IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DONALD E. GREETHAM; LIEN MANAGEMENT SERVICES, LLC; APG ENTERPRISES, LLC; and STRATEGIC LIEN SERVICES, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2084-VCL
SOGIMA L-A MANAGER LLC; LUBERT-ADLER REAL ESTATE FUND IV, L.P.; LUBERT-ADLER REAL ESTATE PARALLEL FUND IV, L.P.; LUBERT-ADLER CAPITAL REAL ESTATE FUND IV, L.P.; JIR INVESTMENTS LLC, CLINTON LIEN MANAGEMENT LLC and TAX LIEN AMIGOS LLC,	)	
Defendants,	)	
and	)	
SOGIMA L-A LLC and SOGIMA LLC,	)	
Nominal Defendants.	)	
SOGIMA L-A MANAGER LLC; LUBERT-ADLER REAL ESTATE FUND IV, L.P.; LUBERT-ADLER REAL ESTATE PARALLEL FUND IV, L.P.; LUBERT-ADLER CAPITAL REAL ESTATE FUND IV, L.P.; and JIR INVESTMENTS LLC,	)	
Counterclaim Plaintiffs,	)	

DONALD E. GREETHAM; LIEN MANAGEMENT SERVICES, LLC; APG ENTERPRISES, LLC, and STRATEGIC LIEN SERVICES, LLC,

Counterclaim Defendants,

and

SOGIMA L-A LLC and SOGIMA LLC,

Nominal Defendants.

MEMORANDUM OPINION

Submitted: July 29, 2008
Decided: November 3, 2008

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LAMB, Vice Chancellor.

The name "Sogima" is the word "amigos" spelled backward and refers to the eight erstwhile friends who pursued the transaction that led to this litigation. Shortly after the Sogima transaction closed, the amigos began fighting over who would service the assets acquired and, thus, who would benefit from the potentially large servicing fees. The plaintiffs in this action contend they were to serve as the sole and permanent servicer. According to the defendants, the amigos agreed to work together to develop the servicing capabilities of a mutually owned entity the parties identified as the servicer in the operating agreement. This dispute led to an early collapse of the transaction.

The plaintiffs seek a variety of damages, ranging from the costs they claim to have incurred in anticipation of performing the servicing, the costs incurred in servicing the assets for several months, their purported lost return on equity, and the claimed lost profits from the transaction. The plaintiffs' legal claims are based on breach of contract and promissory estoppel.

After trial, the court concludes that the plaintiffs have failed to prove any of their claims, other than a right to payment for servicing the assets for several months. The contract the plaintiffs seek to enforce omits material terms that preclude its enforcement. In addition, the court finds that there simply was no promise made that the plaintiffs would permanently perform the servicing function, and, thus, no basis to find a promissory estoppel.

I.

A. The Parties

The nominal defendants in this action are Sogima L-A LLC ("L-A") and Sogima LLC ("Sogima"). L-A is a Delaware limited liability company and the umbrella entity that contains the combined interests of the parties.[1] Sogima is a Delaware limited liability company, the operating member of L-A, and a 10% stockholder of L-A. Sogima holds the equity interests of the parties to the transaction.[2]

The plaintiffs in this action are Donald E. Greetham, Lien Management Services LLC, APG Enterprises, and Strategic Lien Services LLC ("SLS"). Greetham is a Florida resident and the sole owner of Lien Management Services, a Florida limited liability company, which Greetham set up to be one of the two managers of Sogima.[3] APG Enterprises, a Delaware limited liability company, owns a 37.5% equity interest in Sogima. Greetham manages and owns a 33.33% interest in APG.[4] SLS is or was in the business of acquiring, managing, and

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[1] Lubert Adler (defined *infra*) owns 90% of Sogima L-A and Sogima LLC owns the remaining 10%.

[2] Sogima contributed 1.872% of L-A's initial capital. With respect to the ownership of Sogima, APG owned a 37.5% interest, James Douglas owned a 12.5% interest, Clinton Lien Management LLC owned a 12.5% ownership interest, Tax Lien Amigos LLC owned a 25% interest, and the final 12.5% interest is owned by JIR Investments LLC.

[3] JIR Investments Company LLC was the other manager of Sogima.

[4] While Emil Assentato and Matthew Poiset sold their interest in SLS in early 2006, each maintains a 33.33% ownership interest in APG. Poiset testified that he is a senior corporate finance officer at Tradition North America, Inc. According to Poiset, Tradition is a full service

collecting municipal tax liens.[5] Greetham owns a one-third interest in SLS and was its operating manager at all relevant times.[6]

The defendants, Lubert-Adler Real Estate Fund IV, L.P., Lubert-Adler Real Estate Parallel Fund IV, L.P., and Lubert-Adler Capital Real Estate Fund IV, L.P. (collectively "Lubert-Adler") are wholly owned subsidiaries of Lubert-Adler Partners, L.P.[7] Lubert-Adler is also a member of L-A, and the 90% interest holder.[8] Following the June 29, 2006 dissolution of Sogima, Lubert-Adler formed defendant Sogima L-A Manager LLC ("Manager") to receive Lubert-Adler's interest in L-A and to become the operating member of L-A.[9]

Defendant Tax Lien Amigos LLC is a New Jersey limited liability company and owned a 25% interest in Sogima. Martin Kwartler and Robert Kwartler are the principals of Tax Lien Amigos. The Kwartlers own Kwartler Associates, Inc., a full service commercial real estate company with its headquarters in Waldwick,

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money brokerage firm located in New York City. Emil Assentato is the chairman and chief financial officer of Tradition.

[5] SLS became insolvent around May 2006.

[6] The remaining equity interest in SLS is owned in equal shares by James Douglas, Jr. and Robert Jeffrey.

[7] Lubert-Adler is a "series of private equity real estate funds, whose investors include some of the country's largest university endowments, foundations and public pension plans." Defs.' Post-Trial Opening Br. 6.

[8] Lubert-Ader contributed 98.128% of L-A's initial capital.

[9] On April 25, 2006, Lubert-Adler and Manager "entered into a Transfer and Assumption Agreement (subsequently amended and restated as the Amended and Restated Transfer and Assumption Agreement and Admission Agreement) whereby Manager acquired Lubert-Adler's interest in and became a member of L-A." Pretrial Stip. 4-5.

New Jersey. Robert Kwartler is an executive at Kwartler Associates and manages the company's tax lien investments.

Defendant JIR Investments Company LLC is a New Jersey limited liability company. JIR was a manager of Sogima and owned a 12.5% membership interest. Joel Rosenfeld is the principal of JIR. Rosenfeld is a former senior member of Mintz Rosenfeld & Company LLC, a certified public accounting firm. Rosenfeld has been in business in various capacities with three generations of the Kwartler family and his expertise in accounting is often utilized by Kwartler Associates.

Defendant Clinton Lien Management LLC is a New Jersey limited liability company and owned a 12.5% interest in Sogima. Robert Jeffrey is the principal of Clinton. Jeffrey has been involved in the real estate tax lien industry for over 15 years and has worked for numerous large institutional tax lien investors.

Greetham, Martin Kwartler, Robert Kwartler, Rosenfeld, Jeffrey, James Douglas,[10] Emil Assentato, and Matthew Poiset were the original eight amigos.

B. Procedural History

The transaction at issue (the "Sogima transaction") closed in January 2006. Because, at the time of closing, there was no agreed operating budget and no final form of servicing agreement, Lubert-Adler required a side letter providing for the execution of a servicing agreement and the approval of an operating budget within

[10] Douglas, a non-party, owned the remaining 12.5% membership interest in Sogima.

30 days of closing. Those requirements were not met, and, on April 12, 2006, Lubert-Adler provided Sogima with a notice of default and assumed the management of the enterprise.

The plaintiffs filed their original complaint in this action on April 19, 2006. The complaint included claims seeking the appointment of a receiver for L-A, breaches of fiduciary duty, and promissory estoppel. In response, on May 12, 2006, the defendants filed an answer. In addition, Lubert-Adler and JIR filed counterclaims alleging seven different causes of action.[11]

On May 9, 2006, Manager, Lubert Adler, and L-A initiated a separate action against Sogima, Lien Management, and Greetham.[12] Several days later, this court entered a status quo order in the L-A action and ordered Greetham, Sogima, and Lien Management to transfer the books and records of L-A to Lubert-Adler. Soon thereafter, Lubert-Adler and JIR filed a motion for judgment on the pleadings on their claim seeking the dissolution of Sogima. On June 29, 2006, the court granted that motion and appointed Manager as the operating member of L-A.

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[11] Those causes of actions included: (i) breaches of fiduciary duty; (ii) breaches of the limited liability company agreements of L-A and Sogima; (iii) aiding and abetting breaches of fiduciary duty; (iv) conspiracy; (v) an accounting; and (vi) seeking a judicial dissolution of Sogima.

[12] The complaint sought, among other things, the following: an order (i) declaring that Sogima materially defaulted on its responsibilities as operating member of L-A; (ii) declaring that Manager was the new operating member of L-A; and (iii) providing that Sogima deliver to Manager all of L-A's books, operating accounts, and records.

On April 10, 2007, the plaintiffs moved to amend their complaint.[13] The defendants filed an amended answer and, later filed amended counterclaims including, among other things, a claim against SLS for a breach of an oral interim agreement and negligence. The court held a three-day trial in April 2008. The parties thereafter filed post-trial briefs.

C. Facts

1. The Tax Lien Business

The assets acquired in the Sogima transaction were several portfolios of tax liens and related property. A real estate tax lien is a statutorily created asset secured by real property. Many state and local governments sell tax liens to third-party investors to ensure timely receipt of a portion of the taxes owed on the property. In order to encourage investors to purchase these liens, state and local governments grant senior priority status, subordinated only by other liens imposed by the federal or state government, including subsequent real estate tax liens. Tax liens are purchased at auction, in negotiated bulk sales, and through securitizations.

Realizing profit in the lax lien industry occurs through redemption, when the property owner pays off the amount owed, or by a sale of the underlying property

[13] This amended complaint added SLS as a plaintiff, a breach of contract claim, and a promissory estoppel claim.

(REO) after a foreclosure proceeding.[14] The requirements for maintaining the validity and priority of tax liens, as well as the foreclosure proceedings, differ in every jurisdiction and are complex and highly regulated.

2. Greetham's History In The Tax Lien Business

Greetham began his career as a staff accountant at Ernst & Young in Florida in 1989. In 1994, Greetham left Ernst & Young to work at a small company called Capital Asset Research Corporation ("CARC"), which was seeking to become a large, sophisticated purchaser of real estate tax liens. CARC hired Greetham as the vice president of finance and administration. He was charged with overseeing the analysis of the tax lien data and the development of the necessary model to execute CARC's strategy. Eventually, Greetham also oversaw the development of post-acquisition software. Greetham ultimately became CARC's chief financial officer. As CFO, Greetham was charged with overseeing the "servicing"[15] of the CARC portfolio, including the pre-acquisition due diligence and the post-acquisition maintenance.

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[14] In New Jersey, and several other states, the holder of a tax lien must pay off the entire lien to force a foreclosure.

[15] "Servicing" refers to "[a] wide array of tax lien certificate pre-purchase, post purchase, and pre-foreclosure tasks provided to aid high volume purchasers in the management of their tax liens. Common functions of many servicing agreements include pre-purchase due diligence; bidder recruitment and training; bidder representation; bid book compilation; preparation of daily, weekly or monthly redemption and collection reports; as well as custodial and records management. Full service or 'turnkey' providers will also compile aging reports on each portfolio and prepare in-depth data analysis reports. Still others will assume responsibility for management of all acquired real estate or REO. Institutional tax lien investors will often internalize these servicing functions within their own organizational structures." Defs.' Pretrial Br. Ex. B.

According to Greetham, CARC's strategy generated very large returns. At trial, he testified that during his employment with CARC the company achieved return on equity in the very high double digits and during some periods well over 100% IRRs (internal rate of return). On the heels of these achievements, CARC was sold to MBIA, Inc. in 1999. Greetham left CARC at that time.

3. The Breen Transaction

After leaving CARC, Greetham worked for about one year as the chief financial officer of a Florida law firm, then returned to the tax lien business. In early 2001, Greetham received a call from Poiset, whom he met while working at CARC, seeking Greetham's participation in a new tax lien venture.[16] At the time, one of Poiset's clients, a large institutional tax lien investor called Breen Capital Asset,[17] planned to dissolve and put its substantial tax lien portfolio up for sale. Poiset, who worked for Assentato, was interested in putting together a group of people to acquire the Breen portfolio, manage the portfolio, service it, and liquidate it. Poiset and Assentato wanted Greetham to oversee the acquisition and the development of the servicing operations.

[16] One of Poiset's clients invested in tax liens through CARC, and Greetham and Poiset met and became friends. At trial, Poiset testified that he and Greetham were very close and during that two-year period they spoke to each other about two times a week.

[17] Breen Capital was located in Bordentown, New Jersey.

To help finance the approximately $60 million purchase price, Assentato and Poiset contacted Robert Jeffrey,[18] who had worked at CARC in the early 1990s. Poiset asked Jeffrey to locate other investors willing to acquire a portion of the Breen portfolio. Jeffrey contacted the Kwartlers, two of his longtime business associates, who he knew had made some investments in New Jersey tax liens. The Kwartlers were interested and had some familiarity with the Breen portfolio, knowing that a large part of it was in New Jersey, where the Kwartlers had extensive experience investing in real estate.[19] Therefore, they agreed to participate in the transaction, and Jeffrey introduced the Kwartlers to Greetham and Poiset.

Greetham, Poiset, Assentato, Jeffrey, and Douglas, operating together as the "Strategic" group, planned to purchase $45 million of the portfolio with the Kwartlers acquiring the remaining $15 million. While the parties collaborated on the acquisition, they intended to separate their interests immediately after the closing and manage their respective liens independently. The Strategic group

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[18] Jeffrey has been involved in tax liens for over fifteen years. He worked at CARC for several years beginning in 1992 and then moved on to several other large tax lien investors. According to Jeffrey, he has "worked for most of the major players in the tax lien industry." Trial tr. vol. III, 752.

[19] Greetham asserted that SLS actually serviced the Kwartlers' portion of the Breen portfolio because they did not have the proper infrastructure or capability. Robert Kwartler, however, testified that, since the liens they acquired were in New Jersey, they were able to service their portfolio. Specifically, Robert Kwartler stated they "were very familiar with New Jersey, and felt very comfortable with New Jersey tax liens. And . . . just about everything [they] purchased [in the Breen transaction] was in New Jersey." Trial tr. vol. II, 596.

would service its portion of the portfolio, and the Kwartlers, with their longtime accountant and business associate, Joel Rosenfeld, (the "Kwartler group"), planned to service their $15 million portion.

In connection with the Breen transaction, the Strategic group created a number of entities named Strategic,[20] including SLS. The Kwartlers group transferred their liens primarily into existing entities associated with their commercial real estate businesses.[21]

Following the closing of the transaction in early 2003, the parties maintained office space in the same building in New Jersey and collaborated on operating their tax lien portfolios.

4. The Sogima Transaction

After the early success of the Breen transaction, the Kwartlers were again interested in growing their tax lien business. To that end, Robert Kwartler approached Greetham and Poiset in August 2004 to discuss a possible partnership. While the Strategic group were receptive to the idea, the parties did not meet again until March 2005 to further discuss the partnership. That meeting included Greetham, Poiset, Rosenfeld, and Martin Kwartler. At the March meeting, the

[20] Liens from a particular year or from a particular jurisdiction were grouped into separate entities within the Strategic framework.

[21] The Kwartler group formed a company called YellowPad Associates LLC in connection with the transaction to hold $1.5 million of the liens they acquired. YellowPad ultimately became the servicer for the Sogima tax lien portfolio.

parties confirmed their mutual interest in pursuing a transaction and decided to move forward. The general idea was to secure outside financing sources to purchase and leverage a large, multi-jurisdictional portfolio of tax liens. This plan included the immediate acquisition of the Strategic tax lien portfolio.

The Kwartlers were interested in pursuing a transaction with Greetham because of his servicing capabilities. Greetham's motivation was more complex. Since the plan included the acquisition of the Strategic portfolio, Greetham, along with the other members of the Strategic group, stood to receive a sizable payout in connection with the transaction. At the same time, SLS, or some other enterprise he held an interest in, could continue to service the Strategic portfolio as part of a larger portfolio. Additionally, the Kwartler group claimed to have access to large institutional investors with the ability to provide or find the financing for a much larger operation than SLS then ran.

After the March 2005 meeting, Martin Kwartler initiated contact with Gerald Ronon, a partner at Lubert-Adler, a possible equity investor. According to Greetham, Martin told Ronon of the success the parties achieved in the Breen transaction and the servicing capabilities of SLS. Martin asked Ronon if Lubert-Adler would be interested in investing in a tax lien venture. Although not experienced in the tax lien business, Ronon expressed interest in exploring a

transaction. Ronon agreed to set up a meeting with the Kwartlers and the Strategic group in April 2005.

The Kwartlers, Greetham, and Poiset met with Ronon on April 20, 2005 to further discuss a proposed transaction. The plan described to Ronon envisioned an initial purchase of approximately $10 million in tax liens from three separate portfolios. About 80% of the tax liens would be purchased from the Strategic portfolio; liens from two unrelated entities would make up the remaining 20%. This acquisition would be followed by far larger acquisitions as more financing became available. Specifically, the plan contemplated the purchase of $75 million to $100 million in tax liens annually in order to maintain a constant portfolio value of $100 million to $125 million. To achieve the desired level of profitability, the proposal was to employ 20% equity and 80% debt. Securing financing to leverage the portfolio was particularly important to Lubert-Adler because it would provide the scale necessary to be consistent with its other investments.

Based on the April 20, 2005 discussion, Ronon decided to move forward with Lubert-Adler's consideration of the transaction. On June 20, 2005, he sent Greetham, Rosenfeld, and Robert Kwartler an email asking them "to put together an impressive book to secure desirable financing . . . ."[22] In response, Greetham prepared a confidential financing memorandum ("CFM") explaining the tax lien

[22] PX 4.

business, the experience of the Sogima principals, and the general terms of the transaction. The CFM identifies SLS as the servicer and describes its experience in servicing tax liens. The CFM also identifies Robert Kwartler and Jeffrey as "operating principals . . . involved in the day-to-day operations."[23]

During the summer and early fall of 2005, Ronon and the parties met with several lenders in pursuit of a bank commitment to fund a $50 million revolving credit line. Only IXIS Corporate & Investment Bank expressed interest, and the parties entered into negotiations. The credit facility never closed, however, because IXIS wanted to see a servicing agreement and budgetary numbers, neither of which was available.[24] In addition, Ronon became distracted with other matters and stopped pursuing the transaction.

Lubert-Adler indicated renewed interest in the fall of 2005. The Kwartler group and the Strategic group met for dinner in New York City on November 30, 2005.[25] At that dinner, the parties reiterated their interest in moving forward

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[23] PX 7 at 13.

[24] On September 8, Lubert-Adler's attorneys requested a draft of the servicing agreement from Greetham. Greetham sent a draft on September 13. In his email, Greetham refers to the draft servicing agreement as "a form of servicing agreement which . . . fits the mold," and he states that he "modified [the agreement] off of a previous document that our attorney . . . drafted with us some time back." JX 6. Greetham's email also states that he copied Robert Kwartler and Rosenfeld because they had not seen the document, but he failed to actually copy them on the email. Greetham conceded this at trial and Robert Kwartler and Rosenfeld testified that they never received the agreement in this time frame.

[25] Assentato and Douglas did not attend this dinner meeting.

"shoulder to shoulder."[26] The parties also addressed an emerging dispute about the servicing function of the partnership. Simply put, the Strategic group wanted SLS to serve as the sole and permanent servicer and the Kwartler group wanted a role in the servicing of the portfolio. This was to become a key issue that caused the collapse of the Sogima transaction and led directly to the current litigation.

At trial, Poiset testified unconvincingly that at the dinner the Kwartlers backed away from their interest in sharing in the servicing revenue stream. Greetham shared Poiset's recollection of the meeting. The Kwartler group members and others recalled things very differently, testifying that the amigos agreed at the dinner to collectively service the portfolio through a mutually owned Sogima servicing entity. According to Rosenfeld, the Strategic group allayed his concerns by agreeing to designate a jointly owned entity, named Sogima Servicing Company, as the servicer. Rosenfeld characterized Sogima Servicing as a management company, where Greetham would perform the modeling and clerical side of the servicing business. In addition, Robert Kwartler and Jeffrey would manage the REO in New Jersey, where the bulk of the tax liens were located.[27] Rosenfeld intended to assist in the accounting function of the entity. In short,

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[26] Trial tr. vol. II, 611; Trial tr. vol. III, 735.

[27] Specifically, Rosenfeld testified that Robert Kwartler and Jeffrey would help "overlook the REO, maybe attract more liens . . . due diligence process, anything else that may have come up." Trial tr. vol. III, 705.

Rosenfeld "expected everyone to be working in this deal" and contributing to the servicing function.[28]

The emails exchanged between the parties in the ensuing days illustrate these conflicting impressions and how this issue became the key dispute between the parties. On December 3, Greetham circulated the draft operating agreement for L-A and listed SLS as the servicer. The following day, Rosenfeld asked "is [SLS] the servicer or another entity owned by the Amigos?"[29] Robert Kwartler also reviewed the draft agreement, spoke with Rosenfeld about the provision, and sent Greetham a more forceful email. This message repeated his understanding that Sogima Servicing would be the servicer and that he and Rosenfeld would participate in the servicing function.

On December 5, Greetham sent an irritated response recounting his understanding from the November dinner that the parties agreed SLS would be the sole and permanent servicer.[30] Significantly, Greetham suggested, as a solution to the disagreement, that the Kwartlers purchase Assentato's and Poiset's interests in

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[28] *Id*.
[29] JX 3.
[30] Greetham's email reads, in pertinent part: "I REALLY, REALLY, REALLY, thought we had beat this dead horse to death. The deal we put on the table is that we are going out and securing financing and product together. . . . That being said . . . it was NEVER contemplated that [SLS] just throw in the Servicing Company . . . . If we want to bring that back up, then let's discuss it from the perspective of buying out [Poiset and Assentato] from the servicing entity." JX 4 (emphasis in original). Rosenfeld and Jeffrey were copied on this email.

SLS.[31] The following day, Robert Kwartler responded to Greetham and explained his understanding of the servicing arrangement more thoroughly. Specifically, he restated that the tax lien portfolio would be serviced "by a jointly owned servicing entity which would service whatever product" the parties acquired together.[32] In addition, he repeated that SLS would serve as "a sub-servicer for Sogima . . . at a rate low enough to leave something on the table for Sogima Servicing Company."[33] He also expressed interest in considering buying out Assentato and Poiset in the future, a suggestion Rosenfeld rejected. There is no response from Greetham to this email in the record, but additional emails sent in the days leading up to the closing reflect the same basic disagreement regarding the servicing of the Sogima portfolio.

5. The Strategic Partners Begin To Disagree And SLS Suffers

Greetham's suggestion about buying Assentato and Poiset out of SLS reflected the latters' growing disenchantment with SLS and the deal. After the November dinner meeting in New York, Poiset, Greetham, and Jeffrey went out for drinks at a local pub. While there, Poiset announced that he and Assentato did not want to proceed with the Sogima deal and, in fact, wanted out of SLS.

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[31] As is discussed *infra*, following the November 2005 dinner in New York, Greetham, Poiset, and Jeffrey went out together for a drink. According to Jeffrey, Poiset demanded that they shut down SLS because he and Assentato were no longer willing to fund its operation.
[32] JX 5.
[33] *Id.*

According to Jeffrey, Poiset "was basically screaming and yelling that he wanted out of the tax lien business" and told Greetham to "[c]lose [SLS] down" because Assentato and he would no longer fund the operation.[34] Greetham admitted at trial that Poiset's discomfort with the Sogima deal was directly related to the Kwartler group's insistence that Sogima Servicing, not SLS, act as servicer for the Sogima portfolio. Given that Poiset and Assentato were the majority stockholders of SLS, and they controlled SLS's only significant client, Jeffrey feared that SLS was effectively out of business.

At trial, Greetham testified before Jeffrey and did not address the conversation that occurred after the November 2005 dinner. At his deposition, however, Greetham stated that they merely discussed the status of the transaction and that he did not remember Poiset stating he wanted to be bought out, although Greetham conceded that he may have. To be clear, Greetham maintained that nothing out of the ordinary happened at that meeting. Greetham did testify, however, that there was dissension among Poiset and the Kwartlers regarding whether SLS would be the servicer of the tax lien portfolio. According to Greetham, Poiset had "grown concerned and untrusting of the intentions of the Kwartlers" and Greetham wanted to purchase Assentato's and Poiset's interests in SLS to eliminate this dissension.

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[34] Trial tr. vol. III, 758-59.

Despite this conflicting deposition testimony and Jeffrey's flatly contradictory trial testimony, Greetham did not offer any rebuttal testimony. In addition, Douglas, Greetham's current business partner, largely corroborated Jeffrey's version of the story. At his deposition, Douglas testified that while he was not present at the November meeting he learned from Jeffrey and Greetham that Assentato and Poiset wanted out of the servicing side of the business. Indeed, Douglas recalled discussing with Greetham and Jeffrey how Assentato and Poiset were not interested in underwriting the servicing of any future acquisitions. According to Douglas, he, Greetham, and Jeffrey decided to purchase Assentato's and Poiset's interests in SLS to secure a controlling interest so they could complete the Sogima deal and the three of them could receive all the servicing profits.

In late November, Ronon transferred responsibility for the Sogima transaction, among other deals, to James Riordan, a vice president at Lubert-Adler. Riordan spoke with Ronon regarding the background of the transaction and he reviewed the CFM. After some due diligence into the proposed deal, Riordan contacted Greetham and requested a copy of the current cash flow summary of the three portfolios targeted for acquisition, including the Strategic portfolio, as well as a draft of the servicing agreement.

Greetham provided Riordan with a copy of the CFM on January 13, 2006, and a cash flow analysis and the draft servicing agreement on January 16, 2006.[35] Riordan asked for this information because he believed it was the baseline information necessary to prepare the investment summary. Riordan used the CFM to compose an investment summary, dated January 18, 2006, that he presented to the Lubert-Adler investment committee for approval of the deal.

The plaintiffs rely on the investment summary because, like the CFM Greetham prepared, it identifies SLS as the servicer. As the defendants note, however, the investment summary states that the transaction contemplated the formation of "an operating company . . . with members of [SLS] and Kwartler Associates . . . firms experienced in the acquisition and management of diversified portfolios of tax liens, tax deeds and real estate acquired through the foreclosure process."[36] The investment summary also identified Robert Kwartler and Jeffrey as day-to-day operating principals. At trial, Riordan also testified that he understood the servicing organization to be as follows:

> [T]here would be a separation of duties between the [New Jersey] office and the [Florida] office, perhaps along geographic lines as it related to the day-to-day granular, clerical aspects of running the portfolio. And that high level strategic oversight would be provided by . . . the eight individual members of Sogima LLC. . . . with over

[35] The draft servicing agreement was the same agreement sent to Ronon on September 13, but this time Greetham copied Rosenfeld.
[36] PX 51; Trial tr. vol. II, 516-17.

> half or close to half of the investment collateral located in the State of New Jersey, I took a lot of comfort from the fact that half of the principals were in New Jersey.[37]

Based on the investment summary and Riordan's presentation, the Lubert-Adler investment committee approved $10 million in equity financing with the understanding that any additional financing would require separate approval.[38]

6. The Days Before Closing

On January 23, 2006, Greetham sent another draft of the operating agreement to the Kwartler group. This draft, despite the earlier objections, continued to identify SLS as the servicer. Several hours later, Rosenfeld responded to this provision, stating: "I still see that the Servicer is [SLS]. It is our understanding that the servicing company would be Sogima or a Sogima entity."[39] In response, Greetham refused to identify Sogima Servicing as the servicer unless the Kwartlers purchased Assentato's and Poiset's interests in SLS.[40]

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[37] Trial tr. vol. II, 515-16. Riordan also testified that he understood SLS's role as providing "the day-to-day clerical and administrative support for the overall portfolio, whether it was in New Jersey, Florida, Alabama, wherever." Trial tr. vol. II, 522.

[38] As the plaintiffs point out, the investment summary contemplated acquiring "up to and additional $75-100 million of tax liens and tax deeds annually, as well as expand into new strategic markets such as Massachusetts and California." DX 51 at 1. Riordan, however, testified at trial that while Lubert-Adler certainly hoped to purchase these additional liens, doing so was contingent on the existing portfolio demonstrating adequate performance and that Lubert-Adler never committed to purchasing additional tax liens, with the exception of subordinate liens that came available in the existing portfolio.

[39] JX 10 at Bates No. 0003004.

[40] This email illustrates Greetham's understanding of the disagreement between the parties concerning the role of SLS. Greetham argues that he only agreed to identifying Sogima Servicing as the servicer in the LLC agreement because he thought it would be merely a pass-through entity. However, this January 23 email, four days before closing, illustrates that Greetham knew the Kwartlers intended Sogima Servicing to be more than a pass-through entity.

On January 24, 2006, Robert Kwartler replied to Greetham by reiterating his understanding that Sogima Servicing would be the named servicer, that SLS would service the portfolio on an interim basis, and that the parties would work together to build Sogima Servicing into a servicing platform.[41] In this response, Kwartler wrote that SLS would be a subservicer for a period of time, but that Sogima/L-A was to retain control of the servicing permanently. As with the last email exchange on this subject, there is no response from Greetham in the record. However, the day before the closing Greetham agreed in an email to name Sogima Servicing as the servicer in the operating agreement.[42]

According to Greetham, Sogima Servicing was to be merely a pass-through entity to provide the Kwartlers and Rosenfeld with some oversight of the servicing of L-A. In fact, Greetham stated that he endorsed the idea because the Kwartlers and Rosenfeld, as owners in the entity, would have some liability for the servicing.

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[41] Further evidence of the disagreement and Greetham's understanding of the Kwartlers' position can be found in an email Jeffrey sent to Greetham on the same day. Jeffrey sent Greetham a notice entitled "Most Urgent" stating "please deal with [Robert Kwartler and Rosenfeld] with this name thing – Sogima Servicing vs. SLS in Docs. You've got them as crazy as I've seen them in a long time. They are spooked– beyond control–and I'm trying to calm them down . . . ." JX 18.

[42] Specifically, Greetham stated: "I think we have resolved the issue of Sogima vs. SLS as named servicer in the Sogima L-A LLC Agreement. We have agreed that there will be a pass-through of fees to SLS for its servicing fees and costs (as with the current draft of the agreement), but that Sogima would be the named servicer in the agreement with L-A. Once the servicing number begins to show a substantive profit, the 8 amigos in Sogima will address the roll-in of the SLS platform directly into Sogima at that time." JX 12. Despite the language concerning the "roll-in" of SLS, Greetham testified that Rosenfeld expressly told him, in the days before the closing, they the Kwartler group would never purchase SLS.

Greetham also thought this structure made sense because the Kwartlers and Rosenfeld were expecting some level of compensation through the servicing entity.

On January 26, Greetham notified Riordan that the operating agreement should name Sogima Servicing, not SLS, as the servicer. Greetham informed him by email that "[t]he mechanics would be the same and it would merely be a pass through to SLS through Sogima."[43] Greetham relies on the "pass through" language in this email to demonstrate that Sogima Servicing was never intended to be more than a shell company. However, Greetham did not copy the Kwartlers or Rosenfeld on the message, providing them no opportunity to respond. Riordan objected to the change due to the possible conflict of interest in having Sogima, the operating partner, entering into a servicing agreement with an entity that was the equity operating partner.[44] Most important, Riordan testified that he did not interpret this change as modifying his understanding as to how the company would be operated.

Greetham misunderstood Riordan's objection, thinking he was objecting to SLS not being the named servicer, stating:

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[43] JX 11.

[44] Trial tr. vol. II, 531-32 ("Q. And did you have concerns about Mr. Greetham's proposed change? A. . . . For me, entering into a third party servicing agreement with an entity that also was your equity operating partner in the transaction was a clear violation of arm's-length dealing. It was not acceptable to me. I didn't really care what they called it. It just couldn't be the same name as my operating counterpart.").

> This issue has been long-brewing by some of the partners with Kwartler. The reality is that 5 of the 8 partners in Sogima are the owners of SLS anyway. The other 3 partners cannot control Sogima without the SLS partners anyway. My thinking from the L-A side was that from a liability perspective, this ties the servicing responsibility to the Sogima equity holder in Sogima L-A LLC.[45]

Once the name of the servicing entity was changed to Sogima Servicing LLC, Riordan agreed to the change in the L-A operating agreement.

7. Closing

On January 27, 2007, the Sogima transaction closed. The parties formed L-A on January 30, 2006, pursuant to a limited liability company agreement based on the draft circulated by Greetham on January 23. The significant change in the L-A operating agreement was the identification of Sogima Servicing as the servicer. The operating agreement also granted Lubert-Adler certain approval rights over numerous L-A corporate actions, including broad approval over the operating budget. The operating agreement named Sogima as the operating member, charged with the day-to-day management and operation of the business.

The operating agreement also required Sogima to prepare, and submit to Lubert-Adler for approval, an initial operating plan and budget for 2006 within sixty days, or March 30, 2006. In addition, the operating agreement provided for

[45] JX 11. Greetham sent this email at the same time he was orchestrating the purchase of Assentato's and Poiset's interests in SLS. Thus, he was quite certain that SLS would actually be owned only by himself, Jeffrey, and Douglas, yet he failed to inform Lubert-Adler of this possibility.

Sogima to furnish Lubert-Adler with certain monthly reports concerning the status of the business. Lubert-Adler also retained the right to remove Sogima as the operating member and assume operating control of L-A in the event of a breach of any material provision of the operating agreement.[46]

With respect to the servicing agreement, Riordan believed Greetham's January 16 draft was so "defective" that a side letter was needed requiring execution of a final agreement within 30 days. The relevant text of the side letter stated:

> As set forth in the [operating agreement], [Sogima Servicing] and [Sogima L-A] to enter into Servicing Agreement within thirty . . . days of the date of the [operating agreement]. The form of the Servicing Agreement must be acceptable to [Lubert-Adler] and in substantially the same form as the draft provided to [Lubert-Adler] on January 16, 2006 . . . .[47]

Despite the "in substantially the same form" language, Riordan testified at trial that the draft servicing agreement was "unexecuted" and, given his comments, preliminary in nature.

Following the formation of L-A, Lubert-Adler contributed approximately $8,591,000 and Sogima contributed approximately $114,434 to acquire liens.

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[46] The operating agreement also contained the following choice of law provision: "This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to the principles of conflicts of law. The parties agree that any dispute arising in connection with this Agreement shall be resolved in the Chancery Court in the State of Delaware, and each party hereby submits to the jurisdiction of that court." DX 66 at Bates No. 0004060-61.

[47] DX 42.

While Sogima was supposed to contribute 10% of the equity, it was unable to fund its portion on the date of the closing. As a result, Lubert-Adler provided over 98% of the equity.

There was no financing in place at the time of closing. In fact, the parties had not even arranged any tentative financing transaction. Nevertheless, Lubert-Adler and Greetham pushed the closing forward hoping to locate suitable financing afterward.

The record shows that Greetham controlled the closing on behalf of the amigos. For example, he executed the side letter on behalf of Sogima and Sogima Servicing. Despite being co-manager of Sogima, Rosenfeld testified that he had no involvement in the closing and that Greetham initiated the closing without his knowledge. In fact, Rosenfeld testified that immediately before the January 27 closing he received a "frenzied" phone call that he had to wire $14,500 to fund Sogima's portion of the capital contribution. At trial, Rosenfeld noted his disapproval of Greetham's conduct, especially considering that Greetham was on both sides of the transaction. In addition, Rosenfeld testified that he was very surprised to learn the transaction closed without all the documents in place, including the servicing agreement.

Greetham, Douglas, and Jeffrey agreed to use a portion of the proceeds from the Sogima transaction to purchase Assentato's and Poiset's interests in SLS for a

total of $750,000. Prior to this agreement, Greetham attempted to convince the Kwartlers to purchase Assentato's and Poiset's interest in SLS. The Kwartlers refused. Greetham did not notify the Kwartler group or Lubert-Adler of his agreement to purchase those interests.

8. Post-Closing

Immediately after the closing, SLS serviced the tax lien portfolio and Greetham held all of L-A's records at SLS's office in Florida. Since Rosenfeld understood his role to be the accountant for Sogima Servicing, he began asking Greetham to turn over the books, records, and cash of L-A. According to Rosenfeld, Greetham repeatedly evaded his requests and criticized his efforts to obtain the records from Greetham's employees. As a result, Rosenfeld stated that he felt "shut out of the deal" because Greetham was ignoring the existence of Sogima Servicing and refusing to submit necessary financial information. Rosenfeld and Robert Kwartler traveled to Florida in order to resolve the disagreement, but Greetham refused to definitively address their concerns, and no resolution was reached.

Also, following the closing, Riordan resurrected discussions with IXIS to secure a revolving credit line. As before, IXIS wanted to see an executed servicing agreement as part of its due diligence process. According to Robert Kwartler, no progress had been made on the draft agreement because Greetham was focused on

Sogima purchasing SLS. In order to respond to Riordan, Rosenfeld sent Greetham an email on March 1, 2006, inquiring about the draft servicing agreement. Greetham sent a draft servicing agreement to Rosenfeld, and said he was "fine with the agreement as it stands so long as we execute the direct pass through to SLS."[48] Significantly, this draft was the same "form" agreement Greetham circulated to Lubert-Adler's attorneys on September 13, 2005 and in January 2006, but failed to address the comments Riordan made before the closing. Since Greetham conducted the closing, Rosenfeld was never made aware of these comments.

Rosenfeld examined the draft, made comments, and reviewed them with Robert Kwartler and Jeffrey. On March 17, Rosenfeld sent their collective comments to Greetham.[49] The most important comment was to include an audit right over SLS's servicing revenues. Greetham was adamantly opposed to this provision, stating: "if we do work during the term of this agreement and get paid for it and it is under the parameters of portfolio size, etc. we will tell you. If we don't, it is fraud which is a basis for termination of the agreement."[50] Quite naturally, Robert Kwartler and Rosenfeld were disturbed by this response, which led to further disagreement and misunderstanding.

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[48] DX 81.
[49] These comments followed another meeting Rosenfeld had with Greetham. Rosenfeld convened the meeting to discuss the operations of the entity given the lack of communication and lack of disclosure by Greetham. Rosenfeld testified at trial that he started to actually yell at Greetham due to the situation.
[50] DX 88.

On March 21, 2006, Greetham circulated a draft of an "operating and acquisition budgets" projecting the portfolio acquisitions for 2006 and a draft operating budget, which listed SLS's projected servicing fees. The operating and acquisition budgets were predicated on L-A making an additional $285 million in acquisitions through 2006. At trial, Riordan testified that he had never seen this document before the litigation and that Lubert-Adler never approved any acquisitions above the original $10 million contribution. According to Riordan, any such acquisitions would have depended "very directly on the actual operating performance of the existing portfolios."[51] Greetham testified that he relied on Jeffrey, Douglas, Robert Kwartler, and Poiset for the data underlying the $285 million figure. According to Jeffrey, the figures in the operating and acquisition budgets were "just plans" and "even the New Jersey auctions were . . . a hope and a prayer. . . ."[52] In fact, $50 million of the proposed acquisitions were based on a portfolio that was merely soliciting buyout offers for valuation purposes and another $150 million was based on a portfolio whose owner was not interested in selling.

The Kwartler group never received the draft operating budget before Greetham's March 21 email and Lubert-Adler never received it before this

[51] Trial tr. vol. II, 545.
[52] Trial tr. vol. III, 771.

litigation. This budget listed a servicing fee during 2006 of approximately $1.8 million, a number far higher than the $460,000 found in the cash flow model Greetham sent to Riordan on January 16. At trial, Greetham contended that similar estimates of the servicing fee were circulated in earlier cash flow models, including the report Greetham circulated in early 2005.

By late March, the status of the partnership had become dire. The tension between the parties concerning the role of SLS was evident in a letter Rosenfeld sent to Greetham on March 29, 2006. That letter states, in pertinent part:

> [I]t is essential that we all understand that the "game plan" is not to revive and build SLS. It is our understanding that in the future SLS would be rolled-up into Sogima Servicing (of course we will have to work out valuation issues). Until the time of roll-up, SLS serves as a sub-contractor for Sogima Servicing.[53]

Due to the disagreement between the parties and the falling level of trust, Rosenfeld included a comment providing for a termination right without cause after sixty days notice. Rosenfeld also noted that Greetham's budget improperly reflected SLS's total overhead expenses without reduction to reflect SLS's unrelated servicing business. On March 20, 2006, Greetham responded, stating the "termination provisions are not open for negotiation."[54]

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[53] JX 22.

[54] DX 93. Greetham's email also stated, in pertinent part: "From the very beginning, the Sogima L-A transaction was a tax lien and REO acquisition . . . for which the total overhead of SLS ($1.8 million) had been a built-in cost required to monetize existing and build future portfolios. When the desire to roll the entire SLS platform into Sogima was first expressed, our requirement that the partners of SLS be paid for the servicing platform was made crystal clear. This was the

Given the clear impasse between the parties at this point, they reluctantly approached Lubert-Adler and revealed the disagreement concerning SLS, the budget, and the servicing agreement. Greetham contacted Riordan to dispute the sixty-day termination comment in Rosenfeld's March 30 letter. Riordan agreed with Greetham that the provision was unfair and he initially agreed to grant SLS a two-year term in the servicing agreement. However, twenty minutes after agreeing to the term over the phone, Riordan sent Greetham an email stating that he was "uncomfortable" with a two-year term and he would only accept a one-year term, as he stated at the time of the closing.

At trial, Riordan recounted his disappointment with the parties: they had failed to execute the servicing agreement in the thirty-day window, they had failed to agree to a budget, and they were fighting with each other. In an attempt to salvage the transaction, on April 1, 2006, Riordan sent an email to Rosenfeld and Robert Kwartler directing them to work out their dispute with Greetham. Riordan stated that "SLS's involvement was a core component of the business case and a key element of the platform's ability to succeed" and Riordan urged them to "work things out with SLS."[55] Riordan also stated that absent a resolution on this issue

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only basis by which a 'roll-up' to Sogima was to be considered. The need to agree on the amount of the payment has been expressed to all parties on several occasions over the last 9 months." *Id.*

[55] DX 97.

"there is no possible rationale for new investment" despite the future growth of the business being a "core underpinning of our collective desire to become partners."[56] Riordan testified that his email meant to express his "extraordinary frustration" that "a transaction with such great prospects [went] so bad so quickly."[57]

The parties were unable to resolve their disagreements. Consequently, on April 12, 2006, Lubert-Adler provided Sogima with a notice of default, removed Sogima as the operating member, and replaced Sogima with Manager.[58] Without a servicer and with only limited knowledge of the tax lien industry, Riordan contacted the executive director of the National Tax Lien Association seeking a recommendation for a replacement to take over servicing of the portfolio. Riordan received a recommendation and a bid from the suggested servicer. However, Riordan testified that with litigation on the horizon he was reluctant to enter into a contract. Therefore, Riordan looked to the Kwartlers and entered into a servicing arrangement with the Kwartlers' company, YellowPad Associates, to service the portfolio.

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[56] *Id*.

[57] Trial tr. vol. II, 552. The plaintiffs cite this letter as evidence that the Kwartlers were acting as Lubert-Adler's agent in this transaction, pointing out that Greetham was not copied on the letter. Riordan expressly denied that the Kwartlers were ever acting as Lubert-Adler's agent or that he ever told Greetham that the Kwartlers were acting as his agent.

[58] In the notice of default, Lubert-Adler cited: "(i) Sogima's failure to prepare and submit to Lubert-Adler a proposed Operating Plan and Budget; (ii) Sogima's failure to submit monthly reports; and (iii) Sogima's failure to cooperate with Lubert-Adler in order to enter into the Servicing Agreement." Pretrial Stip. 6. On April 28, 2006, Sogima L-A Manager sent Sogima a replacement notice referencing the notice of default and Sogima's failure to cure within the required ten-day period. *Id*.

Riordan testified that no additional portfolios have been purchased because "the business case is . . . shot."[59] According to Riordan, Lubert-Adler has still not received any return on its investment and has had to contribute approximately $600,000 in order to cover all of the parties' capital calls.

II.

The plaintiffs' claims sound in contract, promissory estoppel, and fiduciary duty. The plaintiffs seek four separate categories of damages under these theories. First, the plaintiffs seek $7,793,287 in lost servicing profits under contract, or, alternatively, under promissory estoppel. The plaintiffs assert that the draft servicing agreement attached to the side letter is an enforceable contract because there were no material terms outstanding on the date of closing. According to the plaintiffs, the comments proposed by Lubert-Adler were not material and the Kwartler group's comments in March came too late. Under promissory estoppel, the plaintiffs assert that they reasonably relied to their detriment on the promises of the Kwartler group and Lubert-Adler, as evidenced by the CFM and investment summary, that they would serve as the sole and permanent servicer.

Second, the plaintiffs seek, again pursuant to promissory estoppel, the $250,000 Greetham paid to acquire Assentato's and Poiset's interests in SLS in connection with the January 27, 2006 closing. This claim is based on the same

[59] Trial tr. vol. II, 557-58.

purported representation underlying the plaintiffs' promissory estoppel claim for lost servicing profits. Third, the plaintiffs seek $2,541,542 in lost return on equity as a result of the defendants' alleged breaches of fiduciary duties.[60] Lastly, the plaintiffs seek $481,014 in out-of-pocket expenses incurred servicing the portfolio from January 27, 2006 through the dissolution of Sogima.

The defendants contend that the plaintiffs' contract claim for lost servicing profits fails because the unexecuted draft servicing agreement had material terms, including term and price, outstanding at the time of the closing. In this connection, the Kwartler group alleges that their comments were timely made on March 17, including, as a material term, the right to audit SLS's revenues.

The defendants argue that both of the plaintiffs' promissory estoppel claims fail because they never represented that SLS would be the sole, permanent servicer. To the contrary, the defendants cite the numerous emails before and after closing memorializing their understanding that SLS would serve as the interim servicer and that Robert Kwartler would assist in servicing the properties in New Jersey. In addition, the defendants contend that Rosenfeld would assist in the accounting and

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[60] This claim was not specifically pleaded in the complaint and it is unclear whether it is based on contract law or fiduciary duty law. As the defendants note, the plaintiffs failed to properly allege a claim for lost return on equity in the complaint. Thus, this court will not consider that claim. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("[A]ccepting all well pleaded allegations of fact as true, our review of the complaint fails to support Emerald Partners' contention as to the existence of this claim. None of the allegations of the complaint could fairly be read as providing fair notice to the defendants of a 'best price' claim.").

reporting function of Sogima Servicing. The defendants rely on the appointment of the jointly owned Sogima Servicing as the named servicer in the operating agreement as evidence of this understanding.

Finally, the defendants concede that the plaintiffs are entitled to the reasonable out-of -pocket expenses incurred servicing the portfolio for several months in 2006, but argue that this amount should not exceed $120,000 and in any event, must be offset by the plaintiffs' liability to L-A for $337,887 in damages suffered as a result of the plaintiffs' failure to properly perform the servicing function. According to the defendants, SLS is liable "for this amount under the terms of the parties' interim oral agreement that SLS would provide commercially reasonable services while the parties completed their negotiations."[61] Alternatively, the defendants argue that SLS is liable for these damages "as a bailee [that] had an obligation to exercise ordinary diligence in caring for [L-A's] property."[62]

III.

A. Delaware Law Applies To The Plaintiffs' Claims

The court must first determine what law to apply. The plaintiffs assert that Delaware law should apply due to the choice of law provision in the operating agreement or, alternatively, because there is no significant difference between the

[61] Defs.' Pretrial Br. 49-50.
[62] *Id.* at 50.

relevant Delaware and New Jersey law. The defendants, however, argue that the choice of law provision in the operating agreement is ineffective due to the lack of relationship to Delaware and that, under the "most significant relationship" test, New Jersey law should apply. The defendants recognize that Delaware law and New Jersey law are largely in accord with respect to contract claims and promissory estoppel claims. However, the defendant maintain there are slight differences, and, given New Jersey's greater relationship to the claims, New Jersey law should govern.

As noted, the operating agreement, which both sides agree controls, contains the following choice of law provision:

> This agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to the principles of conflicts of law. The parties agree that any dispute arising in connection with this Agreement shall be resolved in the Chancery Court in the State of Delaware, and each party hereby submits to the jurisdiction of that court.[63]

In considering what law to apply, this court is guided by the principle that "Delaware courts will generally honor a contractually-designated choice of law provision so long as the jurisdiction bears some material relationship to the transaction."[64] Since the key entities underlying the transaction are Delaware entities, including L-A, Sogima, SLS, and the Lubert-Adler entities, there is a

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[63] PX 9.
[64] *J.S. Alberici Const. Co. v. Mid-West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000).

material relationship with Delaware.[65] As this court has previously noted, 6 *Del. C.* § 2708 instructs that Delaware law apply under these circumstances.[66] This court also recognizes that these entities, operating in several different states, sought "a reliable body of law to govern their relationship."[67] Thus, Delaware law will apply.

IV.

A. Contract

1. Lost Servicing Profits

In support of their claim to lost servicing profits, the plaintiffs contend that the draft servicing agreement referenced in the side letter is an enforceable contract. Their submissions, however, are unavailing, and Greetham's testimony

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[65] *See Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1056 (Del. Ch. 2006) ("In this case, Delaware law clearly has a material relationship to the transaction among the Buyer, the Seller, and the Company. The Seller was a Delaware entity that sold a Delaware corporation to a Delaware limited partnership that used a Delaware corporation to acquire the Company.").

[66] That statute states: "(a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflicts of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. *The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State . . .*; (b) Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains the provision permitted by subsection (a) of this section; (c) This section shall not apply to any contract, agreement or other undertaking . . . (ii) involving less than $100,000." *Id*. at 1046-47 (citing 6 *Del. C.* § 2708 (emphasis added)).

[67] *Abry Partners*, 891 A.2d at 1047.

that the missing terms were immaterial was equally unconvincing. At trial, Greetham insisted that the comments made by Riordan in connection with the closing, including the ones Greetham did not see, would not have effected the closing. Specifically, Greetham testified as follows:

> [W]e closed the transaction, they funded $10 million, and we serviced the assets for a period of time. I agreed to not compete. I acquired the interests in SLS. All those things happened. Had there been any material provisions to the contrary of those decisions to close the transaction, it wouldn't have closed.[68]

According to the plaintiffs, all the material terms had also been implicitly agreed to by the Kwartler group. Greetham transmitted the same draft agreement to Rosenfeld on January 16 and Rosenfeld provided no comments before the closing. The plaintiffs also point to the side letter, which states that the servicing agreement "must be acceptable to [Lubert-Adler] and in substantially the same form" as the draft servicing agreement.[69]

"It is elementary that determination of the question whether a contract has been formed essentially turns upon a determination whether the parties to an alleged contract intended to bind themselves contractually."[70] Significantly, "a court determining if such intention has been manifested, however, does not attempt to determine the subjective state of mind of either party, but, rather, determines this

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[68] Trial tr. vol. II, 426.
[69] JX 14.
[70] *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986).

question of fact from the overt acts and statements of the parties."[71] "Accordingly, our inquiry is the 'objective' one: whether a reasonable man would, based upon the 'objective manifestation of assent' and all of the surrounding circumstances, conclude that the parties intended to be bound by contract."[72] As former Chancellor Allen once noted:

> This is not a simple or mechanical test to apply. Negotiations typically proceed over time with agreements on some points being reached along the way towards a completed negotiation. It is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed . . . . Until it is reasonable to conclude, in light of all of these surrounding circumstances, that all of the points that the parties themselves regard as essential have been expressly or (through prior practice or commercial custom) implicitly resolved, the parties have not finished their negotiations and have not formed a contract.[73]

Thus, determination of whether a binding contract was entered into will depend on the materiality of the outstanding issues in the draft agreement and the circumstances of the negotiations.[74]

In this case, the record reveals little, if any, discussion about the draft servicing agreement between Greetham, Lubert-Adler, and the Kwartler group before closing. While Rosenfeld received the draft agreement through email on

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[71] *Id*.
[72] *Id.* at 1101 (citing *Industrial America, Inc. v. Fulton Indust., Inc.*, 285 A.2d 412, 415 (Del. 1971)).
[73] *Leeds*, 521 A.2d at 1101-02.
[74] *Id.*

January 16, 2006, he did not provide comments until March. Given his lack of notice or involvement in the closing, and no similar history of dealing with Greetham, it is impossible to conclude that he implicitly agreed to the terms of the draft servicing agreement. In addition, the closing was completed in a rushed manner and the negotiations up until that point revolved almost exclusively around what entity would be named as the servicer. In fact, only Lubert-Adler provided "preliminary comments" in the days before the closing and it expressly reserved the right to approve the final agreement.

The state of the draft servicing agreement was clearly preliminary at the time of the closing. Riordan remarked that he required the side letter because he felt Greetham's draft was "defective," failing even to include any representations or warranties. As Riordan noted, he thought this was "pretty strange" given that he was "not used to any commercial standard of contract that completely eliminates [representations] and warranties on the part of either party."[75]

These facts alone strongly lead the court to believe that the parties did not intend for the draft servicing agreement to be the final agreement. Indeed,

> [i]t is a well established principle of contract law that if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to

[75] Trial tr. vol. II, 541-42.

> another written form, the preliminary negotiations and agreements do not constitute a binding contract.[76]

Since Greetham had not received comments from the Kwartlers and only received "preliminary comments" from Lubert-Adler, it is not reasonable to conclude that the parties intended to be bound by the agreement.

The lack of the requisite manifestation is even more evident in Lubert-Adler's comments regarding material terms of the agreement. First, the defendants identify Lubert-Adler's general comment requiring an obligation to insure and report on the part of the subservicer. Riordan testified that the obligation to insure was a "major issue" that took a great deal of time in the weeks following the closing to address and was in fact never resolved between the parties. The obligation to report was also significant to Riordan, and he testified that his general comment was a direction to the operating principals to "figure this out."[77]

Perhaps most significant, Riordan also qualified the payment scheme contemplated in the draft servicing agreement by commenting "in accordance with an approved annual budget."[78] Since a proper annual budget had not been circulated at that time, although disputed by Greetham,[79] this left the price

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[76] *Intellisource Group, Inc. v. Williams*, 1999 WL 615114, at *5 (D. Del. Aug. 11, 1999).
[77] Trial tr. vol. II, 537.
[78] DX 42.
[79] Greetham testified at trial that he had sent "half a dozen budgets throughout the process with Lubert-Adler and Kwartler." Trial tr. vol. II, 381. Upon further questioning, however, he conceded that he never sent Lubert-Adler anything titled "draft budget," but that there was budgetary information in the cash flow model he sent. This is contrary to Lubert-Adler's

component of the servicing agreement entirely uncertain. In light of the substantial compensation to be paid to the servicer and the complexity of the payment formula, there was clearly an unresolved essential term.[80] In addition, as Riordan testified at trial, Lubert-Adler contracted for "very firm" budgetary approvals in the operating agreement.

Riordan also suggested material changes to the term of the servicing agreement. While the draft agreement provided for a set three-year term, subject to several limitations, Riordan called for a one-year term "with automatic renewal for successive one-year periods, unless terminated in accordance with the Agreement, etc."[81] According to Riordan, this comment meant the following:

> [W]e would have an initial 12-month period. And if I did not execute my right to terminate prior to the end of that period, with or without cause, that it would then roll forward for another 12-month period, at the end of which, if I had not exercised my right to terminate with or without cause, it would roll forward for another period. Neither party had to do anything actively, other than exercising a termination right, and the [agreement] would just continue on.[82]

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understanding. In an email dated March 31, 2006, two months following closing, Riordan sent an email to Greetham expressing his frustration that he still had not seen a budget. Riordan confirmed this at trial.

[80] *See Intellisource*, 1999 WL 615114, at *5 ("Although defendants contend that 'all essential terms of the settlement were agreed to in writing,' there is no evidence that both parties agreed on a payment schedule. In light of the amount of money at stake and the complexity of repurchasing company stock, the court finds that a reasonable person would conclude that the method of payment would be an essential term in the purported contract at bar.").

[81] DX 42.

[82] Trial tr. vol. II, 540-41.

At trial, Greetham conceded that he did not see this comment prior to the closing. In fact, at his deposition Greetham testified that he only reviewed the highlighted Lubert-Adler comments and not those imbedded in the text, which included the rejection of the three-year term. While Greetham testified that the automatic renewal was the same as the three-year term he requested, Riordan's previously mentioned April email to Greetham made clear that Lubert-Adler required a termination right without cause every year.

As noted, the Kwartlers did not provide any comments to the draft servicing agreement until March 17, 2005. Their comments at that time further evidence the preliminary nature of the draft agreement. The most important comment was the aforementioned right to audit SLS's revenues. As discussed, Greetham was adamantly opposed to this provision and clearly refused to consider incorporating it into the agreement. Greetham's comment struck Robert Kwartler as "ridiculous," and Rosenfeld was similarly disturbed.[83] As previously noted, Greetham testified that he thought the Kwartler group wanted access to confidential agreements and that he was not opposed to a review of SLS's revenues

[83] Trial tr. vol. III, 719-20 ("Q. Was the [audit comment] an important comment to you? A. Yes. Q. Why? Well, it was my understanding that SLS was servicing for other people, and the servicing agreement called for some type of credit towards the Sogima Servicing fee if [Greetham] was . . . servicing for other people. And the only way . . . the only way I can confirm that . . . as an accountant of what credits we're entitled to is to look and examine the books and records and the relationship of the revenues that he's getting from other sources. I'm . . . not looking to pry into his confidential records with other clients. All I was asking to really do here is show me the revenue from the other clients over here.").

to determine the credit owed to Sogima.[84] However, if Greetham planned, as he testified, to "take down the only remaining servicing relationship that SLS had outside of Lubert-Adler" in the first few months, his explanation is unconvincing. Moreover, his responsive email clearly demonstrates he rejected any access to SLS's records, demanding the Kwartler group operate solely on trust.

In sum, the record overwhelmingly demonstrates that the draft servicing agreement and the side letter were no more than an agreement to agree and do not form an enforceable contract.

Even if the plaintiffs could show an enforceable servicing agreement existed (which they cannot), they fail to adequately prove the vast majority of the damages they seek. The plaintiffs' damages expert, Perry Mandarino, based his calculation on Greetham's acquisition budget, which estimated the parties would acquire approximately $285 million in tax liens during the first year.[85] Mandarino opined that the plaintiffs incurred approximately $7.8 million in damages related to lost servicing profits over a three-year period and approximately $2.5 million on lost anticipated return on equity.

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[84] Greetham's full testimony reads: "On its surface, them trying to gain an understanding of what revenues had been received relative to the credit which was promised under the servicing agreement made perfect sense. That's not an audit. An audit requires you to go into agreements . . . and I can't allow confidential agreements with other clients to be subject to an audit. So I simply said that's not happening. And the reality was . . . in the first few months of our operations we expected to take down the only remaining servicing relationship that SLS had outside of Lubert-Adler . . . ." Trial tr. vol. I, 259.

[85] Greetham admitted that Lubert-Adler was not obligated to make *any* additional acquisitions, much less acquisitions in line with his budget.

If the servicing contract had been agreed to (and it was not), plaintiffs would have only been entitled to the standard contract remedy of expectation damages.[86] Expectation damages are "measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract."[87] Mandarino's calculations are based on servicing of and profits from a multi-hundred million dollar portfolio, but as discussed below, Lubert-Adler was not contractually obligated to grow the $9 million tax lien portfolio at all. Additionally, even if Lubert-Adler chose to grow the portfolio, there is no convincing evidence that there would have been any return on equity. In fact, it appears likely that the portfolio would have lost money.

As to the servicing profits claim, the parties never agreed on a three-year servicing term, but rather Riordan insisted on the ability to terminate after one year. More importantly, the parties never agreed nor were they obligated to grow the $9 million portfolio at all, much less by several hundred million dollars. The parties speculatively discussed acquiring additional tax liens, but had not proceeded much further. The parties had not secured financing to make any additional acquisitions, and Lubert-Adler retained complete authority as to whether it would fund any such acquisitions. Riordan testified that Lubert-Adler would not

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[86] *See Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).
[87] *Id.*

have funded additional acquisitions unless and until the business case proved itself. Currently, Riordan testified that "the business case . . . is shot" and as such Lubert-Adler has not made additional acquisitions.[88]

Turning to the anticipated return on equity claim, the plaintiffs fail to show that L-A would have made a profit. With a 90% interest in L-A, Lubert-Adler has great incentive to see to it that L-A succeed. Riordan testified, however, that Lubert-Adler has failed to make any return on L-A and has in fact lost money on the deal.

The law "does not promote . . . speculative damages."[89] Since the plaintiffs' claims for lost servicing profits and lost anticipated return on equity are built on wildly speculative growth of the Sogima portfolio, they would not be entitled to the vast majority of their damages claim, even assuming an enforceable servicing agreement.

B. Promissory Estoppel

The plaintiffs assert that, even in the absence of an executed agreement, the defendants promised SLS would be the sole servicer and the plaintiffs reasonably relied on that promise to their detriment. Therefore, according to the plaintiffs, they are

[88] Trial tr. vol. II, 557
[89] *Ryan v. Tad's Enter., Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996).

entitled to recover, under promissory estoppel, the lost servicing profits and the $250,000 Greetham spent to purchase Assentato's and Poiset's interests in SLS.

To prevail on a promissory estoppel claim, the plaintiffs must demonstrate by clear and convincing evidence that:

> (1) a promise was made; (2) it was the reasonable expectation of the promisor . . . to induce action or forbearance on the part of the promisee; (3) the promisee . . . reasonably relied on the promise and acted to his detriment; and (4) that such a promise is binding because injustice will be avoided only by enforcement of the promise.[90]

As this court has noted, "the application of promissory estoppel in our law has seemed a short-cut to obtaining even greater relief than would be available if a binding contract had been formed, without the necessity for complying with the greater strictures of contract law."[91] Indeed, "promissory estoppel is fundamentally a narrow doctrine, designed to protect the legitimate expectations of parties rendered vulnerable by the very process of attempting to form commercial relationships."[92]

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[90] *Ramone v. Lang*, 2006 WL 905347, at *14 (Del. Ch. Apr. 3, 2006) (citing, *e.g.*, *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003); *Lord v. Souder*, 748 A.2d 393, 398-99 (Del. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); FARNSWORTH ON CONTRACTS § 2.19, at 174)).
[91] *Ramone*, 2006 WL 905347, at *14.
[92] *Id*.

1. Anticipated Lost Profits

The plaintiffs' promissory estoppel argument revolves around their highly dubious contention that the Kwartler group always represented that SLS would be the sole servicer of the Sogima portfolio. According to the plaintiffs, SLS was the only entity capable of servicing the Sogima portfolio because of the infrastructure they had developed and the experience they had servicing multi-state, large tax lien portfolios. The plaintiffs argue that the large disparity in the servicing capabilities of SLS and the Kwartler group demonstrates that the parties understood that SLS would be the sole servicer. The plaintiffs also rely on the identification of SLS as the servicer in the CFM and the investment summary as further support for their argument. Lastly, the plaintiffs assert that in an email Greetham sent on the day before closing he made clear that Sogima Servicing would merely be a shell or pass-through entity immediately before closing.

The defendants do not dispute that SLS's servicing capabilities were critical to the transaction and the key attraction to partnering with Greetham. However, the Kwartler group contends that they understood that SLS would be an interim servicer and that the parties would work collectively to develop Sogima Servicing as a unified servicing entity. The Kwartler group argues that they viewed the Sogima transaction as an opportunity for each party to contribute its particular expertise. Given the valuable capabilities of SLS, it would be compensated for its

work and possibly bought out by Sogima Servicing at some point in the future. To undermine the plaintiffs' claim, the defendants cite to the numerous emails exchanged in the weeks and days before closing expressing this understanding.[93]

There was a clear disagreement between the parties as to the role of SLS in the transaction. This issue arose no later than November of 2005 and was never resolved before closing. After repeatedly arguing this point with the Kwartler group, Greetham ultimately agreed to name Sogima Servicing as the servicer in the operating agreement. This strongly indicates that Greetham gave in to the Kwartler group in order to close the transaction. There is evidence that Assentato and Poiset were unhappy with the tax lien business, and particularly with funding SLS, and that Greetham closed the Sogima transaction in order to fund the buyout of Assentato and Poiset and, thus, salvage the possibility of realizing value for SLS in the future.

In addition, while the January 26 email relied upon by the plaintiffs does state that there will be a pass-through of fees to SLS, it is written by Greetham and not copied to the Kwartler group members. At trial, Greetham testified unconvincingly that this email reflected his understanding that there may be a "few servicing bucks" passed through to the Kwartler group, but that Sogima Servicing

[93] *See e.g.*, JX 4; JX 5; JX 10; JX 18.

was a "shell" without any assets, employees, or infrastructure.[94] Greetham conceded, however, that he knew that Rosenfeld wanted to provide accounting services and Robert Kwartler would have some involvement in servicing the New Jersey assets.

The Kwartler group's position that they expected to participate in servicing the REO in New Jersey also makes practical sense. At trial, Greetham largely glossed over the role of REO in the servicing business, but the record revealed that it is a key component of servicing any portfolio and is often the primary source of monetizing real estate tax liens. Rosenfeld testified that tax liens "create interest that just covers the overhead. The money is always made in the real estate in the lien business."[95] Even Greetham conceded that "[r]eal estate sales tend to be a big component of profit" in the tax lien business.[96]

Significantly, a large portion of the liens that L-A acquired were in New Jersey, including several multi-million dollar properties. Thus, it is logical that Robert Kwartler, Rosenfeld, and Jeffrey would play a key role in managing and overseeing the REO in New Jersey, which is a critical component of servicing. As noted, Riordan testified that he took "great comfort" in knowing that half of the

[94] Trial tr. vol. II, 347.
[95] Trial tr. vol. III, 731.
[96] Trial tr. vol. I, 123.

principals were located in New Jersey and had extensive experience and connections in the New Jersey real estate market.

In short, the plaintiffs have failed to demonstrate, by clear and convincing evidence, that the defendants promised SLS would serve as the sole servicer and that they reasonably relied on this purported representation. Thus, they cannot recover their anticipated lost profits (even if they could prove their damages claim, which they cannot) under a theory of promissory estoppel.

2. Acquisition Of SLS

The plaintiffs seek "$250,000 relating to the costs [p]laintiffs incurred purchasing the additional membership interests in SLS resulting from the [d]efendants' representations that SLS would be the servicer" of the tax lien portfolio. While not clearly expressed by the plaintiffs, they seem to argue that Greetham's acquisition of his share of Assentato's and Poiset's interests in SLS was based on the Kwartler group's representation that Sogima Servicing would ultimately purchase SLS.

The plaintiffs have failed to prove that the Kwartler group ever promised that they or Sogima would ever purchase SLS. Similarly, there is nothing in the record to reflect the terms or timing of any such promised transaction. On the contrary, Greetham conceded that Rosenfeld expressly told him days before the

closing that the Kwartlers would not purchase SLS. Thus, the court is unable to conclude that Greetham agreed to the buy-out of Assentato and Poiset in reliance on any such promise. On the contrary, the court concludes from its review of all the testimony and other evidence that Greetham engineered the buy-out, using proceeds from the closing in order to gain control of SLS and prevent Assentato and Poiset from closing it down. By eliminating Assentato's and Poiset's control, Greetham was able to keep SLS afloat and in a position to profit from a share of the future servicing fees in the Sogima transaction. It was the expectancy of deriving value from SLS in the future, and not any promise from the Kwartler group, that explains Greetham's actions.

C. Out Of Pocket Expenses

The plaintiffs seek $481,014 in out-of-pocket expenses allegedly incurred in connection with servicing the Sogima portfolio from February to May 2006. The defendants do not dispute that the plaintiffs are entitled to reasonable out-of - pocket expenses, but argue that the plaintiffs should recover no more than a 4% annual fee, or $120,000, for their four months of servicing the portfolio of approximately $9 million in value.[97]

[97] The defendants and their expert, Jeffery Katz, contend that an annual servicing fee of 4% fee for a portfolio of less than $100 million in liens would be on the high end of the market rate. Therefore, the defendants argue that the plaintiffs' fee for four months of servicing a portfolio of approximately $9 million should be limited to $120,000.

The plaintiffs claim that the unsigned SLS servicing agreement shows the reasonable expectations of the parties and that the agreement provides for the payment of the greater of 4% of the portfolio value and the plaintiffs' actual expenses. The plaintiffs submit that because their actual expenses of $481,014 are greater than a pro-rated 4% annual fee, they are entitled to their actual expenses. In support of the claim, the plaintiffs point to the four-page expense summary attached to Mandarino's expert report.[98] Mandarino testified that the summary was provided to him by the plaintiffs and admitted that he did not seek detailed back-up of the servicing expenses. On August 18, 2008, after post-trial arguments, the plaintiffs provided the defendants and the court with nearly 100 pages of SLS's general ledger to show the details of the expense summary.

The defendants note that the plaintiffs had other clients at the time they were servicing the Sogima portfolio and that neither the summary nor the ledger separates expenses by client. In response, the plaintiffs claim that the servicing agreement envisioned Lubert-Adler paying for all of SLS's expenses and contemplated a servicing fee reduction equal to 50% of the revenues collected from

[98] The summary includes expenses from February 2006 until October 2006. Mandarino stated in his expert report that "the bulk of these expenses were incurred from February 2006 through May 2006 when SLS was providing the servicing function. Certain expenses, however, continued as the servicing wound down." DX 191. The plaintiffs, in their post-trial brief, revised the reasoning for why charges continued until October, claiming that all of the expenses were incurred during the period SLS serviced the portfolio, but some expenses were merely recorded afterwards.

other clients. The plaintiffs submit that they did not receive any revenue from other clients during the period at issue.

The draft servicing agreement, which calls for payment of all expenses actually incurred, is of little use here. The servicing agreement was drafted by Greetham's counsel and was never executed by the defendants. In fact, the side letter to the purchase agreement explained that the servicing agreement was to be agreed to at a later date (which never occurred). Moreover, Lubert-Adler's comments to the draft servicing agreement indicate that Lubert-Adler would only reimburse expenses that were in line with an approved annual budget. Additionally, Lubert-Adler's investment memorandum stated that it would reimburse expenses "as may be agreed" by the parties.[99] As such, the draft servicing agreement's language regarding reimbursement for *all* expenses cannot be used to measure the amount of fees the defendants owe the plaintiffs.

Because the plaintiffs fail to prove that all expenses should be reimbursed, the court will award reasonable fees, which the defendants concede they owe the plaintiffs. The plaintiffs and the defendants, however, do not agree on what constitutes reasonable and expected fees for servicing a $9 million portfolio of tax liens for four months. The plaintiffs cite a cash flow model sent to the defendants

[99] The parties did not agree to which expenses or what amount of expenses would be reimbursed nor did the parties agree to an annual budget.

in May 2005 for the proposition that the parties should have expected fees of $1.8 million a year, or $600,000 for the four months. This model is based on SLS's actual expenses from 2003 and 2004. Also, the somewhat dated model assumes that the original acquisition would be for over $12 million and that there would be over $4 million in subsequent acquisitions by the third month. The portfolio that SLS actually serviced for Sogima for four months was significantly smaller, approximately $9 million.[100] More enlightening, the plaintiffs point out that Lubert-Adler paid YellowPad approximately $900,000 for a year of servicing the Sogima portfolio, which would result in $300,000 in fees for four months.

The defendants argue the 4% annual fee set forth in the draft servicing agreement for portfolios under $100 million is reasonable. Such a percentage would result in $360,000 in annual fees, or $120,000 for four months. This number appears artificially low. Four percent may have been an adequate fee for a portfolio closer to $100 million, however, the language and comments in the draft servicing agreement suggest that the parties recognized that many fixed costs of servicing, such as salaries which account for approximately 50% of the requested fees, would remain relatively constant regardless of portfolio size. Therefore, a portfolio on the lower end of the $0 to $100 million range would likely require a

[100] In addition, Riordan convincingly testified that $1.8 million in annual costs for a portfolio of approximately $9 million was absurd as the portfolio would nearly self liquidate in four years.

higher percentage of the portfolio value to cover the costs. The defendants did not agree to cover all fees, as set forth in the draft servicing agreement, but they did contemplate covering fees in line with an approved budget, which probably would have reflected a higher percentage of fees in the beginning. Alternatively, the defendants point to the January 2006 cash flow model that SLS sent Lubert-Adler as an indication of the parties' expectations regarding fees. That model showed approximately $460,000 in annual expenses, or approximately $153,000 over a four month period. In addition, Riordan testified that he relied on representations from Greetham in forming the expectation that annual servicing fees would be between $400,000 and $500,000 a year, or between $133,000 and $167,000 for a four month period.

In light of the evidence above, the court finds the amount paid to YellowPad to be the best indicator of reasonable fees and will award $300,000 to the plaintiffs.

D. Failure To Adequately Service The Portfolio

The defendants argue that its liability to the plaintiffs for out-of-pocket expenses is more than offset by damages caused by the plaintiffs' failure to adequately service the portfolio. According to the defendants, the plaintiffs' failure to perform some of the "basic elements of servicing" led to $337,887 in damages to Lubert-Adler. The defendants allege the plaintiffs are liable "under the

terms of the parties' interim oral agreement that SLS would provide commercially reasonable services while the parties completed their negotiations, " or liable "as a bailee [that] had an obligation to exercise ordinary diligence in caring for [Lubert-Adler's] property."[101] In support of their claim, the defendants provided the expert report of Thomas Malnati. The defendants, through Malnati's report, claim that SLS (1) failed to identify defective liens, (2) failed to adequately determine lien expiration, (3) inadequately identified property collateral condition, (4) inadequately identified litigation exposure and costs, and (5) failed to make timely refund claims. In his report, Malnati provided specific liens harmed by the plaintiffs' alleged negligent servicing and the amount of loss sustained in each case.

Mandarino, the plaintiffs' damages expert, testified that he did not analyze the quality of SLS's due diligence or servicing performance and was not aware of the actual performance of SLS in servicing the Sogima portfolio. The plaintiffs did not address the substance of the defendants' counterclaim in its post-trial opening brief, but rather ask the court not to disregard the counterclaim based on the doctrine of unclean hands.[102]

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[101] Defs.' Pretrial Br. 50.

[102] In their post-trial reply brief, the plaintiffs point to a $1.22 million reserve for risk of loss to the portfolio and argue the that loss the defendants describe was properly accounted for in pricing the portfolio. However, this passing reference to an amount in reserve is not adequate evidence to rebut the defendants' detailed showing of mismanagement. In addition, the

The court has broad discretion in determining whether it will apply the doctrine of unclean hands.[103] "It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands."[104] "[T]he unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case."[105] In their post-trial brief, the plaintiffs assert that emails uncovered in discovery show that the defendants did not intend to honor their servicing "agreement."[106] As discussed above,

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plaintiffs' decision to include this argument in their reply brief, instead of in their opening brief, prevented the defendants explaining the purpose of the $1.22 million. Defs.' Post-Trial Reply Br. 42-43 and JX 32.

[103] *See Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998).

[104] *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244 (1933).

[105] *Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354 (Del. Ch. Aug. 5, 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (citing *Nakahara*, 718 A.2d at 522).

[106] While the plaintiffs do not specify which emails they are referring to in their post-trial brief, the court suspects they primarily reference the following two emails: (1) an email from Robert Kwartler to Rosenfeld, which reads in pertinent part:

> [B]etter get it OUT of their [SLS'] heads RIGHT NOW that they are running the servicing show [sic] SOGIMA SERVICING must be asserted and I mean ASSERTED as boss. . . . There is SO MUCH MONEY to be made here. I am NOT letting go easily. I'll remind Don that we could ve [sic] dealt with L-A without him and he will say we couldn t [sic] have done it without him. And I ll [sic] say maybe we could ve [sic] and maybe not but I want to pound it into his dome that, especially when it comes to JR [Joel Rosenfeld]/KA [Kwartler Associates] he is making a royal mistake if [sic] confuses our trust in him with any sort of weakness on our part. He has to believe that we can and will bury him personally if he tries ANY [expletive]. PX-31

And (2) an email from Riodan to Rosenfeld and Robert Kwartler on April 1, 2006, which reads:

> The 'story,' that was told TO us and BY us mirrors the attached - namely, that SLS's involvement was a core component of the business case and a key element of the platform's ability to succeed . . . . From the perspective of both 'optics' (i.e. how things appear) as well as execution, Gerry [the president of Lubert] and I will both look pretty foolish internally and

however, the court finds that the parties never agreed that SLS would be the sole servicer of the Sogima portfolio and the materials suggesting as much were created by Greetham.

The plaintiffs primarily rely on *In re Silver Lake, LLC*, a case in which the court used the doctrine of unclean hands to block the claims stemming from a business that was a "sham meant to defraud investors."[107] Here, the defendants did not engaged in unscrupulous activity, and took no action that even approaches the misdeeds in *Silver Lake*.[108] The plaintiffs also assert that the defendants did not provide a witness at trial to testify regarding their counterclaim. However, the defendants did produce a credible and thorough expert report.

Without any detailed evidence to the contrary presented by the plaintiffs, the court finds that the plaintiffs negligently serviced the portfolio, resulting in damages of $337,887.

> relative to our firm's closest lending relationships if the Company can't work things out with SLS . . . . I should not have to point out that relatively full pricing was paid for the SLS liens acquired to seed the Company and that, from our perspective, there has been at least some expectation that SLS's ongoing involvement would help to mitigate any such relative premium. PX 12.

While the first email shows that Kwartler was frustrated with Greetham and the second email shows that Lubert-Adler considered Greetham an important part of Sogima, neither email shows that the plaintiffs thought Greetham would be the *sole* servicer of the portfolio.

[107] 2005 WL 2045641, *13 (Del. Ch. Aug. 15, 2005).

[108] *See SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 449-50 (Del. 2000) (holding that breach of contract alone was insufficient to invoke the doctrine of unclean hands). Here, the court has not even found that the defendants' breached any contract.

V.

For the foregoing reasons, the court will award the plaintiffs $300,000 for their out-of-pocket expenses and fees. The remainder of the plaintiffs' claims will be denied. The court will also award the defendants/counterclaimants $337,887 for damages sustained due to the plaintiffs' negligent servicing of the Sogima portfolio. Interest on the judgment will be at the legal rate. Counsel for the defendants shall submit a form of final judgment, on notice, in ten days from the date hereof.