statute, 3-202.2, the paper has to be so firmly
9 affixed as to become apart thereof.
10 Q And so it's your opinion that unless it's --
11 does a staple work?
12 A I think a staple works, yeah.
13 Q Even though it can be taken off?
14 A Even though -- yeah. I think it works, and I
15 think that, again, the allonge is a very historical
16 concept. And they wanted to make sure that this
17 additional piece of paper that had the signatures
18 was apart of the original document, so they
19 required gluing or pasting, but I think in modern
20 day, stapling would be sufficient.
21 Q Would a paper clip work?
22 A No, a paper clip wouldn't work.
23 Q What about one of those really strong paper
24 clips, you know, that really holds it in there
25 tight like this little kind of thing; would that

1 work?
2 A Well, I'm just reading --
3 Q Well, I'm asking your opinion. See this thing?
4 Is that -- that would really stick it in there.
5 A No, no.
6 Q Okay.
7 A That's not --
8 Q Okay.
9 A Because that can be -- the whole purpose of the
10 requirement for firmly attaching is to prevent
11 fraud. You could just easily take that off even
12 though it might be a very strong thing. And also,
13 you know, that pinned or a clip is not sufficient
14 for negotiation.
15 Q Let's talk about that. It's to prevent fraud
16 on whom? The parties to the note or the assignees
17 of the note?
18 A Yeah, I mean, I think what, you know, what we
19 have is the Uniform Commercial Code has this
20 concept that when we have a negotiable instrument,
21 you want to make it freely transferable. We want
22 -- it's essentially like cash, and we want to make
23 sure that there isn't any fraud. So if you don't
24 -- if you have -- if you don't have it firmly
25 affixed, then you could attach it at a later time,

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1 there might be more than one note out there. But
2 by firmly affixing it to the original, it's very
3 clear what we have.
4 Q And you agree with me that New York law is more
5 restrictive on that than elsewhere?
6 A I guess I'd have to look at South Carolina law
7 which also has the original UCC.
8 Q I'll give you South Carolina. What about
9 Alabama?
10 A Well, assuming Alabama has enacted the new UCC,
11 then, in fact, the new UCC doesn't require the
12 firmly attaching as it did under the original UCC.
13 Q Now under your theory of the case, you think
14 EMAX is the owner of this note?
15 A Based on this file that I have. I see that --
16 yeah, I see the -- let me get the file here. Yeah.
17 I see that the endorsement was to EMAX.
18 Q Okay. Do you have an opinion as to whether or
19 not EMAX, as we sit here today, can foreclose on
20 Ms. Congress?
21 A I do.
22 Q And what is it?
23 A Well, I think that if EMAX owns the note, I
24 think that the general law is to the effect that
25 the mortgage follows the note, and I think that

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1 EMAX could foreclose.
2 Q Okay. Now, you're aware -- or let me represent
3 to you that Alabama has, in fact, maybe the only
4 place we're ahead of New York, but we did adopt the
5 new UCC.
6 A Yes.
7 Q You're aware that the modern version of the UCC
8 allows a holder of the note to enforce its terms
9 whether or not they're the owner.
10 A Okay.
11 Q Do you agree with me about that?
12 A I don't know that I'm conversing with that. My
13 rule as a trust expert/lawyer is to figure out
14 whether the asset gets -- was sufficiently
15 transferred into a trust. I'm not -- don't purport
16 to be an expert on the UCC per se. But I do --
17 when I have a trust question that involves whether
18 it is a valid transfer, I certainly am comfortable
19 looking at that part of the UCC that deals with
20 transfers.
21 Q And let's get back to that. Your opinion is,
22 in addition to the glue, staple thing --
23 A Yes.
24 Q -- is that because it was not or at least you
25 don't believe it was assigned, deposited to the

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1 trust by that March 2007 date, therefore it can't
2 ever be assigned?
3 A Yeah, that's my opinion because any subsequent
4 assignment -- well, I think in this particular
5 case, my assumption is that the loan is in default.
6 And so that loan could not be subsequently
7 transferred because it would cause adverse tax
8 consequences. And that Paragraph 10(i)
9 specifically precludes the trustee from acting, and
10 the trustee acting would be in contravention of the
11 trust and void under EPTL 7-2.4.
12 Q Okay. Can we look back at the PSA?
13 A We can.
14 Q Let's look at something that requires my
15 glasses.
16 THE COURT: If you all would, give me
17 about five minutes.
18 MR. RAGSDALE: Sure. Absolutely.
19 (Short recess.)
20 THE COURT: All right. Mr. Ragsdale.
21 MR. RAGSDALE: Thank you, Your Honor.
22 Q (BY MR. RAGSDALE:) Would you look at the PSA?
23 A Oh, yes.
24 Q Section 10.01 --
25 A Yep.

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1 Q -- (f).
2 A All right.
3 MR. LAY: Will you give us a page number?
4 THE WITNESS: 66.
5 THE COURT: Do you have different one?
6 MR. RAGSDALE: We have the same one.
7 THE COURT: You two have the same one?
8 MR. RAGSDALE: Yes, sir. We'll let you do
9 that.
10 THE COURT: Okay.
11 Q (BY MR. RAGSDALE:) Would you read that section
12 to yourself or at least -- unless you --
13 A You know, I've read this a couple of times.
14 Q Okay.
15 A It certainly is a lengthy and a convoluted
16 provision.
17 Q Isn't it? It provides, does it not, that is
18 Section 10.01(f), that the trustee, in fact, can
19 accept assets after the March 2007 cutoff date, it
20 just may produce tax consequences that either have
21 to be dealt with by a letter from counsel, or the
22 agreement also provides if somebody agrees to
23 indemnify the parties for that reason, right?
24 A Let me just understand the first part of that.
25 The trustee can accept assets after the start up

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1 date if they are -- don't cause adverse tax
2 problems.
3 Q That's one?
4 A That's one, yeah.
5 Q That's true, isn't it?
6 A Yeah. I think that's true by (i) which
7 essentially by negative implication says that, you
8 know, if it's not going to cause adverse tax
9 consequences you may accept.
10 Q Them after the fact?
11 A Yeah.
12 Q Okay. Even like today, right?
13 A It doesn't seem to be precluded. Again, you
14 would have to have an opinion of counsel whether
15 it's not going to cause adverse tax consequences.
16 Q Okay. And that opinion of counsel is intended
17 to protect the certificate holders?
18 A Yes.
19 Q It's not to protect Ms. Congress, is it? I
20 mean, that's a provision that's put in the
21 agreement so that the people that invested or
22 bought interest in this trust don't suffer adverse
23 tax consequences?
24 A Yes.
25 Q Is that a provision that if those parties and

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1 the trustee all agree can be waived?
2 A No.
3 Q Why not?
4 A Because, again, under New York law, if a trust
5 -- and this trust is irrevocable, by the way,
6 unless you provide otherwise in New York, the trust
7 is irrevocable.
8 Q Okay.
9 A And it cannot be changed.
10 Q Is that one of those idiosyncratic aspects of
11 New York law?
12 A Yeah, I think most states would not have that
13 as the default rule. But most trust documents
14 provide whether it's irrevocable or revocable.
15 Yeah. This is clearly going to be an irrevocable
16 trust. When any irrevocable trust there's a
17 provision that prevents the trustee from doing
18 something that that cannot be changed by -- that
19 cannot be changed.
20 Q Okay. But you would agree with me, would you
21 not, that if could be done, even today, if there
22 were a counsel opinion that it didn't cause adverse
23 tax consequences?
24 A I would -- I think I would -- looking at this
25 Article 10(i), which says, cannot accept any

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1 contributions unless there's a favorable opinion, I
2 would think that, yes, that could be done.
3 Q Okay. And as you sit here today, you don't
4 know one way or the other whether or not there were
5 any opinions of counsel about accepting assets into
6 this particular trust after the March 2007 date,
7 right?
8 A No.
9 Q There could be?
10 A Well, I would assume that that opinion would be
11 -- would be incorrect since my understanding of tax
12 law. The REMIC law provision is that when a note
13 is in default it can't be accepted. But if you
14 have an opinion of counsel that said that, you
15 know --
16 Q You would disagree with it?
17 A Yeah. I mean, I would want to research REMIC a
18 little more, but I think the assumption is that --
19 THE COURT: Whether he was right or wrong,
20 if such letter existed that would make it all right
21 to transfer assets to the trust even now?
22 THE WITNESS: I mean, I guess -- Judge,
23 you know, like if you had someone right out of law
24 school that said, well, in my opinion this is okay.
25 I'm not sure that that would be, you know -- I

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1 mean, you might want to go behind that. I think if
2 you had a reputable opinion of counsel and --
3 Q Show me the word reputable in there. It's not
4 in there, is it?
5 A No. I don't -- I think that -- you know, I
6 think that, as you mentioned, this is designed to
7 protect the certificate holders because there would
8 be adverse consequences to them. So I think that
9 counsel is -- you know, someone who is qualified to
10 render an opinion.
11 Q Let me just stop right there. There's nothing
12 in the agreement the says the opinion of counsel
13 has to be by somebody who meets your standard for
14 reputable, right?
15 A No, it does not.
16 Q Okay. So an opinion of counsel that it doesn't
17 cause adverse tax consequences satisfies that
18 provision, and the trust, even today, could accept
19 these assets?
20 A Yep.
21 Q Okay. In addition the agreement provides, does
22 it not, that the trust can accept assets after the
23 cutoff date if there is indemnification?
24 A Oh, no, I don't agree with that. I don't agree
25 with that.

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1 Q Do you know Mr. Adams -- do you know Mr. Adam
2 yesterday testified that that was a provision in
3 the agreement?
4 A I don't know what he testified to, but I'm
5 looking at this lengthy 10.01(f) which does provide
6 that the -- there can be indemnification agreement
7 if the REMIC administrator and master servicer or
8 both determine to indemnify the trust against the
9 impositions of tax, that they could take that
10 contemplated action.
11 Q Okay. Why doesn't that provide, then, that
12 they could take that contemplated action if they
13 are indemnified?
14 A Well, because it doesn't say the trustee can do
15 that.
16 Q What contemplated action is it talking about,
17 then?
18 A You know, I think REMIC is a very complex
19 provision, and I think there could be a lot of
20 activities in REMIC that don't involve,
21 specifically, accepting a disqualified loan, for
22 example. So I think --
23 Q I'm taking it that you're also an expert in
24 REMIC?
25 A No, I'm not an expert in REMIC.

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1 Q Okay.
2 A But I cannot --
3 Q I'm sorry.
4 A Can I just read to you another sentence in that
5 -- is that okay?
6 Q That's all right with me.
7 A All right. It's hard for me --
8 Q You have the same problem I have.
9 THE WITNESS: I'm sorry, Judge, it's very
10 convoluted.
11 A "In addition, prior to taking any action with
12 respect to the trust fund or its agreement, the
13 trustee shall consult with the certificate insurer
14 and master servicer or the REMIC administrator as
15 applicable with respect to whether such action
16 would cause an adverse REMIC event to occur with
17 respect to the trust fund."
18 And here's a critical part, I think, of this
19 sentence. "And the trustee shall not take any
20 action or cause the trust fund to take any such
21 action as to which the servicer or administrator
22 has advised in writing that an adverse REMIC event
23 could occur." Q Okay.
24 A So as I read that sentence, even though there
25 might be some indemnification that could be

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1 offered, that does not relate to the trustee being
2 able to accept a contribution that would cause
3 adverse REMIC consequences.
4 Q You called it convoluted. Is that the same as
5 ambiguous? Is that provision ambiguous in your
6 mind?
7 A No, that doesn't seem very ambiguous. That
8 sentence doesn't seem ambiguous to me.
9 Q What about the whole section?
10 A Well, I think what will be the problem with
11 this document, which looking at this document, I
12 assume was done by some Wall Street lawyer, okay
13 and it's very complex.
14 Q I don't want to express any opinion about that.
15 A I don't either because I don't live in
16 New York. I live in Upstate New York.
17 But in any event, I think what you have to do
18 is look at this agreement and see, in fact, you
19 know I think you correctly point out that there is
20 an ability to do something that would cause adverse
21 consequences by someone other than the trustee.
22 But you would have to look at the duties of both of
23 the master servicer and the REMIC administrator.
24 And I haven't, you know, they're very complex in
25 their duties, but I see that they're servicing, so

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1 I see that this indemnification would relate to
2 activities once they're servicing an existing loan
3 or doing whatever.
4 So I think the fact that indemnification is
5 possible does not change the sentence that says
6 that if there's going to be adverse consequences
7 the trustee cannot take any action. And it's the
8 trustee who is the only party that, in fact, can
9 own an asset of the trust. That's the nature of
10 the trust.
11 Q The trustee owns it, right?
12 A The trustee owns it. And so the trustee, even
13 in this 10.01(f), which is -- because there's an
14 exception in (i), that says, and subject to this
15 (f) provision, even this (f) provision specifically
16 says the trustee can't do something that's going to
17 cause adverse tax consequences.
18 Q Unless he has an opinion of counsel?
19 A Oh, yes. Yes.
20 Q And we don't know whether there was one or not
21 in this case?
22 A No, I don't know.
23 Q Okay. Now, let me, for just a moment, go back
24 to the staple thing.
25 Is it your opinion that even if the original

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1 promissory note would have been stapled to the
2 allonge, that that would be inadequate under
3 New York law?
4 A No, I don't think so.
5 Q Okay. I think that stapling would be firmly
6 affixing.
7 Q Okay. Can we staple it right now and it would
8 satisfy New York law? Yeah?
9 A You can staple -- I mean, I don't think you
10 want to take this exhibit here and do it, right?
11 Q But if we take the original note and staple it
12 -- if we stapled it, that satisfies New York law?
13 A I don't know if there are any cases on that. I
14 think it's kind of a modern day equivalent of
15 pasting or gluing. You know, New York has a -- you
16 know, is very concerned about staples. And if
17 there's any indication that something was stapled
18 and the staple is removed, there would have to be
19 testimony about that. So I think that would
20 satisfy any possibility of fraud, that by stapling
21 would be sufficient.
22 Q Okay. So I don't have to get glue? A staple
23 would do?
24 A You don't have to get glue.
25 Q Okay. I have no idea where to get glue.

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1 Well, let me ask this question. Let's go back
2 and look at the PSA if we could.
3 A Okay.
4 Q Look at Section 2.06(c) and (d), and I'll ask
5 you this question. I'll let you find it.
6 A All right. (c) and (d). Yes. Purposes and
7 Powers of the Trust.
8 Q Right. And it provides that the purpose of the
9 trust, the first one is to sell the certificates to
10 the depositor in exchange for the mortgage loans,
11 right?
12 A Yes, it says that.
13 Q That's the primary purpose of this trust. And
14 under the law of New York and elsewhere, the
15 primary purpose and intent of the drafters of the
16 agreement govern its interpretation, right?
17 A When there's ambiguity, sure.
18 Q Now, in addition to that, Section C and D of
19 Section 2.06 provide that the trustee and the trust
20 have fairly broad discretion within the compliance
21 of the agreement, do they not. They've got broad
22 authority, the trustee does?
23 A They have authority to carry out the purposes
24 of the trust.
25 Q Okay.

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1 A And only -- you know, only that authority.
2 Q Sure. And it authorizes engaging in
3 activities, including the marshalling of the assets
4 and making sure that those assets are within the
5 trust. Isn't that part of the trustee's
6 responsibility and authority?
7 A Yep. I think the trustee has to -- when they
8 get, you know, get an asset, they have to do a lot
9 of different things and have to make sure that
10 everything is proper.
11 Q Okay. One of the things that a trustee can do,
12 for example, is if it gets an endorsement -- if it
13 gets a note endorsed in blank, the trustee can fill
14 in those endorsements, can't he?
15 A Well, I think that actually Section 2.01(c)
16 says, if the depositor delivers to the trustee any
17 mortgage note in blank, the depositor shall or
18 shall cause the custodian to complete the
19 endorsement of the mortgage note.
20 Q Okay.
21 A So I don't know if it's the trustee that
22 basically endorses it to itself.
23 Q The depositor --
24 A Yeah.
25 Q -- can cause the custodian of records to fill

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1 in the necessary endorsements?
2 A Yes.
3 Q And is there anything in that provision that
4 says that can't be done after it's received by the
5 trustee? In fact, it says -- doesn't it say if
6 it's deposited with the trust?
7 A Yeah. I think that, you know, if, in fact, the
8 note is endorsed in blank, which is originally what
9 had happened in this file, that, in fact, then it
10 would be required that the note now be endorsed to
11 the trustee.
12 Q Okay. And there's no time limitation put in
13 there, is there?
14 A You know, there are some time limits about
15 ninety days and such. Like, you know, hence, the
16 agreement is -- has a lot of nuances to it. But
17 it's talking about in conjunction with the interim
18 certificate issued by the custodian, and I think
19 that has to be done within a certain period of
20 time. So, I think there are time requirements.
21 Q Not in that provision? You're saying --
22 A No. No. Not in that provision.
23 Q Okay. And when you say the agreement has a lot
24 of nuance, it's still your position it's not
25 ambiguous?

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1 A Right. It's not ambiguous. It's just that
2 there's a lot of different things going on in this
3 agreement with custodians, with REMIC
4 administrators, with services. So that's what I
5 mean it's a lot -- you know, it's --
6 Q It's nuanced and convoluted, but not ambiguous?
7 A Right.
8 Q Right.
9 A It's not ambiguous in terms of the issues that
10 I'm giving an opinion on. There may be other parts
11 that are.
12 Q Okay. Turn with me, if you would, while we're
13 at Section 2.01, I think we were looking at.
14 A Yes.
15 Q 2.01(d).
16 A All right.
17 Q Speaking of nuanced and convoluted.
18 A Yes.
19 Q Are you familiar with that section?
20 A I have looked at that section, and yes.
21 Q Okay.
22 A But, you know -- yes. Why don't you ask your
23 question.
24 Q I will. If you'll -- I don't know how to point
25 this out other than to point it out.

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1 A Okay.
2 Q Look at subsection, I think it may be (b) down
3 here. It starts with a "B." I'm having trouble
4 finding it here. It's right here in the middle.
5 The conveyances.
6 A Is it in the first paragraph?
7 Q Yes, it is. If possible, I think yours is in
8 smaller print than mine. I wish we would have
9 written this on a grain of sand. It would be so
10 much easier.
11 THE COURT: What's the section?
12 MR. RAGSDALE: It is 2.01(c).
13 A Oh, (c)?
14 Q I'm sorry. (d).
15 A Yeah.
16 Q I'm sorry. (d). It starts out: "It is
17 intended."
18 A Yes.
19 Q You will see it.
20 A Yes.
21 Q Do you see that?
22 A Yes. Yes.
23 Q Okay. And there's a (b) down there that starts
24 out: Conveyances provided for in this Section
25 2.01.

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1 A Yes.
2 Q And it says: Shall be deemed to be a grant by
3 the depositor to the trustee of a security interest
4 in all of the hereafter acquired in and to (a) the
5 mortgage loans, including the related mortgage
6 note, the mortgage, any insurance policies, and all
7 other documents in the related mortgage file.
8 Do you see that?
9 A Yes, I see that. Let me just --
10 Q Okay. You are aware, are you not, that this
11 PSA had a number of voluminous attachments
12 including a mortgage loan schedule. Are you aware
13 of that?
14 A Is that what's in this file here.
15 Q No. It's a gigantic stack of stuff.
16 It's in the shuck. This big, long nine-hundred
17 page printout, have you seen that?
18 A No.
19 Q Let me ask you this: Are you aware that this
20 particular loan that we're here about today is
21 expressly listed in the mortgage loan schedule?
22 Were you aware of that, for this trust?
23 A I don't know if I was aware of it. But I guess
24 I'm making that assumption.
25 Q Okay.

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1 A Yeah.
2 Q Will you make that assumption with me that it
3 is listed amongst the mortgage loans that are part
4 of this trust?
5 A Yes, I'll make that assumption, sure.
6 Q Okay. And further, would you make the
7 assumption with me that as apart of this agreement
8 the depositor warrants and represents that it, in
9 fact, deposited the necessary documents for
10 Ms. Congress's loan with this particular trust?
11 A I'll agree that the document says that's what
12 it did. I wouldn't necessarily agree that that's
13 what occurred.
14 Q Okay. But the depositor says they did it,
15 right?
16 A The depositor says --
17 Q Okay.
18 A -- you know.
19 Q And you would agree with me that the trustee
20 says as part of this agreement that it received the
21 necessary loan documents, et cetera, from
22 Ms. Congress's loan?
23 A Well, if you can point that out to me I'm sure
24 that I'll agree that it says that.
25 Q I was kind of hoping to avoid doing that.

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1 A Okay.
2 Q All right. Well, let me ask you this: If
3 Mr. Adams testified yesterday, who purports to be
4 an expert on such things.
5 A Yes.
6 Q That that agreement does provide, in fact, that
7 the trustee has represented and warranted that it
8 received the necessary documents and that this loan
9 is a part of this particular trust; would you
10 disagree with that?
11 A If that's his testimony, then I wouldn't
12 disagree with it.
13 Q Okay. You don't independently have any
14 knowledge of the PSA that would contradict that?
15 A No. No.
16 Q Okay. Fair enough. Now, this Section 2.01(d).
17 A Yes.
18 Q It provides, does it not, if you would look
19 down -- now, let's try this again. How about three
20 quarters of the way down or more than that. How
21 about that? I'll show you the line.
22 A Is it in a new sentence.
23 Q Yes. It's in a new sentence down here maybe.
24 Yeah. This sentence right here (indicating). It
25 makes reference, does it not, if it starts in the

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1 parenthetical (c) where it says: The possession by
2 the trustee, the custodian of any other agent of
3 the trustee of mortgage notes, of such other items
4 of property as constitute instruments, money,
5 payment, intangibles, negotiable items, goods,
6 deposit account, letters of credit -- I was just
7 seeing if you were keeping up with me -- advices of
8 credit, investment property, certificated
9 securities of channel paper, shall be deemed to be,
10 quote, possessed by the secured party, close
11 quote, or possessed by a purchaser or a person
12 designated by the secured party for purposes of
13 perfecting a security interest pursuant to the
14 Minnesota Uniform Commercial Code and the Uniform
15 Commercial Code of any other applicable
16 jurisdiction as in effect, including without
17 limitation -- and then it cites some sections.
18 Do you see that?
19 A Yeah, I see that.
20 Q So it's not true, is it, that everything about
21 this PSA is governed exclusively by New York law.
22 In fact, that provision says that it was deemed to
23 be possession under the Uniform Code of Minnesota
24 or any other applicable jurisdiction.
25 A Yes.

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1 Q Okay. So we can get beyond the it's only
2 New York, right? In fact, that provision says that
3 it shall be deemed to be in compliance with the
4 Uniform Commercial Code of the applicable
5 jurisdiction, in this case, Alabama.
6 A You know, again, I'm not an expert on UCC, but
7 I think --
8 Q I'm just asking you, doesn't the agreement
9 specifically make reference to --
10 A Minnesota, yes.
11 Q -- and the Uniform Commercial Code of any other
12 applicable jurisdiction?
13 A It does. But my limited understanding of
14 Articles 8 and Article 9 is that this deals with
15 security interest, and, in fact, notes and
16 mortgages that have already been transferred into
17 the trust. And that in order to -- it's very
18 important that there be a security interest in
19 these documents.
20 Q It is, isn't it? I mean, that's critical to
21 the effectiveness of the trust?
22 A It's critical to the effectiveness of the whole
23 transaction to have certificates issued so that
24 there be mortgage backed securities and that there
25 are securities. So this is designed, I believe, to

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1 comply with Articles 8 and 9 of the Uniform
2 Commercial Code. But it assumes that the asset is
3 first in the trust. Once the asset is in the
4 trust, then you can get security interest perfected
5 under the UCC, maybe in compliance with Minnesota's
6 Uniform Commercial Code.
7 But it certainly doesn't, in my mind, say that
8 the governing law is -- therefore the governing law
9 is whatever you want it to be. This is a very
10 specific exception that I think is -- it's
11 actually, I think, really dealing with security
12 interest with respect to the certificate holders,
13 but it's not dealing with the actual note or
14 mortgage that has to be owned by the trustee.
15 Q Okay. Interesting, but not my question.
16 A Okay.
17 Q My question is this: Despite the fact that the
18 agreement says that this agreement shall be
19 governed and construed in accordance with New York
20 law, there are provisions, including this one, that
21 say, determining the security interest of the
22 parties, determining the ability, for example, to
23 foreclose, shall be determined by the UCC in the
24 applicable jurisdiction?
25 A Yeah, that's what it says.

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1 Q Okay. Now, let me show you, if I can, this is
2 the Code of Alabama.
3 A Okay.
4 Q Section 7-3-301, Person Entitled to Enforce
5 Instrument, and ask you to read that section to
6 yourself.
7 Have you read that?
8 A Well, no. Yeah, I've have read it. Whether I
9 understand it is another question.
10 Q It will not be on the exam.
11 A All right. Okay. Maybe you can ask a question
12 and I can say --
13 Q Okay. Let me start by saying: Do you know
14 whether or not this provision differs from New York
15 law?
16 A Yeah. This looks to be the -- apart of the
17 UCC.
18 Q I'll even represent to you that it is.
19 A Thank you. And I think I might have somewhere
20 in my materials what is New York's equivalent, but
21 this is Uniform Commercial Code 3-301.
22 Q Right.
23 A Right. And if you give me a moment I could --
24 Q Okay.
25 A Because I do believe that I have that section

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1 somewhere, but finding it -- yeah. No. I have
2 3-201, not 3-301.
3 Q Okay.
4 A So I can't really tell you whether this is
5 different from New York law.
6 Q Okay. I probably shouldn't have asked you
7 that. I didn't really care.
8 A Okay.
9 Q That provision, though, provides, does it not,
10 that in order to enforce a negotiable instrument
11 you do not have to be the owner, you merely have to
12 be the holder?
13 A That's what it says.
14 Q And you don't have any reason to doubt that
15 that is the law in Alabama?
16 A I have no reason to -- when you say, "the
17 holder," you say -- you're looking at this non
18 holder part?
19 Q I think.
20 A A non holder in possession who has the rights
21 of the holder.
22 Q Right.
23 A So I guess I would want to find out who -- how
24 a non holder has the rights of the holder.
25 Q Okay. Well, would you agree with me that a

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1 holder of a negotiable instrument has the right to
2 enforce it even if he is not the owner under
3 Alabama law?
4 A Well, you know, again, this is -- I'd really
5 want to look at this a little more. I'd want to
6 look at the comments as to what was intended, but I
7 need to know when a non holder in possession has
8 the rights of a holder.
9 Q And I actually forgot you're not a UCC expert.
10 A I'm not an UCC expert.
11 Q And you're not an expert on Alabama law?
12 A Not, I'm not an expert on Alabama law.
13 Q Okay. Well, then I'll quit asking you
14 questions about Alabama law. How about that?
15 A Okay.
16 Q One last question, I guess, on that line,
17 though, is, do you know what law governs the
18 interpretation of Ms. Congress's mortgage and note,
19 assuming they were entered into in Alabama,
20 assuming they involve real property in the state of
21 Alabama?
22 A Yeah. I would think that in terms of the
23 validity of a mortgage, those kinds of issues would
24 be determined by Alabama law.
25 Q Okay. And in the absence of the trust, the

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1 right to foreclose would be determined by Alabama
2 law, the absence of this PSA that you rely on?
3 A The right to foreclose would depend on who owns
4 the note.
5 Q Really? Not who holds the note?
6 A Who holds the note.
7 Q Okay.
8 A So if the note is held or owned by Person A and
9 Person B has the mortgage, Person B can't foreclose
10 on the mortgage. I saw, for example, there was an
11 assignment of the mortgage in 2008, but unless
12 there had been -- the note had also been assigned
13 that, you know, that the mortgage holder doesn't
14 have rights per se. It's really rights to --
15 Q The note?
16 A To the note.
17 Q Right. So it's the holder of the note --
18 A Yes.
19 Q -- that has the right to foreclose?
20 A Yes.
21 Q So in the absence of the trust, in the absence
22 of this PSA --
23 A Okay.
24 Q -- I want you to -- we're going to do a
25 hypothetical.

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1 A All right.
2 Q In the absence of that, I want you to assume
3 that U.S. Bank holds the original note. In the
4 absence of that PSA they would have the right to
5 foreclose as a holder of the note?
6 A When you say, "holder," that is that it was
7 negotiated pursuant to required law?
8 Q Well, okay.
9 A I mean, I guess that's the definition of a
10 holder.
11 Q Sure. Assuming you meet the definition of a
12 holder under the Alabama --
13 A Yes.
14 Q Okay. Under the Alabama UCC, assuming we meet
15 the definition of a holder under the Alabama UCC,
16 in the absence of that PSA, U.S. Bank would be
17 entitled to foreclose under Alabama law?
18 A They would, but it would depend on whether they
19 were doing it in a trustee capacity or in a
20 non-trustee capacity. I mean, if they, in the
21 absence of this agreement, I'm going to assume they
22 wouldn't be in trustee capacity, they, holding the
23 note, would have the right to foreclose.
24 Q Holding the note?
25 A Yes.

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1 Q Okay. So in the absence of the PSA --
2 A Yes.
3 Q U.S. Bank, period, is the holder of the note,
4 has right to foreclose under Alabama law?
5 A Assuming they were. That would be also under
6 New York law.
7 MR. RAGSDALE: Hold on, Judge.
8 Q I'm apparently required under Alabama law to
9 ask you how much you're being paid.
10 A Five hundred dollars an hour.
11 Q Okay. And do you know how much you've billed
12 the lawyers in this case for your work?
13 A I got an initial retainer of three thousand
14 dollars, and haven't had any subsequent billing. I
15 haven't billed them.
16 Q Do you have any idea how many hours you've put
17 in?
18 A I would say that, you know, in the neighborhood
19 of thirty hours.
20 Q Okay. I think this is the final area.
21 Under your answer that I think you gave
22 earlier, which is that based on your theory that
23 the allonge is ineffective.
24 A Yes.
25 Q EMAX, according to you, has the right or would

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1 have the right to foreclose on that note in the
2 absence of any other endorsements?
3 A Yes.
4 Q Okay. And it's EMAX that would have the right
5 to complain if somebody else tried to foreclose,
6 right? I mean, EMAX would be able to say, no,
7 that's my right?
8 A Okay.
9 Q Is that true?
10 A Yeah, I think that's -- I mean, if you don't
11 own the note -- someone doesn't own the note, they
12 couldn't foreclose. And obviously, the owner of
13 the note would be very unhappy with that result.
14 Q And as we sit here today as far as we know EMAX
15 isn't complaining about the fact that U.S. Bank is
16 trying to foreclose, right?
17 A I have no information on that.
18 Q Okay. And one other thing. You're not aware
19 of any evidence, are you, that Ms. Congress's note
20 is listed on the mortgage loan schedule of any
21 other trust other than this trust?
22 A I'm not aware of that, no.
23 MR. RAGSDALE: Thank you, Professor. I
24 appreciate your time.
25 THE WITNESS: Thank you.

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1 REDIRECT EXAMINATION
2 BY MR. WOOTEN:
3 Q Professor --
4 THE COURT: Let me ask you one thing
5 before we move on.
6 THE WITNESS: Sure.
7 THE COURT: Is there any difference
8 between a holder and an owner of a note? You seem
9 to be using them interchangeably.
10 THE WITNESS: Yeah, I think the UCC talks
11 about a holder. And I think my understanding is
12 that a holder is one who basically either
13 originally owns the note or is -- has -- the note
14 has been transferred by proper negotiation.
15 THE COURT: So it sounds to me like
16 they're the same?
17 A Yes. All right. Thank you.
18 REDIRECT EXAMINATION
19 BY MR. WOOTEN:
20 Q Professor, let's just start with the simplest
21 thing we can clear up.
22 A Okay.
23 Q Mr. Ragsdale seemed to imply that you can just
24 go get any, as you mentioned, first year law
25 student to write an opinion of counsel letter and

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1 that would satisfy the requirements to accept this
2 asset on time. Was that your impression of the
3 question?
4 A Well --
5 Q If you will, look at Page 17 of the agreement.
6 A Page?
7 Q Was the definition section.
8 A Oh, okay.
9 Q It defines opinion of counsel.
10 A Okay.
11 Q And, if you will, read that.
12 A A written --
13 Q You don't have to read it out loud. You can
14 read it to yourself.
15 A Oh.
16 Q You were mentioning that you couldn't imagine
17 anybody -- you couldn't imagine anybody would write
18 an opinion of counsel letter saying you could
19 accept a disqualified asset. You seemed a little
20 incredulous by the suggestion, right?
21 A I did. Yes.
22 Q Nobody wants to take on a billion dollars worth
23 of tax liability for a busted trust, right?
24 A Well, you have to have a lot of malpractice
25 insurance.

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1 Q Not a good idea, is it?
2 A No, no.
3 Q Does this opinion of counsel definition put
4 some qualifications on just who might really
5 qualify to give an opinion of counsel like this?
6 It doesn't say any independent opinion of counsel?
7 A Yes.
8 Q Okay. So if for somebody who didn't have a
9 vested interest in proving they had a right to
10 foreclose, those independent opinions of counsel
11 was going to violate the tax code, does that seem
12 to you like something a reasonable expert on trust
13 law and REMIC provisions would do?
14 A I'm sorry. Would you repeat that?
15 Q Does it seem to you that a reasonable New York
16 lawyer with skill and knowledge that you would
17 expect them to have in the industry would render an
18 opinion of counsel that the trust could accept a
19 defaulted loan more than three years after it
20 closed for purposes of fixing a problem with
21 standing after they've been caught without it?
22 A No.
23 Q Not an independent lawyer, right?
24 A Right.
25 Q An independent lawyer.

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1 A An independent counsel.
2 Q Right. Nobody whose name typically you find
3 attached to these SEC filings, like the Thatcher,
4 Proffit & Woods, those people, Mayor Brown, those
5 people don't write those kind of opinions to your
6 knowledge, do they?
7 A Not to my knowledge.
8 Q Because like you said, you need a lot of
9 malpractice insurance to put your name on that,
10 don't you?
11 A Yes.
12 Q Okay. Mr. Ragsdale seemed to intimate that
13 there was some special significance to the fact
14 that these parties said they did what they were
15 supposed to do.
16 A Right.
17 Q Tell the Court what you think about the
18 significance of the parties saying in the agreement
19 that they did what they said they did. They made a
20 representation or a recital. What is the legal
21 effect of that?
22 A Well, the legal effect in New York is governed
23 by this EPTL Section 7-1.18, which the -- I
24 originally read that -- the first sentence, that in
25 order for an asset to be part of the trust it has

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1 to be transferred to the trust. But then the next
2 sentence, the beginning of it, I think is critical.
3 For purposes of this section, a transfer is not
4 accomplished by recital of assignment holding a
5 receipt in the trust instrument. So that what New
6 York law and it may be different -- I think it's
7 different in other states -- is that merely a
8 reciting that there's been an assignment or a
9 holding is not sufficient to get the asset into the
10 trust.
11 In fact, the Court might be interested --
12 there's a very recent opinion in the Bishop case,
13 the citation is 899 New York Sub 2nd 612, and the
14 last two 612. And it's an appellant division. We
15 have an intermediate appellate court, first
16 department.
17 Let me just briefly read this. "In order for
18 assets to become part of the trust, the grantor is
19 obligated to actually transfer the assets to the
20 trust. Furthermore, the language of the statute is
21 clear that mere recital of assignment holding a
22 receipt is insufficient for transferring assets to
23 a trust." Here the trust instrument simply recited
24 that various assets belong to or had been assigned
25 to the trust. There was no evidence in the record

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1 that any deed had actually been executed.
2 Q Is that kind of where we find ourselves based on
3 the --
4 A I think --
5 Q -- of this case?
6 A -- that's where we find ourselves is that in
7 effect we need to have proof of actual transfer in
8 compliance with New York's Uniform Commercial Code
9 with respect to this negotiable instrument.
10 Q So for this giant box of mortgage loan
11 schedules that's a representation that it's in that
12 trust --
13 A Yeah.
14 Q -- if you were to examine every loan file and
15 found that it was endorsed to EMAX, would it be
16 your opinion that any of these loans had ever been
17 conveyed to this trust?
18 A No.
19 Q So this is worthless as evidence of conveyance
20 to the trust, right?
21 A I think New York law would say that the mere
22 recital of assignment, holding, or receipt is
23 insufficient to have the asset transferred to the
24 trust. If you want to say that -- I don't like to
25 characterize big documents as worthless.

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1 Q I understand. It is evidence of an intent.
2 It's evidence of a plan?
3 A Right. Right. But, in fact, in order to
4 accomplish -- and this really goes to the nature of
5 transferring assets, generally. You need to have
6 the intent to do it and you need to have requisite
7 delivery. And with a negotiable instrument, you
8 not only have to have delivery of possession, you
9 have to have endorsement and acceptance.
10 Q All right. Let's talk about the Muratori case
11 that Barry mentioned.
12 A Yeah, that 1944 case that he pointed out?
13 Q Yes.
14 A Yes.
15 Q This case deals with someone coming in many
16 years after the fact and saying, we believe the
17 trustee acted beyond their authority. Is that a
18 fair summary?
19 A No, I don't think that's a fair summary.
20 Q Okay. Tell the court why this is not an
21 analogous case to the present situation.
22 A Well, because what counsel asked me to read is
23 this court, which was applying the forerunner of
24 the EPTL 7-2.4, which says that an act in
25 contravention of the trust is void. So let me read

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1 this: Neither is this case to be confused. So the
2 case that was actually decided didn't involve
3 successive transfers that have taken place and many
4 years have elapsed. That was not the case in the
5 case that was decided. The distinguishing in this
6 case, rendering it difficult or even impossible to
7 determine whether the trustee acted in
8 contravention of the case.
9 In that case, there is going to be a
10 presumption that the trustee acted correctly and
11 not in contravention of the trust.
12 But in my view, what we have here is an
13 agreement that was going to effective March 2007,
14 and we have -- well, it is what? 2010. It's three
15 years later that we're litigating this thing.
16 There is nothing difficult or impossible to
17 determine whether the trustee would act in
18 contravention of the trust if the trustee accepted
19 a defaulted loan.
20 Q And even if you assume the contents of the
21 collateral file are correct, you are looking at the
22 evidence that this loan is not in this trust. It's
23 never been conveyed to this trust, right?
24 A Based on the filing you gave me, I see that
25 it's been conveyed to EMAX, and the attempt to do

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1 anything further was invalid under New York law
2 because it didn't comply with New York's Uniform
3 Commercial Code.
4 Q All right. And you mentioned that you thought
5 there was something instructive to the Court about
6 this case. Would you tell the Court?
7 A Yeah.
8 THE WITNESS: Yeah. Your Honor, this case
9 is called Dana, and it's in 465 New York Sub 2nd
10 102. It's a 1982 case. And I think it has -- may
11 have some relevance here because in that case,
12 essentially, what happened is that an individual
13 created a trust, named himself as trustee, actually
14 husband and wife involved. But just to simplify,
15 an individual created this trust, and created a
16 trust that was designed to comply with the federal
17 tax laws, estate tax laws. Specifically, this was
18 called the -- it's a charitable -- renamed the
19 trust.
20 But in order to comply with -- to have a valid
21 charitable trust and therefore get a deduction, it
22 is critical that the trustee agreeing not to sell
23 assets to himself. And the trust specifically said
24 that the trust was prohibited from engaging in any
25 act of self dealing.

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1 Well, it turned out the trustee sold the trust
2 assets including real and personal property to
3 himself. And the question was, what was the effect
4 of this self dealing? And the court said that
5 because the trustee was specifically prevented from
6 engaging in self dealing that would cause adverse
7 tax consequences, that this act would cause the
8 court to invoke EPTL 7-2.4 to void the transaction.
9 And I think, essentially, that Article 10,
10 which prevents the trustee from accepting an asset
11 where it would cause tax problems, it's very
12 similar to this case, and I feel confident that
13 New York would basically say this is a void act.
14 Q So --
15 MR. RAGSDALE: Can I see that case?
16 MR. WOOTEN: Sure.
17 MR. RAGSDALE: Thank you. Can I staple
18 it?
19 THE WITNESS: But you can't put a rubber
20 band around it.
21 MR. RAGSDALE: Fair enough. I mean,
22 you'll be able to take the staple out.
23 THE WITNESS: But I will see the evidence
24 that there was a staple mark, but I want see
25 evidence of a rubber band.

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1 MR. RAGSDALE: Or a quitclaim marks (sic)?
2 THE WITNESS: Whatever that is.
3 THE COURT: All right. Go ahead.
4 THE WITNESS: I'm sorry.
5 Q (BY MR. WOOTEN:) Professor, go back to Page 32
6 of the agreement.
7 A I'm sorry. 32?
8 Q 32, yes, sir.
9 A Yes.
10 Q The convoluted section that mentions Minnesota
11 law.
12 A Yes.
13 Q Take a moment and read that section in its
14 entirety.
15 THE COURT: What section? (d)?
16 MR. WOOTEN: It's Paragraph (d).
17 THE COURT: You want him to read that
18 whole section?
19 A Well, Counsel, if I was going to read that, we
20 would be here, you know, well past --
21 THE COURT: We're not going to do that.
22 Q But let me -- I've got two good teachers on
23 that. Professor Bloom, you sound like one of my
24 law school professors. Don't make me do that.
25 Look at the sentence under -- it begins with:

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1 "Nevertheless." It looks like it's the third
2 sentence.
3 A In the first paragraph?
4 Q In subparagraph (d).
5 THE COURT: It says, "Nonetheless?"
6 Q It says, "None of the less." I'm sorry. It's
7 above the part that Mr. Ragsdale had you read,
8 right?
9 A Nonetheless, paren (a)?
10 Q Yes.
11 A "This agreement is intended to be hereby -- is
12 a security agreement within the meaning of Articles
13 8 and 9 of the New York Uniform Commercial Code and
14 other UCC jurisdiction."
15 Q So that paragraph leads with: This document is
16 governed under the New York UCC, right?
17 A Yes.
18 Q And it talks about Articles 8 and 9?
19 A Yes.
20 Q And those deal with bulk sales, right?
21 A No. I think those are dealing with basically
22 securities and security interests. And I think
23 what it's really designed to deal with is once an
24 asset is in the trust and then, in fact, here the
25 certificates were issued, but the certificate

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1 holders would want to have some security that
2 they're going to get paid, so that Articles 8 and 9
3 would allow the perfection of security in an asset
4 that's in the trust already.
5 Q And it would allow the perfection of that
6 security instrument in the trust assets in states
7 other than New York?
8 A Yes.
9 Q And in compliance with other states UCC?
10 A Yes.
11 Q For purpose of perfecting the security interest
12 in the trust assets?
13 A Yes.
14 Q Okay.
15 A Yes.
16 Q That has nothing to do with adopting every
17 states' Article 3 requirements for negotiation and
18 delivery to the trust, right?
19 A No. No. This is only dealing with once the
20 asset is in the trust that because, as I pointed
21 out in 2.06, that the purposes of the sale of
22 certificates to the depositor who's in turn is
23 going to sell the certificates, that the whole idea
24 is that these are going to be securities -- that's
25 the whole basis here of having these mortgage

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1 backed securities, that there is some security
2 interest once the asset is in the trust.
3 Q Right. And so it's not the magic bullet that
4 means that all the New York law provisions unwind
5 and every other state --
6 A No, no, no. I think it's very -- it's limited
7 to saying once you have complied with New York law
8 to get it into the trust, then in terms of
9 perfecting the security interest you have to look
10 to whatever -- you know, whatever this (d)
11 provides.
12 Q And last thing, and I'll be through.
13 A Okay.
14 Q With respect to the questions about whether
15 U.S. Bank as trustee for this trust, could be the
16 holder of this note for purposes of collection --
17 A Yes.
18 Q -- is that permissible under this
19 agreement?
20 A If it wasn't -- didn't own the note?
21 Q If it was not the owner of the note --
22 A Right.
23 Q -- could it be designated the holder of the
24 note to foreclose?
25 A I don't think so because I think the purpose of

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1 the agreement is that if -- that the trustee has to
2 own the note and have validly acquired it and not
3 acquired it, whether it be an adverse tax
4 consequence. And so I don't think it's a trustee
5 function of U.S. Bank to be a collection agency for
6 EMAX.
7 Q Okay. So in your opinion under New York law,
8 looking at the collateral file, EMAX is the party
9 who should have been foreclosing on Ms. Congress?
10 A Yeah, assuming that's -- yeah, assuming that's
11 the note, that EMAX is the holder of the note and
12 then would have the right to foreclose on the
13 mortgage.
14 Q And you are absolutely confident based on
15 contents of that collateral file that at the time
16 this foreclosure commenced, the trust did not own
17 the loan?
18 A Yes. I'm absolutely confident that the trust
19 did not own the loan.
20 Q Okay. And in your opinion, based on your
21 knowledge of New York Trust Law, now that the loan
22 is defaulted, the trust can never acquire the loan?
23 A If the trust attempted to acquire without the
24 requisite opinion of counsel, it would be a void
25 act under New York law. In fact, there is -- there

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1 is a very old New York Court of Appeals case, our
2 highest court, the Supreme Court is the lowest
3 court in New York.
4 MR. RAGSDALE: Same here.
5 A Courts-at-large has its jurisdiction. I know
6 of no such power to dispense with the enactment of
7 the Legislature and make that valid which the law
8 giver has it pled shall be void. So it would be a
9 void act and there's no power to do anything about
10 it.
11 Q And that is settled law in New York?
12 A In effect, this is current EPTL 7-2.4, an act
13 in contravention of the trust is void, period.
14 RE-CROSS EXAMINATION
15 BY MR. RAGSDALE:
16 Q Your opinion is that Ms. Congress's loan never
17 became apart of this trust, right?
18 A That's my opinion, yes.
19 Q So your opinion is the trust is irrelevant to
20 Ms. Congress's note because it was never held by
21 this trust, never became apart of it?
22 A Right.
23 Q Okay. So if the trust is irrelevant, then the
24 invocation of New York law governing any aspect of
25 this proceeding is also not applicable, right?

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1 A No. I think there's two parts to it. One is
2 was the note ever acquired -- was the note acquired
3 by the closing date March 12th, 2007?
4 Q Let's assume that's true. Let's assume that
5 you're right. It was never acquired by the trust?
6 A Right. And then what I'm further saying is
7 that the trustee cannot now acquire that note
8 because it would be in contravention of the trust.
9 Q I'm all over you.
10 Let's assume that the trust and the trustee
11 have no role in this.
12 A Okay.
13 Q Okay.
14 A I'll assume that.
15 Q U.S. Bank as holder of this note, we talked
16 about, could still foreclose?
17 A No.
18 Q U.S. Bank? You're telling me because U.S. Bank
19 is the trustee in that they can't foreclose on a
20 note that was never covered by the PSA?
21 A How did they get the note?
22 Q They asked for it and it was given to them.
23 They're the holder of the original note. U.S. Bank
24 is the holder of the original note as we stand here
25 today. And you tell me the trust has no

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1 application because it was never apart of the
2 trust. So let's just forget the trust, because
3 your position is it has no governing authority,
4 right, because it's not an asset of the trust?
5 A Right.
6 Q So U.S. Bank as the holder --
7 A No. In order to be a holder it has to be
8 endorsed -- you know, just because you have
9 possession of a note doesn't mean that you are the
10 holder of the note, because under the UCC --
11 Q Applicable in Alabama?
12 A -- applicable in Alabama. Applicable in every
13 state.
14 Q Except New York and South Carolina?
15 A No, no. No. New York -- well, Alabama
16 requires that there be an endorsement. The
17 question is whether, you know, the endorsement was
18 proper.
19 Q Right. And you don't have an opinion about
20 whether the endorsement on that allonge is proper
21 under Alabama law, do you?
22 A I don't have an opinion as to whether that was
23 proper in Alabama law.
24 Q Okay. Assuming it is -- assuming it's a proper
25 endorsement to U.S. Bank.

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1 A Notes share the capacity (sic).
2 Q But it is capacity as a holder of the note, it
3 could foreclose?
4 A If it got the note in due course and it was the
5 holder, then it --
6 Q Could foreclose?
7 A Yes.
8 Q Okay. Let me clear something up in response to
9 the Judge's question if we can.
10 A Okay.
11 Q Let me show you the Alabama Code again, part of
12 the UCC?
13 A Sure.
14 Q 3-203.
15 A All right.
16 Q Transfer of Instrument Rights Acquired by
17 Transfer.
18 A Okay.
19 Q And you can either read it out loud or to
20 yourself, the highlighted portion of the
21 commentary. And I think you said as an academic
22 you look first at the statute and then the
23 commentary to inform your interpretation?
24 A Uh-huh.
25 A Okay. I see ownership rights and instruments

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1 that concern by principles of law of property
2 independent of Article 3.
3 Q It provides, does it not, in this first
4 sentence --
5 A Yep.
6 Q Although transfer of an instrument might mean
7 in a particular case that title to the instrument
8 passes to the transferee. The result does not
9 follow in all cases.
10 A Okay.
11 Q The right to enforce an instrument and
12 ownership of the instrument are two different
13 concepts.
14 A Okay.
15 Q Is that right?
16 A Okay.
17 Q Do you have any reason to question whether
18 that's applicable Alabama law?
19 A No, no reason to question that.
20 THE COURT: What's the section number?
21 MR. RAGSDALE: 7-3-203.
22 THE COURT: Thank you.
23 Q Just a few more questions.
24 A Okay.
25 Q This Dana case?

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1 A Yes, sir.
2 Q Okay. The court held that the act was void?
3 A Yes.
4 Q Who brought that action? Excuse me. In other
5 words, who raised the issue that the act and
6 contravention of the trust was void?
7 A It turns out that the person who created the
8 trust had a conservator appointed, so the
9 conservator was claiming that -- in fact, the
10 conservator was claiming, was that this trust was
11 never validly created. And what the court held,
12 was the trust was validly created, but the act of
13 self dealing contravened the trust was a void act.
14 Q And they held that in a lawsuit brought by --
15 it was a co-conservator, wasn't it?
16 A It could be, yeah.
17 Q Yes. You don't have any doubt that a
18 conservator named in a trust has standing to
19 challenge the existence of the trust or the acts of
20 the trustee?
21 A Conservator --
22 Q Named in the trust, which is what I think you
23 told me.
24 A No, no, no. I don't think the conservator.
25 The person who created the trust was -- became

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1 incapacitated, and then a conservator was
2 appointed.
3 Q Oh, by the court?
4 A By the court, yes. And now the conservator is
5 saying, well, this trust was not validly created.
6 Q Okay.
7 A The court saying, well, it was validly created
8 but the act was void.
9 Q Are you familiar with the case of Cashman vs.
10 Petree. A New York case from 1964. Let me read
11 you this sentence and see if you would dispute it.
12 In that case the court held that, quote, only
13 persons who have any right to object in this
14 instance would be income beneficiaries of the
15 trust.
16 Would you agree with me that under New York law
17 only parties to the trust or intended beneficiaries
18 have the right to come into court and challenge
19 whether or not a trustee complied with the terms of
20 the trust?
21 A Absolutely no.
22 Q Well, would you give my associates the cite to
23 the cases where non parties, that is, people who
24 are not parties to the trust, people who are not
25 intended beneficiaries have gone into court in

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1 New York and challenged actions of the trust, just
2 your best cite.
3 A There's hundred of cases dealing with MERS.
4 MERS. Do you know about MERS?
5 Q I've heard of it.
6 A I've heard of it too. You know, where, in
7 fact, MERS is trying to in New York foreclose on a
8 mortgage.
9 Q And New York courts have said you can't do
10 that?
11 A Right.
12 Q Okay. Are you aware Alabama courts have said
13 MERS can foreclose here?
14 A I am aware of that Crumb case, and yeah.
15 Q But that's not a term of derogation. That's
16 the name of the party, right?
17 A Yeah.
18 Q Okay.
19 A I think the point, Counsel, is that if someone
20 is trying to enforce rights against, for example,
21 in this case, against Ms. Congress, that she has a
22 right to say that in fact, this --
23 Q You don't own the note?
24 A You don't own the note.
25 Q Okay. But does she have to prove that?

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1 A I think she has to -- you know, I think if
2 there's evidence that -- again, I don't know if
3 you're going back to the presumption, but, you
4 know, if, in fact, the note is note owned, then the
5 person can't, in fact, sue on it.
6 Q Okay.
7 A So I think that's her position, as I understand
8 it, is look, U.S. Bank don't own this note under
9 this trust, and therefore, you cannot foreclose.
10 Q Can you cite me the hundreds of cases in which
11 a non-party has challenged the actions of a trustee
12 under the term pursuant to the terms of the trust?
13 Can you just give me one cite to that?
14 A You know, I can't give you one site to it
15 because, generally, the trust is not -- I think
16 what you have is there are a lot of cases dealing
17 with third-party liability to trustees or trustees
18 having liability, third-party trustees, those are
19 cases where -- that you would find that there would
20 be a third party not to the trust who would be
21 complaining about some action of the trustee.
22 Q Can you give me a cite to one of those cases?
23 A No, but there are -- like several sections, I
24 think starting about Section 290 that deal with
25 issues with respect to third parties, intra

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1 trustees. So there's a lot of activity in that
2 area.
3 As to whether, in fact, a third party is bound
4 by a trust? The third party can say, well, I'm not
5 bound by the trust. So, you know, I think that
6 there are cases where third parties can contest
7 aspects of the trust.
8 Q Even if they're not beneficiaries of the trust?
9 A Absolutely.
10 Q But you can't cite me to a case?
11 A No, but I can cite you the restatement of
12 trust, which, by the way, is very authoritative in
13 New York. You know, it's going to be replete with
14 instances where third parties are involved in terms
15 of situations.
16 Q In this instance, in the absence of the issue
17 you raised about the allonge not being --
18 A Yes.
19 Q -- by the way, the allonge says it's affixed,
20 doesn't it?
21 A Yeah. It says it's affixed. And the trust
22 says that the assets are owned by the trust.
23 Q Okay. In the absence of your argument about
24 the allonge not being a proper transfer, are you
25 aware of any evidence at all that this note was not

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1 transferred to the trust by the date specified?
2 A I'm not aware of any evidence that it was or
3 wasn't.
4 Q Okay. Equipose, do you know that term?
5 A I know that term.
6 Q I looked one up when you started using those
7 professorial words. That means the evidence is --
8 there's no evidence either way, right?
9 A Well, I don't know what the evidence is. But I
10 am not aware of any evidence as to whether, in
11 fact, the transactions occurred by March 12th,
12 2007.
13 Q Okay. You do have, though, in the PSA, both,
14 all of the parties to the PSA saying it was, right?
15 I mean they say it. You don't believe it, but they
16 say it, right?
17 A No. I don't necessarily believe it or would
18 not believe it.
19 Q Okay.
20 A I just know that New York law says it doesn't
21 matter what you say, it matters what you do. And
22 if you don't physically and actually transfer it,
23 it doesn't matter what you recite that you own it,
24 you recite that you assigned it. That's not good
25 enough in New York.

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1 Q Those cases say a mere recital, right?
2 A Not a case. This is a statute.
3 Q But it says a mere recital.
4 A Yes.
5 Q Okay. In this instance it's more than a
6 recital. It's a representation and warranty that
7 it occurred, and specifically listing in the
8 mortgage loan document that. That's more than a
9 mere recital, isn't it? It is a representation and
10 warranty.
11 For example, under contract law, a recital
12 whereas, whereas, those kind of recitals are not
13 actionable. You can't bring a lawsuit based on a
14 recital, a mere recital, can you?
15 A No, but I think --
16 Q Okay. Can you bring a lawsuit based on a
17 representation or a warranty that an act was done,
18 in fact, if it was not done, could you bring that
19 lawsuit?
20 A Again, I'm not a contract lawyer, but I assume
21 that's the case. But again --
22 Q Okay.
23 A -- going back that no evidence -- the
24 representation is not good enough to get it into
25 the trust in New York. It has to be actually

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1 transferred. You can say whatever you want, but
2 it's not good enough under EPTL 7-1.18.
3 Q In this case what we have is the parties saying
4 it was done in the agreement. You agree with that?
5 The mortgage note specifically listed and
6 referenced in the attachment to the PSA, right?
7 And you have an endorsement, which you challenge,
8 but an endorsement to U.S. Bank as trustee, right?
9 A Yes.
10 Q You have all of that?
11 A Yes.
12 Q And on the other side you have nothing. You
13 have no evidence that it wasn't done.
14 A Well, I don't know. Does this file talk about
15 -- is there an August date here on this file?
16 Q When it was scanned into the computer.
17 A Oh, when it was scanned into the computer.
18 Q Yeah. That probably isn't -- there is no
19 reference in the PSA to scanning dates, are there?
20 Is there a scanning date deadline? I don't know of
21 any. Do you know of any?
22 A No, I don't know of any. Okay.
23 Q Okay. So in the absence of your objection to
24 allonge, you have the evidence I just mentioned,
25 the representations, the warranties, the listing in

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1 the mortgage loan schedule, the endorsement to the
2 trustee, and you can't tell me any evidence over
3 here that it wasn't done, right?
4 A I'm not aware of any evidence as to when or --
5 when it was done.
6 Q And you don't know one way or the other when
7 that note with the allonge was delivered to the
8 trust, right?
9 A To the trustee, no.
10 Q Okay. I mean, as far as you know -- I'm sorry.
11 A We don't even know who the -- when you say
12 trustee, U.S. Bank, there's got to be some
13 individual. So is there some evidence as to who
14 actually got the note from U.S. Bank?
15 Q You're saying that a transfer to U.S. Bank
16 isn't sufficient? There has to be a person's name?
17 A You have to deliver possession to someone who
18 is, you know, part of the U.S. Bank.
19 Q Oh, okay. You mean somebody who works for
20 them?
21 A Yeah. Yeah. Somebody who works for them.
22 Q Okay.
23 A Yeah. I mean, I guess as far as I know, I
24 don't know any evidence as to when the transfer
25 occurred.

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1 Q You have no opinion and you cannot say one way
2 or the other whether that note with the allonge was
3 transferred by the cutoff date?
4 A I can absolutely not say that one way or the
5 other.
6 Q Okay.
7 MR. RAGSDALE: I think I'm done with you.
8 Thank you.
9 THE WITNESS: All right. Thank you.
10 THE COURT: Anything else?
11 FURTHER REDIRECT EXAMINATION
12 BY MR. WOOTEN:
13 Q In the absence of a date, Professor --
14 A Yes.
15 Q -- if you look at the collateral file under New
16 York law, is there a conveyance to this trust?
17 THE COURT: In the absence of what?
18 Q In an absence of a date certain --
19 THE COURT: Oh.
20 Q -- if you look at the collateral file, their
21 evidence of the trust ownership, is there a
22 conveyance to this trust?
23 A Well, we're talking about the allonge problem,
24 right?
25 Q Yeah. We've already addressed that. I'm

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1 talking about looking at the promissory note.
2 A Looking at the promissory note.
3 Q Under New York law their evidence of trust --
4 A I need to know when it was done.
5 Q Yeah. But based on the contents of the
6 document --
7 A Yes.
8 Q -- who owns the note?
9 A Based on New York law, EMAX Financial Group,
10 LLC owns the note.
11 Q Professor, we talked about this mortgage
12 assignment that you saw.
13 A Yes.
14 MR. LAY: And the date.
15 Q And the date on it that says, 29th of July,
16 '08.
17 A Yes.
18 Q And you talk about the fact that the assignment
19 says that it's a transfer of the mortgage and the
20 note.
21 A Yes.
22 Q Is that evidence that it was transferred after
23 the date?
24 A It seems to be.
25 Q Okay. And if you read the sworn mortgage

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1 assignment of an attorney --
2 A Yes.
3 Q -- would you expect the contents to be truthful
4 and accurate?
5 A Yes.
6 Q Would you relay on that if you saw that in the
7 probate records?
8 A Yes.
9 Q And would you assume based on the contents of
10 that assignment that a transfer occurred on that
11 date?
12 A Yes.
13 Q And would that be out of time?
14 A Yes.
15 Q So in the absence of any other evidence, that's
16 direct evidence that the transfer occurred after
17 the fact, right?
18 A Yes.
19 Q When you examined the top of the collateral
20 file where it has dates across the top of the
21 collateral file --
22 A Show me these dates.
23 Q -- and you look at the scan sheet, the scan
24 sheets they were referencing say this was the scan
25 date.

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1 A Yeah.
2 Q When you look across the top of the file that
3 says original 8-29-07.
4 A Yes.
5 Q And then it says revision?
6 A Yes.
7 Q Does that implicate to you any significance of
8 the date the scan took place or does that look like
9 the form date or do you know?
10 A I don't know.
11 Q So that doesn't mean anything, does it?
12 A Excuse me?
13 Q It doesn't mean anything as far as date of
14 transfer, does it?
15 A No.
16 Q But if the cutoff date were March 12th, 07 --
17 A Yeah.
18 Q -- and that was the date that it was scanned
19 into the trustee, that would be after March 12th
20 also, wouldn't it?
21 A Yes.
22 Q So if you relied on that date, that would be
23 evidence it was delivered out of time, right?
24 A Yes.
25 MR. WOOTEN: Nothing further.

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1 THE COURT: All right. Nothing else?
2 MR. RAGSDALE: I have one question, Judge.
3 FURTHER RE-CROSS EXAMINATION
4 BY MR. RAGSDALE:
5 Q Are you aware that under this PSA a MERS as
6 original mortgagee, what's called a MOM mortgage
7 which this one was.
8 A Yes.
9 Q The mortgage doesn't even have to be assigned
10 to the trust. Are you aware of that?
11 A Right.
12 Q Okay. So that there's no requirement under
13 this PSA that the mortgage ever be assigned to the
14 trust?
15 A Well, I think the 201 talks about 201(b) talks
16 about the mortgage being assigned. But, yeah, I'll
17 assume that it doesn't have to be assigned.
18 Q So the document that Mr. Wooten just asked you
19 about is completely unnecessary under the PSA?
20 A No. I think under 2.01(b) little one and two,
21 you've got to have the original mortgage.
22 Q Has to be assigned to the trust?
23 A Yes.
24 Q So every one of the mortgages under this trust
25 that were not assigned, despite the fact that it

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1 says that MERS mortgages don't have to be assigned,
2 every one of those is invalid under New York law,
3 every one of those assignments if it wasn't
4 assigned?
5 A No, because see under New York law, and I think
6 probably under every law, if you have the note that
7 allows you to sue on the mortgage.
8 Q Oh, okay. Even under New York law if you have
9 the note?
10 A Yes.
11 Q You don't need to have the mortgage assigned?
12 A Yes. But the flip side of what's different, if
13 you have the mortgage but you don't have the note,
14 you can't sue in New York, but you told me in
15 Alabama in the Crumb case you could.
16 Q Okay.
17 MR. RAGSDALE: That's all Judge.
18 MR. WOOTEN: Judge, we just need to make
19 sure we've offered 22 and Ryan and I have agreed to
20 take out the documents that don't have to do with
21 the securitization issues for this trust.
22 THE COURT: All right.
23 MR. RAGSDALE: Yes.
24 MR. WOOTEN: We're going to remove
25 everything that is not a securitization document.

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1 MR. RAGSDALE: One last housekeeping.
2 Y'all were going to bring the mortgage loan
3 schedule for that 2006 thing.
4 MR. WOOTEN: I represent to the Court that
5 the mortgage loan schedule for the other trust, the
6 final one, does not have that loan number in it.
7 MR. RAGSDALE: And we would move to strike
8 whatever it was, Defendant's Exhibit 2, which was
9 the preliminary prospectus which was represented
10 that it was included with that. I heard you say
11 it.
12 MR. WOOTEN: Well, represented --
13 MR. RAGSDALE: It was not included.
14 MR. WOOTEN: We represented that the loan
15 was on the schedule in the preliminary prospectus.
16 MR. RAGSDALE: Can we stipulate, then,
17 that the only one of these stacks of PSAs, the only
18 place where Ms. Congress's loan appears in any
19 mortgage loan schedule is on the trust we're here
20 about today.
21 MR. WOOTEN: Yeah.
22 MR. RAGSDALE: It's not in any of the
23 others.
24 MR. WOOTEN: And we did not find it in any
25 final document.

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1 THE COURT: I had thought you said it was
2 in the --
3 MR. WOOTEN: I apologize if I misled the
4 Court in any way.
5 THE WITNESS: -- the trust '09.
6 MR. WOOTEN: We meant it was in the
7 prospectus as a preliminary pool.
8 THE COURT: Okay. Well, with that
9 stipulation and 22 is admitted with those removed.
10 (Whereupon, Defendant's Exhibit
11 Number 22 was received into
12 evidence.)
13 MR. RAGSDALE: Thank you, Judge.
14 THE COURT: All right. In the morning.
15 MR. RAGSDALE: In the morning. Start at
16 9:00?
17 THE COURT: Nine o'clock. Thank y'all.
18 THE WITNESS: Thank you, Your Honor for
19 accommodating me.
20 THE COURT: You're welcome.
21
22 (Court in recess.)
23 June 3, 2010 9:00 a.m.
24 P R O C E E D I N G S
25 * * * * *

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1 THE COURT: Good morning. Who is our next
2 witness? Ms. Congress come on up.
3 All right. On the record. Yes, sir?
4 MR. RAGSDALE: We have agreed between the
5 parties to make as an exhibit the trial testimony
6 from the previous trial.
7 THE COURT: Very good.
8 MR. RAGSDALE: And we stipulate
9 that Ms. Congress's previous testimony is
10 admissible as if she gave the testimony today.
11 THE COURT: Very good.
12 MR. RAGSDALE: Does that work?
13 MR. LAY: Well, are we not stipulating
14 that the entire transcript --
15 MR. RAGSDALE: Yes, we are.
16 THE COURT: And that I may consider that
17 in --
18 MR. LAY: Anything in the previous trial?
19 MR. RAGSDALE: Yes.
20 THE COURT: That I will consider any
21 evidence already heard in making the decision in
22 this case.
23 MR. LAY: Part of it is to expedite today
24 so we don't have to go through --
25 THE COURT: Well, I'm grateful for that.

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