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10
11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13
14 DONNA A. RUTHE, an individual; TODAY'S)
REALTY, INC., a Nevada Corporation; CDR)
15 INVESTMENTS, LLC, a Nevada Limited Liability)
Company; DONNA A. RUTHE as attorney in fact)
16 for: CHARLES L. RUTHE, in his individual and in)
representative capacities as trustee for the)
17 CHARLES L. RUTHE TRUST and on behalf of his)
Individual Retirement Account; CALOGERO S.)
18 GRANIERI in his representative capacity as trustee)
for RICHARD F. ACOVINO IRREVOCABLE)
19 TRUST; FRANK E. GRANIERI, in his)
representative capacity as trustee for the FRANK E.)
20 GRANIERI REVOCABLE LIVING TRUST; and)
RICHARD ACOVINO, an individual,)

21 Plaintiffs,)

22 vs.)

23 ASPEN FINANCIAL SERVICES, INC., a Nevada)
24 corporation; ASPEN FINANCIAL SERVICES,)
LLC, a Nevada Limited Liability Company;)
25 JEFFREY B. GUINN, an individual; DOES I)
through X, inclusive; and ROE BUSINESS)
26 ENTITIES I through X, inclusive,)

27 Defendants.)
28)

Case No. A-587791
Dept. No. 19

FIRST AMENDED COMPLAINT

**REQUEST FOR TRANSFER
TO BUSINESS COURT**

Date of Hearing: N/A

**EXEMPT FROM ARBITRATION:
Amount in Dispute in Excess of
\$50,000.00; Action for Injunctive and
Declaratory Relief**

1 Plaintiffs, Donna A. Ruthe, an individual, Today's Realty, Inc., a Nevada Corporation
2 ("Today's Realty"), CDR Investments, LLC, a Nevada Limited Liability Company ("CDR
3 Investments"), and Donna A. Ruthe as attorney in fact for: Charles L. Ruthe, in his individual and
4 in representative capacities as trustee for the Charles L. Ruthe Trust ("Ruthe Trust") and on behalf
5 of his individual retirement account ("Ruthe IRA"); Calogero S. Granieri, Trustee in his
6 representative capacity as trustee for the Richard F. Acovino Irrevocable Trust ("Acovino Trust");
7 Frank E. Granieri in his representative capacity as trustee for the Frank E. Granieri Revocable Living
8 Trust ("Granieri Trust"); and Richard Acovino, individually (collectively, "Plaintiff"), by and
9 through their attorneys, the law firm of Solomon Dwiggin & Freer, Ltd., hereby complain and allege
10 against Defendants Aspen Financial Services, Inc., a Nevada corporation, Aspen Financial Services,
11 LLC, a Nevada Limited Liability Company, and Jeffrey B. Guinn, an individual (collectively,
12 "Aspen" or "Defendant") as follows:

13 I. PARTIES

14 1. At all relevant times herein, Plaintiff Donna A. Ruthe, an individual, was a resident of
15 Clark County, Nevada.

16 2. At all relevant times herein, Plaintiff Today's Realty was a Nevada corporation
17 authorized to conduct business in Clark County, Nevada.

18 3. At all relevant times herein, Plaintiff CDR Investments was a Nevada limited liability
19 company authorized to conduct business in Clark County, Nevada.

20 4. Plaintiff Donna A. Ruthe is the authorized attorney in fact for Charles L. Ruthe, an
21 individual, who at all relevant times is a resident of Clark County, Nevada.

22 5. Plaintiff Donna A. Ruthe is the authorized attorney in fact for Charles L. Ruthe in his
23 representative capacities as Trustee of the Charles L. Ruthe Trust, a trust formed under the laws of
24 Nevada, and which is administered out of Clark County, Nevada, and for his individual retirement
25 account, which at all relevant times is a validly existing individual retirement account with business
26 interests in Clark County, Nevada.

27 6. Plaintiff Donna A. Ruthe is the authorized attorney in fact for Richard Acovino, Trustee
28 of the Acovino Trust, a trust formed under the laws of Nevada, and which is administered out of

1 Clark County, Nevada.

2 7. Plaintiff Donna A. Ruthe is the authorized attorney in fact for Calogero S. Granieri,
3 Trustee of the Granieri Trust, a trust formed under the laws of Nevada, and which is administered
4 out of Clark County, Nevada.

5 8. Plaintiff Donna A. Ruthe is the authorized attorney in fact for Richard Acovino, an
6 individual who at all relevant times herein was a resident of Clark County, Nevada.

7 9. Upon information and belief, Defendant Aspen Financial Services, Inc., is a Nevada
8 domestic corporation that at all relevant times herein was duly authorized to conduct business in
9 Clark County, Nevada.

10 10. Upon information and belief, Defendant Aspen Financial Services, LLC, is a Nevada
11 limited liability company authorized to conduct business in Clark County, Nevada.

12 11. Upon information and belief, Defendant Jeffrey B. Guinn ("Guinn"), is a resident of
13 Clark County, Nevada and was the majority owner/investor in Aspen, and served as Aspen's
14 president, manager and/or chief executive officer at all relevant times herein.

15 12. The true names and capacities, whether individual, corporate, associate or otherwise, of
16 Defendants named and identified herein as Does I through X, inclusive, are currently unknown to
17 Plaintiff. Therefore, Plaintiff sues said Defendant by such fictitious names and will amend its
18 Complaint to show its true name and capacity upon ascertaining the same. Upon information and
19 belief, each Defendant sued herein as Doe has some responsibility for the damages to Plaintiff as a
20 result of the matters herein alleged.

21 13. The true names of Defendant Roe Business Entities I through X, inclusive, are currently
22 unknown to Plaintiff. Plaintiff, therefore, sues said Defendant by such fictitious name and will
23 amend its Complaint to show its true name upon ascertaining the same. Upon information and
24 belief, each Defendant sued herein as Roe Business Entity has some responsibility for the damages
25 to Plaintiff as a result of the matters herein alleged.

26 14. Through its wrongful acts and omissions, as set forth herein, Defendant has subordinated
27 Plaintiff's interests to Aspen's interests, and in so doing, Aspen has breached its statutory,
28 contractual, and fiduciary duties owing to Plaintiff.

1 22. When a loan matures and the principal amount is repaid by the borrowers, Aspen often
2 provides the lenders, frequently verbally over the telephone, with the option to reinvest or “roll-over”
3 their deposited funds in another loan investment package arranged and brokered by Aspen.

4 23. As a condition of the initial deposit of funds with Aspen for investment, Aspen requires
5 each lender to execute a standard Loan Servicing Agreement (effective for the initial and any future
6 loans the lender participates in with Aspen) authorizing Aspen to service loans it arranges and
7 brokers and to protect and enforce the lender’s rights with respect to such loans.

8 24. In exchange for acting as a servicer of the loans, Aspen receives a servicing fee from the
9 interest payments paid by borrowers to lenders. Thus, upon investing with Aspen, the lenders must
10 consider whether Aspen is a trustworthy loan servicer at the same time the lenders are considering
11 whether to invest with Aspen, as the two functions are made indivisible by Aspen.

12 25. With respect to each loan participated in by a lender, Aspen requires the lender to execute
13 a “Special Power of Attorney” authorizing Aspen to service a particular loan in accordance with the
14 terms of the Loan Servicing Agreement. The Special Power of Attorney consists of a revocable
15 power of attorney and purports to have been approved by the Commissioner of Mortgage Lending.
16 Additionally, the Special Power of Attorney expressly states (as required by NRS § 645B.330) that
17 such power “shall not be effective to authorize any transaction that subordinates the priority of the
18 recorded deed of trust that secures the Loan (the “Deed of Trust”) to any other monetary
19 encumbrance, unless accompanied by a writing executed by Lender that consents to such
20 subordination.”

21 26. However, concurrent with the execution of each Special Power of Attorney, Aspen also
22 requires the lender to execute a separate “Subordination Addendum,” which modifies the Special
23 Power of Attorney and purports to grant Aspen a “durable irrevocable power of attorney” authorizing
24 Aspen “to subordinate the lien position of Lenders ... to a deed of trust in favor of another lender
25 making a loan enabling the Borrower to construct improvements upon the [subject] Property.”
26 Unlike the Special Power of Attorney, the Subordination Agreement does not purport to have been
27 approved by the Commissioner of Mortgage Lending.

28 27. From 2001 through 2007, Plaintiff was solicited by and deposited funds with Aspen for

1 various loans arranged, brokered and serviced by Aspen (“Aspen Loans”). The majority of Aspen’s
2 loan solicitations to Plaintiff occurred by Aspen first placing a telephone call to Plaintiff soliciting
3 interest in a particular loan transaction, followed by sending loan solicitation materials to Plaintiff
4 through the United States Postal Service. Plaintiff presently has invested substantial sums on at least
5 twenty six (26) loans arranged, brokered and serviced by Aspen. Plaintiff’s corresponding percentage
6 interests in the various Aspen Loans are set forth in **Exhibit A**, attached hereto.

7 28. Pursuant to the terms of the Loan Servicing Agreements executed by and between
8 Plaintiff and Aspen, Plaintiff appointed Aspen as its agent “to service each Note, to protect the
9 interest of Lender in and enforce the rights of Lender under each Note, Deed of Trust and any other
10 Loan Documents.”¹ Aspen accepted such appointment as agent for Plaintiff and “agree[d] to
11 exercise diligent and good faith efforts in the execution of its duties as agent....”

12 29. Plaintiff has recently become aware of certain representations, acts and/or omissions by
13 Aspen relating to the arranging, brokering and servicing of Plaintiff’s loans indicating that Aspen has
14 materially breached its statutory, fiduciary and contractual duties owing to Plaintiff.

15 30. Plaintiff has requested that Aspen provide her with further information and Plaintiff has
16 attempted to investigate the representations, acts and/or omissions by Aspen with respect to the
17 various loans. However, Aspen has refused to fully disclose information to Plaintiff and has
18 obstructed Plaintiff’s efforts to obtain further information.

19 31. A review of the limited information to which Plaintiff has been made privy to reveals
20 substantial causes for concern, as set forth below. Plaintiff intends to amend this Complaint upon
21 the receipt of further information.

22 **B. THE FLAMINGO/TC, LLC LOAN (#60-00294-6)**

23 32. Beginning in or about December 2005, Aspen arranged, brokered and financed \$40.9
24 million in loans, comprising a \$26 million first priority loan and \$14.9 million second priority loan,
25 for Flamingo/TC, LLC (“Flamingo/TC”) for Flamingo/TC’s purchase of real property situated near
26

27 ¹ Recital B of the Loan Servicing Agreement defines “Loan Documents” as “the Note,
28 the Deed of Trust and any other agreements, security instruments and other documents executed in
connection therewith.”

1 the intersection of Flamingo and Town Center in Clark County, Nevada (“Flamingo/TC Property”)
2 for a purchase price of \$39,067,500.00.

3 33. Aspen also serviced these first and second priority loans to Flamingo/TC, with Aspen
4 and/or Guinn owning an approximate 34.2543% pro-rata interest (\$8,906,118.00 of the loan amount)
5 in the first trust deed,² and an approximate 1.7634% pro-rata interest (\$262,746.60 of the loan
6 amount) in the second trust deed.³

7 **(1) Aspen’s Solicitation of Plaintiff as Investors in the Flamingo/TC Loan**

8 34. On or before September 6, 2006, Aspen solicited Plaintiffs Charles L. Ruthe IRA, Charles
9 L. Ruthe Trust, Donna A. Ruthe, Richard Acovino, and CDR Investments, LLC for participation as
10 “Exhibit A” lenders in a new \$21.85 million second priority loan to Flamingo/TC (“Flamingo/TC
11 Loan”) for the development of “723 condominium units and approximately 50,000 square feet of
12 commercial/retail space.”

13 35. In the Flamingo/TC Loan solicitation package presented to Plaintiff, Aspen represented
14 that Ohio Savings Bank n/k/a AmTrust Bank (“AmTrust”) would have a \$79.7 million first priority
15 deed of trust on the Flamingo/TC Property, of which \$53 million would be outstanding at closing
16 and used to refinance the then-existing first priority Aspen loan and for soft development costs, and
17 that the proceeds of the Flamingo/TC Loan would be used to refinance Aspen’s then-existing second
18 priority loan.

19 36. Aspen further represented in the loan solicitation package that: (1) the Flamingo/TC Loan
20 term would be eighteen (18) months; (2) the Flamingo/TC Loan would be secured by a second
21 priority deed of trust on the Flamingo/TC Property and personal guarantees executed by
22 Flamingo/TC’s principal; (3) adequate security existed based upon the appraised value of
23

24 ² See Clark County Recorder Document # 20051215-0004024, Deed of Trust,
25 Assignment of Rents, Security Agreement, and Fixture Filing, at “Exhibit A” listings for Guinn
26 Family Trust (2.5%), Aspen Financial Services, LLC (25.9851%), and Investment Guys, LLC
(5.7692%).

27 ³ See Clark County Recorder Document # 20051215-0004026, Deed of Trust,
28 Assignment of Rents, Security Agreement and Fixture Filing, at “Exhibit A” listing for Aspen
Financial Services, LLC (1.7634%).

1 \$116,760,000.00; and (4) AmTrust would provide “copies of [its] executed Loan Agreement, Trust
2 Deed and Note prior to closing for review and approval by Aspen.”

3 37. In reliance on these representations, and Aspen’s promise under the Loan Servicing
4 Agreement to service the Flamingo/TC Loan and protect and enforce Plaintiff’s rights and interests,
5 Plaintiff deposited funds with Aspen and invested as an “Exhibit A” lender in the Flamingo/TC
6 Loan.

7 38. However, on September 18, 2006, prior to close of escrow, unbeknownst to Plaintiff and
8 undisclosed by Aspen, Aspen and Guinn knowingly and intentionally signed an Intercreditor
9 Agreement with AmTrust wherein Aspen, on behalf of the “Exhibit A” lenders,: (1) agreed to
10 subordinate “any and all Claims” of the “Exhibit A” lenders in favor of AmTrust; (2) “agree[d] that
11 all Claims of [AmTrust] shall be paid in full before any payment may be made on any Indebtedness
12 ... of Borrower or Guarantor” to the “Exhibit A” lenders; and (3) agreed “not to enforce or to apply
13 any security ... or to sue upon or collect or receive payment [from Flamingo/TC] ... until all
14 Indebtedness of [Flamingo/TC to AmTrust] shall have been paid in full.”

15 39. Aspen, through its counsel, admits that the limitation of the “Exhibit A” lenders’ rights
16 under Intercreditor Agreement is “unconscionable”:

17 THE COURT: Okay. Your argument, Mr. Forstadt, is, first, the
18 intercreditor agreement is unconscionable....

19 MR.FORSTADT: Correct.⁴

20 40. Likewise, Guinn admits under oath that at the time he executed the Intercreditor
21 Agreement he knew it was “unfair” to the “Exhibit A” lenders, but signed it anyway:

22 Q. ... Did you determine at the time you signed the intercreditor
23 agreement whether it was fair or unfair for Aspen?

24 A. It was – it was unfair, because if they breached it, we had no rights.⁵

25 ⁴ Transcript of Proceedings (Testimony of Jeffrey Guinn), 08/21/08, at p. 59, lines 2-7,
26 in the matter of *AmTrust Bank v. Aspen Financial Services, LLC, et al.*, Clark County Case No. A-
27 568316 (“AmTrust Litigation”). A copy of this transcript is attached as **Exhibit B** to the Amended
28 Complaint.

⁵ Ex. B, Transcript of Proceedings, 08/21/08, at p. 27, lines 15-22.

1 41. In addition to executing an “unfair” and “unconscionable” Intercreditor Agreement,
2 Aspen also “reviewed and approv[ed]” the AmTrust loan agreement. In so doing, Aspen failed to
3 disclose to Plaintiff: (1) the AmTrust loan had no set maturity date, but was not anticipated to mature
4 until at least July 2009 (more than 16 months after the maturity date of the Flamingo/TC Loan
5 effectively rendering timely payment of principal to the “Exhibit A” lenders impossible pursuant to
6 the Intercreditor Agreement);⁶ and (2) Flamingo/TC would expressly default under the AmTrust loan
7 agreement if the Flamingo/TC Loan matured prior to the maturity of the AmTrust loan.⁷

8 42. Moreover, in soliciting Plaintiff’s participation in the Flamingo/TC Loan, Aspen
9 represented to Plaintiff that the investment would be adequately secured since the value of the
10 Flamingo/TC property used as collateral would be worth \$116 million “upon completion of site
11 improvements” for Phase I and II of the project. However, in making this representation, Aspen
12 knew and failed to disclose to Plaintiff that the neither Phase I nor Phase II would have “completed
13 site improvements” upon the maturity date of the Flamingo/TC Loan.

14 43. Specifically, under the terms of the AmTrust Loan (which Aspen failed to disclose to
15 Plaintiff), the Phase I site improvements were not even scheduled for completion until September
16 19, 2008, six months after the maturity date of the Flamingo/TC Loan.⁸ Moreover, the Phase II site
17 improvements were not even scheduled to begin until after completion of the Phase I improvements
18 and the pre-sale of a sufficient number of Phase I units to make the completion of Phase II site
19

20 ⁶ See AmTrust Loan Agreement at ¶ 3.1 (setting a 24 month completion date for Phase
21 I of the lot improvements, with a completion schedule for Phase II of the lot improvements to be
22 determined after the completion of Phase II). *See also* Narrative Appraisal, Self-Contained Report,
23 08/10/06 (“Flamingo/TC Appraisal”), at p. 51 (“The subject is planned to be completed on or around
24 July 1, 2009”).

25 ⁷ See AmTrust Loan Agreement at ¶ 18.20 (stating an Event of Default will occur if
26 “Borrower fails to deliver to Lender, not later than ninety (90) days prior to the maturity date under
27 the junior loan, written evidence that the Junior Lender has extended the maturity date of the junior
28 loan to a date that is later than the maturity date under the Land Note or that Borrower has obtained
a commitment from a third-party lender to refinance the junior loan provided by the Junior Lender
on or before the maturity date of the junior loan pursuant to the requirements of Section 16.13
above”).

⁸ See AmTrust Loan Agreement at ¶ 3.1.

1 improvements commercially reasonable.⁹

2 44. As such, according to the Flamingo/TC Appraisal in Aspen's possession, upon the
3 maturity date of the Flamingo/TC Loan, the Flamingo/TC Property would possess an appraised value
4 of only \$54 million. Thus, contrary to Aspen's representations Plaintiff's investment as an "Exhibit
5 A" lender would have been undersecured at and any time prior to the maturity of the time the
6 Flamingo/TC Loan.

7 45. On September 19, 2006, Aspen (in its capacity as agent for Plaintiff and the other
8 "Exhibit A" lenders of the Flamingo/TC Loan) executed escrow instructions authorizing the close
9 of escrow and directing the disbursement of the Flamingo/TC Loan proceeds.

10 46. However, unknown to Plaintiff, undisclosed by Aspen, and contrary to Aspen's
11 representations, Aspen permitted the escrow to close knowing that: (1) Flamingo/TC would not be
12 permitted by AmTrust to repay the principal of the Flamingo/TC Loan at maturity; (2) the second
13 priority deed of trust advertised as security could not be enforced on account of the Intercreditor
14 Agreement; and (3) the appraised value of the property was inflated and would not be reflective of
15 the value of the Flamingo/TC Property at the maturity date of the Flamingo/TC Loan.

16 47. By permitting escrow to close on the Flamingo/TC Loan, Aspen received at least
17 \$613,500.00 in loan fees.¹⁰

18 48. By permitting escrow to close, Aspen and/or Guinn appear to have received more than
19 \$9 million from the payoff of their pro-rata interests in the previous Aspen first and second priority
20 loans that were paid off by the AmTrust loan and the Flamingo/TC Loan.¹¹

21 49. Guinn admits under oath that he signed the "unfair" and "unconscionable" Intercreditor
22 Agreement and allowed the loan to close subject to the onerous terms imposed by AmTrust because
23 he otherwise would not have been able to pay off the previous first and second priority Aspen loans:
24
25

26 ⁹ See *id.* at ¶¶ 2.1 and 3.1.

27 ¹⁰ See Final Instruction Letter to Title Company, 09/18/06.

28 ¹¹ See Amended Complaint at Paragraph 33, footnotes 2 and 3, *supra*.

1 “if you already have a loan outstanding, you’re kind of at [AmTrust’s] mercy.”¹² Guinn also admits
2 he would not have been able to close on the Flamingo/TC Loan (thereby receiving a loan fee) unless
3 he acceded to AmTrust’s terms: “If AmTrust doesn’t make a loan, the second probably won’t be
4 made either.”¹³

5 50. Consequently, to enhance Aspen and Guinn’s own benefit by receiving \$9.6 million,
6 Aspen and Guinn knowingly and fraudulently solicited and brokered a \$21.8 million loan without
7 disclosing to Plaintiff that: (1) the borrower could not repay the principal at stated maturity date of
8 the Flamingo/TC Loan; (2) the only way that Plaintiff would receive a return of principal at the
9 maturity date of the Flamingo/TC Loan is if new lenders paid additional sums to pay off the
10 outstanding principal balance; (3) no security existed for Plaintiff’s investment since the second
11 priority deed of trust and the personal guarantees were an unenforceable sham; and (4) the
12 Flamingo/TC Property would be over-encumbered throughout the duration and at the maturity date
13 of the Flamingo/TC Loan since the represented appraised value of \$116 million could not be
14 achieved until well after the maturity date of the loan.

15 **(2) Aspen Failed to Notify Plaintiff of Material Events Concerning the Flamingo/TC Loan**

16 51. Pursuant to the Loan Agreement and other loan documents executed by Plaintiff, Aspen
17 agreed to protect and enforce Plaintiff’s rights and interest as an “Exhibit A” lender under the Loan
18 Agreement and further agreed to “promptly notify [Plaintiff] of the occurrence and nature” of any
19 event of default by Flamingo/TC under the Flamingo/TC Loan documents. Aspen received
20 consideration for the performance of such services.

21 52. On November 19, 2007, AmTrust notified Aspen that Flamingo/TC was in default under
22 the AmTrust loan for its failure to make a \$6 million required principal reduction payment. AmTrust
23 further notified Aspen that AmTrust and Flamingo/TC had executed a forbearance letter agreement
24 with respect to such payment until February 19, 2008, which was conditioned upon the execution
25 of an acknowledgment by the “Exhibit A” lenders on the Flamingo/TC Loan.

26

27 ¹² See Ex. B, Transcript of Guinn Testimony at p. 44, lines 21-22.

28 ¹³ See Ex. B, Transcript of Guinn Testimony at p. 45, line 9.

1 53. Aspen and Guinn executed an “Acknowledgment and Agreement of Junior Lender”
2 acknowledging the forbearance letter agreement and reaffirming the terms of the “unfair” and
3 “unconscionable” Intercreditor Agreement.

4 54. Aspen failed to disclose to Plaintiff either the occurrence of Flamingo/TC’s default under
5 the AmTrust loan or that it had executed an “Acknowledgment and Agreement of Junior Lender”
6 on Plaintiff’s behalf.

7 55. On January 7, 2008, consistent with the undisclosed requirement that Flamingo/TC would
8 default under the AmTrust Loan if the Flamingo/TC Loan was permitted to mature, AmTrust
9 informed Aspen by way of email correspondence that it would not continue funding the AmTrust
10 loan unless Aspen refinanced the Flamingo/TC Loan to a date extending through the end of 2008.

11 56. On February 14, 2008, Aspen notified Plaintiff and the other “Exhibit A” lenders that
12 Flamingo/TC failed to make the monthly interest payment and requested that the lenders vote to
13 either allow a forbearance of ninety days or to proceed with foreclosure. Aspen failed to disclose
14 to Plaintiff that proceeding with foreclosure would have placed the lenders in violation of the terms
15 of the “unfair” and “unconscionable” Intercreditor Agreement which Aspen had executed on the
16 lenders’ behalf, or that AmTrust would hold Flamingo/TC in default unless Aspen either refinanced
17 or extended the maturity date of the Flamingo/TC Loan.

18 57. On February 22, 2008, only seven days after sending the letter requesting a vote, Aspen
19 executed a Consent, Acknowledgment and Agreement of Junior Lender that not only consented to
20 a forbearance on the property but also agreed that the “unfair” and “unconscionable” Intercreditor
21 Agreement continued in full force and effect. Aspen did not disclose the terms of this agreement to
22 Plaintiff.

23 58. On March 25, 2008, Aspen filed a Notice of Breach on the Flamingo/TC Property. Prior
24 to taking this unilateral action, Aspen did not disclose to Plaintiff that it was filing the Notice of
25 Breach and did not disclose to Plaintiff that filing the Notice of Breach violated the “unfair” and
26 “unconscionable” Intercreditor Agreement, thereby subjecting Plaintiff and the other “Exhibit A”
27 lenders to possible legal action by AmTrust.

28 59. On March 26, 2008, Aspen sent Plaintiff and the other “Exhibit A” lenders another

1 update stating it had “entered into a Forbearance Agreement on February 22, 2008,” notifying the
2 lenders that Flamingo/TC defaulted under the forbearance, and that “[i]n order to protect your
3 position against the first mortgage filing its breach before yours, [Aspen] recorded a notice of
4 default.” Aspen failed to disclose to Plaintiff that pursuing foreclosure would place the lenders in
5 violation of the terms of the “unfair” and “unconscionable” Intercreditor Agreement.

6 60. In furtherance of its foreclosure efforts, Aspen billed and/or collected approximately
7 \$222,000 from Plaintiff and the other “Exhibit A” lenders for their pro-rata share of foreclosure costs
8 on the Flamingo/TC Property.

9 61. However, on July 28, 2008, AmTrust filed a lawsuit against Plaintiff and the other
10 “Exhibit A” lenders and obtained a temporary restraining order halting Aspen’s attempt to foreclose
11 on the Flamingo/TC Property.

12 62. On or about October 22, 2008, Aspen entered into a settlement agreement with AmTrust,
13 wherein it allowed AmTrust to foreclose upon the property. On November 3, 2008, AmTrust
14 foreclosed on the Flamingo/TC Property, wiping out the deed of trust securing Plaintiff’s interest.

15 63. To date, Aspen has not refunded to Plaintiff the fees it collected for its foreclosure on the
16 Flamingo/TC Property.

17 64. Additionally, during the course of the litigation with AmTrust, Aspen has billed and/or
18 collected in excess of \$175,000 from Plaintiff and the other “Exhibit A” lenders for their pro-rata
19 share of attorney’s fees and litigation costs.

20 65. Accordingly, because Aspen failed to advise and disclose to Plaintiff and the other
21 “Exhibit A” lenders the true facts and circumstances regarding the Flamingo/TC Loan, not only have
22 Plaintiff and the other “Exhibit A” lenders lost their deed of trust securing the Flamingo/TC
23 Property, but Aspen has also billed and/or collected approximately \$400,000 from Plaintiff and the
24 other “Exhibit A” lenders in fees and costs for which Plaintiff and the other “Exhibit A” lenders have
25 received no benefit.

26 **C. THE MILANO RESIDENCES, LLC LOAN (#60-00277-1)**

27 66. Beginning in or about 2005, Aspen arranged, brokered and refinanced loans with Milano
28 Residences, LLC (“Milano”) for the development of a 100 unit condominium project on property

1 situated near the intersection of Cactus and Bermuda in Clark County, Nevada (“Milano Property”).
2 Milano is owned and managed by Susan Mardian (“Mardian”), who Plaintiff is informed and
3 believes is a long-time friend of Defendant Guinn and a partner with Guinn in other business
4 transactions.

5 67. Pursuant to the construction contract entered into between Milano and its general
6 contractor, Dayside Construction, Inc. (“Dayside”), dated April 25, 2005, the cost of the
7 condominium project was not to exceed \$9,771,530.00 and was to be substantially completed no
8 later than 240 days after the “commencement date,” defined as “two weeks after receipt of [the]
9 Building Permit” from Clark County.

10 68. As of March 6, 2006, Aspen was then servicing first and second priority loans with
11 Milano in the respective amounts of \$17.7 million and \$5 million.

12 69. On or about March 6, 2006, Mardian requested that Aspen arranged a refinance of its then
13 existing \$5 million second priority loan.

14 **(1) Aspen’s Solicitation of Today’s Realty as an Investor in the Milano Loan**

15 70. In connection with Mardian’s loan request, on March 14, 2006, Milano, by and through
16 Mardian as its manager, executed a Loan Agreement, Promissory Note and Deed of Trust for a new
17 second priority loan in the principal amount of \$10 million to be financed for a period of eighteen
18 months (“Milano Loan”) in favor of “Exhibit A” lenders, which were to be solicited by Aspen. In
19 conjunction with the Milano Loan, Mardian also executed a personal Guaranty guaranteeing
20 Milano’s performance under the respective loan documents.

21 71. In paragraph 1.02 of the Deed of Trust, Milano represented, *inter alia*, that as of March
22 14, 2006, “all costs arising from construction of any improvements and the purchase of all equipment
23 located on [the Milano Property] have been paid” and “the proceeds of the indebtedness advanced
24 by Beneficiary and evidenced by the Note are to be used only for the purposes of acquiring [the
25 Milano Property] and reimbursement of capital improvements made to [the Milano Property].”

26 72. However, on March 15, 2006, the day after Milano and Mardian had made such
27 representations, Mardian caused Joshua Tree, LLC (“Joshua Tree”), a Nevada limited liability
28 company likewise owned and managed by Mardian, to record a \$3 million third priority deed of trust

1 on the Milano Property. Plaintiff is informed and believes no consideration was given by Joshua
2 Tree in exchange for the deed of trust placed upon the Milano Property.

3 73. On or about March 16, 2006, Aspen solicited Plaintiff Today's Realty for participation
4 as an "Exhibit A" lender in the \$10 million Milano Loan. In the Milano Loan solicitation package
5 presented to Today's Realty, Aspen represented that the loan proceeds would be used to refinance
6 Aspen's then-existing second priority loan (without reference to the principal balance of such loan)
7 and "other costs related to the project, loan fees and interest reserves for both the 1st and 2nd
8 Mortgages." Aspen further represented that it was also servicing the first mortgage on the project
9 in the amount of \$17,700,000 and that the "combined [loan to value ratio] on the project including
10 both the 1st and 2nd mortgages is 91% of the appraised value of \$30.3 million."

11 74. In soliciting the Loan, Aspen did not disclose details concerning the construction contract
12 entered into between Milano and Dayside, including the contract price or the anticipated date of
13 completion. Rather, Aspen represented to Today's Realty that the "Site has been inspected by
14 Aspen" and that the project consisted of "a 100 Unit Condominium Project [that] is under
15 construction."

16 75. On March 24, 2006, in reliance upon Aspen's representations concerning the Milano
17 Loan and Aspen's promise under the Loan Servicing Agreement to service the Milano Loan and
18 protect and enforce Today's Realty's rights and interests, Today's Realty deposited funds with Aspen
19 and invested as an "Exhibit A" lender in the Milano Loan.

20 76. On March 28, 2006, Aspen (in its capacity as agent for Today's Realty and the other
21 "Exhibit A" lenders of the Milano Loan) executed escrow instructions authorizing the close of
22 escrow and directing the disbursement of the Milano Loan proceeds.

23 77. However, unknown to Today's Realty, undisclosed by Aspen, and contrary to the
24 representations made by Aspen, Plaintiff is informed and believes that the condominium project was
25 not under construction as of the close of escrow because the Clark County had not issued a building
26 permit for the project. Indeed, based upon a recent review of Clark County permit records, Plaintiff
27 is informed and believes that Dayside Construction did not receive a building permit for the Milano
28 Property until May 18, 2006.

1 78. Additionally, unknown to Today's Realty, undisclosed by Aspen, and contrary to the
2 representations made by Aspen, in the escrow instructions executed by Aspen, Aspen directed that
3 the escrow agent disburse loan proceeds in the amount of \$1.1 million directly to Joshua Tree. At
4 no time prior or subsequent to the disbursement of the Milano Loan proceeds did Aspen disclose to
5 Today's Realty the relationship between Joshua Tree and Milano or that Aspen had authorized
6 disbursement of such proceeds to Joshua Tree.

7 79. Consequently, by the at the closing of the Milano Loan and the disbursement of the
8 "Exhibit A" lenders' proceeds Aspen knew and failed to disclose to Today's Realty: (1) Joshua Tree
9 was owned and controlled by Mardian; (2) Mardian had recorded the Joshua Tree deed of trust on
10 the Milano Property the day after she executed the Milano Loan documents; and (3) Aspen
11 authorized and directed the escrow agent to disburse Milano Loan proceeds directly to Joshua Tree
12 to pay a third priority trust deed that was subordinate to the refinanced second priority trust deed and
13 did not represent a payment for acquiring the Milano Property or reimbursing capital improvements
14 made to the Milano Property.

15 **(2) Aspen's Failure to Notify Today's Realty of Material Events Concerning the Milano Loan**
16 **and Failure to Require Additional Deposits By Milano**

17 80. Pursuant to the Loan Agreement and other loan documents executed by Milano, it agreed
18 to maintain a funds account for the loan proceeds ("Funds Account"), governed by a Deposit
19 Account Control Agreement and Disbursement Agreement, and agreed to deposit additional sums
20 into the Funds Account as necessary to enable Milano to perform and satisfy all of its covenants
21 under the loan documents and to maintain the 91% loan to value ratio.

22 81. Milano further agreed pursuant to the terms of the Milano Loan Agreement that, should
23 the "Exhibit A" lenders determine the amounts held in the Funds Account were insufficient for such
24 purposes, then it would deposit the deficiency amount within seven (7) business days of the lenders'
25 written demand.

26 82. Pursuant to the Loan Servicing Agreement, Aspen agreed to protect and enforce Today's
27 Realty's rights and interest as an "Exhibit A" lender under the Loan Agreement and further agreed
28 to "promptly notify [Today's Realty] of the occurrence and nature" of any event of default by Milano

1 under the Milano Loan documents. Aspen received consideration for the performance of such
2 services.

3 83. Plaintiff is informed and believes the Milano Property was supposed to be fully
4 constructed, marketed and sold on or before June 2007.¹⁴

5 84. However, on or prior to April 20, 2007, Aspen was notified by Milano that its original
6 contractor had been replaced, that the project had been delayed and that construction would not be
7 underway until May 1, 2007. Aspen failed to inform Today's Realty of this development and the
8 resulting delay in the completion of the project.

9 85. On July 25, 2007, Aspen received a Nevada Construction Services Project Draw Request
10 Report that notified Aspen the project was 25% over budget, with 50% of the \$18 million project
11 budget having been disbursed but only a calculated completion of 25%. Aspen failed to notify
12 Today's Realty of these material facts and failed to demand that Milano deposit additional funds into
13 the Funds Account to bring construction and interest reserves to acceptable level under the terms of
14 the Milano Loan documents.

15 **(3) Aspen's Failure to Monitor Liens on the Property, Failure to Notify Today's Realty of the**
16 **Existence of Liens Upon the Milano Property, and Failure to Enforce Today's Realty's**
Rights Regarding the Existence of Such Liens

17 86. Additionally, Plaintiff is informed and believes that pursuant to the Milano Loan
18 Agreement, Milano agreed to keep the property free and clear of any claim of lien on the property
19 and agreed that an event of default would occur in the event that such claim of lien was not
20 discharged or otherwise satisfied within twenty (20) days.

21 87. Pursuant to the Loan Servicing Agreement, Aspen agreed to protect and enforce Today's
22 Realty's rights and interest as an "Exhibit A" lender under the Loan Agreement and further agreed
23 to notify Today's Realty of any default on the property. Aspen received consideration for the
24 performance of such services.

25 88. On or about May 10, 2007, the prior general contractor for Milano, Dayside Construction,
26

27 ¹⁴ Plaintiff's information and belief is based upon both the terms of the construction
28 contract dated April 25, 2005, and correspondence from Mardian to "Aspen Financial First and
Second Trust Deed Investors" dated on January 28, 2009.

1 Inc., recorded a Mechanic's Lien on the property in the amount of \$381,661.40 ("Dayside Lien").

2 89. On or about May 17, 2007, Peri Formwork Systems, Inc. recorded a Mechanic's Lien on
3 the property in an amount Plaintiff is informed and believes to be approximately \$196,849.14
4 ("Periforms Lien").

5 90. As of May 30, 2007, the Dayside Lien remained on the subject property, thereby
6 rendering Milano in default under the Loan Agreement.

7 91. As of June 7, 2007, the Periforms Lien remained on the subject property, thereby
8 rendering Milano in default under the Loan Agreement.

9 92. On or about November 14, 2007, Peri Formwork Systems, Inc. recorded a *lis pendens* on
10 the subject property ("Periforms *Lis Pendens*").

11 93. As of November 24, 2007, the Periforms *Lis Pendens* remained on the subject property,
12 thereby rendering Milano in default under the Loan Agreement.

13 94. Aspen knew or should have known of the recordation of the Dayside Lien, the Periforms
14 Lien, and the Periforms *Lis Pendens*. Aspen failed to timely notify Today's Realty of the existence
15 of such liens and encumbrances and that the Milano Loan was in default under the Milano Loan
16 Agreement.

17 **(4) Aspen's Failure to Notify Today's Realty of the Conditions Precedent for Granting a Loan**
18 **Extension and Improper Retention of Loan Extension Proceeds**

19 95. Plaintiff is informed and believes that pursuant to the Milano Loan Agreement, Milano
20 possessed a conditional right to extend the term of the Milano Loan for up to six months, but only
21 upon, *inter alia*: (a) no default or event of default had occurred under the loan documents; (b) the
22 "Exhibit A" lenders had determined that no material adverse change had occurred in the financial
23 condition of Milano or Mardian, as guarantor; (c) the "Exhibit A" lenders had determined that the
24 interest reserve portion allocated to the disbursement budget is sufficient to pay interest over the
25 extended term as it accrues or Milano deposited sufficient additional funds to redress such shortfall;
26 and (d) Milano paid to the "Exhibit A" lenders an extension fee equal to 0.5% of the principal
27 balance of the loan.

28 96. On or about August 14, 2007, Milano provided Aspen written notice that it was

1 requesting a six month extension of the Milano Loan from October 1, 2007, to April 1, 2008. At that
2 time, Milano also provided to Aspen a check payable to Aspen for a "loan extension fee" in the
3 amount of \$50,000.00.

4 97. On or about August 31, 2007, Aspen, through Guinn, executed a consent to loan
5 extension on the Milano Loan.

6 98. On August 31, 2007, Aspen sent Today's Realty an "extension notice" letter stating that
7 Milano had exercised its right to a six month extension of the loan and notified Today's Realty that
8 the new maturity date on the loan was April 1, 2008.

9 99. Aspen failed to inform Today's Realty that Milano's right to seek a six month extension
10 was conditioned upon the aforementioned events or conditions which had not occurred or been
11 satisfied.

12 100. Aspen failed to inform Today's Realty that Milano had been in default under the loan
13 documents, including Milano's failure to remove the Dayside Lien and Periforms Lien, prior to its
14 request for extension and that it remained in default at the time Aspen consented to the extension on
15 behalf of the "Exhibit A" lenders.

16 101. Aspen failed to inform Today's Realty that the construction on the Milano Property
17 was behind schedule and over budget.

18 102. Aspen failed to require Milano to replenish the interest and construction reserve
19 balances in the Funds Account as a condition to the loan extension.

20 103. Aspen never informed Today's Realty that Milano had paid a \$50,000.00 extension
21 fee in violation of the Loan Agreement.

22 104. Aspen never paid Today's Realty its pro rata share of Milano's extension fee in
23 violation of the Loan Agreement.

24 **(5) Aspen's Failure to Enforce the Loan to Value Ratio Covenants on the Milano Property**
25 **and Improper Subordination of Today's Realty's Deed of Trust by an additional \$1.5**
26 **Million**

27 105. As a condition precedent to the Loan Agreement, Milano agreed to maintain a
28 combined first and second mortgage loan to value ratio of 91% on the property, and agreed that it
would deposit additional funds into the Funds Account sufficient to keep the loan to value ration no

1 greater than 91%. Additionally, to protect this loan to value ratio covenant, Milano agreed that every
2 six months the Exhibit A lenders could retain an appraiser at Milano's expense to appraise the
3 property, whereupon the Exhibit A lenders could demand deposit upon five days' notice into the
4 Funds Account to bring the loan to value ration to the required percentage to the extent of any
5 deficient equity.

6 106. Pursuant to the Loan Servicing Agreement, Aspen agreed to protect and enforce
7 Today's Realty's rights and interest as an "Exhibit A" lender under the Loan Agreement and received
8 consideration for such services.

9 107. Pursuant to the terms of the Loan Agreement, on or about October 1, 2006, the
10 "Exhibit A" lenders possessed the right to request an appraisal on the property at Milano's expense
11 and to demand that Milano deposit additional funds into the Funds Account in the event the loan to
12 value ratio increased above 91%. Aspen failed to notify Today's Realty of this right and Plaintiff
13 is informed and believes that Aspen failed to exercise this right on behalf of Today's Realty.

14 108. Plaintiff is informed and believes that as of October 2006, the condominium market
15 in Clark County began to decline, as evidenced by GLVAR statistics showing that since March 2006,
16 the median value for condominiums sold in Clark County had declined by approximately -2.4%, with
17 the number of sales declining by -31.7% and the number of units available for sale increasing by
18 40%.

19 109. On or about December 29, 2006, Aspen authorized the refinance of the first deed of
20 trust without informing Today's Realty that the amount of first deed of trust had increased from
21 \$17.7 million to \$19.2 million and without receiving Today's Realty's consent to a subordination
22 of its interest by another \$1.5 million in indebtedness.

23 110. Additionally, Plaintiff is informed and believes that the substantial majority of the
24 \$1.5 million in additional indebtedness was incurred to allow payment, unknown and undisclosed
25 to Today's Realty but with Aspen's knowledge and consent, to Joshua Tree on its then-existing third
26 deed of trust, thereby impermissibly subordinating Today's Realty's second deed of trust interest in
27 favor of the holder of a third deed of trust.

28 111. Aspen did not notify Today's Realty of the subordination to additional indebtedness

1 and did not provide Today's Realty with an updated appraisal on the property. Based on March 2006
2 appraisal Aspen previously supplied Today's Realty, the newly refinanced first deed of trust in the
3 amount of \$19.2 million would have placed the combined loan to value ratio for the first and
4 second mortgages at approximately 96%, in violation of the 91% loan to value ratio covenant.

5 112. Pursuant to the terms of the Loan Agreement, on or about April 1, 2007, the "Exhibit
6 A" lenders possessed the right to request an appraisal on the property at Milano's expense and to
7 demand that Milano deposit additional funds into the Funds Account in the event the loan to value
8 ratio increased above 91%. Aspen failed to notify Today's Realty of this right and Plaintiff is
9 informed and believes that Aspen failed to exercise this right on behalf of Today's Realty.

10 113. Plaintiff is informed and believes that as of April 2007, the condominium market in
11 Clark County continued to exhibit weakness, as evidenced by GLVAR statistics showing that, based
12 upon year-over-year comparisons, the median value for condominiums sold in Clark County had
13 declined by -2.5% and the number of sales had declined -47.2% while the number of available units
14 for sale had increased +63.5%.

15 114. On August 31, 2007, Aspen knew or should have known the condition of the real
16 estate market in Clark County and failed to request an appraisal on the Milano Property at Milano's
17 expense and to demand that Milano deposit additional funds into the Funds Account to bring the loan
18 to value ratio current to 91% when it authorized and consented to Milano's aforementioned six
19 month loan extension.

20 115. Pursuant to the terms of the Loan Agreement, on or about October 1, 2007, the
21 "Exhibit A" lenders possessed the right to request an appraisal on the property at Milano's expense
22 and to demand that Milano deposit additional funds into the Funds Account in the event the loan to
23 value ratio increased above 91%. Aspen failed to notify Today's Realty of this right and Plaintiff
24 is informed and believes that Aspen failed to exercise this right on behalf of Today's Realty.

25 116. Plaintiff is informed and believes that as of October 2007, the condominium market
26 in Clark County had substantially deteriorated, as evidenced by GLVAR statistics showing that, in
27 the intervening eighteen months since April 2006, the median value for condominiums sold in Clark
28 County had declined by -14.6%, with the number of sales declining by -66.8% and the number of

1 available units increasing by 68.2%.

2 117. On February 19, 2009, Aspen informed Today's Realty in a written letter to the
3 "Exhibit A" lenders that it had obtained a current appraisal on the subject property and that value of
4 the subject property had declined from \$30.3 million to a value of \$3.81 million as of January 2009.

5 118. On or about March 23, 2009, Aspen represented to counsel for Plaintiff that other
6 than the 2009 appraisal, no other appraisal for the Milano property had been performed for the
7 benefit of the "Exhibit A" lenders since the March 2006 appraisal.

8 119. Thus, at no point during the term of the loan or the six month extension did Aspen
9 notify Today's Realty of its rights to enforce the 91% loan to value ratio and Aspen failed to enforce
10 such loan to value ratio covenant, all to the detriment of Today's Realty.

11 **(6) Aspen's Failure to Halt Disbursement of Loan Proceeds from the Funds Account**

12 120. In addition to having power to request additional deposits into the Funds Account
13 under the Milano Loan Agreement, Today's Realty also possessed a perfected security interest in the
14 Funds Account managed by Nevada Construction Services as disbursement agent.

15 121. Pursuant to the Milano Loan Agreement, Today's Realty, as an "Exhibit A" lender
16 possessed the right to require Milano to deposit funds into the Funds Account necessary to retain
17 sufficient interest reserves and construction reserves balances to guarantee performance during the
18 life of the loan.

19 122. As of August 27, 2007, the interest reserve portion of the Funds Account reached \$0,
20 while \$4.9 million in the Funds Account.

21 123. Aspen failed to notify Today's Realty that the interest reserve balance reached \$0.
22 Aspen failed to demand that Milano replenish the interest reserve balance in the Funds Account and
23 failed to halt the disbursement of funds from the Funds Account until Milano replenished such
24 reserves. Rather, Aspen continued to authorize disbursement from the Funds Account for Milano's
25 benefit until the account reached \$0 in or about December 2008.

26 124. On March 10, 2008, Aspen notified Today's Realty that Milano could no longer meet
27 its obligations under the Milano Loan. Shortly thereafter, in April 2008, Aspen received a financial
28 statement from Milano and Mardian that displayed the net value of Milano as negative nine million

1 dollars (-\$9,000,000). At the time of receiving this information, in excess of \$2 million remained
2 in the Funds Account.

3 125. Aspen failed to notify Today's Realty that \$2 million remained in the Funds Account
4 and failed to halt the disbursement of funds upon receipt of Milano's notice of intent to breach the
5 Milano Loan and upon receipt of notice that Milano's financial condition had suffered a material
6 adverse change. Rather, Aspen continued to authorize disbursement from the Funds Account for
7 Milano's benefit until the account reached \$0 in or about December 2008.

8 **(7) Aspen Has Prevented Today's Realty From Further Investigating Milano Loan Issues**

9 126. On February 19, 2009, Aspen notified Today's Realty and the other "Exhibit A"
10 lenders that Milano was walking away from the project. Further, for the first time, Aspen notified
11 Today's Realty that despite having loaned Milano \$29.2 million on property, including the Milano
12 Loan, for the construction on the project, the current value of the property is only \$3.8 million.

13 127. Upon subsequent investigation, Plaintiff is informed and believes that construction
14 on the Milano Property is only 50-60% complete and will take another \$9 million in construction
15 costs before the property is marketable as condominium units.

16 128. Moreover, Plaintiff's recent investigation of documents recorded at the Clark County
17 Recorder's office reveal that of the \$29.9 million in loans brokered and serviced by Aspen, it appears
18 that Aspen authorized the disbursement of as much as \$11.5 million directly to Joshua Tree through
19 the continued recordation of deeds of trust by Joshua Tree and reconveyances upon the funding of
20 loans brokered by Aspen.

21 129. In connection with researching these issues and requesting additional answers,
22 Plaintiff requested that Aspen make available its entire file concerning the Milano Loan and to
23 produce copies of documents within such file.

24 130. In addition to its general fiduciary duties to maintain records and provide information
25 to Plaintiff as Plaintiff's agent, Aspen expressly acknowledged in the Loan Servicing Agreement that
26
27
28

1 it “has no rights in such executed originals of the Loan Documents¹⁵,” further acknowledged its
2 appointment as Plaintiff’s “agent to hold the executed originals of the Loan Documents on its
3 behalf,” and agrees to “maintain full and accurate records of its receipts, maintenance and
4 disbursements of all Payments.”

5 131. However, Aspen has only permitted Plaintiff’s counsel to review portions of the
6 Milano file and asserts that Plaintiff is not entitled to review the remaining portions of the Milano
7 file or various Aspen Loan files.

8 132. Further, Aspen has failed and refused to produce copies of the selected documents
9 which Plaintiff’s counsel were permitted to review and tag for copying.

10 133. Additionally, on March 26, 2009, Plaintiff called Nevada Construction Services
11 (“NCS”) to inquire about the Funds Account disbursements for the Milano Loan. NCS informed
12 Plaintiff that it would not disclose any information without the prior approval from Aspen. Later that
13 day, NCS contacted Plaintiff, and stated that Aspen expressly refused to authorize NCS to disclose
14 such information to Plaintiff.

15 134. Accordingly, despite its fiduciary and contractual duties, Aspen is denying Plaintiff
16 access to her own documents and is actively preventing Plaintiff from acquiring information from
17 other agents ultimately acting on Plaintiff’s behalf.

18 **D. PLAINTIFF HAS SUBSTANTIAL INSECURITY CONCERNS REGARDING THE OTHER**
19 **ASPEN LOANS**

20 135. Plaintiff has substantial concerns relating to Aspen’s representations, acts and/or
21 omissions with respect to their other Aspen Loans, particularly in light of: (1) Aspen’s solicitation
22 of loans using false and/or misleading representations; (2) Aspen’s apparent refusal to enforce or
23 protect Plaintiff’s respective rights under the various loan agreements, promissory notes, and deeds
24 of trust; and (3) Aspen’s failure to act with the fidelity, honesty and good faith required of an agent
25 pursuant to the principal-agent relationship established pursuant to the various Loan Servicing
26

27 ¹⁵ “Loan Documents” is defined under the Loan Servicing Agreement as “the Note, the
28 Deed of Trust and any other agreements, security instruments and other documents executed in
connection therewith”

1 Agreements and related documents.

2 136. Plaintiff has requested to review Aspen's files related to the other Aspen Loans and
3 has requested the production of documents relevant thereto. However, Aspen has failed and refused
4 to make available adequate files concerning these other loans and has permitted Plaintiff's counsel
5 only a cursory review of limited documents concerning such transactions. Due to the limitations
6 imposed by Aspen upon Plaintiff's review, Plaintiff cannot adequately determine to what extent
7 whether Aspen has similarly breached its duties owing to Plaintiff on the other Aspen Loans.
8 However, Plaintiff's cursory review of records has revealed a number of serious and substantial
9 concerns, including the following:

10 **(1) Canyons Edge Homes (60-00304-2) and Christopher Homes Ridges (60-00320-2)**

11 137. As it did in the Flamingo/TC transaction, Plaintiff is informed and believes that
12 Aspen may have made similar misrepresentations and/or performed similar wrongful actions in other
13 loan transactions.

14 138. Specifically, Plaintiff is informed and believes Aspen has executed similar "unfair"
15 and "unconscionable" intercreditor agreements with AmTrust on the following loans in which
16 Plaintiff is an "Exhibit A" lender: Canyons Edge Homes (60-00304-2) and Christopher Homes
17 Ridges (60-00320-2).

18 139. However, because Aspen has failed and refused to provide documents to Plaintiff,
19 Plaintiff is unable to ascertain the extent of its rights, the damages to its interests, and/or the extent
20 of Aspen's liability.

21 **(2) Monarch Ridge Project, LLC Loan (#60-00313-5)**

22 140. In or about May 2007, Aspen provided a letter of instruction to Equity Title of
23 Nevada regarding Monarch Ridge Project 60-00313-5, a second trust deed for \$5,221,000 in which
24 Plaintiffs Ruthe Trust, Ruthe IRA and CDR Investments are investors ("Monarch Loan"). In its
25 letter of instruction on the Monarch Loan, Aspen instructed Equity Title of Nevada to distribute
26 \$900,000 to "Coronado South, LLC" as "Seller Proceeds" from the net loan proceeds. Aspen failed
27 to disclose to Plaintiffs Ruthe Trust, Ruthe IRA and CDR Investments that \$900,000, or 17.2% of
28 the loan proceeds, were going to Coronado South, LLC, an entity of which Guinn is a member.

1 141. To the contrary, on or about May 16, 2007, and as part of its solicitation of the
2 Monarch Loan, Aspen presented a Loan Officer Analysis to Plaintiffs Ruthe Trust, Ruthe IRA, and
3 CDR Investments that represents that the loan proceeds “will be used to payoff the remaining
4 balance on the existing second mortgage (60-00283-1).”

5 142. At the time of the undisclosed \$900,000 transfer to one of Guinn’s entities, Guinn and
6 Todd Stratton were business partners in one or more entities, including Monarch Ridge Estates, LLC,
7 in which Guinn and Stratton were co-managers.

8 **(3) Aspen Self Storage, LLC Loan (#60-00292-2)**

9 **(a) Disbursement of Loan Proceeds to Joshua Tree**

10 143. As it did in the Milano Loan transaction, Plaintiff is informed and believes that Aspen
11 may have similarly authorized disbursement of loan proceeds to Joshua Tree in connection with a
12 loan to Aspen Self Storage, LLC (“Aspen Self Storage”), a Nevada entity likewise controlled and
13 owned by Mardian.

14 144. On July 26, 2006, Aspen Self Storage, LLC, by and through Mardian, executed a loan
15 agreement, promissory note, and deed of trust for a \$2 million loan with a term of 18 months to be
16 brokered by Aspen pursuant to the terms of a loan agreement and promissory note (“Aspen Self
17 Storage Loan”) and secured by a deed of trust on property situated near the intersection of Cactus
18 and Bermuda in Clark County, Nevada (“Aspen Self Storage Property”).

19 145. On that same day, July 26, 2006, Mardian caused Joshua Tree to record a deed of trust
20 on the Aspen Self Storage Property. Plaintiff is informed and believes that the Joshua Tree deed of
21 trust recorded on this property was without consideration.

22 146. At or about that same time, Plaintiff Ruthe IRA, deposited funds with and/or
23 otherwise authorized reallocation of previously invested funds brokered by Aspen for investment in
24 the Aspen Self Storage Loan.

25 147. On August 4, 2006, escrow closed on the Aspen Self Storage Loan.

26 148. Plaintiff is informed and believes that Aspen, without Ruthe IRA’s knowledge or
27 permission, authorized and directed disbursement of some or all of the Aspen Self Storage Loan
28 proceeds to Joshua Tree in a manner similarly done in the Milano Loan transaction.

1 (b) Loan Extension on the Aspen Self Storage Loan

2 149. Plaintiff is likewise informed and believe that pursuant to the Loan Agreement, Aspen
3 Self Storage possessed a right to extend the term of the Aspen Self Storage Loan for up to six
4 months, which right was conditioned upon, *inter alia*: (1) no default or event of default having
5 occurred under the loan documents; (2) the “Exhibit A” lenders determining that no material adverse
6 change had occurred in the financial condition of Aspen Self Storage or Mardian, as guarantor; (3)
7 the “Exhibit A” lenders determining that the interest reserve portion allocated to the disbursement
8 budget is sufficient to pay interest over the extended term as it accrues or Milano deposits sufficient
9 additional funds to redress such shortfall; and (4) Milano paying to the “Exhibit A” lenders an
10 extension fee equal to 0.5% of the principal balance of the loan.

11 150. On or about May 21, 2007, Mardian presented to Aspen a signed financial statement
12 dated May 21, 2007, that set forth the net value of Aspen Self Storage as only \$416,059.

13 151. On or about December 10, 2007, Aspen Self Storage provided Aspen written notice
14 that it was requesting a six month extension of the Milano Loan from February 1, 2008, through
15 August 1, 2008. At that time, Aspen Self Storage also provided to Aspen a check made payable to
16 Aspen for a “loan extension fee” in the amount of \$10,000.

17 152. On or about January 22, 2008, Aspen, through Guinn, executed a consent to loan
18 extension on the Aspen Self Storage Loan.

19 153. On December 21, 2007, Aspen sent Ruthe IRA an “extension notice” letter stating
20 that Aspen Self Storage had exercised its right to a six month extension of the loan and notified
21 Today’s Realty that the new maturity date on the loan was August 1, 2008.

22 154. Aspen failed to inform Ruthe IRA that Aspen Self Storage’s right to seek a six month
23 extension was conditioned upon several events or conditions which had not occurred or been
24 satisfied.

25 155. Aspen failed to inform Ruthe IRA that Aspen Self Storage’s net asset value had
26 declined to only \$400,000, rendering the Aspen Self Storage lenders under-secured on the project
27 at the time of the extension request and at the time Aspen consented to the extension on behalf of
28 the “Exhibit A” lenders.

1 156. Aspen never informed Ruthe IRA that Aspen Self Storage had paid a \$10,000
2 extension fee to Aspen.

3 157. Aspen never paid Ruthe IRA its pro rata share of Aspen Self Storage's extension fee.

4 **(4) Celebrate Homes 46, LLC, Loan (#10-0325-9), Celebrate Investments, LLC Loan (#10-**
5 **00337-1), Celebrate Investments, LLC Loan (#60-00302-4), and Celebrate Properties, LLC**
6 **Loan (#10-00326)**

7 158. Plaintiff Ruthe Trust is an investor in Celebrate Homes 46, LLC (#10-00325-9)
8 (“Celebrate Homes 46 Loan”).

9 159. Plaintiff Ruthe Trust is an investor in the 1st priority loan for Celebrate Investments
10 (#10-00337-1) (“Celebrate Investment #1 Loan”). Plaintiffs Ruthe Trust, Acovino Trust, Charles L.
11 Ruthe and Donna A. Ruthe, Donna A. Ruthe and Richard Acovino, Ruthe IRA and CDR
12 Investments are investors in the 2nd priority loan for Celebrate Investments (#60-00302-4)
13 (“Celebrate Investment #2 Loan,” collectively, “Celebrate Investments #1 and #2”).

14 160. Plaintiff Ruthe Trust is an investor in the Celebrate Properties (#10-00326)
15 (“Celebrate Properties Loan”).

16 161. Each of the aforementioned Plaintiffs executed a separate standardized special power
17 of attorney form for each of the loans serviced by Aspen.

18 162. Each special power of attorney expressly limited the authority of Aspen and was “not
19 ... effective to authorize the use or release of money in which the Lender owns a beneficial interest
20 for any purpose except for the provision of the services described above relating to the Loan unless
21 accompanied by written authorization executed by Lender for the use or release of the money for the
22 other purpose.”

23 163. As a holder of a perfected security interest in the Funds Account for its respective
24 loan for which the aforementioned Plaintiffs had invested, each Plaintiff held a respective “beneficial
25 interest” in such Funds Account.

26 164. From a review of a portion of the Nevada Construction Project Draw Request
27 Reports, it appears that prior to March 23, 2007, interest reserve draws in the amount of \$19,416.72
28 were paid monthly to investors in the Celebrate Homes 46 Loan. On March 23, 2007, the balance
of the interest reserve for the Celebrate Homes 46 Loan was \$5,519.08, or \$13,897.64 short of the

1 previous \$19,416.72 payments made to the investors.

2 165. On or about May 2, 2007, Aspen instructed Nevada Construction Services to transfer
3 \$13,862.08 from Celebrate Investments #1 and #2 to the Celebrate Homes 46 Loan.

4 166. On or about June 5, 2007, Aspen instructed Nevada Construction Services to transfer
5 \$19,416.72 from Celebrate Investments #1 and #2 to the Celebrate Homes 46 Loan.

6 167. On or about July 3, 2007, Aspen instructed Nevada Construction Services to transfer
7 \$19,416.72 from Celebrate Investments #1 and #2 to the Celebrate Homes 46 Loan.

8 168. On or about August 2, 2007, Aspen instructed Nevada Construction Services to
9 transfer \$19,416.72 from Celebrate Investments #1 and #2 to the Celebrate Homes 46 Loan.

10 169. On or about August 2, 2007, Aspen instructed Nevada Construction Services to
11 transfer \$19,416.72 from Celebrate Investments #1 and #2 to the Celebrate Homes 46 Loan.

12 170. On or about September 11, 2007, Aspen instructed Nevada Construction Services
13 to transfer \$5,700 from Celebrate Investments #1 and #2 to the Celebrate Properties Loan.

14 171. Accordingly, Plaintiff is informed and believes improper transfers from one account
15 to another were performed without Plaintiff's knowledge or consent and in violation of the special
16 power of attorney. Further, Plaintiff is informed and believes that these transfers effectively
17 (a) transfer Funds Accounts from which Plaintiff holds a greater percentage issue to Funds Accounts
18 in which Plaintiff possesses a lesser percentage or no interest, and (b) allowed Aspen to continue
19 disbursing interest payments on the various Celebrate Loans after some loans would otherwise
20 become non-performing.”.

21 **(5) Golshan Weber AGA Kahrobai (#80-00064-0)**

22 172. Section 7.18 of the Loan Agreements states:

23 Borrower shall have the right to extend the term of the Loan for a period not to
24 exceed six months from its original maturity date. . . (b) On or before the original
25 maturity date, borrower shall pay Lender an extension fee in immediately available
26 funds on the amount of one half of one percent (0.5%) of the total of (i) the
27 outstanding disbursed principal of the Loan and (ii) the undisbursed principal balance
28 of the Loan (both as determined on the original maturity date).

1 173. Aspen violated its duties and obligations to Plaintiff by failing to pay the lenders a
2 pro rata distribution of the extension fees. For example, on or about March 1, 2008, Kevin Golshan,
3 Geraldine Weber, AGA, LLC, Ebrahim Kahrobai, Masoud I. Kahrobaie and Lancaster Real Estate
4 Holdings, LLC presented Aspen with an application for modification of terms of note to extend the
5 maturity date of the loan from March to September 2008 and an extension fee check in the amount
6 of \$49,450. On or about August 29, 2008, Kevin Golshan, Geraldine Weber, AGA, LLC, Ebrahim
7 Kahrobai, Masoud I. Kahrobaie and Lancaster Real Estate Holdings, LLC presented Aspen with a
8 second application for modification of terms of note to extend the loan from September 2008 to
9 March 2009 and an extension check in the amount of \$98,900. Aspen failed to disclose to Plaintiff
10 Ruthe Trust the payment of these extension fees and Aspen failed to pay Ruthe Trust a pro rata
11 payment of these loan extension fees.

12 **(6) Coronado Eastern, LLC Loan (#80-00065-1)**

13 174. Additionally, it appears Aspen did not obtain extension fees for loans in which Guinn
14 owned an interest in the borrowing entity. Specifically, in or about March 2008, Coronado Eastern,
15 LLC (80-00065-1), which is 50% owned by Jeff Guinn through his Trust, presented Aspen with an
16 application for modification of terms of note extending the maturity date of the loan from April to
17 October 2008 with no accompanying extension check to Aspen.

18 175. In our about October 2008, Coronado Canyons (60-00321-3), of which Jeff Guinn
19 is a principal, presented Aspen with an application for modification of terms of note to extend the
20 maturity date of the loan from November 2008 to May 2009. No accompanying extension check to
21 Aspen was located within the loan filed present to Plaintiff's counsel for review.

22 **(7) Aspen's Misrepresentation to Plaintiff as to the Use of Loan Proceeds**

23 176. On March 23, 2009, during a limited on-site inspection of documents at Aspen's
24 offices, Aspen denied Plaintiff's counsel access to any construction reserve files related to the
25 Plaintiff's loans, except for Milano Loan.

26 177. In response to a demand to make these files available, on April 2, 2009, Aspen, by
27 and through a letter drafted by its counsel, notified Plaintiff that "Milano is the only loan with a
28 construction draw file, as none of the other loans was a construction loan."

1 178. Such notification contradicts the prior representations made by Aspen to Plaintiff in
2 soliciting the Aspen Loans for investment. For example:

3 i. On or about May 8, 2007, Aspen presented Plaintiff Ruthe Trust and Ruthe IRA with a
4 Loan Officer Analysis for a 2nd mortgage with Coronado Horizon/Boulder, LLC (Loan
5 60-00322-4), an entity in which Guinn possesses either a direct or indirect ownership
6 interest, which states that a portion of the loan proceeds would be used to fund the
7 “construction reserve.” Aspen also presented Ruthe Trust and Ruthe IRA with a Loan
8 Summary and Investors Authorization form which classifies the loan type as
9 “Construction.”

10 ii. On or about March 16, 2007, Aspen presented Plaintiffs CDR Investments, LLC and the
11 Frank Granieri Trust with a Loan Officer Analysis for a 1st and 2nd mortgage with
12 Coronado Eastern, LLC (Loans 80-00065-1 and 60-00317-1), yet another entity in which
13 Guinn owns a direct and/or indirect ownership interest, which states that a portion of the
14 loan proceeds would be used to “payoff the existing construction loan on the project,
15 costs and fees related to the transaction” and “if necessary tenant improvements.” Aspen
16 also presented Plaintiffs CDR Investments, LLC and the Frank Granieri Trust with a
17 Loan Summary and Investors Authorization form which lists the loan type as
18 “Construction.”

19 iii. On April 10, 2007, Aspen presented Plaintiff Ruthe Trust with a Loan Summary and
20 Investors Authorization form for a 2nd mortgage with Christopher Homes Ridges, LLC
21 (Loan 60-00320-2), which states the loan proceeds would be used for “Construction” and
22 further represented that the loan collateral is “in various stages of construction and
23 development.”

24 iv. On April 17, 2007, Aspen presented Plaintiffs Ruthe Trust, CDR Investments, LLC, and
25 Ruthe IRA with a Loan Summary and Investors Authorization form, which classified the
26 collateral as “85 single family residential lots in various stages of construction or
27 development” and listed the loan type as “Construction.”

28 179. Moreover, substantially all of Plaintiff’s other Aspen Loans at a minimum funded the

1 interest reserve accounts for construction loans on the respective property. As such, as to the other
2 Aspen Loans Plaintiff necessarily obtained an interest in the progress and financing contained in the
3 construction reserve files for the construction loans. Thus, Aspen's misrepresentations and attempts
4 to deny Plaintiff's access to the construction reserve files is unreasonable and unfounded.

5 180. Further, many of the appraisals Aspen provided to Plaintiff while soliciting the Loans,
6 and which Aspen used to calculate the Loan to Value ratio, are based upon the value of the subject
7 property with the completed residential/commercial structures, forming a material inducement to
8 Plaintiff for the purpose of making such a loan, *i.e.* the amounts in the construction and interest
9 reserves.

10 **(8) Aspen's Directions to Escrow Companies to Withhold Documents from Plaintiff**

11 181. In or about November 2008, Plaintiff contacted Chicago Title and Lawyers Title to
12 request information concerning the escrow accounts for transactions in which Aspen had authorized
13 partial reconveyances of property securing the Coronado Horizon Loan (Loan No.60-00322-4) in
14 which Plaintiffs Ruthe Trust and Ruthe IRA had invested. On that same day, both title companies
15 informed Ms. Ruthe that Aspen instructed them not to provide the requested escrow documents to
16 her.

17 182. Further, on December 10, 2008, Aspen, through a letter written by its counsel,
18 threatened to take action against Ms. Ruthe if she persisted in requesting such documents from
19 escrow companies.

20 **(9) Aspen's overcharge of loan service fees on partially performing loans**

21 183. On numerous occasions, Aspen failed to reduce their monthly fee for servicing
22 Plaintiff's Loans despite a reduction in the interest payments made on such Loans to Plaintiff. For
23 example, prior to receiving partial payments, Plaintiff Today's Realty, Inc. received monthly
24 payments in the amount of \$1,218.75 from the Milano Loan and Aspen charged a monthly service
25 fee of \$31.25. In or about March 2008, Aspen reduced Plaintiff Today's Realty, Inc. future monthly
26 payments on the Milano Loan to \$302.08 but failed to reduce its \$31.25 service fee charge.

27 **(10) Aspen's Failure to Render an Account and Supporting Detail.**

28 184. In or about October 2008, Aspen began requesting that Plaintiff pay additional fees

1 and costs on the Aspen Loans for purported expenses, including “attorney’s fees,” “appraisal fees,”
2 and “accounting fees,” on account that the substantial majority of the Aspen Loans were non-
3 performing.

4 185. On November 10, 2008, Plaintiff, by and through her counsel, requested that Aspen
5 account for the expenditure of such “fees” and “costs” it attempted to pass on to Plaintiff and
6 requested supporting detail for such fees and costs incurred.

7 186. Aspen has failed and refused to either account for such fees and costs or provide
8 supporting detail for such alleged fees and costs purportedly incurred on Plaintiff's behalf.

9 **(11) Aspen’s Failure to Provide Lists of Names and Addresses of Other Lenders on Loans**

10 187. For each of the Aspen Loans, Aspen and the respective Plaintiff executed a Mortgage
11 Investment Disclosure Form, wherein Aspen, through Guinn, notifies Plaintiff that the loan servicing
12 agreement executed by and between Aspen and such Plaintiff “should address issues such as: ... (6)
13 The right to obtain the names, addresses and phone numbers of other persons with beneficial
14 interests in the loan.”

15 188. However, Aspen’s Loan Servicing Agreements do not contain any provision
16 concerning the production of names, addresses and phone numbers of other persons with beneficial
17 interests in the loan.

18 189. On April 8, 2008, Plaintiff sent a letter to Aspen requesting “the most recent list of
19 all current lenders on each of the [then] Nonperforming Loans, their most recent addresses and all
20 telephone numbers” for the purpose of contacting those individuals and organizing “a lender
21 meeting, with Aspen representatives present, in order to collectively discuss, evaluate, and make an
22 informed decision about how to proceed on those [Nonperforming] loans.”

23 190. In response, Sean Corrigan, the President of Aspen, telephoned Ms. Ruthe and stated
24 that, although Aspen possessed this information, it was not obligated to give Ms. Ruthe such
25 information, it would not give Ms. Ruthe such information, such information was public record and
26 she could go “get it herself.”

27 **FIRST CLAIM FOR RELIEF**

28 191. Plaintiff incorporates by reference the allegations contained in all preceding

1 paragraphs of this Complaint.

2 192. As Plaintiff's agent, Defendant owes fiduciary duties to Plaintiff, including (but not
3 by way of limitation) full disclosure, due diligence, fairness, loyalty, avoidance of self-dealing,
4 upmost good faith, and, more specifically, the duty to use its best efforts to protect, service and
5 collect Plaintiff's share of the Aspen Loans.

6 193. Defendant has breached these duties as set forth above.

7 194. As a direct and proximate result of Defendant's acts and omissions, which were done
8 with oppression, fraud, and/or malice entitling Plaintiff to an award of actual damages and punitive
9 damages, Plaintiff has suffered damages in an amount in excess of \$50,000.

10 195. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
11 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

12 **SECOND CLAIM FOR RELIEF**

13 196. Plaintiff incorporates by reference the allegations contained in all preceding
14 paragraphs of this Complaint.

15 197. Defendant executed numerous promissory notes, deeds of trusts, contracts, loans,
16 assignments, transfers, exchanges, and/or other transactions ("Subject Agreements") with or on
17 behalf of Plaintiff.

18 198. These Subject Agreements imposed various duties upon Defendant including, *inter*
19 *alia*, the duties to safeguard and enforce Plaintiff's rights under the Subject Agreements, pay all sums
20 due to Plaintiff under the Subject Agreements, properly manage and account for the assets of
21 Plaintiff, to keep adequate books and records, and make such books and records available for
22 inspection by Plaintiff.

23 199. As set forth herein, Defendant breached its duty owing to Plaintiff under the Subject
24 Agreements.

25 200. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
26 suffered damages in an amount in excess of \$50,000.

27 201. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
28 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

1 **THIRD CLAIM FOR RELIEF**

2 202. Plaintiff incorporates by reference the allegations contained in all preceding
3 paragraphs of this Complaint.

4 203. Each Subject Agreement executed by Defendant contained an implied covenant of
5 good faith and fair dealing.

6 204. Additionally, there existed a relationship of trust and reliance between Plaintiff on
7 one side, and Defendant, on the other side arising from its fiduciary duties owing to Plaintiff as set
8 forth herein.

9 205. Defendant contractually and/or tortiously breached the implied covenant of good faith
10 and fair dealing as set forth above.

11 206. Plaintiff is informed and believes and thereon alleges that the tortious conduct of
12 Defendant, as set forth herein, is intentional, malicious, express or implied, fraudulent, oppressive
13 and in violation of the rights of Plaintiff under the Subject Agreements. As a result of the acts and
14 omissions of Defendant, which were done with malice, express or implied, Plaintiff is entitled to an
15 award of punitive damages.

16 207. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
17 suffered damages in an amount in excess of \$50,000.

18 208. It has been necessary for Plaintiff to retain the services of Solomon Dwiggin & Freer
19 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

20 **FOURTH CLAIM FOR RELIEF**

21 209. Plaintiff incorporates by reference the allegations contained in all preceding
22 paragraphs of this Complaint.

23 210. Defendant owed Plaintiff a duty to exercise a reasonable degree of care in pursuing
24 the duties and rights under the Subject Agreements and in servicing the Loans as Plaintiff's agent.

25 211. Defendant breached this duty of care owing to Plaintiff as described herein.

26 212. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
27 suffered damages in an amount in excess of \$50,000.

28 213. It has been necessary for Plaintiff to retain the services of Solomon Dwiggin & Freer

1 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

2 **FIFTH CLAIM FOR RELIEF**

3 214. Plaintiff incorporates by reference the allegations contained in all preceding
4 paragraphs of this Complaint.

5 215. Defendant owed Plaintiff a manifest duty to exercise a reasonable degree of care in
6 pursuing compliance with the duties and rights under the Subject Agreements and in servicing the
7 Loans as Plaintiff's agent.

8 216. Defendant consciously and intentionally failed to perform its duty in reckless
9 disregard of the consequences to the Plaintiff.

10 217. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
11 suffered damages in an amount in excess of \$50,000.

12 218. It has been necessary for Plaintiff to retain the services of Solomon Dwiggin & Freer
13 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

14 **SIXTH CLAIM FOR RELIEF**

15 219. Plaintiff incorporates by reference the allegations contained in all preceding
16 paragraphs of this Complaint.

17 220. At the time Defendant and Plaintiff entered into their respective Loan Servicing
18 Agreements, Aspen represented that it would protect and enforce Plaintiff's rights in the respective
19 Aspen Loans in which Plaintiff had invested.

20 221. At the time Defendant solicited Plaintiff as lenders in the Aspen Loans, Aspen
21 represented that the loans would be used for the purposes stated in solicitation materials.

22 222. Defendant either (i) had an insufficient basis upon which to make its representations
23 contained in the Loan Servicing Agreements and loan solicitation materials; (ii) knew or had reason
24 to believe such representations were false when made; or (iii) learned after making such
25 representations that they were false, and failed to advise Plaintiff of such falsity.

26 223. Defendant intended to induce Plaintiff to rely and act upon such representations.

27 224. Plaintiff justifiably and reasonably relied upon Aspen's representations.

28 225. As a result of Aspen's concealment and suppression of material facts, Plaintiff has

1 sustained damages in excess of \$50,000.00.

2 226. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
3 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

4 **SEVENTH CLAIM FOR RELIEF**

5 227. Plaintiff incorporates by reference the allegations contained in all preceding
6 paragraphs of this Complaint.

7 228. Defendant, either explicitly or tacitly agreed with or conspired, and aided and abetted
8 Milano and other borrowing entities to defraud Plaintiff by seizing upon the power of serving as
9 agent of Plaintiff to intentionally harm Plaintiff and benefit itself as demonstrated herein.

10 229. Plaintiff is informed and believe and thereon allege that the conduct of Defendant,
11 as set forth herein, is intentional, malicious, express or implied, fraudulent, oppressive and in
12 violation of the rights of Plaintiff under the terms of the Subject Agreements.

13 230. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
14 suffered damages in an amount in excess of \$50,000.

15 231. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
16 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

17 **EIGHTH CLAIM FOR RELIEF**

18 232. Plaintiff incorporates by reference the allegations contained in all preceding
19 paragraphs of this Complaint.

20 233. At the time Defendant and Plaintiff entered into their respective Loan Servicing
21 Agreements and Special Power of Attorney agreements, Aspen represented that it would protect and
22 enforce Plaintiff's rights in the respective Aspen Loans in which Plaintiff had invested.

23 234. At the time Defendant solicited Plaintiff as lenders in the Aspen Loans, Aspen
24 represented that the loans would be used for the purposes stated in solicitation materials.

25 235. The disbursement of the loan proceeds in conformity with the representations made
26 in the loan solicitation materials and Aspen's protection and enforcement of Plaintiff's rights in the
27 respective Aspen Loans was material to Plaintiff.

28 236. Defendant either (i) had an insufficient basis upon which to make its representations

1 contained in the Loan Servicing Agreements and loan solicitation materials; (ii) knew or had reason
2 to believe such representations were false when made; or (iii) learned after making such
3 representations that they were false, and failed to advise Plaintiff of such falsity.

4 237. Defendant intended to induce Plaintiff to rely and act upon such representations.

5 238. Plaintiff justifiably and reasonably relied upon Defendant's representations.

6 239. As a result of Defendant's false representations, Plaintiff is entitled to rescind the
7 Loan Servicing Agreements Plaintiff entered into with Defendant.

8 240. It has been necessary for Plaintiff to retain the services of Solomon Dwiggin & Freer
9 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

10 **NINTH CLAIM FOR RELIEF**

11 241. Plaintiff incorporates by reference the allegations contained in all preceding
12 paragraphs of this Complaint.

13 242. In light of the allegations contained in this Complaint, Plaintiff is entitled to a full and
14 complete accounting from Defendant in regard to any of its transactions or activities which have
15 affected or may affect Plaintiff's interests under the Subject Agreements.

16 243. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
17 suffered damages in an amount in excess of \$50,000.

18 244. It has been necessary for Plaintiff to retain the services of Solomon Dwiggin & Freer
19 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

20 **TENTH CLAIM FOR RELIEF**

21 245. Plaintiff incorporates by reference the allegations contained in all preceding
22 paragraphs of this Complaint.

23 246. Plaintiff provided contributions to Defendant for the sole purpose of funding the
24 development of the properties that were the subject of the Loans. Despite the known limitations on
25 its use of Plaintiff's contributions, Defendant exercised dominion and control over such
26 contributions such that it deprives Plaintiff of the ownership, possession, and benefits of its monies.

27 247. As a direct and proximate result of Defendant acts and omissions, which were done
28 with oppression, fraud, and/or malice entitling Plaintiff to an award of actual damages and punitive

1 damages, Plaintiff has suffered damages in an amount in excess of \$50,000.

2 248. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
3 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

4 **ELEVENTH CLAIM FOR RELIEF**

5 249. Plaintiff incorporates by reference the allegations contained in all preceding
6 paragraphs of this Complaint.

7 250. Under NRS.32.010, a receiver should be appointed to take charge of the Aspen Loans
8 being serviced by the Defendant, the proceeds of the Aspen Loans Aspen has in its possession held
9 on behalf of the lenders, and/or the balance of any funds in the Funds Accounts for the Loan
10 Agreements.

11 251. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
12 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

13 **TWELFTH CLAIM FOR RELIEF**

14 252. Plaintiff incorporates by reference the allegations contained in all preceding
15 paragraphs of this Complaint.

16 253. Plaintiff, in expectation that such money would be used to further the development
17 of the properties that were the subject of the Loans, contributed money to Defendant.

18 254. On information and belief, the money was not used to fund the development of
19 property, but was instead used by Defendant for its own gain.

20 255. Defendant has been unjustly enriched to the detriment of Plaintiff. To permit
21 Defendant to retain the benefit of Plaintiff's investment funds without making just compensation
22 therefor would result in an unjust and unconscionable investment.

23 256. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
24 suffered damages in an amount in excess of \$50,000.

25 257. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
26 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

27 **THIRTEENTH CLAIM FOR RELIEF**

28 258. Plaintiff incorporates by reference the allegations contained in all preceding

1 paragraphs of this Complaint.

2 259. Defendant have wrongfully exercised ownership and dominion over Plaintiff's assets
3 and has retained control of such assets and other proceeds for its own benefit.

4 260. The Defendant has an equitable duty to convey Plaintiff's share of such monies to the
5 Plaintiff to avoid being unjustly enriched.

6 261. In equity, a constructive trust in favor of Plaintiff should be imposed over their
7 rightful share of all monies, and the benefits thereof, that pertained to the Subject Agreements which
8 are in possession or control of Defendant or in the possession or control of any other entity or
9 individual because of Defendant's self dealing, mismanagement, and other bad acts. Plaintiff is
10 entitled to an equitable decree that Defendant and such entity or individuals hold such monies in a
11 constructive trust for Plaintiff's benefit because such an action is essential to the effectuation of
12 justice.

13 262. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
14 suffered damages in an amount in excess of \$50,000.

15 263. It has been necessary for Plaintiff to retain the services of Solomon Dwiggins & Freer
16 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

17 **FOURTEENTH CLAIM FOR RELIEF**

18 264. Plaintiff incorporates by reference the allegations contained in all preceding
19 paragraphs of this Complaint.

20 265. A present, ripe, and justiciable controversy exists between Plaintiff, on the one hand,
21 and, on the other hand, Defendant, with regard to said Defendant's self dealing and mismanagement
22 pursuant to its duties as Plaintiff's agent.

23 266. Defendant's malicious attempts to deny Plaintiff access to its own records and interest
24 in the Subject Agreements and to convert that interest to their own use made this litigation necessary.
25 Plaintiff should have declaratory relief to this effect: that Plaintiff is entitled to a complete inspection
26 of the Loan Documents, that Plaintiff is entitled to its fair share of monies Defendant wrongfully
27 converted to its own use and that any such proceeds in the hands of Defendant or other entity(s) or
28 individual(s) are held in constructive trust for the benefit of the Plaintiff.

1 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

2 **SIXTEENTH CLAIM FOR RELIEF**

3 278. Plaintiff incorporates by reference the allegations contained in all preceding
4 paragraphs of this Complaint.

5 279. Defendant defrauded Plaintiff by making misrepresentations to Plaintiff and seizing
6 upon the power of serving as agent of Plaintiff to intentionally harm Plaintiff and benefit itself as
7 demonstrated herein.

8 280. Defendant made material misrepresentations with the fraudulent intent and purpose
9 to induce Plaintiff into acting on such misrepresentations.

10 281. Plaintiff relied to their detriment on Defendant's intentional misrepresentations by
11 way of the Subject Agreements.

12 282. Plaintiff's reliance was reasonable and foreseeable.

13 283. Plaintiff is informed and believes and thereon alleges that the conduct of Defendant,
14 as set forth herein, is intentional, malicious, express or implied, fraudulent, oppressive and in
15 violation of the rights of Plaintiff under the terms of the Subject Agreements.

16 284. As a direct and proximate result of Defendant's acts and omissions, Plaintiff has
17 suffered damages in an amount in excess of \$50,000.

18 285. It has been necessary for Plaintiff to retain the services of Solomon Dwiggin & Freer
19 to bring this action, and Plaintiff is entitled to an award of attorney's fees and costs.

20 **SEVENTEENTH CLAIM FOR RELIEF**

21 286. Plaintiff incorporates by reference the allegations contained in all preceding
22 paragraphs of this Complaint.

23 287. Defendant, misrepresented, concealed and suppressed material facts in its dealings
24 with Plaintiff, which material facts Aspen had a duty to disclose to Plaintiff.

25 288. Defendant was under a duty to disclose to the Plaintiff the facts it concealed and
26 suppressed.

27 289. Defendant misrepresented, suppressed and concealed the facts alleged in order to
28 defraud Plaintiff.

1 crimes related to racketeering.

2 300. Defendant's racketeering conduct is an unlawful act, as defined in NRS 207.400.

3 301. As a direct and proximate result of Defendant's racketeering conduct or activity,
4 Plaintiff has been, and continues to be, damaged in an amount in excess of \$10,000.00.

5 302. Defendant's wrongful actions were done with improper motives and with a willful,
6 wanton, or reckless disregard of Plaintiff's rights. Plaintiff, therefore, is entitled to punitive
7 damages.

8 303. Plaintiff is also entitled to an award of treble damages, attorneys' fees, and the costs
9 of litigation and its related investigation.

10 304. Plaintiff is also entitled to civil forfeiture of all property, including money used in the
11 course of, intended use in the course of, or derived from or gained by Defendant through their
12 racketeering conduct or activity.

13 **NINETEENTH CLAIM FOR RELIEF**

14 305. Plaintiff incorporates by reference the allegations contained in all preceding
15 paragraphs of this Complaint.

16 306. As to the acts and allegations regarding the wrongful acts and breach of obligations
17 not arising from contract, Defendant has been guilty of oppression, fraud, or malice, express or
18 implied, thereby entitling Plaintiff to an award of punitive damages, in an amount to be proved at
19 trial.

20 307. To discourage such conduct by Defendant in the future, Plaintiff should be awarded
21 exemplary damages for the wrongful acts and breach of obligations not arising from contract, in an
22 amount to be determined at trial.

23 **WHEREFORE**, Plaintiff respectfully request judgment against Defendant as follows:

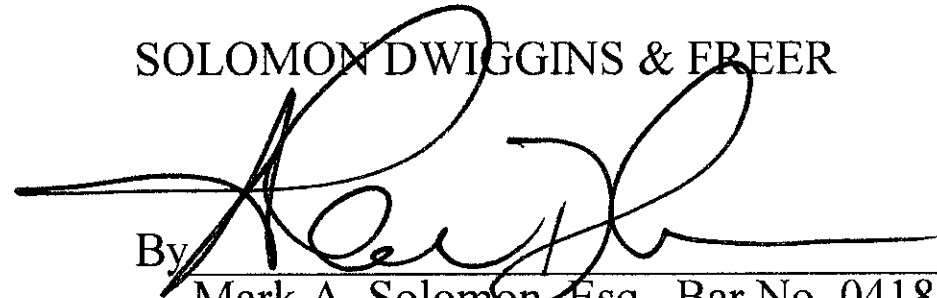
24 1. For an injunction ordering Defendant to allow the immediate inspection of Loan Documents
25 by Plaintiff pertaining to its rights and interests in the Loans and related documents;

26 2. For judgment declaring the rights, duties and legal relations of Plaintiff and Defendant with
27 regard to Plaintiff's rights to inspect the Loan Documents as provided in the Loan Servicing
28 Agreements and related documents;

- 1 3. For damages in excess of \$50,000, plus prejudgment interest on those damages;
- 2 4. For punitive damages;
- 3 5. For a constructive trust over the assets of Plaintiff;
- 4 6. For the appointment of a receiver over Defendant;
- 5 7. For an Order requiring Defendant to account for the assets of Plaintiff;
- 6 8. For a receiver to be appointed over the servicing, loan proceeds and/or retained funds in the
- 7 Aspen Loans invested in by Plaintiff;
- 8 9. For rescission of the Loan Servicing Agreements and other agreements entered into by and
- 9 between Plaintiff and Defendant;
- 10 10. For an award of interest, costs, and attorneys fees incurred by Plaintiff in connection with
- 11 litigating this action as agreed by the Parties in the Loan Servicing Agreements; and
- 12 11. For any other relief that the Court deems just and proper.

13 **DATED** this 4th day of May, 2009.

14 SOLOMON DWIGGINS & FREER

15 

16 By _____
17 Mark A. Solomon, Esq., Bar No. 0418
18 Alan D. Freer, Esq., Bar No. 07706
19 Robert D. Simpson, Esq., Bar No. 10990
20 9060 W. Cheyenne Avenue
21 Las Vegas, Nevada 89129

22 Attorneys for Plaintiff

EXHIBIT “A”

<u>LOAN</u>	<u>LOAN NO.</u>	<u>INVESTOR</u>	<u>INVESTOR'S INTEREST</u>	<u>TOTAL AMOUNT OF LOAN</u>
Aspen Self Storage	60-00292-2	Charles L. Ruthe IRA	.165%	\$2,000,000.00
Canyons Edge Homes	20-00080-4	Charles L. Ruthe Trust CDR Investments, LLC	.03354% .00220%	\$13,815,000.00
Canyons Edge Homes	60-00260-6	Charles L. Ruthe IRA Charles L. Ruthe Trust CDR Investments, LLC	5.5959% 7.0834% 4.4271%	\$5,950,000.00
Canyons Edge Homes	60-00304-2	Charles L. Ruthe IRA Richard F. Acovino Irr Trust Frank E. Granieri Trust	.04864% .006947% .006742%	\$7,195,000.00
Celebrate Homes 46	10-00325-9	Charles L. Ruthe Trust	.11392%	\$1,345,500.00
Celebrate Investments	10-00337-1	Charles L. Ruthe Trust	.00000005%	\$18,196,000.00
Celebrate Investments (33 acres)	60-00302-4	Charles L. Ruthe IRA Charles L. Ruthe Trust Donna A. Ruthe or Richard Acovino Richard F. Acovino Irr. Trust CDR Investments, LLC	.03164% .00672% .00769% .00759% .00650%	\$7,900,000.00
Celebrate Properties (2.69 acres)	10-00326-0	Charles L. Ruthe Trust	.12218%	\$1,755,000.00
Centennial Lamb (17.38 acres)	60-00323-5	Charles L. Ruthe Trust Richard F. Acovino Irr Trust Frank E. Granieri Trust	.03340% .00824% .00154%	\$4,850,000.00

<u>LOAN</u>	<u>LOAN NO.</u>	<u>INVESTOR</u>	<u>INVESTOR'S INTEREST</u>	<u>TOTAL AMOUNT OF LOAN</u>
Centennial Lamb (9.57 acres)	60-00324-8	Charles L. Ruthe Trust	13.5397%	\$2,585,000.00
Christopher Homes Ridges	60-00320-2	Charles L. Ruthe Trust	.05132%	\$5,700,000.00
City Crossing 9	10-00338-8	Charles L. Ruthe Trust	.02208%	\$7,000,000.00
City Crossing 10	10-00343-3	Charles L. Ruthe Trust	.02208%	\$4,832,000.00
Coronado Canyons	60-00321-3	Charles L. Ruthe Trust	.001455%	\$5,910,000.00
Coronado Eastern, LLC	60-00317-1	CDR Investments, LLC Frank E. Granieri Trust	.02308% .05217%	\$2,300,000.00
Coronado Eastern, LLC	80-00065-1	Charles L. Ruthe IRA	.4818%	\$19,550,000.00
Coronado Horizon Boulder	60-00322-4	Charles L. Ruthe IRA Charles L. Ruthe Trust	1.6284% 2.5680%	\$2,960,000.00
Flamingo TC	60-00294-6	Charles L. Ruthe IRA Charles L. Ruthe Trust Donna A. Ruthe or Richard Acovino CDR Investments, LLC	.01217% .03140% .00182% .01128%	\$21,850,000.00
Golshan Weber AGA Kahrobai	80-00064-0	Charles L. Ruthe Trust	2.2750%	\$9,890,000.00
Grand Teton Residential	60-00318-2	Charles L. Ruthe IRA Charles L. Ruthe Trust CDR Investments, LLC	3.6514% 13.6301% .3352%	\$2,600,000.00
HDB LLC	60-00301-7	Charles L. Ruthe IRA Charles L. Ruthe Trust	.04476% .03409%	\$5,585,000.00
HK Investments	60-00311-3	Charles L. Ruthe IRA	5.1667%	\$600,000.00

<u>LOAN</u>	<u>LOAN NO.</u>	<u>INVESTOR</u>	<u>INVESTOR'S INTEREST</u>	<u>TOTAL AMOUNT OF LOAN</u>
Milano Residences	60-00277-1	Today's Realty Inc.	1%	\$10,000,000.00
Monarch Ridge Project	60-00313-5	Charles L. Ruthe IRA Charles L. Ruthe Trust CDR Investments, LLC	2.8730% 4.4305% 4.4305%	\$5,221,000.00
Pay Dirt Development	60-00272-6	Charles L. Ruthe Trust	13.2645%	\$577,100.00
Phillips Homes Mountains Edge	60-00326-0	Donna A. Ruthe or Richard Acovino	.4259%	\$3,145,000.00
Rising Sun Land Development	60-00310-4	CDR Investments, LLC	1.6374%	\$1,141,000.00

EXHIBIT “B”

FILED

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

OCT 3 10 55 AM '08



CLERK OF THE COURT

AMTRUST BANK .
Plaintiff .
vs. .
ASPEN FINANCIAL SERVICES LLC, .
et al. .
Defendants .
.

CASE NO. A-568316

DEPT. NO. XI

Transcript of
Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

PORTION OF EVIDENTIARY HEARING - DAY 2
(TESTIMONY OF JEFFREY GUINN)

THURSDAY, AUGUST 21, 2008

APPEARANCES:

FOR THE PLAINTIFF:

ELEISSA C. LAVELLE, ESQ.

FOR THE DEFENDANTS:

MATTHEW J. FORSTADT, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

1 LAS VEGAS, NEVADA, THURSDAY, AUGUST 21, 2008, 3:10 P.M.
2 (Proceedings 10:40 a.m. - 3:09 p.m. previously transcribed)
3 THE COURT: Thank you, Mr. Jones. You can return to
4 your chair.
5 Next witness. Can you tell that I know how to do
6 that?
7 MS. LAVELLE: I can't talk that fast.
8 THE COURT: You should hear me read the recess
9 admonishment to a jury.
10 MS. LAVELLE: Mr. Guinn, please.
11 THE COURT: Mr. Guinn, if you would approach,
12 please, climb my stairs, and remain standing.
13 JEFFREY GUINN, PLAINTIFF'S WITNESS, SWORN
14 THE CLERK: Please be seated. Please state your
15 name and spell it for the record.
16 THE WITNESS: Name is Jeffrey B. Guinn, G-U-I-N-N.
17 DIRECT EXAMINATION
18 BY MS. LAVELLE:
19 Q And your address, please.
20 A 7900 West Sahara, Suite 200.
21 Q Mr. Guinn, how are you employed?
22 A I'm the owner of Aspen Financial Services.
23 Q And that's a licensed mortgage broker; is that
24 right?
25 A Yes.

1 Q Okay. How many -- well, I'll just move real quick
2 to what I need to know here.

3 You -- is it true that Aspen recorded its notice of
4 breach or notice of default on March 25th of 2008?

5 A I don't quite remember the date, March 25th,
6 March 16th.

7 Q Take a look at Exhibit 14.

8 A I don't have it.

9 Q It's in the first volume.

10 A There's no numbers on this one.

11 THE COURT: You have three books with black binders?

12 THE WITNESS: Yes.

13 THE COURT: Not in there? 14.

14 THE WITNESS: I have it.

15 THE COURT: Okay. Good.

16 BY MS. LAVELLE:

17 Q Okay. Is that your signature at the bottom of that
18 page, sir?

19 A Yes.

20 Q Did you prepare this letter or the sign this letter?

21 A Yes.

22 Q And did this go to the borrowers, each of the --
23 excuse me, each of the investors on the Flamingo/TC project?

24 A Yes.

25 Q And does it state in that letter that the notice --

1 Aspen filed the breach on March 25, 2008?

2 A Yes.

3 Q Does that refresh your recollection?

4 A Yes.

5 Q That's an accurate statement; correct?

6 A Yes.

7 Q Okay. Did you also sign the forbearance agreement,
8 which is Exhibit 13?

9 A Yes.

10 Q Did you read that before you read it -- before you
11 signed it?

12 A Yes.

13 Q Are you aware that that document required that Aspen
14 not record any notice of default or --

15 A Yes.

16 Q -- or would forbear from pursuing its remedies under
17 its deed of trust until May 16th?

18 A Yes.

19 Q You are aware of that?

20 A Yes.

21 Q Okay. Now, you'd had previous experience with Mark
22 Oiness in another project; is that right?

23 A Correct.

24 Q What other project was that?

25 A Mira Villa and Ace D Develop.

1 Q Did there come a time when you believed that Mr.
2 Oiness's other development activities involved perhaps a
3 diversion of funds from the lenders to that project?

4 A Which lenders?

5 Q Any lenders. Let me see if I can clarify the
6 question.

7 Q You mentioned Mira Villa; is that right?

8 A Yes.

9 Q Did you ever come to believe at any time that there
10 were diversions of the lenders' funds on that project to
11 sources that were not beneficial to the project Mira Villa?

12 A On Mira Villa I doubt very seriously, because it was
13 voucher controlled.

14 Q Okay. So there was some question -- so you did not
15 believe that there was any problem with diversion of funds on
16 Mira Villa by Mr. Oiness; is that right?

17 A You mean diversion of funds from those loans --

18 Q Yes.

19 A -- to somewhere else?

20 Q From any loans to somewhere else.

21 A Not from our loan on that side, because we had
22 voucher control.

23 Q Okay. Did you learn that there were problems of
24 potential diversion of funds relating to other lenders on the
25 Mira Villa project?

1 A No.

2 Q Did you in January or February or before that time
3 have any concerns whatsoever about Mr. Oiness and the method
4 by which he conducted his construction activities around town
5 in Westmark Homes?

6 A Yes, we were concerned.

7 Q Okay. What was the source of your concern?

8 A One of the main concerns was that we were getting
9 phone calls from subcontractors, I think it was starting in
10 January and February, that they weren't getting paid and that
11 Mark had the money and they were calling us, which we weren't
12 in control of disbursing that money.

13 Q Okay. So that was only on this project; is that
14 right?

15 A It was on Flamingo/TC.

16 Q And you had no other concerns arising from any other
17 involvement with Mr. Oiness on any previous transaction that
18 you had ever participated in; is that right?

19 A Well, there were lien problems on the Mira Villa
20 project.

21 Q Okay. But did you have any concern that those loan
22 funds were being diverted or misused on the Mira Villa project
23 from any lender?

24 A Not to my knowledge.

25 Q Okay. So until you started getting phone calls in

1 January and February of 2008, is it an accurate statement that
2 you had no concern that Mr. Oiness was in the habit of
3 diverting loan funds from lenders on his construction
4 projects?

5 A No.

6 Q That is not an accurate statement?

7 A I have no evidence that he was doing that.

8 Q All right. And you didn't have any belief that he
9 was, did you?

10 A No.

11 Q Okay. Did you share with anyone at AmTrust the fact
12 that you were getting telephone calls from subcontractors in
13 January, February on the project that we're talking about,
14 Flamingo/TC?

15 A Mark and myself and Elaine and sometimes Shawn would
16 meet once in a while. I'm not sure if those discussions came
17 up, but I'm sure that Elaine probably discussed those with
18 mark.

19 Q Okay. Did you ever -- did you personally --

20 A I'm sorry. With Terry. I'm sorry. With Terry.

21 Q Did you personally ever convey any concern that you
22 had about subcontractors to Terry Jones or anyone else at
23 AmTrust?

24 A To Terry, yes.

25 Q When?

1 A Several meetings we had in the negotiation of the
2 forbearance.

3 Q Okay. So that would have been late January and
4 early February; is that right?

5 A Correct.

6 Q Not before that; correct?

7 A You know, there may have been some discussions on
8 the fact that we had -- Mark had wanted us to do a new loan on
9 the project, on Flamingo/TC, and we were concerned about the
10 values just in the overall real estate market, so Terry agreed
11 to split a cost of an appraisal, because we wanted to get the
12 appraisal, which we got in January. So we've had discussions
13 before that Mark was having some issues or maybe some value
14 issues, because just the general market as a whole was down.
15 And both of us wanted to make sure where we're at on the
16 value, that it was okay.

17 Q So you had a concern in December, January, February
18 that the market was such that the value of this property was
19 not going to be where you thought it was going to be; is that
20 right? Or where you'd hoped it was going to be?

21 A We knew it wasn't going to be where it was
22 18 months, two years before when we did the loan first.

23 Q Okay. You -- and I say "you," Aspen had the ability
24 and the right under the intercreditor agreement to verify the
25 borrower's financial condition; isn't that accurate?

1 A Correct.

2 Q Did -- up until the time that you started having
3 these discussions about refinancing the loan that was coming
4 due had you ever taken any steps whatsoever, and by you I mean
5 Aspen -- had Aspen taken any steps whatsoever to go through
6 the books and records of the borrower to verify his financial
7 condition?

8 A I'm sure we got financial statements from Mark. And
9 they were deteriorating just like everybody else who's
10 involved in the real estate market.

11 Q Okay. So you had some -- do you remember these, or
12 are you just guessing?

13 A I guess. I'm sure we do have them, and we did look
14 at them.

15 Q Do you remember seeing them?

16 A I'm sure I did.

17 Q Do you remember seeing that Mr. Oiness's or Westmark
18 or Flamingo/TC's financial condition was deteriorating?

19 A Their position was -- their financial condition was
20 deteriorating just like everyone else involved in real estate.

21 Q Okay. So there was nothing unusual, then, about
22 Westmark here that was not being suffered by every other
23 builder in Clark County; is that right?

24 A That's true.

25 Q Okay. Would you take a look at Exhibit 27, please.

1 THE COURT: That should be in the other book.

2 THE WITNESS: Yeah. I've got it.

3 BY MS. LAVELLE:

4 Q That's in the smallest of the black books. Can you
5 find it?

6 A Yeah. I have it.

7 Q Okay. All right. You're familiar with this
8 Flamingo/TC irrevocable business trust?

9 A Yes, I am.

10 Q Okay. And this was a document prepared -- in fact,
11 you signed on page 11; is that right?

12 A Yes.

13 Q Okay. Is it not true, Mr. Guinn, that a majority
14 but not all of the borrowers have already assigned their
15 interest in the Aspen deed of trust to this irrevocable trust?

16 A Yes, the vast majority have.

17 Q Okay. And that was pursuant to a letter that was
18 sent to them -- take a look at Exhibit 17. Have you got it?

19 A Yep.

20 Q Okay. They assigned that interest pursuant to their
21 vote here on this letter dated June 12th, 2008, where they
22 indicated their willingness to do that; is that right?

23 A Correct.

24 Q And that's your signature on this letter?

25 A Yes.

1 Q And that went to all of the investors on this Aspen
2 deed of trust?

3 A It went to all of them, but it wasn't required that
4 they all sign it.

5 Q Okay. Did you prepare this letter or did you have
6 someone prepare it for your signature?

7 A We had this prepared in house and was cooperation
8 with our legal counsel.

9 Q Okay. But you read it and understood it --

10 A Yes.

11 Q -- and approved it; is that right?

12 A Uh-huh.

13 Q Okay. And it set out all the options that were
14 available to Aspen with respect to this irrevocable business
15 trust?

16 A The letter may not have said everything that's in
17 there, but they got a copy of the trust so they could read
18 that.

19 Q Okay. But this gave the reasons why the trust might
20 be necessary?

21 A Correct.

22 Q And it gave reasons -- things that the trust would
23 be capable of doing if in fact people signed and assigned
24 their rights to the trust?

25 A Correct.

1 Q Right? And then each of these borrowers signed a
2 formal assignment that was in recordable form; is that right?

3 A Yes.

4 MS. LAVELLE: Okay. All right. I don't have
5 anything else right now, but I would like to reserve my right
6 in the event that he is called later to cross-examine him.

7 THE COURT: Do you have some questions?

8 MR. FORSTADT: Yes.

9 (Pause in the proceedings)

10 CROSS-EXAMINATION

11 BY MR. FORSTADT:

12 Q Mr. Guinn, you authorized the filing of the notice
13 of default in this case, did you not?

14 A Yes.

15 Q And that was contrary to the provisions of the
16 intercreditor agreement, is it not?

17 A Yes.

18 Q Tell us why you did it.

19 A We felt that AmTrust had deceived us in negotiating
20 the forbearance and what they were doing. They stopped the
21 project, endangered our collateral, so we had to take action.

22 Q In what way did they deceive you?

23 A Giving money to the borrower to pay the bills
24 without lien releases is just not right.

25 Q Well, what do you mean it's not right?

1 A It just goes against any principles in lending.

2 MR. FORSTADT: Your Honor, I'm going to call him as
3 a witness, so I'm going to go through a lot of this then, just
4 as a heads up. I'm not going to do it now.

5 THE COURT: Unless you want to do it now.

6 MR. FORSTADT: No, I'd prefer to wait.

7 THE COURT: Okay.

8 MR. FORSTADT: Thank you.

9 THE COURT: Thank you, sir. You can return to
10 your --

11 MR. FORSTADT: I'm not finished.

12 THE COURT: Oh.

13 MR. FORSTADT: I'm sorry.

14 BY MR. FORSTADT:

15 Q On loans such as this who's responsible for voucher
16 control?

17 A Could you restate that.

18 Q On loans such as this who is responsible for voucher
19 control?

20 A In my experience in all my years of banking and
21 lending the right people get the voucher control, a third
22 party, unbiased opinion, that disburses the money.

23 Q In this case who was supposed to be doing the
24 voucher control?

25 A Well, AmTrust was supposed to be doing it, but they

1 also said they were hiring a outside inspector.

2 Q Do you know whether they hired an outside inspector
3 with respect to the vertical construction?

4 A No, I do not.

5 Q Who was supervising in this case the disbursement of
6 moneys once it reached the builder's hands?

7 A Terry Jones.

8 Q And once the moneys were authorized by Terry Jones
9 and a check was cut, who was the check cut to, the builder?

10 A It was told by us by Terry to the builder.

11 Q And if that's done -- withdraw that.

12 The irrevocable business trust has how many
13 participants?

14 A Approximately 341 people are in it, and I'm guessing
15 maybe 333 or -34 have signed in. To the trust. It's not
16 mandatory.

17 Q With respect to the Mira Villa project, are you
18 familiar with that at all?

19 A Yes.

20 Q Familiar with the fact there was a two-year delay on
21 that project --

22 A Yes.

23 Q -- caused by construction issues on the roof joists?

24 A Correct.

25 Q Is that what caused that project to go south?

1 A It contributed greatly, because the holding costs
2 for that project went up significantly.

3 MR. FORSTADT: I have nothing further at this time,
4 subject to the right to call him in my case in chief.

5 THE COURT: Redirect?

6 MS. LAVELLE: Nothing else, Your Honor.

7 THE COURT: Thank you, sir. We appreciate your
8 time. You can return to your chair.

9 Next witness.

10 MS. LAVELLE: We have no further witnesses at this
11 time.

12 THE COURT: Do you rest at this time?

13 MS. LAVELLE: We do.

14 PLAINTIFF RESTS

15 THE COURT: Okay. Do you have any witnesses?

16 MR. FORSTADT: Yes, we do. But first of all we'd
17 like to move to dismiss the case for failure to --

18 THE COURT: We're not on an actual trial. We're on
19 a preliminary injunction hearing.

20 MR. FORSTADT: I understand. But if I could at this
21 point, Your Honor --

22 THE COURT: All right.

23 MR. FORSTADT: -- business trust has never been
24 served in this case, and you just heard the testimony they had
25 341 of the unit owners.

1 The injunction, if it's going to be valid, needs to
2 include the owner of the equity redemption, which is now the
3 business trust.

4 THE COURT: Okay. Ms. Lavelle.

5 MS. LAVELLE: Well, the only recorded document that
6 we had up until the time that this was filed, that we were
7 aware of, was the deed of trust by each of these people. This
8 is the recorded deed of trust from each of those owners.

9 You know, I'm -- I guess I'm surprised at this.
10 It's a bit of a sandbag. We have never been told that this
11 was not -- that this was going to be an indispensable party.
12 Clearly, and I think it's part of the record, all of the
13 interests in that trust, including the trustee represented by
14 Mr. Guinn and all of the investors who might have been
15 beneficiaries have been identified. So anybody who has any
16 interest in this case is sitting before you and has already
17 been identified.

18 THE COURT: Except for the trust entities.

19 MS. LAVELLE: And that's the first that we learned
20 that those interests had been assigned.

21 THE COURT: So, Judge --

22 MS. LAVELLE: We are going to request that we amend
23 the complaint.

24 THE COURT: Your request is granted.

25 MS. LAVELLE: Thank you.

1 THE COURT: Okay. So anything else before we get to
2 your witnesses?

3 MR. FORSTADT: Nothing.

4 THE COURT: Okay. Your first witness.

5 MR. FORSTADT: Mr. Guinn, please.

6 THE COURT: Mr. Guinn, if you would come all the way
7 back up here. See how much easier it would have been if you'd
8 just done it all at once?

9 Sir, I'd like to remind you you're still under oath.

10 THE WITNESS: Yes.

11 THE COURT: And you're going to get the amendment on
12 file in a week?

13 MS. LAVELLE: We are.

14 THE COURT: Sounds good.

15 Hello again, Mr. Guinn. All right.

16 JEFFREY GUINN, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

17 DIRECT EXAMINATION

18 BY MR. FORSTADT:

19 Q Sir, where did you go to school?

20 A Arizona State University.

21 Q Graduated?

22 A Yes.

23 Q Would you tell us your work history in series since
24 you graduated from Arizona State.

25 A After graduating from Arizona State I worked for

1 approximately four years at Valley Bank of Nevada. After that
2 I worked at Nevada Savings/Primerit Bank until 1992.

3 THE COURT: When it was acquired by Southwest Gas.

4 THE WITNESS: Yes. And then I took a year off, and
5 I worked at Consolidated Mortgage for a year, decided hard
6 money business was pretty good, and I started Aspen in 1995.

7 BY MR. FORSTADT:

8 Q What were your duties at Nevada Bank?

9 A I was in charge of the major loan department, the
10 REO department and the property management department.

11 Q And what did you do in that capacity?

12 A Made loans and oversaw the real estate that we did
13 take back --

14 Q Uh-huh.

15 A -- worked out deals. And in the old days the S&Ls
16 were allowed to have property to manage and own it.

17 Q Can you estimate for us approximately how many
18 millions or billions of dollars you were involved in
19 supervising while with Nevada Bank.

20 MS. LAVELLE: Objection. Vague.

21 THE COURT: Can you rephrase your question.

22 Can I give some disclosures here. Okay. We used to
23 represent Primerit. We used to represent them in litigation
24 involving some of the land that they decided to hold, and they
25 were part of my complexes. I used to represent Southwest Gas.

1 I was appointed by the witness's father to the bench, who was
2 at the time governor. Before that he was the president of
3 Southwest Gas. Before that he was the president of Primerit.
4 So I know all this stuff. Can we just --

5 MR. FORSTADT: Sure. We --

6 THE COURT: No. Skip ahead.

7 MR. FORSTADT: Okay.

8 THE COURT: It's a small town, okay.

9 BY MR. FORSTADT:

10 Q Can you estimate for us, sir -- withdraw that.

11 What has been your experience at other institutions
12 with voucher control?

13 A Absolute, unnegotiable, must have it.

14 Q Why?

15 A First off, the regulators require it. And bank
16 policy always requires it.

17 Q In your experience is it common or uncommon for a
18 loan officer to be the inspector for --

19 A Very.

20 Q -- a construction project?

21 A Very.

22 Q Very what?

23 A It's a conflict.

24 Q What's a conflict?

25 A A lot of times the banks, if loans go bad, they'll

1 blame the loan officer for maybe not underwriting it properly,
2 and to cover up their loan for being good they can play with
3 the disbursements, move, reallocate money, say the interest
4 reserve, cause shortfalls and so on.

5 Q What was your reaction when you found out that Mr.
6 Jones was doing the inspections for the construction draws?

7 A Shock.

8 Q Because?

9 A You just don't see it.

10 Q Did you express that to AmTrust?

11 A I think Elaine expressed that to Terry Jones.

12 Q Is the Aspen loan to Flamingo/TC in default?

13 A Well, yes. It's in foreclosure.

14 Q And you made demand for payment?

15 A Pardon me?

16 Q You made demand for payment?

17 A Yes.

18 Q And you've initiated foreclosure action?

19 A Yes.

20 Q Do you have a loan servicing agreement with your
21 investors?

22 A Yes.

23 MR. FORSTADT: Can I inquire as to whether the
24 witness has Exhibit 31 up there.

25 THE COURT: Here, sir. Here you go.

1 BY MR. FORSTADT:

2 Q Turn, if you would, please, sir, to page -- page 5
3 at the bottom. Do you see under 7(a)(i) it requires Aspen to
4 promptly perform all acts and execute all documents necessary
5 to do certain things, including seek relief from any stay of
6 foreclosure?

7 A Yes.

8 Q And you're here in court today for what primary
9 reason?

10 A To allow us to foreclose on our property.

11 Q And why is that important?

12 A To protect our investors.

13 Q Do you know of any way in which AmTrust is going to
14 be injured if you foreclose first?

15 A Not at all.

16 Q Do you know of any way in which Aspen will be
17 injured if AmTrust forecloses first?

18 A Yes.

19 Q What is that?

20 A We would be left going after the guarantees on the
21 personal guarantees.

22 Q And that's of Mark Oiness?

23 A Yes.

24 Q And his wife?

25 A Yes.

1 Q Now, are you aware that an appraisal was done that
2 was paid for half by Aspen and half by AmTrust?

3 A Yes.

4 Q What was the amount -- when was that appraisal done?

5 A I think it was dated at the end of January of 2008.

6 Q Do you recall what the as-built value was?

7 A There were several values in there because there
8 were several parcels that could be valued separately. It was
9 anywhere from sixty-five to 75 million, depending on how you
10 looked at the appraisal.

11 Q And was that an appraisal that was shared with
12 AmTrust?

13 A Yes. We were going to do a new loan for Mark, and
14 we wanted to make sure where we were at in the value, as I
15 stated before. So they agreed to split that with us, because
16 they wanted to see the value, also.

17 Q When you signed the intercreditor agreement were you
18 aware of the fact that the loan document required inspections
19 to be done?

20 A Yes.

21 Q Would you have signed the intercreditor agreement if
22 you had known that inspections were not going to be done?

23 A Would not have.

24 Q Why not?

25 A It goes against all lending practices.

1 Q Were you aware when you signed the intercreditor
2 agreement of the fact that the loan document required releases
3 of mechanics' liens?

4 A Yes.

5 Q Would you have signed if you knew that they were not
6 going to be getting mechanic lien releases?

7 A No, I would not.

8 Q How unusual is it in this community for a loan such
9 as this for there not to be either third-party disbursements
10 or mechanic lien releases?

11 A This is the first I've seen it.

12 Q When you signed the forbearance agreement February
13 22nd was it your anticipation that AmTrust would -- sorry.
14 Can I start over.

15 When you signed the forbearance agreement was it
16 your anticipation that AmTrust would fund the hard costs and
17 the soft costs going forward?

18 A Yes.

19 Q Were you ever advised that they intended to fund
20 only one requisition for \$800,000?

21 A No. It would be useless to sign the agreement if
22 they're only going to do that.

23 Q If you had known that, what would you have done?

24 A Renegotiated, I guess, to find out what their
25 intentions were.

1 Q Let's go to the intercreditor agreement for a
2 moment. Now, you've heard testimony that there were
3 negotiations concerning that agreement.

4 A Yes.

5 Q Describe for me what happened in the context of
6 whether there were negotiations, who was saying what to whom.

7 A I think Elaine and Terry talked mostly, and then
8 Elaine would get with me. Our concern was -- is because we
9 had heard some rumblings about the contractors calling, such
10 as a plumber, electric guy, the framer guy was calling my
11 partner constantly.

12 THE COURT: Hold on a second. I'm confused. Are we
13 talking about the initial negotiation of the intercreditor
14 agreement?

15 MR. FORSTADT: Yeah, that was the question.

16 THE WITNESS: Yeah.

17 MR. FORSTADT: I think the witness misunderstood the
18 question.

19 THE COURT: Yes. I think he was talking about the
20 forbearance agreement.

21 MR. FORSTADT: Yeah.

22 BY MR. FORSTADT:

23 Q Let me back up. Let me go to the intercreditor
24 agreement.

25 A Okay.

1 Q Were there negotiations concerning the contents of
2 that intercreditor agreement?

3 A Yes.

4 Q Who negotiated?

5 A I was part of it, but Elaine more than likely talked
6 most of that with Terry Jones.

7 Q Was there a give and take, or was it a take it or
8 leave it on the intercreditor agreement?

9 MS. LAVELLE: Could I object and ask with respect to
10 which time period we're talking about?

11 THE COURT: Yeah. Can I -- here's my concern. I
12 had testimony yesterday, and I don't know if it's consistent
13 with Mr. Guinn's understanding or not, that there was the
14 first time he used the intercreditor agreement there was a big
15 meeting and Mr. Eisner drafted the original form and they
16 worked out some details and -- is that when you're asking
17 about?

18 MR. FORSTADT: Yes.

19 THE COURT: Or are you asking about Exhibit 5?

20 MR. FORSTADT: No. At that time.

21 THE COURT: So the first time they ever --

22 MR. FORSTADT: Correct.

23 THE COURT: -- did business and negotiated the
24 intercreditor agreement together.

25 MR. FORSTADT: Correct. Thank you, Your Honor.

1 THE COURT: Thank you. It was very confusing.

2 THE WITNESS: I was confused, too.

3 MR. FORSTADT: Thank you.

4 THE WITNESS: I was confused, too. I thought we
5 were talking about the forbearance part.

6 BY MR. FORSTADT:

7 Q My fault.

8 A Okay. This is the one that supposedly was
9 negotiated back in what, 2002, 2003 that was talked about?

10 Q Yes.

11 A I would have been involved in those meetings, Frank
12 Bologna, Elliott -- I mean, Elliott was never there.

13 Q Elliott Eisner?

14 A Elliott Eisner was never there.

15 Q Sure?

16 A Absolutely. He didn't handle our stuff on our
17 corporate side even though we had the same law firm. But
18 Elliott wasn't handling that. Elaine Elliott was probably
19 there. She was probably relatively new at the company at the
20 time. And Jeffrey Shime [phonetic], my former partner. And
21 Terry Jones may have been there.

22 Q And during those discussions was it a give and take
23 in terms of what you could get, or was it a take it or leave
24 it, this is what we're prepared to do?

25 A Dealing with AmTrust was always bordering on that

1 was it, if you want this deal this is the way it is. They're
2 always close to that line.

3 Q And was that true with respect to the intercreditor
4 agreement that you signed?

5 A Yes.

6 Q And you've had -- Aspen has had several business
7 transactions with AmTrust --

8 A Yes.

9 Q -- correct? In all -- in those other transactions
10 was there an intercreditor agreement?

11 A Yes.

12 Q Was that intercreditor agreement similar to the
13 intercreditor agreement that was signed in this case?

14 A Yes.

15 Q Why, sir -- withdraw that. Did you -- withdraw
16 that. Did you determine at the time you signed the
17 intercreditor agreement whether it was fair or unfair for
18 Aspen?

19 A It was -- it was unfair, because if they breached
20 it, we had -- we had no rights.

21 Q And did they breach it?

22 A Yes.

23 Q In what respects?

24 A Voucher control.

25 Q Now, prior to the forbearance agreement did you have

1 discussions with Aspen about the corner parcel, the commercial
2 parcel?

3 A Elaine -- I think Elaine did, yes.

4 Q And what was your understanding as to what AmTrust's
5 position was prior to you signing that forbearance agreement
6 with respect to that parcel of property?

7 A That if an offer came in they would consider
8 releasing it. It would have paid off approximately \$2 million
9 to AmTrust and a million dollars to Aspen. We knew some
10 people that wanted the corner, so we wanted to make sure that
11 they would at least reasonably negotiate with us if we brought
12 one in.

13 Q Subsequent to signing the forbearance agreement what
14 transpired with respect to that corner parcel?

15 A Nothing, other than we just felt that there could be
16 some buyers out there. We wanted to make sure that we had the
17 ability of a partial paydown.

18 Q Do you know whether or not AmTrust was shopping that
19 same parcel?

20 A Don't know.

21 Q Do you know who Don Sharp is?

22 A Don Sharp?

23 Q May have the name wrong. Bob Sharp.

24 A Oh. Bob Sharp.

25 Q Bob Sharp.

1 A Yes.

2 Q And what relationship -- withdraw that. What does
3 Bob Sharp have to do with that corner parcel, if anything?

4 A Oh, Bob didn't have anything to do with the corner
5 parcel. Bob was -- is a borrower on another project that we
6 have, eight lots that were in an intercreditor agreement with
7 AmTrust.

8 Q And do you know whether or not AmTrust shared with
9 him information that was confidential as between AmTrust and
10 Aspen?

11 A Yes.

12 Q And without telling me what the information was,
13 what was the type of information that was shared?

14 MS. LAVELLE: Objection. Hearsay.

15 THE COURT: Overruled.

16 THE WITNESS: Bob Sharp came into our office at
17 Aspen Financial and met with Elaine Elliott and Shawn Corrigan
18 and myself and instructed us that AmTrust had --

19 MS. LAVELLE: Objection. Hearsay, Your Honor. I'd
20 move to strike this testimony.

21 THE COURT: We don't want to know what they told
22 you. We're just right now trying to find out the general
23 nature of the information you believe was confidential.

24 THE WITNESS: Bob Sharp was explaining facts that
25 detailed the entire settlement conference.

1 MS. LAVELLE: Again, Your Honor.

2 MR. FORSTADT: I'm not going any further. I'm
3 stopping there.

4 THE COURT: Okay. It was general, so we're okay.
5 Objection's overruled right now.

6 BY MR. FORSTADT:

7 Q Now, last I want to turn your attention to the
8 forbearance agreement of February 22nd.

9 A What exhibit is that?

10 MR. FORSTADT: Can I hand the witness a copy,
11 please?

12 THE COURT: Yes, you can.

13 THE WITNESS: It's here, isn't it?

14 THE COURT: It's like 7 or something. 12? 13? 13
15 is the forbearance agreement.

16 THE WITNESS: I've got it.

17 BY MR. FORSTADT:

18 Q At the time you signed this was it your
19 understanding that the lender, AmTrust, would commence advance
20 -- making advancing in unit construction loan proceeds?

21 A Absolutely.

22 Q Was that important to you?

23 A Yes.

24 Q Did they do that?

25 A No.

1 Q What was the consequence of them not doing that?

2 A Subs walked off the job, subs were calling our
3 office wondering they couldn't get paid, and Mark -- and Mark
4 closed the doors.

5 Q How did Mark close the doors, cutting off the money?

6 A He closed down the sales trailer, if I remember
7 right.

8 Q Page 4. "Borrower shall deliver to lender
9 conditional and/or unconditional lien waivers." You see that,
10 sir? You see that?

11 A What number was that?

12 Q Number (f), (e), (f), (g), page 4.

13 A Yes.

14 Q "Borrower shall have delivered to lender." Do you
15 know whether or not the borrower -- withdraw that. Do you
16 know whether or not the lender ever got the conditional and/or
17 unconditional lien waivers with respect to the vertical
18 construction?

19 A We suspected it was happening, and then through
20 testimony today it was obvious.

21 Q Was that important to you?

22 A Yes.

23 Q Why?

24 A You just don't make loans and disburse money that
25 way.

1 Q How many loans have you made at Aspen? Dollar
2 amount. Approximately.

3 A In our 12-year history \$3 billion.

4 Q \$3 billion?

5 A 3 billion, yeah.

6 Q Now, is part of voucher control balancing and
7 reconciling a budget?

8 A Yes.

9 Q Are you aware that Aspen on numerous occasions asked
10 for reconciliation to be done on this project?

11 A Through Elaine, yes.

12 Q And was that ever done, to your knowledge?

13 A No.

14 THE COURT: Can I ask a question. And this is maybe
15 from -- I don't know which person in the room knows. Are the
16 draw requests in these books?

17 MR. FORSTADT: No.

18 THE COURT: Where are the draw requests? Gosh,
19 Judge, we don't know. Okay.

20 MR. FORSTADT: No, I've got -- I've got a box that
21 has some of the draw --

22 MS. LAVELLE: We've produced them, Your Honor.

23 MR. FORSTADT: -- that has some of the draw requests
24 in it.

25 THE COURT: So there's not a single draw request in

1 the documents you've brought?

2 MR. FORSTADT: That is correct.

3 MS. LAVELLE: No. We've produced them. Mr.
4 Forstadt has them, and they're all available.

5 THE COURT: My question was are they in the books I
6 have.

7 MR. FORSTADT: No.

8 THE COURT: The answer is, no, Judge. Okay.

9 MR. FORSTADT: I have nothing further, Your Honor.

10 THE COURT: Cross-examination.

11 MS. LAVELLE: Yes.

12 CROSS-EXAMINATION

13 BY MS. LAVELLE:

14 Q Mr. Guinn, take a look at -- you were just looking
15 at Exhibit 13. And I think there's some confusion, because
16 what you were reading was taken out of context.

17 Take a look at page 3. This is the forbearance
18 agreement, paragraph 5. Paragraph 5 says, "Borrower
19 hereby --"

20 Borrower is Flamingo/TC; correct?

21 A (No audible response)

22 Q "Borrower hereby acknowledges and agrees that the
23 advances of proceeds to be made by lender under the land loan
24 as provided for in this forbearance agreement shall be made
25 subject to the following conditions and satisfaction of the

1 following requirements."

2 Isn't it true that that means that going forward
3 from the date of this agreement that's what these
4 disbursements were talking about? Is that how you read that?

5 MR. FORSTADT: Objection, Your Honor.

6 THE COURT: Overruled.

7 THE WITNESS: This is -- I think this is more
8 detailed than the loan agreement, because --

9 BY MS. LAVELLE:

10 Q No, I'm not talking about that. I'm asking for
11 your understanding of the language I just read to you in
12 paragraph 5 of the forbearance agreement. Does that refer to
13 disbursements of loan proceeds to be made as provided in the
14 forbearance agreement? Isn't that what that says?

15 A Yes.

16 Q So this doesn't talk about loan proceeds disbursed
17 historically, it means going forward; isn't that right? Isn't
18 that what that says?

19 A Yes.

20 Q Okay. So the subsection that you were talking about
21 just a minute ago, subsection (f) and (e) and (g) and (h) and
22 all the rest of them, these are the requirements that are to
23 be made in the loan disbursements to be made going forward;
24 isn't that right?

25 A Yes. It has more detail than the loan agreement,

1 yes.

2 Q Okay. So it's going forward; correct? After the
3 date of this agreement? Isn't that when the -- what this
4 relates to, what that entire paragraph and section relates to?

5 A Yes.

6 Q Okay. And do you disagree with -- you were here in
7 the courtroom. Do you disagree with Mr. Jones's testimony
8 that he obtained lien releases and disbursed directly to the
9 subcontractors the disbursement that was made by AmTrust after
10 the date that you executed this agreement?

11 MR. FORSTADT: Objection. I don't believe that was
12 his testimony in terms of the disbursements.

13 THE COURT: I do. But if you don't -- didn't hear
14 it that way, the objection's overruled.

15 THE WITNESS: Could you rephrase that.

16 BY MS. LAVELLE:

17 Q My question is do you have any information
18 whatsoever to dispute Mr. Jones's testimony that he obtained
19 lien releases on the disbursement that he made after the date
20 of this forbearance agreement?

21 A I'm not in possession of lien releases to know.

22 Q So you don't know one way or another? You can't
23 dispute his testimony; correct?

24 A Maybe in the fact that there's mechanics' liens on
25 the property. That'd be the only way.

1 Q But you don't dispute his testimony? You don't know
2 one way or another; is that right?

3 A I don't know one way or the other.

4 Q Okay. Is there anything in the loan agreement that
5 requires a voucher control? And I'm talking about the loan
6 agreement between AmTrust and Flamingo/TC.

7 THE COURT: Exhibit 30?

8 MS. LAVELLE: Exhibit 30.

9 MR. FORSTADT: You're asking if that term is used,
10 or --

11 MS. LAVELLE: Yes, that's what I'm asking.

12 THE COURT: She's saying is it a requirement under
13 Exhibit 30 that there be voucher control used.

14 THE WITNESS: There's talk about a inspection.

15 BY MS. LAVELLE:

16 Q Is there the term "voucher control" and that concept
17 described or required in any way in the loan agreement between
18 AmTrust and Flamingo/TC?

19 A Well, I haven't read the -- I haven't read this.
20 I'd have to read the whole thing again.

21 Q Okay. But you would -- whatever it says it says; is
22 that right? If it's not in there, it's not in there; if it's
23 in there, it's in there. Is that right?

24 A Well, I think the agreement does [unintelligible]
25 because it says that an inspector will be hired, employed by

1 or at the expense of the borrower. Which to me refers to an
2 outside --

3 Q The words "voucher control" are not described; is
4 that right? To your knowledge.

5 A I'd have to read the whole thing to see if "voucher"
6 is not in there.

7 Q Now, you mentioned that you had a law firm engaged
8 at the time that the intercreditor agreement with AmTrust was
9 negotiated; is that right?

10 THE COURT: The first one?

11 BY MS. LAVELLE:

12 Q The first one.

13 A -- had the same offer, yes.

14 Q It was Kolesar & Leatham?

15 A Yes.

16 Q And who was your counsel?

17 MR. FORSTADT: Could we be specific, Counsel. For
18 what?

19 BY MS. LAVELLE:

20 Q Did you have several lawyers at Kolesar & Leatham
21 that were assisting Aspen in various matters in 2002?

22 A Maybe several, yeah.

23 Q Okay. Who?

24 A Bob Kolesar and Howard Goldstein.

25 Q Okay. Now, at the time that you were negotiating

1 this first intercreditor agreement with AmTrust were you
2 familiar with what an intercreditor agreement was?

3 A Yes.

4 Q Had you executed intercreditor agreements with other
5 lenders before that date?

6 A Yes.

7 Q Had you in fact entered into intercreditor
8 agreements requiring standstill provisions that would require
9 a second deed of trust holder not to foreclose ahead of the
10 first?

11 A I don't believe so.

12 Q You never had before?

13 A Don't believe so.

14 Q Okay. You were handling how much in loans for your
15 investors with respect to that initial intercreditor agreement
16 that you executed with AmTrust?

17 A Six years ago I don't know.

18 Q Was it in the ballpark of 20 million, just like this
19 one?

20 A I don't know. I think we started off with some
21 small deals. I want to recall that maybe one was with Astoria
22 Homes. But six years ago it's hard.

23 Q Mr. Guinn, is it your practice to not have counsel
24 look at agreements before you sign them?

25 MR. FORSTADT: Objection.

1 THE COURT: Overruled.

2 THE WITNESS: Well, we have counsel look at them.

3 BY MS. LAVELLE:

4 Q Did you have counsel review the intercreditor
5 agreement before you signed it?

6 THE COURT: The first one?

7 BY MS. LAVELLE:

8 Q The first one.

9 A I'm sure we did.

10 Q Why?

11 A Just a standard practice of new documents, to look
12 at things, give suggestions.

13 Q Okay. And if your counsel had said, don't sign
14 this, this is a problem, would you have followed that
15 recommendation?

16 MR. FORSTADT: Objection.

17 THE COURT: The basis of your objection?

18 MR. FORSTADT: Hypothetical.

19 THE COURT: Overruled. You can answer if you can.

20 THE WITNESS: We would highly consider advice of our
21 counsel.

22 BY MS. LAVELLE:

23 Q Wouldn't you really have a problem with your
24 investors if you chose to ignore your counsel's advice?

25 A Well, I don't think in this case I ignored my

1 counsel's advice.

2 Q I'm talking about hypothetically. If you signed an
3 agreement, a subordination agreement, an intercreditor
4 agreement that affected the rights of investors who had loaned
5 \$21 million, wouldn't you have a problem with those investors
6 if you ignored your attorneys' advice if that advice were
7 don't sign the agreement?

8 MR. FORSTADT: Objection.

9 THE COURT: Overruled. If you can answer, you can.
10 If you can't, okay.

11 THE WITNESS: I don't know.

12 BY MS. LAVELLE:

13 Q You don't know. Did you at any time have any of
14 your attorneys review the intercreditor agreement that you
15 signed with AmTrust, any of them?

16 MR. FORSTADT: At any time?

17 THE COURT: Any of the various intercreditor
18 agreements --

19 BY MS. LAVELLE:

20 Q Before you signed them.

21 THE COURT: -- reviewed by any of his attorneys?

22 MS. LAVELLE: Right. Before they were signed.

23 THE WITNESS: I'm sure we did.

24 BY MS. LAVELLE:

25 Q And did any attorney ever tell you, don't sign this

1 agreement?

2 A No.

3 Q No?

4 A No.

5 Q You said that you had done subordination agreements
6 with other creditors prior to AmTrust; is that right?

7 A Correct.

8 Q Who were those first lenders?

9 A Well, I'd have to give you a list on that one.

10 Q Just off the top of your head a few.

11 A We have other deals with AmTrust, we have some deals
12 with Community Bank. Off the top of my head that's about all
13 I can remember.

14 Q Okay. Now, you -- Aspen does first trust deed and
15 conventional lending, as well as second trust deed lending; is
16 that right?

17 A Correct.

18 Q And as a first conventional lender does Aspen
19 require subordination of subsequent financing or other
20 financing?

21 A I'm not clear on what you're trying to say.

22 Q Okay. What I'm saying is that when Aspen does a
23 first trust deed on a loan, on a property to secure a loan,
24 has AmTrust -- has Aspen ever in its history required other
25 lenders on the same project to subordinate other financing?

1 A Yes.

2 Q It has?

3 A Yes.

4 Q Why?

5 A Well, we have investors that want to go into seconds
6 because of the higher yield. So a bank comes in and does a
7 \$10 million loan and there's some equity left and they want to
8 do a two or \$3 million equity loan, as we call it, but it's a
9 second, it's not mezzanine, they can put it in there. Then
10 the investors sign a subordination agreement.

11 Q Okay. So you don't dispute the fact that
12 subordination agreements in general are valid; is that
13 correct?

14 MR. FORSTADT: Objection. Objection, please.

15 THE COURT: Basis?

16 MR. FORSTADT: It's asking for a legal conclusion.

17 THE COURT: Overruled. You can answer.

18 THE WITNESS: Some seconds don't require any
19 subordination with respect to the two sets of lenders at all,
20 because you can go on a loan that has a first after the fact.

21 BY MS. LAVELLE:

22 Q That's not my question. My question is do you agree
23 that subordination agreements are -- can be valid.

24 A Oh, yes.

25 Q Okay. You've done business with other banks making

1 first trust deeds, conventional lending secured by first trust
2 deeds in which Aspen has made a junior loan; is that right?

3 A Yes.

4 Q And in addition to Community Bank, what banks would
5 those be?

6 A As I said, AmTrust, Community Bank is pretty much
7 all I can think of.

8 Q Besides AmTrust.

9 A Community Bank, I said.

10 Q So you've only dealt with Community Bank and AmTrust
11 in all of these loans that you have been involved with on
12 behalf of your investors making second trust deeds?

13 A Oh, no. There's probably more. I just can't
14 remember them.

15 Q You can't remember them?

16 A I was just trying to remember off the top of my head
17 for you.

18 Q More than five?

19 A Could be.

20 Q More than 10?

21 A Don't know.

22 Q Are there other banks that do more lending,
23 conventional lenders in which Aspen holds second deeds of
24 trust than AmTrust? Or is AmTrust the largest?

25 MR. FORSTADT: Objection. I don't understand that

1 question at all.

2 THE COURT: Can you rephrase your question.

3 MS. LAVELLE: Sure.

4 MR. FORSTADT: Thank you.

5 BY MS. LAVELLE:

6 Q Which bank or lenders does Aspen do business with
7 that have loaned by volume more than AmTrust on first trust
8 deeds in which Aspen is a second -- or Aspen's investors are
9 seconds?

10 A I don't think any bigger than AmTrust.

11 Q Okay. Now, let's assume for just a minute that
12 AmTrust said to you, you know, you've got to sign this
13 intercreditor agreement with the subordination and the
14 standstill, or we won't -- we won't loan the money as a first.
15 Let's assume that was said. Was that what was said? Do you
16 know?

17 A At the beginning --

18 Q Sure.

19 A -- the middle or -- I mean --

20 Q At any time.

21 A Well, if you already have a loan outstanding, you're
22 kind of at their mercy.

23 Q Why?

24 A It's take it or leave it.

25 Q Why is it take it or leave it? If you've already

1 got a loan, Aspen's already made a loan; is that right?

2 A Correct.

3 Q And you don't disburse funds without a deed of trust
4 being in place; correct?

5 A Correct.

6 Q Okay. If AmTrust doesn't make a loan, you still
7 have your deed of trust; correct?

8 A If AmTrust doesn't make a loan, the second probably
9 won't be made, either.

10 Q All right. But then the second may be a first;
11 correct? Can't you get enough money together to make a first
12 instead of a second, since you're in that business?

13 MR. FORSTADT: Objection, Your Honor.

14 THE COURT: Overruled.

15 THE WITNESS: I'm really confused what you're
16 saying. If -- if AmTrust came to us and it was a deal that
17 we've deemed that it wasn't good, that it wasn't a good
18 project, it wasn't a good borrower and you're dealing with a
19 reputable lender and they hadn't funded their loan yet --

20 BY MS. LAVELLE:

21 Q Let me see if I can clarify.

22 A -- then you can walk away from it.

23 Q Let me clarify this for you. You're in the business
24 of making -- of making loans that are secured by first trust
25 deeds; is that right?

1 A Firsts and seconds.

2 Q Firsts. Let me just ask you firsts. Firsts;
3 correct?

4 A Yes.

5 Q So if you choose not to sign the intercreditor
6 agreement requiring a standstill provision, you can still make
7 a first-trust-deed-secured loan, can't you? Nothing's
8 preventing that?

9 A Right.

10 Q Okay. Now, you said that the way that Aspen is hurt
11 if Aspen is not allowed to foreclose is if -- is that they
12 would be left only going after the guarantees; is that right?

13 A From a lender's standpoint, yes.

14 Q Isn't that the risk that Aspen assumed -- its
15 investors assumed when it made -- signed the intercreditor
16 agreement and agreed to be in second position?

17 A Well, they didn't assume that it would be breached
18 by AmTrust, either.

19 Q That's not my question.

20 A I'm giving an answer.

21 Q In the normal transaction as a second --

22 MR. FORSTADT: I think the witness should be allowed
23 to finish his answer.

24 THE COURT: Sir, were you finished with your answer

25 THE WITNESS: I am now.

1 THE COURT: Okay.

2 BY MS. LAVELLE:

3 Q When a lender is in a subordinate position, a second
4 trust deed, would you agree that there is always the risk that
5 they will be foreclosed out by the first?

6 A Yes.

7 Q And in that event, even if there is no breach,
8 alleged breach by the beneficiary of the first trust deed, you
9 still have that result; isn't that right?

10 A Yes.

11 Q So isn't the fact that you would be left with going
12 after the guarantors the same risk that you had when this loan
13 was made?

14 A The risk has increased due to the breach from
15 AmTrust.

16 Q Isn't it the very same risk?

17 A No. It's greater --

18 Q Why?

19 A -- by AmTrust's breach. The fact that they did not
20 properly disburse this loan has created liens, which makes it
21 almost impossible when AmTrust comes to us to help us sell the
22 property. It devalues it, and it's very tough to bond around
23 that and to sell the property. So it's hurt us more.

24 Q Have you got a buyer for this property?

25 A We have -- several people have talked to us.

1 They're waiting for it to be foreclosed. In the early days
2 AmTrust was willing to work with us on it. Obviously not now.

3 Q Now, there's been some confusion, I think, in the
4 terminology here. Is there anything in the intercreditor
5 agreement -- this would be Exhibit 5 -- that creates any
6 obligation of any kind to Aspen to obtain mechanic's lien
7 releases?

8 A Which intercreditor agreement?

9 Q Exhibit 5.

10 A Again, I haven't read this in a few days.

11 Q Why don't you take your time. Because I believe you
12 testified that the intercreditor agreement required lien
13 releases in response to one of Mr. Forstadt's questions. And
14 I'd like you to look at that agreement and tell me where that
15 obligation exists.

16 A I think that was when Judge Gonzalez said we were
17 confused and I thought we were talking about the forbearance
18 that kind of rehashed a little bit of it --

19 Q No, that was a different --

20 A -- and we corrected that.

21 Q That was different.

22 THE COURT: I wasn't saying that you were confused.
23 I said I was confused.

24 THE WITNESS: Well, I was confused, too --

25 THE COURT: I was confused.

1 THE WITNESS: -- because I was testifying about the
2 wrong thing.

3 BY MS. LAVELLE:

4 Q No. That was -- that was dealing with the
5 forbearance agreement.

6 MR. FORSTADT: Is there a question?

7 MS. LAVELLE: Yes, there is.

8 THE COURT: Yes. She's trying to find out if
9 there's anything in Exhibit 5 that requires the AmTrust to get
10 lien releases for the benefit of Aspen.

11 MR. FORSTADT: So her question is --

12 THE WITNESS: If you're telling me it's not there,
13 it's probably not in there. But again, that's why we get
14 copies of all of the documents, to make sure the bank's --

15 BY MS. LAVELLE:

16 Q Well, that's not my question, Mr. Guinn.

17 A No, it's not --

18 Q You testified -- you testified that the
19 intercreditor agreement requires that AmTrust obtain
20 mechanic's lien waivers. And I'm asking you if that's an
21 accurate statement right now because that's what you testified
22 about.

23 A My statement was that the lien releases -- I was
24 commenting about the letter of February 22nd. We talked about
25 that.

1 Q So if you were to say -- if you had said that the
2 intercreditor agreement required lien releases, now you're
3 saying you don't know one way or another; is that right?

4 A I'd have to read the whole thing to make sure.

5 Q Okay. So the document would -- whatever the
6 document is it is; correct?

7 A It is.

8 Q Okay. You're a signator -- you on behalf of Aspen
9 is the signator to the intercreditor agreement --

10 A Yes.

11 Q -- is that right?

12 A Yes.

13 Q And isn't it true that there is nothing in this
14 intercreditor agreement that requires AmTrust, formerly Ohio
15 Saving Bank, to do anything whatsoever for the benefit of
16 Aspen?

17 A Again, I'd have to read the whole thing again.

18 Q Okay.

19 A Unless you --

20 Q Whatever the document says it says; is that right?

21 A Yes.

22 MS. LAVELLE: Okay. All right. Nothing further.

23 THE COURT: Any redirect?

24 MR. FORSTADT: Thank you.

25 //

1 REDIRECT EXAMINATION

2 BY MR. FORSTADT:

3 Q The intercreditor agreement refers to a certain loan
4 agreement; correct?

5 A Correct.

6 Q And have you reviewed the loan agreement?

7 A Yes.

8 Q And you know that the loan agreement requires
9 mechanic lien waivers; correct?

10 A Yes.

11 Q And the lien -- the loan agreement also requires
12 inspections; correct?

13 A Yes.

14 Q Going back to the time of the initial negotiation of
15 the first subordination agreement which AmTrust did with
16 Aspen, would you characterize those negotiations as a give and
17 take, or as a this is the way we have to have it?

18 A Is this the one in 2006?

19 Q Yes.

20 A The first one?

21 Q The first one.

22 A The first one. At the time we had a first and
23 second deed of trust that we did the purchase money on this
24 transaction and they were going to pay off our first, the
25 seconds were going to continue to be a second. So in

1 negotiating that I would say that they were very, very tough
2 on negotiating. But we had a good borrower, we're dealing
3 with a bank that we felt that were in good shape, that wasn't
4 that we were behind another hard money lender that may not do
5 voucher control even though that is required by law. So we
6 weighed out the balances, and for a year and a half it was
7 doing pretty good.

8 Q Did you trust Aspen during that period? I'm sorry.
9 Trust AmTrust during that period?

10 A Yes.

11 Q Let's go to the forbearance agreement just for a
12 moment. At the time of the forbearance agreement you wanted
13 this project to go; correct? To be a success?

14 A Yes. The only way to get out of it is to build it
15 out.

16 Q And the only way to build out of it was to get
17 additional funds from AmTrust?

18 A Not additional funds. Have them continue to fund.

19 Q And when you signed the forbearance agreement were
20 you under the understanding that they would continue to fund?

21 A Yes.

22 Q Now, paragraph 5 --

23 A What number is that one again?

24 THE COURT: It's 13.

25 THE WITNESS: I'm sorry.

1 BY MR. FORSTADT:

2 Q We'll finish with it in a minute.

3 THE COURT: It's okay. The jury asks me in other
4 cases, they say, Judge, what exhibit's that. It's like -- and
5 the lawyers don't know, and it's like --

6 BY MR. FORSTADT:

7 Q The term "voucher control" is not used in the
8 documents; correct? I'm telling you it's not in there.

9 THE COURT: In which documents?

10 MR. FORSTADT: Any of them.

11 THE COURT: All the documents?

12 MR. FORSTADT: Any of them.

13 THE COURT: Okay. Good.

14 THE WITNESS: Okay.

15 BY MR. FORSTADT:

16 Q Is voucher control a recognized practice?

17 A Yes.

18 Q And voucher control consists of things such as
19 mechanic lien waivers and inspections and other things like
20 that for the control of the project?

21 A Make sure it's in balance, also.

22 Q And keeping the project in balance and getting the
23 mechanic lien waivers and getting the inspections are for the
24 benefit of both the first and the second --

25 MS. LAVELLE: Objection. Leading.

1 BY MR. FORSTADT:

2 Q -- correct?

3 THE COURT: Overruled. You can answer.

4 THE WITNESS: It's the benefit for everyone that's
5 involved in the loan.

6 BY MR. FORSTADT:

7 Q And to your detriment -- sorry. Did you rely on
8 AmTrust to do certain things that they did not do in
9 connection with this loan?

10 A Yes.

11 Q And what were those?

12 A Voucher control and giving the money to the
13 borrower. The subs were not getting paid.

14 Q And had AmTrust continued to fund this loan, were
15 you prepared to forgive their prior breaches?

16 A Yes. Because we felt we had additional checks and
17 balances on them that were a little more detailed. And we
18 felt that would protect us even more, because we were a little
19 bit concerned with the phone calls coming, and we didn't
20 understand why they were calling us. We [unintelligible]
21 disburse money for construction, so, yeah, that's probably why
22 this was tidied up quite a bit.

23 MR. FORSTADT: Nothing further. Thank you.

24 THE COURT: Okay. Do you have any recross?

25 MS. LAVELLE: Just very briefly.

1 for Aspen's benefit or its investors' benefit; isn't that
2 right?

3 A Again, I -- you know, I'm not a lawyer. I'm reading
4 this stuff. You just asked me about one comment, so I'm not
5 sure what you're getting at.

6 Q Okay. Can you point to anything in this document in
7 which Ohio Savings Bank undertakes any obligation to the
8 holders, who are the investors and -- of Aspen's investors in
9 the way that this loan is going to be administered?

10 A Indirectly, because it refers to the loan documents.

11 Q Is there any assumption of any obligation?

12 THE COURT: And you're asking him if there was an
13 express assumption?

14 BY MS. LAVELLE:

15 Q An express assumption.

16 A Not express, just indirectly with mentioning the
17 loan documents.

18 Q And isn't it true that the document places that I
19 have read to you in fact say that the bank, OSB, is not
20 obligated to Aspen in any way or its investors?

21 A That's what it says.

22 Q Okay. Take a look at paragraph 2. Read that to
23 yourself. Have you read it?

24 A Yes.

25 Q Okay. And isn't it true that paragraph 2, looking

1 at the second sentence, says, "OSB has no obligation or duty
2 to holders to monitor or control the use of any disbursements
3 which OSB may make pursuant to the loan documents. Any
4 actions which OSB may take in connection with such
5 disbursements are solely for the purpose of protecting its own
6 interests and not the interests of holders. If such
7 disbursements are used by borrower or any other person for
8 purposes other than as provided in the loan documents, this
9 agreement and subordination of subordinated note," et cetera,
10 it says, "note the deed of trust shall remain in full force
11 and effect"? Do you see that?

12 A Yes.

13 Q Okay. Did you understand that when you read it?

14 A I'm sure I did.

15 Q And you read it before you signed it?

16 A I'm sure I did.

17 MS. LAVELLE: Okay. I have nothing further.

18 THE COURT: Anything further?

19 MR. FORSTADT: Yes. Very quickly.

20 FURTHER REDIRECT EXAMINATION

21 BY MR. FORSTADT:

22 Q To the extent that AmTrust was administering the
23 loan for its own benefit, would that benefit Aspen, as well?

24 A Yes.

25 Q To the extent that AmTrust kept the loan in balance,

1 would that assist Aspen and be of benefit to Aspen?

2 A Yes.

3 Q To the extent that the bank did its inspections,
4 that would benefit Aspen?

5 A Yes.

6 Q To the extent that the bank got mechanic lien
7 waivers, that would benefit Aspen?

8 A Yes.

9 Q If you had known that the bank was going to pull the
10 plug on this project, would you have signed that forbearance
11 agreement of February 22nd?

12 A No.

13 MR. FORSTADT: Nothing further.

14 MS. LAVELLE: Nothing further.

15 THE COURT: Thank you, sir. You can return to your
16 chair.

17 Before you call your next witness let me see if I
18 can try and distill what I think are the issues you guys are
19 presenting.

20 First, Ms. Lavelle, it's basically your position
21 that you do not have any duties to Aspen other than not to
22 commit fraud. Basically all your other duties are contractual
23 and they don't run to Aspen, they run to the borrower?

24 MS. LAVELLE: Yes, that's -- that is --

25 THE COURT: Basically your argument.

1 MS. LAVELLE: Yeah, that's basically it.

2 THE COURT: Okay. Your argument, Mr. Forstadt, is,
3 first, the intercreditor agreement is unconscionable, and then
4 if we get past that one and I don't buy that argument, then
5 that there are duties owed by AmTrust under Exhibit 5 and
6 Exhibit 13 to Aspen?

7 MR. FORSTADT: Correct.

8 THE COURT: And that those duties were breached?

9 MR. FORSTADT: Correct.

10 THE COURT: And that as a result I should delay
11 their foreclosure sale.

12 MR. FORSTADT: Correct.

13 THE COURT: Okay. Is there more you're going to
14 give me other than that there was what I'm going to
15 characterize as a -- either a fraudulent inducement in getting
16 the execution of the forbearance agreement or the failure to
17 get the lien releases or to use voucher control? Is there
18 more to it?

19 MR. FORSTADT: Any other testimony would be
20 corroborative.

21 THE COURT: Okay. So that those are -- those are my
22 basic issues?

23 MR. FORSTADT: Yes.

24 THE COURT: All right. So you wanted to ask me when
25 you can come back, since it's almost 4:30.

1 MR. FORSTADT: Your Honor, when can we come back?

2 THE COURT: Monday at 10:30. I have to go to Carson
3 City tomorrow to visit with some of the Supreme Court.

4 MR. FORSTADT: Thank you.

5 THE COURT: That will be your last day; right?

6 MR. FORSTADT: Absolutely.

7 THE COURT: How many more witnesses you got?

8 MR. FORSTADT: One.

9 THE COURT: Just one more?

10 MR. FORSTADT: Just one. I think. We still may
11 call Mr. Eisner in rebuttal, but I don't think so.

12 THE COURT: Well, he's not really rebuttal. He's
13 going to be in your case in chief; right?

14 MR. FORSTADT: Well, to rebut -- I want to think
15 about it. But there was testimony that he was involved in
16 negotiations. And he wasn't.

17 THE COURT: Okay. So do either of you think it
18 would be helpful for you to give me some supplemental briefs
19 regarding the arguments as I've distilled them, or do you
20 think they're fully covered in the briefs you've already
21 supplemented, which are these?

22 MR. FORSTADT: I think they're fully covered, Your
23 Honor.

24 MS. LAVELLE: We might want to supplement, Your
25 Honor.

1 THE COURT: Yeah, I thought so. Okay. If you'll
2 get them to me -- if you'll fax them over here tomorrow
3 afternoon before --

4 What time are you leaving?

5 Jill's got to bring the stuff over to me so I can
6 look at it over the weekend.

7 THE COURT RECORDER: Before 4:00.

8 THE COURT: Before 4:00. If you fax it over before
9 4:00 or you have it hand-delivered before 4:00, I'll look at
10 it over the weekend so I can be ready to talk to you about it
11 when you get here on Monday at 10:30. Because my settlement
12 conference cancelled on Monday, so you're in luck. Because
13 otherwise I was booked till the end of 2010.

14 MS. LAVELLE: Is there anything --

15 THE COURT: The caveat is I need more judges.

16 MS. LAVELLE: Is there anything in particular? I
17 mean, I know what I think we're going to be adding; but is
18 there anything else that the Court would specifically request
19 that we brief?

20 THE COURT: Well, the issue of the duties arising
21 out of those two documents is of some concern to me given my
22 history with my builder clients and the way that I know those
23 documents always were negotiated. And I haven't read all of
24 the intercreditor agreement, but there's usually not much in
25 there that runs back to the other side. So I assume that you

1 guys are going to find the provisions for me and say, Judge,
2 this is the one, hang your hat on it. Right, Judge.

3 MR. FORSTADT: No, Your Honor. There is nothing
4 flowing back to the other side. It's totally one way.

5 THE COURT: Okay. Have a nice weekend.

6 MR. FORSTADT: Thanks, Judge.

7 THE COURT: See you on Monday at 10:30. Hopefully
8 my criminals will be very quick and their lawyers will all be
9 here, and I'll be ready for you.

10 MS. LAVELLE: Thank you.

11 (Court recessed at 4:21 p.m., until the following
12 Monday, August 25, 2008, at 10:30 a.m.)

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

10/2/08

DATE