

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
WASHINGTON MUTUAL, INC., et al., .
Debtors. . Case No. 08-12229 (MFW)
 . (Jointly Administered)
 . Sept.25, 2009 (10:32 a.m.)
 . (Wilmington)

JPMORGAN CHASE BANK, .
NATIONAL ASSOCIATION, .
 .
Plaintiff, .
vs. . Adv.Pro.No. 09-50551 (MFW)
 .
WASHINGTON MUTUAL, INC., and .
WMI INVESTMENT CORP., .
 .
Defendant for All Claims, .
 .
-and- .
 .
FEDERAL DEPOSIT INSURANCE .
CORPORATION, .
 .
Additional Defendant .
For Interpleader Claim .

WASHINGTON MUTUAL, INC., and .
WMI INVESTMENT CORP., .
 .
Plaintiffs, .
vs. . Adv.Pro.No. 09-50934 (MFW)
 .
JPMORGAN CHASE BANK, .
NATIONAL ASSOCIATION, .
 .
Defendant. .

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

Appearances:

For the Debtors: Brian S. Rosen, Esq.
Richards, Layton & Finger
David Elsberg, Esq.
Quinn Emanuel

For JPMorgan Chase: Robert Sachs, Esq.
Sullivan & Cromwell
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Landis, Rath & Cobb

For the Unsecured
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1 THE COURT: Good morning.

2 MR. ROSEN: Good morning, Your Honor, and I'm going
3 to get it right this time even though it's a different case.
4 Brian Rosen, Weil, Gotshal & Manges on behalf of Washington
5 Mutual, Inc., and with me today is Mr. Mark Collins from
6 Richards, Layton & Finger.

7 THE COURT: Alright.

8 MR. ROSEN: Thank you, Your Honor. We have a few
9 matters on the agenda this morning, and as we alerted the
10 Court, based upon an extraneous circumstance, travel, we
11 would like to just switch the order in which we are going to
12 be doing them. So, the first item we would like to take up,
13 Your Honor, would be the additional item, which is the notice
14 of divestiture, and with was the JPMorgan request to talk to
15 the Court.

16 THE COURT: Okay.

17 MR. SACHS: Yes, I'm up, Your Honor. Good morning.
18 Robert Sachs from Sullivan & Cromwell on behalf of JPMorgan
19 Chase. Your Honor, we have filed a notice before the Court
20 because we don't believe that this is a matter that requires
21 a decision but simply given the parties have a disagreement
22 on the issue, an indication from the Court that it is
23 divested of jurisdiction while the appeal is pending from
24 Your Honor's orders denying the FDIC's and JPMorgan Chase's
25 motions to dismiss and to stay the adversary proceedings

1 under the exclusive claims process under FIRREA. We are
2 taken to task in the opposition for delaying in bringing this
3 to Your Honor. For that I apologize. We, frankly, did not
4 focus on this at the time of the first matter following the
5 initial appeal. We did focus upon it, and when we focused it
6 upon it brought it immediately to Your Honor's attention. I
7 would note, however, that subject matter jurisdiction of
8 which this is, is not waive-able and it is all parties'
9 responsibility to alert the Court when there are questions
10 about the Court's subject matter jurisdiction, and that's
11 what this is. The rule that is applicable is very
12 straightforward, though there's obviously a fundamental
13 dispute as to its application here. The filing of a notice
14 of appeal divests the Court of jurisdiction over all matters
15 that are encompassed by the appeal. In this case, we and the
16 FDIC both filed timely notices of appeal. There's no dispute
17 among the parties. One of the few matters that's not
18 disputed is that all the matters encompassed by these
19 adversary proceedings are in fact encompassed by the appeal.
20 So if the rule were applicable, it would encompass the entire
21 adversary proceedings pending either the dismissal of the
22 appeals or their disposition by the District Court and/or the
23 Third Circuit, in this case. There's an exception to this
24 rule. It's a specific exception and the controlling Third
25 Circuit case is Lepo, and it says, "You don't have to honor

1 the divestiture of jurisdiction. There is no divestiture."
2 It' not an honor, there is no divestiture of jurisdiction in
3 a situation where the Court finds by specific written factual
4 findings that an appeal is frivolous. That is the exception
5 to that rule.

6 THE COURT: Well, except in bankruptcy cases, the
7 case can proceed while only the matter that is on appeal is -

8 MR. SACHS: We're not suggesting that the Court is
9 divested of jurisdiction over the bankruptcy case. We're
10 discussing specifically the adversary proceedings, which are
11 adjudicated proceedings between parties. So in this
12 particular case we're dealing only with those. Your Honor
13 has complete jurisdiction to continue to adjudicate this
14 bankruptcy. The issue that you do not have jurisdiction,
15 given the pendency of the appeal, and we've cited bankruptcy
16 cases and adversary proceedings to that effect. Sacred
17 Heart, for example, is one, and there are numerous other ones
18 cited in our - which is a case that went up in Pennsylvania
19 and was affirmed by the Third Circuit, is one involving
20 adversary proceedings. It doesn't matter whether the case is
21 pending before the Bankruptcy Court or the District Court,
22 the application of the rule is the same. It doesn't apply to
23 your case.

24 THE COURT: Does it apply where an appeal is taken
25 of a motion to dismiss the adversary? Is that interlocutory?

1 MR. SACHS: No, it is a collateral order appeal,
2 Your Honor, and I'm going to address that very specifically
3 right now. Specifically, the rule is, it does apply to
4 collateral order appeals and the cases we have cited to you
5 do involve collateral order appeals. The Sacred Heart case,
6 for example, is a collateral order appeal. Lepo is a
7 collateral order appeal. The Supreme Court has found in
8 these cases and the Third Circuit multiple times has found
9 that the same rule applies when you're dealing with a
10 collateral order appeal as it applies to an appeal from a
11 final judgment. Indeed, that's what the whole dispute is
12 about, that's what all these cases exist to find, and indeed,
13 Your Honor, courts have found that actions taken by a
14 district court after divestiture of jurisdiction during a
15 collateral order of appeal are nullities, and even where they
16 uphold the Court below, they rule that the actions taken have
17 to be undone even though it's almost a - it's silly in a
18 sense, because the case is going to proceed, but that's the
19 rule. That's what the Tenth Circuit found in the Stewart
20 case, for example, Your Honor, that we cited to you. But,
21 Your Honor, the rule is applicable to collateral order
22 appeals for all matters encompassed within the appeal, and
23 the distinction, I would say, between a final appeal and a
24 collateral order appeal is obviously a final appeal
25 encompasses the entire case. In some cases a collateral

1 order appeal might not encompass the entire case, it's
2 conceivable, but in this case there is no dispute it
3 encompasses the entire case here. So, looking here at this,
4 there is a controlling case in the Third Circuit, Your Honor,
5 on this issue, and that is the Praxis case, and surprisingly
6 enough, the debtors do not cite to Your Honor, they do not
7 cite, they do not address the Praxis case in any way, shape,
8 or form. They give you a generalized argument about why this
9 should not be considered a collateral order appeal, and I
10 would suggest, first of all, they're arguing about the merits
11 not whether our collateral appeal is frivolous, which is the
12 only inquiry here, whether you agree or disagree as to how
13 that should come out. But in this case, Praxis, a Third
14 Circuit case, has already determined that appeals given
15 FIRREA's importance, the collateral appeals from a refusal to
16 abide by FIRREA's mandatory terms are properly treated as a
17 collateral order. It's not even mentioned, distinguished, or
18 referenced in any way, shape, or form in the brief filed by
19 the debtors, but it's dispositive here as to whether this is
20 a proper collateral order appeal, but it's at least
21 dispositive as to whether we have a good faith basis to take
22 a collateral order appeal and therefore is inconsistent with
23 any finding that our appeal is in bad faith, taken
24 objectively, frivolous, no reasonable lawyer could believe we
25 have a basis for filing a collateral order appeal, et cetera,

1 which is the scope of the Court's inquiry here. Praxis, the
2 Third Circuit stresses the importance of FIRREA, and I would
3 add that there's a Tenth Circuit case that comes to exactly
4 the same conclusion as Praxis, the Mark Development case. We
5 didn't cite it to Your Honor. Didn't think it was necessary
6 given citing Praxis from the Third Circuit, but the Tenth
7 Circuit, 992 F2d 1503 comes to the same conclusion about the
8 importance of FIRREA in taking a collateral order appeal from
9 a refusal to abide by the mandatory terms of FIRREA. Now, we
10 understand Your Honor disagrees with us on the underlying
11 merits -

12 THE COURT: Yes.

13 MR. SACHS: - and I'll address those in a minute. I
14 don't believe Your Honor would conclude that our position on
15 that is frivolous. You may disagree, and we respectfully
16 disagree with the conclusion that you reached, but that's
17 litigation. Sometimes you win and sometimes you lose, and
18 courts agree with you sometimes and they disagree with you
19 other times, but that doesn't mean that we are frivolous in
20 advocating our client's position and indeed the FDIC's
21 position that this matter is properly subject to FIRREA and
22 that FIRREA does apply to claims against third party buyers
23 from the receiver that involve the assets of the receivership
24 estate or the actions of the receiver, which the claims here,
25 in our view, do.

1 THE COURT: Have you filed a notice for leave to
2 appeal or do you feel that the notice of appeal is
3 sufficient?

4 MR. SACHS: We filed both. We filed a notice of
5 appeal of right as a collateral appeal. We have
6 alternatively sought leave to appeal. So, the notice of
7 appeal in this case is the act that divests the Court of
8 jurisdiction. We understand the Court of Appeal, or in this
9 case, the District Court could disagree with us on that
10 issue, but our position is not frivolous. This isn't a case,
11 like many of the ones they cite that say a notice of appeal
12 is a nullity where they cite a case where you have to appeal
13 within 30 days and the appeal is filed in 50 days.
14 Objectively, that's a nullity or where you cannot appeal
15 until after something happens and they appeal at a different
16 point in time or they forget to file the appeal or they file
17 the wrong paper, objective acts. The claim here, this is a
18 subjective issue. Does this appeal fit within the collateral
19 order appeal doctrine? If it does, this Court is divested of
20 jurisdiction to entertain matters encompassed by the appeal
21 pending that adjudication, and as I said, the sole issue for
22 this Court is, Is our filing of a notice of appeal under the
23 collateral order doctrine frivolous? Not that you disagree
24 with it, not how you would decide it, not how some other
25 court would, but is it frivolous, and if you look at Praxis,

1 the importance that the Third Circuit ascribes to FIRREA and
2 that was a collateral appeal, Your Honor of far less
3 significance than this one. That was one as to whether the
4 receiver, in that case the RTC as opposed to the FDIC, was
5 entitled to a 90-day stay as opposed to only the 45-day stay
6 that the Court granted to it, and the Third Circuit went
7 through the critical importance of FIRREA's comprehensive
8 claims process, identified FIRREA as the most sweeping thrift
9 reform legislation in the nation's history, identified the
10 cost and importance of litigation claim handling to the
11 FIRREA comprehensive scheme, and the expressed limits imposed
12 upon parties in attempting to circumvent the exclusive claims
13 process. That's precisely what this appeal involves. Again,
14 the substance of that is not before us now. You've already
15 ruled against us on that. I don't expect you to agree with
16 me today, but the question of whether we can appeal it is one
17 that Praxis makes very clear that in the Third Circuit this
18 is properly the subject of a collateral order of appeal and
19 the filing of that document divests the Court of
20 jurisdiction. That's not a surprising result, Your Honor.
21 The debtors cite a lot of Supreme Court cases going into the
22 narrowness of the collateral appeal doctrine, why it's
23 narrow, avoiding the need for piecemeal appeals. That's been
24 considered by the Third Circuit in looking at FIRREA and the
25 importance of that, but if you look at the case they rely on

1 most, is Lozem, a case that is subsequently discussed by the
2 Supreme Court again in Digital Equipment and the reason that
3 the result in Praxis in the Third Circuit is not surprising
4 is sort of highlighted by the Supreme Court in Digital
5 Equipment, and it's the distinction between the public
6 importance of a statutory or constitutional right as opposed
7 to a private contractual right, and the Court in Digital
8 Equipment, Supreme Court, says, "While there is no need to
9 decide here that a privately conferred right could never
10 supply the basis of a collateral order appeal, but there are
11 surely sound reasons for testing such rights differently than
12 those originating in the constitution or statutes. When a
13 policy is embodied in a constitutional or statutory provision
14 entitling a party to immunity from suit, a rare form of
15 protection, there is little room for the judiciary to gainsay
16 it's, quote, 'importance', close quote." And this is a case
17 where, as again, the Third Circuit has spoken on the
18 importance of the comprehensive litigation scheme in FIRREA
19 and the permissibility of a collateral appeal from a decision
20 by a court that addresses whether the court has properly
21 applied that scheme. Now, again, it's not a unique case.
22 These arise most in the case of immunities from suit and
23 double jeopardy. I mean it's clear that those are proper
24 collateral appeals, but the original case on the collateral
25 order doctrine appeal, Cohen didn't involve that kind of a

1 case, it involved an appeal of a court not to require the
2 plaintiff in a derivative action to post costs. We have
3 Praxis. Moses Cohen is another case. Mark Development. So,
4 while this does arise most in the case of absolute
5 constitutional and statutory immunities, in many ways this is
6 like that, but again, the Third Circuit has looked at this
7 issue, spoken on it, and therefore, under the frivolous test,
8 which is the one Your Honor is applying here, we suggest that
9 you cannot properly find that this is frivolous. Now, let's
10 go spend just a couple of seconds on the substance of the
11 appeal. The debtors spend most of their time addressing that
12 this is an improper collateral order appeal. They spend a
13 little time addressing the substance of the appeal, but I
14 would respectfully suggest that again, Your Honor's already
15 disagreed with us on the substance, but you could not
16 properly characterize our position as frivolous on this
17 particular issue. Indeed, we submitted that to you in a case
18 involving this very set of players here, brought against
19 JPMorgan Chase in Texas. The Court had Your Honor's
20 decision. They had before them that decision. It was
21 submitted in that case by the plaintiffs, reached an entirely
22 contrary decision. Said, "Absolutely this applies to claims
23 against third parties who purchase from the receiver because
24 the claim is one that's essentially attacking the acts of the
25 receiver." It's exactly the same as what happened here, and

1 in that case the Court sent the case to D.C. where that is
2 the exclusive forum to do it because that is where the claims
3 process is now lodged. Your Honor, in light of that, it's
4 directly contrary to Your Honor's decision. There's no basis
5 to conclude - you'd have to conclude Judge Hoyt was off his
6 rocker and he was frivolous too and for that decision
7 effectively -

8 THE COURT: Well, he was not dealing with bankruptcy
9 jurisdiction, which has the exclusive jurisdiction over
10 property of the estate, a different issue and the basis for
11 my decision is different.

12 MR. SACHS: Well, no, Your Honor, you ruled, and
13 with all due respect, your ruling was - I understand your
14 basis for your ruling. You were driven by the Bankruptcy
15 Court's jurisdiction, and we suggest that that can't override
16 FIRREA but what you did expressly rule was that FIRREA's
17 jurisdictional provisions do not apply to claims against
18 third parties. They only apply to the receiver. Judge Hoyt
19 reached an absolutely contrary decision. The case in Texas
20 was brought against JPMorgan Chase just like the debtors'
21 claims here were brought against JPMorgan Chase as the
22 purchaser from the receiver. Judge Hoyt said, "You cannot
23 avoid FIRREA's jurisdictional provisions that apply to claims
24 involving the assets of a receivership estate or the acts of
25 the receiver by suing the purchaser from the receiver." It's

1 directly contrary to Your Honor's ruling even though I
2 understand your ruling may have been motivated by the scope
3 of Bankruptcy Court jurisdiction over the property of the
4 debtor, and there's a direct conflict there, but Judge Hoyt
5 found exactly the opposite, and, Your Honor, there are cases
6 we cited to you before. The Sixth Circuit in The Village of
7 Oakwood. There's a Ninth Circuit case, the Eleventh Circuit
8 case. They reached a conclusion that is different than Your
9 Honor's that FIRREA's bar applies to, in certain
10 circumstances, claims against third party purchasers from the
11 receiver, and while I'm not asking you today to reconsider
12 your decision or agree with me, you've disagreed with us
13 twice, I understand, that's something that, as you
14 understand, we intend to pursue on appeal, but I am saying
15 that you cannot determine that our position is frivolous,
16 i.e., without any reasonable good faith basis, and with
17 respect to the divestiture of jurisdiction in this particular
18 case, that's the limits of the Court's inquiry. So, I
19 understand that the debtors don't like this result. They
20 think it's gamesmanship. They think we're playing fast and
21 loose. They think it's tactical. We think their filing of
22 the claims in this Court while they are simultaneously
23 pursuing their appeal from the denial of the very same claims
24 in the District of Columbia, is tactical. Litigation is on
25 its own, each party pursuing their own interests with

1 reasonable arguments to their client's end, but this is a
2 rule. It is a clear rule. It is a jurisdictional rule. It
3 is not a discretionary rule, and we respectfully ask Your
4 Honor to simply state that you regard yourself as divested of
5 jurisdiction to entertain matters in the adversary proceeding
6 until these appeals are either dismissed as improper under
7 the collateral order doctrine or are disposed of on their
8 merits by the District Court and/or the Third Circuit.

9 THE COURT: Thank you.

10 MR. SACHS: Thank you.

11 MR. ELSBERG: Good morning, Your Honor. David
12 Elsberg, Quinn Emanuel, for the debtors. Just to put this in
13 context, JPMC made motions asking Your Honor to dismiss or
14 stay these proceedings, and Your Honor considered it and
15 rejected it and said, No, these cases will go forward. The
16 cases went forward. They filed notices of appeal. Two
17 months have passed since they filed the notices of appeal.
18 In that time they've asked for a deposition and taken it.
19 They've negotiated discovery. They've served motions.
20 They've served discovery. They argued a motion to dismiss,
21 which they then lost. After all this happened over the
22 course of the two months, after the filing of the notice of
23 appeal, they turn around and essentially what they're saying
24 is, Guess what, Your Honor, that motion, that relief that we
25 asked for and that you rejected, we're giving it to

1 ourselves, and the way we're doing it is we're simply going
2 to fill out a piece of paper that basically says, Dear Your
3 Honor: This case must stop even though you decided it should
4 go forward. This is gamesmanship and it shouldn't be
5 tolerated. Now, Your Honor, there's a fundamental premise
6 which is flawed, which is inherent in their argument, and the
7 premise is that all that matters - I think the language that
8 was used was, "The limit of the inquiry is whether the appeal
9 is frivolous." The appeal is in fact frivolous on the
10 merits, and I'll get to that, but you don't even need to get
11 to that issue. Their brief and the presentation today,
12 whether deliberately or not, ignores the controlling legal
13 standard and a threshold issue that they cannot get over in
14 order for them to prevail. The Third Circuit has said, very
15 clearly along with other circuits, that a case must proceed
16 if the notice of appeal or the putative notice of appeal is
17 of an order that is actually not appealable. If it's not
18 appealable, you can't just fill out a piece of paper and say,
19 the show stops. You can be in the middle of trial. I filled
20 out a piece of paper. Clearly this is not an appealable
21 order, but I unilaterally get to stop the case. That's now
22 how it works. If you look at Venon, it's a Third Circuit
23 decision. It discussed on page 8 of our brief. What the
24 Third Circuit said there is, "An appeal from a non-appealable
25 judgment or order is sometimes characterized as a nullity."

1 And then it goes on to specifically say, "The jurisdiction of
2 the lower court is not lost by the taking of an appeal from
3 an order or judgment which is not appealable." Lepo, a
4 decision that they cite, Third Circuit, on page 8 and 17 of
5 our brief, we discuss it, it likewise says, "A notice of
6 appeal from a non-appealable order does not divest
7 jurisdiction." And by the way, it says that while
8 acknowledging the general rule that a trial court is divested
9 of jurisdiction over a case where a notice of appeal is filed
10 from an order that actually is appealable. The Third Circuit
11 in Lepo, again the case that I'm not sure why they cite, but
12 they did, Lepo relied on a case and quoted approvingly
13 Hitchman from the Fifth Circuit which says the same thing.
14 Ruby from the Second Circuit says the same thing. These are
15 all on page 8 of our brief, and what these cases discuss on
16 page 8 of our brief make clear is that it is this Court's
17 function to look at whether or not the order that is
18 supposedly being appealed actually is appealable, and if it's
19 not appealable, then the show goes on. It's not so easy,
20 otherwise, it would be too easy to abuse this doctrine which
21 is supposed to be a narrow and limited exception, it would
22 come wide open for abuse. Anybody could stop the show
23 whenever they want to. In face Lepo, by the way, I'll get
24 back to this later, but there was a statement made in the
25 briefs and today that, Sorry, Your Honor, we didn't mention

1 it before, we went forward with depositions, we argued the
2 motion to dismiss, we lost, maybe we should have brought it
3 up but it's not waive-able. If you look at Lepo, what Lepo
4 says is that the divestiture rule is a, quote, "Judge made
5 rule. There is not a ritualistic application of it. A
6 reasoned choice should be made," I'm quoting, "and that a
7 contrary rule would leave the Court powerless to prevent
8 dilatory tactics and disruption." And that was said in a
9 case, by the way, and again I'll get to this later, where the
10 order at issue was one that could have been deemed as a
11 collateral order unlike here where you don't even get passed
12 square one. It is not an appealable order. It's not a
13 collateral order. So you don't even get to assessing the
14 merits of the appeal. So, the question is, the threshold
15 question is, Is this an appealable order? Absolutely, this
16 is not an appealable order. The dispute here, Your Honor, is
17 about forum. What JPMorgan has said over and over again is
18 that this case should be litigated in D.C., and we cite on
19 page 13 of our brief in footnote 7, statements over and over
20 and over again about how it should be, it must be the right
21 place for this litigation to move forward in D.C. What
22 they're not saying is that they have a right to be free from
23 trial for even a day, for even a second. What they're
24 saying is, it should move forward, move forward now in D.C.
25 The United States Supreme Court in Lauro Lines (phonetical),

1 Your Honor, has directly and precisely addressed exactly that
2 type of argument. What happened there is, there was the
3 argument that there was a forum selection clause which said
4 that a case can be heard only in Italy, and the Court denied
5 the motion, and on appeal the argument was, Isn't this a
6 collateral order? Shouldn't the show stop because the right
7 would be destroyed if it moves forward in the wrong forum,
8 and Lauro Lines said, and I'm quoting, that there's no
9 collateral order where, quote, "The lower court has denied a
10 claim not that the defendant has a right not to be sued at
11 all, but that the suit against the defendant is not properly
12 before the particular court because it lacks jurisdiction."
13 That's exactly the type of claim that's being made here, and
14 Lauro Lines, the Supreme Court in a unanimous decision, goes
15 on to say, quote, "The critical question is whether the
16 essence of the claim is a right not to stand trial." And it
17 gives us examples: qualified immunity or absolute immunity.
18 This is going to become relevant in a minute when we discuss
19 Praxis, Your Honor, and what the Supreme Court also said is,
20 "An entitlement to avoid suit is different in kind from an
21 entitlement to be sued in only a particular forum." Which
22 again, is exactly the nature of their argument. Now, Your
23 Honor, in an attempt to get around the very clear holding of
24 Lauro Lines, which is fatal to their argument, we've heard
25 two things. We've heard, number one, that Praxis supposedly

1 helps them. I think they only cited this in a footnote,
2 although we were taken to task by them for not spending lots
3 and lots of time in every case on their footnotes. What
4 Praxis said, Your Honor, is that a right to be free from
5 claims for 90 days could count as a collateral order, akin to
6 what Lauro Lines recognized is a different and narrow type of
7 cases, if it's immunity, if it's double jeopardy, if it's
8 something saying that for a period of time you can be
9 completely free from claims to have a breathing room. That's
10 a different type of case. The second argument that we heard,
11 that again gets them absolutely nowhere, is we've heard the
12 argument that, Well, you know, Your Honor, this is about a
13 statute. This is more important than just a forum selection
14 clause, but if you look at the concurrents in Lauro Lines,
15 what Justice Scalia says clearly is that we have made the
16 same judgment, and I'm quoting, we've applied the same rule,
17 that it's not a collateral order, quote, "When the right not
18 to be tried in a particular court has been created through
19 jurisdictional limitations established by Congress, a
20 statute, or by international treaty." So, the holding of
21 Lauro Lines applies regardless of whether it's a contract
22 selection clause, a treaty selects it, a statute selects it.
23 So, they don't get past square one and again, their brief in
24 the presentation today, they had said it explicitly and
25 completely incorrectly that the inquiry is limited only to

1 whether the appeal is frivolous. Not so. There is a
2 threshold inquiry, is this an appealable order. If it is
3 not, what the cases have said including in the Third Circuit,
4 is the so-called appeal is a nullity, and a nullity cannot
5 and does not divest this Court of jurisdiction. Again,
6 otherwise, this would be wide open for abuse rather than a
7 narrow exception, and I would just note, Your Honor, by the
8 way, that the Third Circuit in Hudson specifically called the
9 FIRREA provision that they're relying on, a quote, "venue
10 provision". So, just like Lauro Lines, we're talking about a
11 venue or forum provision. So, let's just put a bookmark
12 there for a second. That's the key question and they try to
13 hide from Lauro Lines and they can't get past that. Even if
14 they could get past that, and they can't, only then does Your
15 Honor need to get to the question of assessing the merits of
16 the appeal and whether on the merits it's frivolous, and we
17 believe, Your Honor, that the merits of their appeal don't
18 exist, that it is merit-less, and I believe Your Honor said
19 on the transcript last time that the result was dictated by
20 controlling Third Circuit precedent, Rosa and Hudson. Now in
21 Lepo, what the Third Circuit said, again, I mentioned this
22 earlier, is that the divestiture rule is a judge-made rule
23 and it should be applied, not ritualistically but with a
24 reasoned choice, and there what you have is an appeal that's
25 frivolous, an appeal that clearly is merit-less, and you can

1 see which way it's going to be decided. Here it's the Third
2 Circuit that decided Rosa and Hudson, that's going to be
3 receiving this, and I think we know how that's going to turn
4 out, and if there has been delay, if those two things are
5 present, Your Honor, you do have a choice. This is not a
6 situation, subject matter never waive able. Delay does mater
7 and the merits and the weakness or absence of the merits does
8 matter, and that's exactly the situation here, and in terms
9 of the Texas case, this five-page decision, that decision
10 does not cite Rosa, it doesn't analyze the Rosa much less
11 does it even mention or analyze Your Honor's decision, and
12 whether or not in this circuit there's any merit or whether
13 or not an appeal is frivolous in this circuit is controlled
14 by what the Third Circuit Court of Appeals has said. This
15 Court is bound by what the Third Circuit has said not by what
16 a judge in Texas has said, and in our brief we discuss also
17 why we believe that decision doesn't get them anywhere on the
18 analysis. And just before I conclude, Your Honor, I would
19 just like to point out that JPMorgan's brief when they're
20 making points, supposedly in support of the idea that this
21 could be qualified as a collateral order and that therefore
22 they can get past square one, the cases that they cite do not
23 actually support what they're saying. These are cases that
24 deal with completely different situations. So they're the
25 immunity cases that don't help them here. Griggs is one of

1 the first cases that they cite. What Griggs says is, quote,
2 "A premature notice of appeal shall have no effect and will
3 be a nullity." That's one of the leading cases they rely on
4 here. We agree with that statement, a premature appeal is a
5 nullity and has no effect. They also cite - Paragraph (13)
6 of their submission is the paragraph where they say, You know
7 what, outside the context of immunity, outside of the right
8 to be free from suit, there are cases that show that just
9 like here, Your Honor, you can say, you should view this as a
10 collateral order, but those cases don't come close to
11 supporting that. So, for example, the Ehleiter case, that's
12 E-h-l-e-I-t-e-r, I'm not sure how to pronounce it, in that
13 case what the Court said is that the FAA, the Federal
14 Arbitration Act, gave a specific statutory right to bring an
15 appeal. They never got to the question of whether there
16 could be a collateral order. To the contrary, Your Honor,
17 in that case it specifically says there is no basis other
18 than the FAA to appeal this. This could not count as a
19 collateral order. Similarly, Hallock is quoted in paragraph
20 (13) as supposedly showing that in a situation just like
21 this, it's appropriate to deem it as a collateral order that
22 can be appealed. Hallock was an immunity case. Hallock was
23 a case involving 28 U.S.C. 2676, which states, quote, "There
24 can be a, quote, 'complete bar to any action'." That's what
25 was at issue there was the question of whether there could be

1 a complete bar to any action. Then there's the Ariove
2 (phonetical) case where the collateral order doctrine isn't
3 even mentioned much less was there any argument there about
4 the proper forum in which a case should proceed. By contrast
5 here again, the precise nature of the argument, and again, if
6 you look in our brief on page, I believe, 17 of our brief -
7 sorry, page 13 of our brief, footnote 7, over and over and
8 over again JPMorgan has made clear what is the disputed
9 issue. It's an order where Your Honor said, this case should
10 proceed here, not in D.C. where you, JPMC, wanted to proceed.
11 That's the issue. The issue is not the issue of whether or
12 not they're to be completely free from trial, and again, in
13 Lorro, the U.S. Supreme Court made clear, that is exactly the
14 kind of case that should proceed, and that's exactly the kind
15 of case that should not stop the show, and as this Court, as
16 the Third Circuit has said in Lepo and in Venon, when it's a
17 non-appealable order like this one is here under Lauro Lines,
18 the show must go on. Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. SHIEKMAN: Good morning, Your Honor. Larry
21 Shiekman from Pepper Hamilton, appearing for the Unsecured
22 Creditors Committee. We filed a joinder in the debtors'
23 paper, and I just wanted to add a couple of points, if I
24 might. One of them is, I searched the Bankruptcy Rules in
25 vain for a provision that authorized the filing of something

1 called a notice, and I wasn't really sure what JPMorgan
2 wanted the Court to do other than to look at it and say,
3 Well, thank you, I've noticed it, and now I can put it under
4 my desk. So there's a certain brashness, I think, about the
5 way in which they're trying to proceed here, and if they
6 could have come up with a procedural device that would have
7 given them a third opportunity to argue the same issue to the
8 Court, I'm sure they would have done that, and failing to
9 have found one, they now have called it something which the
10 rules don't describe. I think beyond that, I just want to
11 echo a point that Mr. Stratton, my partner, made in an
12 earlier iteration of this argument which is, these two
13 adversary proceedings involve virtually all of the assets of
14 this estate, and the prejudice to the creditors by simply
15 having the Court stand down, having these two adversary
16 proceedings await the outcome of either Judge Sleet or the
17 application they've made to the Third Circuit will continue
18 to prejudice the creditors by causing the occurrence of
19 additional costs and imposing delay on the final disposition
20 of this estate. So we ask that you do what you should do,
21 which is to ignore the notice and let the District Court do
22 whatever it's going to do in response to whatever JPMorgan
23 Chase may dream up next. Thank you.

24 THE COURT: Thank you. Reply?

25 MR. SACHS: Again, Robert Sachs on behalf of

1 JPMorgan Chase. Let me address a few points, Your Honor.
2 First, the point made by the debtors that suggests that Your
3 Honor is permitted to make a wholesale, independent
4 determination as to whether you believe that our appeal is
5 properly a collateral order appeal. The law is precisely to
6 the contrary. That is completely incorrect, and I'd cite you
7 simply to Lepo. This is not a case of a facial nullity of
8 something that is untimely filed or on its face does not
9 comply with the rules when you are asking for a subjective
10 determination, the determination that is required of this
11 Court's, from whose order is being appealed, role is very
12 circumscribed, and it's set forth in Lepo, a Third Circuit
13 case. We hold - and this is a case on the double jeopardy
14 motion. "We hold that an appeal from the denial of a double
15 jeopardy motion does not divest the District Court of
16 jurisdiction to proceed with the trial if the District Court
17 has found the motion to be frivolous and supported its
18 conclusions by written findings. Of course, in the absence
19 of a finding that the motion is frivolous, the trial court
20 must suspend its proceedings once the notice of appeal is
21 filed. In those instances in which it refuses to do so or
22 when its findings are not supported by the record, the
23 concerns of Avni are sufficiently safeguarded by the
24 availability of a stay pursuant to Federal Rules of Appellate
25 Procedure 8 or a writ of mandamus or prohibition under 28

1 U.S.C. 1651. The fact is that the concerns that are
2 expressed by the debtors about dilatory appeals, interfering
3 with proceedings, et cetera, that has been struck by a
4 balance that says, "The Court disposes of those facially
5 frivolous acts on a standard of frivolousness." Otherwise,
6 the issue of whether something is properly appealed as a
7 collateral order is in the Court reviewing the appeal, in
8 this case either the District Court or the Third Circuit.
9 That's number one. So they're entirely incorrect, and Your
10 Honor, again Stewart out of the 10th Circuit, another such
11 case, going through exactly the same thing, the Court
12 explained that it is only after the District Court has
13 determined the defendant's appeal to be frivolous or
14 forfeited that the defendant must seek a stay from the Court
15 of Appeals to prevent the trial from proceeding. Other
16 courts have similarly emphasized the need for a clear and
17 reasoned finding of frivolousness or forfeiture by the
18 District Court in order to prevent the automatic divestiture
19 of jurisdiction. It is an automatic divestiture of
20 jurisdiction. The issue of whether you agree or disagree is
21 not the issue before this Court. That is an issue for the
22 Court of Appeals to the extent they suggest that this is
23 subject to wholesale, independent, we agree, we don't agree
24 review in this Court. They are misstating the applicable
25 law. Lepo could not be clearer on that subject. Second,

1 they rely again entirely on Lauro Lines, however, Praxis
2 itself from the Third Circuit distinguishes Lauro Lines. The
3 issue here undoubtedly involves JPMorgan Chase's and the
4 FDIC's because the FDIC regards this as a claim against them
5 effectively, right not to be subjected to claim in this Court
6 at all, but it involves more than that. It involves, as
7 Praxis said, the protection of Congress's mandated claims
8 process, enforcement of that claims process. That is what is
9 irreparably lost and that is why we believe, that is why
10 Praxis says that an appeal under FIRREA is subject to
11 collateral order review where a court does not honor those
12 strict limits on jurisdiction and protection of the claims
13 process that Congress carefully crafted in the most important
14 piece of thrift legislation in the nation's history. That's
15 how it was characterized. It has tremendous public
16 importance, and that's why FIRREA appeals have already been
17 found in this case, a failure to adhere to a FIRREA issue.
18 FIRREA limit on jurisdiction has been found in the Third
19 Circuit to be a proper subject of collateral order appeal.
20 Again, we have a good faith basis even if Your Honor believes
21 that under Lorro or some other case by Praxis should have
22 bene decided differently, might be decided differently today,
23 you would have decided differently, that's not the standard.
24 We have a good faith basis to claim that this is a subject to
25 collateral order review, that is the scope of the inquiry at

1 this point in time, and Lorro is again distinguished by
2 Praxis and there's an explanation of why Lorro is also
3 characterized in Digital Equipment, and so continued
4 reference to Lorro, Lorro is a different case. It's a
5 private contract case, and undoubtedly, you know, everything
6 is continuum and you can understand why different decisions
7 are reached in different cases. You can always say they're
8 not consistent with one another. They are consistent. Maybe
9 they had something funning for breakfast that day when they
10 decided that one. It was this justice or that justice, and
11 you rationalize things, but in this case we do have a Third
12 Circuit case and it is specifically on FIRREA, and it does
13 indicate why a collateral order appeal is appropriate. And
14 they again go back to the notion that collateral order
15 appeals are limited to the complete divestiture of
16 jurisdiction cases, a right never to trial. As I say, that's
17 part of the argument, but it also begs the question of the
18 importance of FIRREA, the public importance of that, the
19 importance of it to the FDIC, which underlay the stay motion,
20 the complete stay motion in this particular case. It also
21 ignores the fact that there are many - the first case ever
22 decided, the geneses of the collateral order doctrine is not
23 a complete defense to a jurisdiction no-suit case. It's
24 Cohen v. Beneficial Life, it involves a case involving a
25 failure to post security in a derivative action. So there

1 are cases that are different than that. That's one strand,
2 that's undoubtedly where it comes up most often, but it is
3 not the sole issue. But again, these are debates on the
4 merits as to whether Praxis is going to control, should
5 control, should be reviewed, should be reversed, should be
6 disregarded, can be distinguished in some way, but Praxis is
7 the this Third Circuit decision. It does find it appropriate
8 for reasons that are equally applicable here. Finally, Your
9 Honor, with respect to the comments from the Creditors
10 Committee on prejudice, we've heard time and time and time
11 again how these adversary proceedings involve the most
12 significant assets of the estate and we are delaying it. We
13 are delaying nothing in this case, Your Honor. The fact is
14 that the debtors filed claims to these very assets in the
15 receivership. They filed an action in D.C. They are
16 delaying the resolution of their entitlement to those assets
17 by filing the same claims in this Court, that is our position
18 on this.

19 THE COURT: How does that delay the D.C. action?

20 MR. SACHS: It delays the D.C. action because you
21 are - two Courts are resolving the very same matter, and,
22 Your Honor, the D.C. action is going to have to determine in
23 that Court the effect to be given to the denial of the claims
24 by the receiver in the receivership process, and so, they
25 are, for example, asserting claims here to assets that are

1 the subject of claims that they made in the receivership that
2 were denied by the receiver. Now it may be that they can
3 convince the District Court in D.C. that those denials were
4 improper and they should be adjudicated *de novo* on their
5 merits, that there was something wrong with the denial, but
6 that is an integral part of the receivership resolution
7 process and I respectfully suggest you can't adjudicate the
8 claims here anew on a clean slate as though those denials
9 never happened, which is what they're trying to do here.

10 THE COURT: They're suing two different parties in
11 two different forums.

12 MR. SACHS: No, Your Honor. That's where you and we
13 disagree. Respectfully, they have sued us but as Judge Hoyt
14 recognized while they've named the third-party buyer their
15 claim is based upon whether these were or were not assets of
16 the receivership at the time of receivership. We are simply
17 a transferee of whether those were assets. We didn't do
18 anything independently wrong about those assets -

19 THE COURT: Well, that's not quite what they allege
20 in their adversary.

21 MR. SACHS: Well, that's -

22 THE COURT: They allege that you did do something
23 wrong independently of the actions of the FDIC.

24 MR. SACHS: Well, that's not entirely correct, Your
25 Honor. So, for example, they claim they're entitled to

1 certain amounts of money that are on deposit. Those either
2 were or were not deposits at the time of receivership to
3 which the debtors did or did not have an entitlement. We
4 simply got what the FDIC had, trust preferred securities.
5 They're claiming that there are certain rights in trust
6 preferred securities. Again, those either were or were not
7 assets of the receivership estate. At the time of the
8 receivership, we either got them from the receivership or we
9 didn't get them. We didn't do anything with respect to
10 those. They're seeking to rescind the PNA agreement by which
11 we bought the assets and liabilities from the receiver.
12 That's a direct challenge, while it undoubtedly affects us,
13 they say it's an improper contract. They have a whole bunch
14 of things, but fundamentally, it's a challenge to the acts of
15 the receiver, that the receiver erred in entering into that,
16 not that we are independently liable for that, that it's a
17 contract that the receiver should not have entered into under
18 a variety of theories. It directly challenges the acts of
19 the receiver. They have claims to intellectual property -

20 THE COURT: We're rearguing what we've -

21 MR. SACHS: We are.

22 THE COURT: - heard before.

23 MR. SACHS: But you did raise the issue with me,
24 Your Honor, and I didn't - you raised this one. I didn't
25 raise this one, but so I would respectfully suggest it is the

1 same sort of thing, but my last point was in response to the
2 comments from the Unsecured Creditors Committee which is
3 there are adverse consequences that would befall a delay here
4 due to that. I'm suggesting they could be mitigated in other
5 ways, but the Third Circuit has made clear in a case we cited
6 for you. It's Venon, and I believe the other side cited to
7 you where they go specifically into that issue and they say,
8 You know what, that's unfortunate. We wish it weren't the
9 case, but there are benefits to be accorded to this rule to
10 one court having jurisdiction over an issue at the same time,
11 and there are reasons for having a collateral appeal
12 doctrine, and there are reasons that when an appeal is filed,
13 the lower court is divested of jurisdiction so you don't have
14 two courts considering the same issue. That's why, Your
15 Honor, a lower court can't even reconsider its order while an
16 appeal is pending even if it suddenly said tomorrow, Oh, my
17 God, you know, I made a - assume you said, Your Honor, You
18 know, I looked at Judge Hoyt, I really messed up. I made a
19 mistake. I'd like to change my order. You don't have the
20 power to do that. That might be efficient, but you don't
21 have the power to reconsider your order because you're
22 divested of jurisdiction over that order once the notice of
23 appeal is filed. Now, I know that seems crazy in some sense,
24 but that is the clear rule, and that is the interplay between
25 courts of appeal and lower courts, and it's the impact of the

1 divestiture rule which is only one court decides it. That's
2 why the impact on the lower court is, you review it simply to
3 determine if the appeal is frivolous and as the Third Circuit
4 said, You're inquiry must be one for frivolousness, and you
5 either need to recognize the divestiture or find by written
6 findings that the appeal is one that's frivolous, Your Honor.

7 THE COURT: Thank you.

8 MR. ELSBERG: Your Honor, on the Rosa point that was
9 argued, it's like groundhog day and on the Lepo point, it's
10 like Alice in Wonderland. I can't understand, Your Honor,
11 and if you haven't, I hope you will look at Lepo. Why JPMC
12 keeps returning to Lepo as if Lepo supports the notion that
13 this is an appealable order is a mystery. Lepo is a case
14 that helps us and demonstrates that even if you get past step
15 one, which is to determine that it could be a collateral
16 order, then there's another way that the Court can decide
17 that this proceeding should continue. Lepo, remember, was
18 about immunity. It was not a Lauro Lines situation where
19 clearly it was a non-appealable order. It was a
20 quintessential type of appealable order because it was about
21 immunity, and what the Court said in Lepo is, even in that
22 case, I have to take a practical approach, a reasoned
23 approach, and if this looks strategic, dilatory, and merit-
24 less I can still stop the show, but that is a case where
25 hurdle one had been cleared. Here they can't get past hurdle

1 one, they can't get past Lauro Lines, and if there's any
2 doubt on that, Your Honor, we filed our brief yesterday. We
3 had less than a week to file it, and on page 8 of our brief
4 we cite case after case including Venon, and I mentioned it
5 before, which says the Third Circuit does not just go to step
6 two and look at frivolousness which is an independent reason
7 to say that jurisdiction will be kept or shared, but this
8 Court can and should look at, is this a non-appealable order.
9 Again, I'm quoting from the Third Circuit in Venon, "An
10 appeal from a non-appealable judgment or order is sometimes
11 characterized as a nullity." Again, I'm quoting from Venon,
12 the Third Circuit. "The jurisdiction of the lower court is
13 not lost by the taking of an appeal from an order or judgment
14 which is not appealable." Again, there's Lepo which cites to
15 Hitchman, a Fifth Circuit case, which we quote in our brief,
16 and Rubia, a Second Circuit case which is quoted in our brief
17 and what they say is whether you call it a premature appeal,
18 whether you call it a non-appealable order, whether your call
19 it effective appeal, if you can't get past step one and they
20 can't because of Lauro Lines then you don't need to get to
21 step two which is, by the way, is this strategic and dilatory
22 and under this judgment rule, should I still say that this
23 case will move forward. So that's Lepo. Again, they went
24 back to Praxis. Praxis, Your Honor, was about the stay
25 provision, a right to be free from suit for a period of time,

1 completely free from claims, again, like immunity, and
2 completely unlike Lauro Lines which is dead on point where
3 the argument is, JPMorgan's argument here, which is, Please,
4 we want to litigate this and now in a different forum which
5 they've said *ad nauseam* and we quote just some of their clear
6 statements on this point in our brief, and again, they made
7 the point, Lauro Lines is only about a forum selection clause.
8 Please, Your Honor, take a look at the concurrence, the last
9 sentence I believe in Scalia's concurrence, it says, "By the
10 way, we've applied the identical rule when the issue of forum
11 has to do with an argument about a statute, an act of
12 Congress, or a treaty designating the forum, same result."
13 And, Your Honor, I would just finish with where I started
14 initially, which is to just keep in mind, go back to basics
15 on this doctrine. The courts have said again and again, this
16 is a narrow doctrine. It is a narrow exception, and if the
17 interpretation that they're pushing were correct, it would
18 blow it wide open to abuse by anyone at any stage in a
19 proceeding. It could be right in the middle of a trial and
20 someone could give a notice and say, Your Honor, I previously
21 moved to stay. I previously moved to stay on exactly the
22 grounds where I am now making this appeal. Your Honor
23 rejected the motion to stay on solid grounds, I continue to
24 litigate. How long can they proceed? Are they saying they
25 could go to trial and benefit if they don't like how it's

1 going? They can say, Here's a notice, I'm stopping the show
2 now. Maybe after the trial and before the verdict, if they
3 think it didn't go well. Here they just waited to argue a
4 motion to dismiss, which they lost. They just took a
5 deposition, maybe they didn't like how it went and they're
6 saying, Guess what, here's a piece of paper, Your Honor, you
7 can't even look at this. That would be the most wildly
8 inefficient and a wide-open rule. The exception would
9 swallow the rule. That's not what the case law holds, and
10 just before I finish, Your Honor, just to correct one other
11 thing that was said. I believe it was JPMorgan that filed
12 proofs of claims here and filed the adversary proceedings
13 here, and I think something was said about that that was not
14 completely accurate. Thank you, Your Honor.

15 THE COURT: Okay. Alright, well, let me issue my
16 ruling. Although I'm not quite sure what I'm ruling on,
17 there is no motion before me. There's a notice of a
18 divestiture, but I take it the parties are asking me whether
19 the adversary proceeding will proceed, and in my opinion,
20 yes, it will proceed. It is clear that the appeal of the
21 denial of a motion to dismiss or the denial of a motion to
22 stay a proceeding is not appealable. The only exception to
23 that that has been cited is the collateral order doctrine.
24 The Supreme Court has made it clear that this is a narrow
25 exception, and the Supreme Court held in Lauro Lines that it

1 does not apply to issues of where a party can be sued as
2 opposed to whether a party can be sued. Praxis is not
3 applicable. It dealt with whether a party can be sued, i.e.,
4 whether a 90-day stay applied or a 45-day stay applied, not
5 to an issue of where a party can be sued. So it just is not
6 applicable to this case. The fact that JPMC has continued to
7 appear before me and to continue to proceed with this
8 adversary for the past four months, I think evidences an
9 acknowledgment that really their position is frivolous. Need
10 I say it, I do say it, the argument is frivolous that the
11 collateral order doctrine applies. With respect to the
12 merits of the appeal, I've already made my ruling on that
13 numerous times. I need not issue it again. I think the
14 decision of JPMC that I do not have jurisdiction is
15 frivolous. The adversary proceedings will proceed until and
16 unless the Appellate Court decides otherwise, but they need
17 not be held up pending that appeal.

18 MR. ELSBERG: Your Honor, if I might, I was just
19 hoping that I could raise the issue of scheduling a hearing
20 date for the summary judgment motion on the deposit issue,
21 and we would propose, if it works for you -

22 THE COURT: Have I seen - has the briefing been
23 completed?

24 MR. ELSBERG: Yes.

25 THE COURT: When did the notice of completion of

1 briefing get filed?

2 MR. ELSBERG: We'll file a notice today. We're
3 hoping we could just get something on the calendar, if Your
4 Honor is agreeable, for the week of October 12.

5 THE COURT: Is that the week of - that's the week
6 before the NCBJ?

7 MR. ROSEN: I think that's right, Your Honor. I
8 think it is the following weekend.

9 MR. SHIEKMAN: Your Honor, could I ask . . .
10 (microphone not recording) the following week?

11 THE COURT: The following week I'm out.

12 MR. SHIEKMAN: (Microphone not recording.)

13 THE COURT: I'm going to ask the parties, I'm going
14 to talk to Ms. Capp, I'm not going to set, but as I
15 understand it, the parties are suggesting then the week of
16 October 25th?

17 MR. ELSBERG: Or, Your Honor, we would prefer
18 October 12 or if it could be October 8 or 9, and if it can't
19 be sooner then, yes, the following week.

20 THE COURT: Well, it can't be the 9th.

21 MR. ELSBERG: Okay. We can try to work it out
22 together. We can work it out together.

23 THE COURT: Okay.

24 MR. ELSBERG: Thank you, Your Honor.

25 THE COURT: Get a date from Ms. Capp. Thank you.

1 MR. ROSEN: Thank you, Your Honor. The next time, I
2 may not change the agenda order, but I will try to - Your
3 Honor, if I could get rid of some things which I believe are
4 either going to be continued or be very quick, we could do
5 that, Your Honor?

6 THE COURT: Okay.

7 MR. ROSEN: Item 7 on the agenda, Your Honor, is the
8 motion for reconsideration of an order that approved the
9 stipulation between the debtors and Dell Marketing, and the
10 parties, Your Honor, have reached an agreement, and it's
11 actually a tri-partied agreement between the debtors, Dell,
12 and JPMorgan Chase. We thought we had concluded the
13 documentation of that stipulation, Your Honor, however we did
14 receive some comments late yesterday afternoon and Dell and
15 the debtors are still looking at those comments that JPMorgan
16 provided. So if I could ask Your Honor to continue this, but
17 it is my guess that we'll provide a stipulation with a
18 certificate of counsel resolving this matter.

19 THE COURT: That's fine, you may file it under
20 certification of counsel.

21 MR. ROSEN: Thank you, Your Honor.

22 MR. GORFEIN: Your Honor, if I may. Peter Gorfein.
23 You'll provide a copy of that to the Committee?

24 MR. ROSEN: Absolutely.

25 MR. GORFEIN: Thank you.

1 MR. ROSEN: Your Honor, just generally speaking,
2 there was equipment that was provided, there was a request
3 then pursuant to the early stip we had provided an admin
4 claim, pursuant to this, Your Honor, based upon the change in
5 circumstances, JPMorgan is actually going to be keeping that
6 equipment, paying for it, and we will then tussle over our
7 remaining unsecured claim against the estate.

8 THE COURT: Okay.

9 MR. ROSEN: Your Honor, item number 8 on the docket
10 is a motion for an order authorizing the debtors to enter
11 into a letter of intent with Goldman, Sachs & Company and
12 approving the reimbursement of due diligence expenses and for
13 an exclusivity for a period to negotiate with Goldman, Sachs
14 and the debtors. Your Honor, we have received a response and
15 a reservation of rights from JPMorgan, specifically, JPMC
16 Wind Investment LLC, and JPMC Wind Investment Portfolio LLC
17 really asking that their rights, whatever they may be, would
18 be preserved, and we have no issues with respect to that,
19 Your Honor. In fact, we've modified an order and all parties
20 have agreed to the form of order. There were no other
21 objections submitted. I do have in the courtroom, Your Honor

22 -

23 THE COURT: I have a problem with sealing the price.

24 MR. ROSEN: Your Honor, we do have in the courtroom
25 today an unredacted version of that that we are happy to show

1 the Court. The problem with that, Your Honor - not a problem
2 with showing the Court, but the problem with making it public
3 is we believe that will have a detrimental effect on the
4 overall process if in fact we come out, Your Honor, and then
5 it does go to subsequent bidding, which we would, of course,
6 Your Honor, have a stalking horse, and then it would be fully
7 disclosed, but in the interim, the debtors and Goldman, Sachs
8 felt, as well as the investment banker, who was retained by
9 the estate, that it would have a negative effect on the
10 process.

11 THE COURT: So, tell me what process you think
12 you're going to follow.

13 MR. ROSEN: Your Honor, we are going to allow
14 Goldman, Sachs to do some due diligence at this point in
15 time, and hopefully upon the completion of that due
16 diligence, Goldman, Sachs will tender a more formal bid which
17 is a step beyond the expression of interest that we already
18 received that is set forth in this letter of intent.

19 THE COURT: So the bid will be public.

20 MR. ROSEN: The bid will be public, absolutely, Your
21 Honor, and then we will come back with a formal stalking
22 horse, if necessary.

23 THE COURT: Okay.

24 MR. ROSEN: Your Honor, as I said, I do have an
25 unredacted version if you would like us to present it to the

1 Court at this time.

2 THE COURT: Yes. Thank you.

3 MR. ROSEN: Your Honor, just to be clear also, we
4 have provided the Creditors Committee with a copy of the
5 unredacted letter of intent.

6 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

7 THE COURT: Alright, I'll mark this as sealed for
8 the record.

9 MR. ROSEN: Thank you, Your Honor. Your Honor, as I
10 indicated, I do have Mr. Goulding in the courtroom if the
11 Court would like a proffer on this although I don't think
12 it's necessary, but if you'd like I could do that.

13 THE COURT: Very briefly.

14 MR. ROSEN: Okay, Your Honor. Your Honor, Mr.
15 Goulding would testify that the debtors' Wind Power
16 Investment is comprised of WMI Investment's membership
17 interest in JPMC Wind Investment Portfolio LLC, the portfolio
18 holding company that has an equity interest in four projects.
19 Mr. Goulding would testify that in February 2009, the debtors
20 were authorized by the Court to retain CP Energy Group LLC as
21 their investment banker in order to, among other things,
22 identify potential purchasers of this investment and to
23 coordinate technical due diligence and assist in negotiation
24 with perspective purchasers. He would state that CP Energy
25 generated a list of approximately 30 potential purchasers of

1 which 23 executed confidentiality agreements and distributed
2 the materials necessary to continue the process. He would
3 testify that the limited liability company agreement
4 governing JPMC Wind Investment Portfolio contains
5 restrictions regarding, among other things, the identify of
6 proposed solicitees or transferees of WMI Investment's
7 interest and a right of first refusal on the behalf of
8 JPMorgan. Mr. Goulding would testify that the original list
9 of potential purchasers was modified in consultation with
10 JPMorgan to exclude certain potential purchasers based on the
11 transferee restrictions in the LLC agreement. He would also
12 state that WMI Investment solicitations were required to
13 comply with the confidentiality provisions of the LLC
14 agreement. He would state that in response to the marketing
15 efforts, seven parties contacted CP Energy to express their
16 interest in Wind Power Investment and executed further
17 confidentiality agreements with the debtors. He would state
18 that after preliminary due diligence regarding this,
19 potential purchasers submitted non-binding written offers to
20 purchase Wind Power Investment. He would state that the
21 expression of interest submitted by Goldman is the highest
22 and best expression of interest submitted to date. He would
23 state that Goldman has advised the debtors that it would only
24 conduct further due diligence in connection with the
25 potential purchase if the debtors agreed in advance and

1 obtained Court approval to compensate Goldman for its out-of-
2 pocket expenses including professional fees up to an
3 aggregate amount of \$300,000. He would state that upon
4 information and belief this up-front payment of expenses is a
5 standard practice in the marketplace for similar tax equity
6 investments. Mr. Goulding would state that in light of the
7 submission by Goldman and the potential benefits to the
8 debtors' estates from a sale transaction with Goldman, the
9 debtors determined that it was in their best interest to seek
10 approval of a letter of intent with Goldman. He would state
11 that pursuant to the terms of the letter of intent, the
12 parties agreed that WMI Investment will only be required to
13 reimbursement Goldman for its expenses if the purchase price
14 is set forth in any definitive documentation after adjustment
15 is greater than \$15 million. He would also state that WMI
16 Investment's obligations to reimburse Goldman for its
17 expenses would cease if definitive agreements are entered
18 into between Goldman and WMI Investment with respect to a
19 transaction and the transaction is not consummated as a
20 result of Goldman's material breach. He would state that the
21 terms of the letter of intent were negotiated in good faith
22 and that the preliminary non-binding terms and conditions of
23 the proposed transaction, including the fees and expense
24 provision to be paid or reimbursed under the most favorable
25 of the proposals received by the debtors to date. Mr.

1 Goulding would also state that the 300,000 in fees and
2 expenses are reasonable in comparison to the potential
3 purchase price for the Wind Power Investment of which the
4 floor is currently \$15 million. That would be Mr. Goulding's
5 testimony, Your Honor.

6 THE COURT: Alright, does anybody wish to cross-
7 examine Mr. Goulding? Alright, I'll accept the proffered
8 testimony.

9 MR. ROSEN: Thank you, Your Honor. As I mentioned,
10 Your Honor, there are no objections, only the response and
11 the reservation of rights that have been submitted by
12 JPMorgan. We have worked out the terms of the form of order
13 with both JPMorgan and the Creditors Committee has had an
14 opportunity to review it, and we would ask the Court to
15 approve the motion and grant the relief requested.

16 THE COURT: Alright, I will grant the relief
17 requested.

18 MR. ROSEN: May I approach, Your Honor?

19 THE COURT: You may. Alright, the revisions look
20 acceptable and I'll enter that order.

21 MR. LANDIS: Your Honor, if I might.

22 THE COURT: I'm sorry.

23 MR. LANDIS: Adam Landis, for the record, from
24 Landis, Rath & Cobb on behalf of JPM Wind Investment
25 Portfolio LLC and JPM Wind Investment LLC. Mr. Rosen is

1 correct, we did file a reservation of rights and a response,
2 and Your Honor has granted the relief requested already which
3 is appropriate. We didn't object to the solicitation of
4 interest, although, Your Honor, we reserved our rights under
5 the LLC agreement itself, under applicable LLC law, and also
6 with respect to any potential transfer of that interest which
7 are two very different matters altogether. We did put in our
8 reservation of rights in response, a note that we had been
9 discussing what the debtors' desires are and how they would
10 like to try to proceed to transfer their interests. That
11 includes issues relating to the right of first refusal. It
12 includes the ability to transfer at all, but we're willing to
13 continue those discussions. We've also engaged the Committee
14 in those discussions, and we intend to continue down that
15 road, hopefully on a consensual basis, but if not, obviously
16 we know where to find the Court.

17 THE COURT: Alright.

18 MR. LANDIS: Thank you, Your Honor.

19 MR. ROSEN: Your Honor, the next items I'd like to
20 take up from the agenda are items, I believe, 5 and 6,
21 because I think they'll be much quicker than item number 4.
22 Items 5 and 6, Your Honor, are the debtors' fifth omnibus
23 objection to claims and the sixth omnibus objection to
24 claims.

25 MR. LANDIS: Your Honor, if I might jump in one more

1 time, for the record, Adam Landis for JPMorgan Chase.
2 Inasmuch as what we were here for today has concluded, if
3 it's possible for us to be excused, we would take our leave.

4 THE COURT: You may.

5 MR. LANDIS: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. ROSEN: Your Honor, if I could just step back
8 and give a brief overview as to where we have been with
9 respect to the various omnibus objections to claims, I think
10 we can move forward quite quickly on these then.

11 THE COURT: Okay.

12 MR. ROSEN: Your Honor, with respect to the first
13 omnibus objection, which isn't on the calendar anymore and
14 the reason for that is both remaining claims under that
15 objection have been adjourned until October 28th. With
16 respect to the fifth omnibus objection, there are two claims,
17 claim numbers 2306 and 1026 filed by Asbury Park Press and
18 Cape Publications respectively. Those were adjourned from
19 the July 27th hearing per the request of the claimants'
20 counsel. We have never received a response from that
21 counsel. Nothing has ever been filed with the Court, so the
22 debtors' objection with respect to these claims would be
23 going forward today, Your Honor, as unopposed. With respect
24 to the claims of Compliance Coach, Courier Solutions, Andrew
25 Eshenbach, and Kenneth Koch, those have been agreed, with

1 counsel, to be adjourned until October 28th. With respect to
2 the balance of the fifth omnibus objection, the only claims
3 objections that would be going forward today, Your Honor,
4 then, besides the two I mentioned as unopposed, would be the
5 employee claims.

6 THE COURT: Okay.

7 MR. ROSEN: With respect to the sixth omnibus
8 objection, there are certain other matters that have also
9 been agreed upon to adjourn to October 28th. One, I
10 apologize, Your Honor, because it is, I believe, reflected as
11 going forward on the agenda, but we did receive a call last
12 night from counsel. This is the one with respect to John
13 Pereira as the Chapter 11 Trustee of Maywood Capital. If the
14 Court recalls, we previously had a hearing on this one, Your
15 Honor, and that was where they were told that in their case,
16 the FDIC was going to rule by September 30th. They've now
17 been told that it's going to take a little bit longer, and
18 they've asked us, therefore, to push it a little bit longer
19 so we agreed to push it to October 28th, Your Honor. That
20 would be claim 2675 of the John Pereira's Chapter 11 Trustee.
21 Certain other ones will also be adjourned, Your Honor.
22 That's Mr. John H. Murphy, claim 2033, MARTA/ATU Employees
23 Retirement Plan, claim 3515 and relies on claim 3349. With
24 respect to the other claims then, Your Honor, for the sixth,
25 they would be the employee claims.

1 THE COURT: Alright.

2 MR. ROSEN: With respect to the eighth omnibus
3 objection, Your Honor, the one remaining claim that was part
4 of that, that had not been resolved, we have agreed again to
5 adjourn. That is that of the L.A. County. We're hoping now
6 and we believe that are very close to reach resolution, and
7 we are pushing that to October 28th. So that takes us then,
8 Your Honor, to the employee claims, and, Your Honor, we have
9 a presentation, and I can do it either in an outline form,
10 which I think would be quite easy, or I can put Mr. Spittell
11 on. We also have Mr. Spittell's declaration that was
12 previously filed with the Court. In any of those matters
13 moving forward, Your Honor, the purpose of it would be to
14 establish that these employees are not employees of WMI.

15 THE COURT: I have an 11:30 sale hearing, and I have
16 a 12:15 meeting, so, whatever is most expeditious.

17 MR. ROSEN: Well, Your Honor, as I indicated, we
18 already filed the Spittell declaration but if I could, I'd
19 like to present one and submitted it into evidence, Your
20 Honor.

21 THE COURT: Alright.

22 MR. ROSEN: Make it easy. If I may approach, Your
23 Honor?

24 THE COURT: Yes.

25 MR. ROSEN: Your Honor, I do have Mr. Spittell in

1 the courtroom today if the Court or anybody else would like
2 to ask Mr. Spittell any questions. This was the declaration
3 that we did file with the Court. The one, however, that we
4 subsequently because of concerns of privacy, we have removed
5 the documents which were included as Exhibit B because it
6 contains some financial information about the respective
7 employees. We do have, however, in front of you now, Your
8 Honor, the complete Spittell declaration which has all of
9 that data. Your Honor, the point of all of this is that
10 we've gone through many different ways to try and establish
11 where these people were appropriate employees. Exhibit A is
12 a summary of the employee-related information with respect to
13 the claimants and the related claim information. Exhibit B
14 is the W-2 information. Exhibit C is the human resources
15 software data that the debtors have, and Exhibit D is a list
16 of WMI employees. When we distill all of this, Your Honor,
17 whether we're looking at the retention agreements or the
18 change in control agreements the conclusion always is the
19 same, that none of these employees were employees of WMI,
20 rather they were employees of WMB. We received, Your Honor,
21 way back when, certain responses to the objections
22 themselves. Mr. William Finzer filed one, and he filed two
23 claims as well, Your Honor, where he says that he was
24 employed by Washington Mutual for the benefit of Washington
25 Mutual, Inc., and therefore, he requested that the objection

1 to his claim be denied pending the resolution of multiple
2 cases and claims between the debtors, the FDIC and JPMorgan
3 Chase. I think as we heard today, that might take a little
4 bit of time, Your Honor, but it doesn't really matter because
5 we think that that is all irrelevant. He alleges that it is
6 believed by him that independence among the debtor, WMI and
7 other subs of the debtors, have not been established and
8 pending claims in cases may further provide additional facts
9 regarding the relationship among the debtors, the claimants
10 and the subsidiaries. No other allegation, however, Your
11 Honor, is made with respect to the WMI or WMB independence.
12 It's just a mere statement on his part. Well, Your Honor, in
13 our reply with respect to his retention agreement, we stated
14 that the person who signed his agreement, the signature of
15 Mr. Murphy, did not have any corporate authority to bind WMI,
16 rather he was a WMB employee and so he did not - although he
17 may also have been an officer of multiple entities, he did
18 not have any authority to bind WMI and did not sign in the
19 capacity as an officer of WMI. With respect to Mr. Foster,
20 that's claim 612, Your Honor, he alleged that WMI was a party
21 to the retention agreement. He also alleged that the
22 retention agreement indicates that it would be governed by
23 the WaMu severance plan which is administered by WMI. Your
24 Honor, as we stated in our reply, the retention agreement
25 includes by reference certain definitions that were found in

1 the WaMu severance plan documents, but the agreement itself
2 is not governed by that. He also filed a change in control
3 claim, Your Honor, but has not challenged that claim's
4 disallowance which we found intriguing. I think Your Honor
5 also focused on something that might have been the Grow-
6 Iverson claim that was filed. There Michelle Grow-Iverson
7 alleged that WMI was a party to the retention agreement.
8 Your Honor, regarding the change of control claimant Ms.
9 Grow-Iverson filed, she alleged that the agreement supercedes
10 a previous change in control agreement with Providian
11 Financial Corp., and I think, Your Honor, when we were here
12 one time with Mr. Arko (phonetical) on the stand, you asked
13 questions of Mr. Arko about that Providian agreement or that
14 amendment, Your Honor. In fact, Your Honor, that is a
15 different amendment to a different agreement and doesn't have
16 anything to do with the claims which are before the Court
17 today. So the fact that she appended that to a response is
18 irrelevant, Your Honor, that's not the claim that's before
19 the Court. We are objecting to a different claim. Julie
20 Morales alleged that WMI failed to maintain corporate
21 formalities, there was a commingling of funds, et cetera.
22 For these allegations Ms. Morales relied upon a proof of
23 claim filed by WMI and the receivership and a disclaimer in
24 one of WMI's recent AK filings, and also the lawsuit that WMI
25 commenced, Your Honor, in the District of Columbia.

1 Unfortunately, Your Honor, we believe that none of these
2 support Ms. Morales' claims. We do in fact always
3 acknowledge that this is and was a large corporate entity and
4 there were intercompany transactions between the two, but
5 there was always - the corporate existence was always
6 maintained, and that there was no commingling of funds. The
7 disclaimer that was set forth in the AK states prior to the
8 petition date WMI and WMB jointly maintained their respective
9 financial records, but that does not demonstrate that WMI
10 controlled the banking services of WMB. Lastly, Your Honor,
11 the commencement of the action in D.C. is a wholly unrelated
12 to what is going forth between us and Ms. Morales. Mr. Bruce
13 Weber's claim, Your Honor, he alleged that WMI is a party to
14 the retention agreement, and that that was also governed by
15 the WaMu severance plan. Again, Your Honor, we believe that
16 that is not accurate and that Mr. Weber also filed a change
17 in control claim just like Mr. Foster did, but in that
18 situation he has not challenged the disclaimer of the
19 disallowance claim. Mr. Weinstein alleges that WMI was not a
20 party to that agreement, Your Honor. We agree. It's the
21 same point as we previously made. Lastly, Your Honor, Mr.
22 Stephen Whittaker's claims, he alleged that WMI was a party
23 to the underlying change in control and retention agreements.
24 He alleges that he was an in-house counsel for WMI and he
25 believed the agreements were being offered by WMI. He also

1 submitted an amendment to the change of control agreement
2 with Providian that is signed by WMI. Your Honor, as
3 indicated before about the Providian piece, that is a
4 different agreement, not subject to the claims which are
5 before the Court today. Your Honor, also with respect to the
6 change in control agreement that forms the basis for his
7 claim, it is subsequent to the amendment that he provided
8 that is signed by WMI. It is a separate agreement, as I just
9 indicated, Your Honor. He took two different agreements, put
10 them together to a proof of claim or his reply. It does not
11 have to do with what we are here before Your Honor. In
12 addition, the signature block to that agreement indicates
13 that it is with Washington Mutual Bank.

14 THE COURT: Was he an employee of WMI? Was he in-
15 house counsel to WMI?

16 MR. ROSEN: Your Honor, he provided certain - he was
17 an employee of WMB, but on occasion he provided some services
18 for WMI as did other in-house counsel at WMB.

19 MR. WHITTAKER (TELEPHONIC): Your Honor, this is
20 Stephen Whittaker on the phone, if you have any questions for
21 me about that, I'd be happy to answer them.

22 THE COURT: Well, were you an employee of the bank?

23 MR. WHITTAKER (TELEPHONIC): I was an employee of
24 the bank, but like all of the lawyers that were an employee
25 of either Washington Mutual Bank or its sister, Federally

1 Insured Bank, we provided legal counsel to all of the
2 entities in the Washington Mutual, Inc., family including
3 advice to Washington Mutual, Inc., on occasion and all of the
4 entities. I was counsel for and acted as counsel for WMI. I
5 was counsel for WMB, also counsel for WMB, little ffb which
6 was a bank in Idaho and in Utah, I believe, and other
7 corporate entities in the big Washington Mutual family.

8 THE COURT: But your employment agreement was with
9 WMB.

10 MR. WHITTAKER (TELEPHONIC): I was an employee with
11 WMB, that is true, Your Honor, and I'd like to respond to
12 some of the other comments made by counsel because I think
13 he's actually confusing the different agreements and what my
14 arguments are.

15 THE COURT: Alright, I'll allow you to respond. Mr.
16 Rosen, are you done with your presentation?

17 MR. ROSEN: Your Honor, the answer is in just a
18 moment. I would just want to reflect, as we said, on Exhibit
19 D to Mr. Spittell's declaration and consistent with what Mr.
20 Whittaker just said, he's not listed there because he is not
21 an employee of WMI, and, Your Honor, that would be Mr.
22 Spittell's testimony if he were called to the witness stand,
23 and we believe, Your Honor, based upon that it clearly
24 establishes where these respective employees were employed or
25 by which entity, not the debtors.

1 THE COURT: Well, let me see if - Mr. Whittaker, do
2 you wish to respond?

3 MR. WHITTAKER (TELEPHONIC): I would. Can you hear
4 me, Your Honor?

5 THE COURT: Yes, I can, go ahead.

6 MR. WHITTAKER (TELEPHONIC): Okay, let me know if I
7 fade out at all, I'm on the telephone obviously. The first
8 point I'd like to make here is basically, although I was an
9 employee of Washington Mutual Bank, the claim that I'm making
10 here is with regard a contract dated February 13, 2008
11 entitled Special Bonus Opportunity. It's claim number 3458
12 that I'm speaking to. And the first thing I'd like to say
13 is, the debtors have been making the argument over and over
14 that I was an employee at Washington Mutual Bank, as were the
15 others, and hence, all of the obligations discussed, whether
16 they are Washington Mutual change in control agreements or a
17 special contract like the one I'm discussing now that they
18 must in fact be obligations solely at WMB. This is a red
19 herring, Your Honor. Parent companies provide compensation
20 through different contracts to their employees,
21 notwithstanding that they're only employees of a subsidiary.
22 I believe in front of the Court right now, you've had many
23 examples where WMI, the parent company, has sought to provide
24 compensation to employees of its subsidiaries, such as WMB.
25 The fair-out, the supplemental executive retirement

1 accumulation plan, WaMu pension funds, 401(k) fund, these are
2 examples, I think, before the Court where they are
3 obligations of WMI, but the idea is to provide compensation
4 to employees of subsidiaries to try to make sure that they
5 want to continue to remain employed by the Washington Mutual
6 family.

7 THE COURT: Uh-huh.

8 MR. WHITTAKER (TELEPHONIC): So, it's a red herring
9 to say this decision before you should be solely determined
10 on where I was employed. I'm now going to speak specifically
11 about this agreement under claim 3458 and how the intent
12 there by WMI is to keep me employed so they can pay me this
13 money knowing that I provide services to all of the entities
14 and knowing that I was just an employee of WMB. I need to
15 just go back one step to explain the contract dated February
16 13, 2008. I was an employee of a company called Providian
17 Financial Corporation. I had a change-in-control agreement
18 with Providian Financial Corporation which was the parent
19 company of a number of entities, one of which was a
20 subsidiary I was an employee of. So, this is an example
21 where I was an employee of a subsidiary and the parent
22 company agreed to pay me money under it if there was a change
23 in control. Washington Mutual bought Providian Financial in
24 October of 2005, and by virtue of that purchase, I had the
25 opportunity to go ahead and trigger my rights under the

1 Providian change in control. I had three years to go ahead
2 and do that, and I hadn't done that at the time I was given
3 this special bonus opportunity. In my response to the
4 objection by WMI, I filed a copy, which perhaps you have in
5 front of you, a one-page document called Amendment to Change
6 in Control Employment Agreement. This was an amendment that
7 Washington Mutual, Inc., presented to me to their obligation
8 under the Providian Financial change in control. So when
9 Washington Mutual bought Providian, they assumed that
10 obligation. As you can see under - Do you have that document
11 in front of you, Your Honor?

12 THE COURT: No, I don't.

13 MR. WHITTAKER (TELEPHONIC): Okay, well, I will just
14 talk about it and if you have questions about it or -

15 THE COURT: Go ahead.

16 MR. WHITTAKER (TELEPHONIC): - counsel can present
17 it, you can let me know, but the bottom line is, Washington
18 Mutual, Inc., signed this amendment to my Providian change in
19 control and the signature block states Washington Mutual,
20 Inc., successor to Providian, and it's signed by Darrell
21 David, the chief human resources officer. They knew they
22 were on the hook for the obligations under the Providian
23 change in control. A few months later - that was signed in
24 September 2007, in February 2008, Washington Mutual realized
25 they did not want to let me go. They wanted to keep me and

1 they knew that I could very well trigger my Providian change
2 in control, so they offered me a special bonus opportunity,
3 and this is the February 13, 2008 contract, which I'm talking
4 about, and they said, If you stay, we will give you the
5 amounts listed there. So, they wanted to keep me there. I
6 agreed. I signed that agreement. Under that agreement, if
7 my job was eliminated, they would owe me that money. Now we
8 move forward to talk about the specifics of this February
9 13th, 2008. There's nothing anywhere in this contract that
10 mentions the words Washington Mutual Bank, so let's just get
11 that clear. You're looking now at the contract and the words
12 on the contract. There's nothing there. In the very first
13 paragraph it says, "I am pleased to offer you this
14 opportunity during this special bonus of \$1,233,000 as a
15 reward for your continued service to Washington Mutual (the
16 company or WaMu)." And the dispute here is who are they
17 referring to? It is my argument, contention that this is an
18 obligation of WMI. They may also include WMB as an
19 obligation, but certainly not WMB solely. And I think what
20 the Court could do, if you could look back to that amendment
21 that I referred to earlier, dated September of 2007, where it
22 refers to - and this is in paragraph (12)(I), Washington
23 Mutual, Inc., or any of its affiliates or subsidiaries as
24 successors to Providian, and then (Washington Mutual). So
25 they're using the same defined term, this term "Washington

1 Mutual". Under that agreement, it's clear they're talking
2 about Washington Mutual, Inc., as we've seen because that's
3 the entity that signed that agreement, and now they're using
4 similar language in here. So I think the evidence, by
5 looking both at the contract where you're only talking -
6 February 13th contract where you don't see Washington Mutual
7 Bank discussed at all, or if you even look to this prior
8 amendment, you will see that we're talking about Washington
9 Mutual, Inc., which is Nancy that signed it. So, for that
10 reason, I believe it's clear that it's Washington Mutual,
11 Inc., that is on the hook for this money, has the interest in
12 retaining me, and gave me this special bonus. If you look at
13 General Rules of Contract Construction, again, nowhere in
14 here is there any mention of Washington Mutual Bank. To the
15 extent that there's any ambiguity in this contract agreement,
16 I suggest under principles of contract construction, that it
17 should be construed against the drafter, and the drafter,
18 obviously it should be construed against them, and that it
19 should be Washington Mutual, Inc., that would own this, and
20 the third thing I say is, at the same time about their
21 writing these two agreements, Washington Mutual, Inc., is
22 also - and Washington Mutual Bank, I guess, are drafting and
23 amending their own change in control agreements. So this is
24 where I think there was the confusion we heard from opposing
25 counsel. The Washington Mutual change in control agreement,

1 which I also filed a claim under, and that's claim number
2 2832, is a separate agreement completely from the Providian
3 change in control agreement, which I earlier discussed and
4 the special bonus opportunity which seeks to keep me from
5 exercising that Providian one. In that Washington Mutual
6 change in control agreement, it's written differently by the
7 company. In theirs they state that the change in control
8 agreement is between the subsidiary of Washington Mutual,
9 Inc., and the employee. So, it's clear that when the company
10 wants to make contracts specifically between the subsidiary
11 by which an employee is employed and that employee, they know
12 how to do that. They did that in that change in control
13 agreement and you probably have an example of that either
14 from my claim in front of you or from the others. In the
15 claim number 3458, which I'm talking about, we don't have
16 that situation. So the HR and Legal Departments of
17 Washington Mutual, which by the way, there was one department
18 for each of those that served and provided services to all of
19 the Washington Mutual entities, they knew how to write a
20 contract solely between WMB and employee. They did it there.
21 They did not do that in my February 13, 2008 agreement, and I
22 think that's highly dispositive of the fact that they didn't
23 do it there, and they knew how to do it. They must have
24 meant it was a different entity that was on the hook for me
25 in my contract.

1 THE COURT: Okay, I think I understand your
2 argument.

3 MR. WHITTAKER (TELEPHONIC): Okay? So bottom line,
4 and I notice that opposing counsel has said that I hadn't
5 provided any evidence or any preponderance of evidence, I
6 would just note that all of the evidence that's out there, I
7 think, makes it clear this is an obligation of WMI. Now,
8 maybe Washington Mutual also wanted to have WMB also be on
9 the hook for these, but in general, because of this change in
10 control agreement, it was WMI. I think if there's any other
11 questions you have about that, please, I'd like to respond or
12 if opposing counsel has any responses, I'd like to reply
13 again, thank you.

14 THE COURT: Alright, let me hear from Mr. Rosen.

15 MR. ROSEN: May I approach, Your Honor?

16 THE COURT: Yes.

17 MR. ROSEN: Your Honor, I appreciate everything that
18 Mr. Whittaker said, but for most of it, it really didn't have
19 anything to do with what is before the Court today. What I
20 just handed up to the Court was a copy of proof of claim
21 number 3458 which is and in a nexus as an exhibit to it this
22 special February 2008 agreement that Mr. Whittaker was
23 talking about. That is in fact one of the claims that we're
24 objecting to. The one that he talked about before with the
25 Providian one, is not before the Court today, Your Honor, but

1 if you take a look at that one, Your Honor, and go to the
2 back page, you can see that it is signed by Mr. Tony Vuoto,
3 and I'm not sure I pronounced that correctly. He's president
4 of Washington Mutual Card Services, which is a division of
5 Washington Mutual Bank, and it is that entity which provided
6 Mr. Whittaker with his special bonus plan and it is that
7 entity which is referred to, obviously, if you take the back
8 page and put it to the front page, Your Honor, that is the
9 company that is referred to in that special bonus plan. It
10 is not Washington Mutual, Inc., Your Honor, it is Washington
11 Mutual Card Services, a division of Washington Mutual Bank.

12 THE COURT: Is it a division of the bank?

13 MR. ROSEN: I am told that it is a - Oh, it is a
14 subsidiary? I apologize. It is 100 percent subsidiary of
15 Washington Mutual Bank, not Washington Mutual, Inc., it is a
16 sub of the bank.

17 MR. WHITTAKER (TELEPHONIC): Your Honor, may I
18 respond to that, please?

19 THE COURT: Yes.

20 MR. WHITTAKER (TELEPHONIC): Opposing counsel is
21 incorrect. Washington Mutual Card Services is not a
22 corporate entity, therefore, it could not be a subsidiary.
23 It was used to describe a division of Washington Mutual Bank,
24 but it was really the description of one of our four business
25 lines within the company. Tony Vuoto, and Vuoto is actually

1 the pronouncement, Tony Vuoto was a member of the Executive
2 Committee of WMI. He had the ability to bind WMI. He was an
3 officer of WMI. He was also an officer of WMB. The fact
4 that they used a desk title, the title president of
5 Washington Mutual Card Services, is not an officer title. It
6 is just a simple desk title, because it's the general sort of
7 title that I would know him as, but of course a desk title
8 cannot allow somebody to bind a corporation. Only if that
9 person is an officer do they have the authority to bind along
10 these lines for this amount of money. So, when I saw this, I
11 noticed that they had mentioned that he was the president of
12 card services, but he was an officer of WMI and WMB. He had
13 the obligations to and the authority to bind both of them,
14 and I, knowing that he was an officer of WMI, assumed and
15 understood that he was binding WMI because I knew that was
16 the underlying obligation was a WMI obligation, and so when
17 opposing counsel said that that Exhibit A had nothing to do
18 with this agreement, I was simply referring the Court to
19 Exhibit A to explain why this Washington Mutual, which is not
20 a corporate entity described in the first paragraph, what it
21 was referring to. We know the underlying obligation was a
22 WMI obligation, and that's the obligation to pay under the
23 old Providian change in control agreement. All the evidence
24 points to that. Exhibit A shows that Washington Mutual,
25 Inc., has declared itself successor to the Providian under

1 this agreement. It only makes sense that WMI would be
2 offering me an opportunity during the money-end of that, if I
3 did not exercise and leave the company by triggering my
4 Providian change in control. The fact that Tony Vuoto signed
5 with a desk title and specifically not a title of WMB, shows
6 me that he was speaking either on behalf of both of those
7 entities or on behalf of WMI.

8 THE COURT: Well, let me just say, I'm not deciding
9 this objection to claim or any of the employee claims.
10 There's too much confusion with respect to this, with respect
11 to who's signing for whom, and I'm just not going to decide
12 it today. You can put it on for a special trial with respect
13 to Mr. Whittacker's or anybody else's, but this raises just
14 too many questions. We can't do it in an omnibus objection.

15 MR. ROSEN: Okay, Your Honor.

16 THE COURT: That, I think is clear. Thank you, Mr.
17 Whittaker for your time -

18 MR. ROSEN: Your Honor, even with respect to those
19 where there is no objection?

20 THE COURT: Yes. I think the documents are the
21 same. The documents raised a question in my mind as to who
22 was signing on behalf of whom, and I think we're going to
23 have to do this on the basis of a full trial.

24 MR. ROSEN: That's fine, Your Honor, and hope Mr.
25 Whittaker will be able to make it because it's kind of

1 difficult to deal with his representations which he is
2 claiming are fact here, Your Honor, so, obviously, he would
3 have to attend in person.

4 MR. WHITTAKER (TELEPHONIC): I would obviously -
5 well, first of all, Your Honor, I and all of the other
6 employees, I think, or a lot of them, we're all along the
7 West Coast, so I'm not going to say that I won't try, but
8 we'll have to set up a time where we can go ahead and do
9 that. I don't know Mr. Rosen's comments about my allegations
10 here. He can come on out and we can do this under oath and
11 take a deposition on any of this.

12 THE COURT: Yeah, I think I'll consider allowing the
13 parties to proceed by deposition, but I'm going to convert
14 this into an adversary proceeding. We'll follow the
15 adversary rules, since this is a contested claim, and you can
16 do discovery on that point, take depositions if needed.

17 MR. ROSEN: That's fine, Your Honor. I'm still a
18 little bit confused how I'll have to deal with the people who
19 haven't opposed the objection, but we'll arrange that.

20 THE COURT: They're all the same documents, so -

21 MR. ROSEN: Okay.

22 MR. WHITTAKER (TELEPHONIC): Yeah, just to be clear,
23 Your Honor, there's only a small handful that have an
24 agreement like mine where we were legacy Providian employees
25 and have something a little different. Separately, there's

1 some employees that filed claims under the Washington Mutual
2 change of control. I think that's probably the majority of
3 those. I'll let opposing counsel decide, and then there were
4 also a few retention agreements, I believe, that were not for
5 the legacy Providian employees. So, my comments here, I just
6 want to make clear, reference the small number. I think
7 there's probably a handful of Providian legacy employees that
8 have very specific type retention or special bonus
9 agreements.

10 THE COURT: Alright.

11 MR. ROSEN: Your Honor, your comments go well beyond
12 that small group. So, I understand what you want to do.

13 THE COURT: Alright.

14 MR. ROSEN: And we'll take care of that, Your Honor.
15 Your Honor, the last item on the agenda is something that is
16 going to take some period of time.

17 THE COURT: Then I'm going to continue it till 3
18 o'clock.

19 MR. ROSEN: That's fine, Your Honor.

20 THE COURT: I'll hear the Crucible matter next then.

21 MR. ROSEN: Thank you.

22 MR. WHITTAKER (TELEPHONIC): Your Honor, may I sign
23 off now then?

24 THE COURT: Yes, all the parties can.

25 MR. WHITTAKER (TELEPHONIC): Thank you, good-by.

1 (Whereupon at 12:16 p.m., a recess was taken in the
2 hearing in this matter.)

3 (Whereupon at 4:13 p.m., the hearing in this matter
4 reconvened and the following proceedings were had:)

5 THE COURT: Alright, we're back again.

6 MR. ROSEN: Thank you very much, Your Honor, for
7 having us back this afternoon, and I apologize for the length
8 of the day and the length of the omnibus hearing this
9 morning. It may have set your whole day back a little bit.
10 What we're here for -

11 THE COURT: You're not the only ones.

12 MR. ROSEN: Well, we did contribute, I do know that.
13 Your Honor, we're here this afternoon for the debtors' motion
14 for an order pursuant to §§ 105(a) and 363 of the Bankruptcy
15 Code authorizing but not directing Washington Mutual, Inc.,
16 to exercise its ownership rights over certain trust assets,
17 authorizing the distribution of the trust assets and the
18 termination of the trust. We have received, Your Honor, four
19 responses, sort of three objections and one response, and I
20 think the best way we can perhaps approach this, Your Honor,
21 is saving the arguments for the end and let's just try and
22 get through whatever we can with respect to evidence,
23 testimony, and then try and leave that for the balance of the
24 day.

25 THE COURT: Alright, that's good.

1 MR. ROSEN: Your Honor, I think counsel is prepared
2 to stipulate that the nine trusts that are the subject of the
3 motion are grantor rabbi trusts, and that would certainly
4 expedite this afternoon's hearing, and we would still want to
5 put into evidence, Your Honor, the plan agreements and the
6 trust agreements, but that would certainly cut down some of
7 the testimony that we otherwise would do.

8 MS. KREPTO: Good afternoon, Your Honor. Laurie
9 Krepto, Montgomery, McCracken, Walker & Rhoads, on behalf of
10 Geoffrey Olsen, Kari Noomen, Donald Cook, Kevin McDonough,
11 and Dotti Jensen, certain plan participants who filed an
12 objection. Your Honor, I'm here today with Jeanne Bakker of
13 Montgomery, McCracken. She's already been admitted *pro hac*
14 *vice*, Your Honor, and she'll be handling the hearing today.

15 THE COURT: Alright, she will be heard.

16 MS. BAKKER: Good afternoon, Your Honor. Thank you
17 so much for hearing us today. I know it's been a long day.

18 THE COURT: That's alright.

19 MS. BAKKER: My clients who are here to testify
20 before you today are rank and file employees of fairly
21 limited means. They flew out here from the West Coast, and
22 so they really appreciate your willingness to hear this
23 motion at this late hour in the day.

24 THE COURT: Okay.

25 MS. BAKKER: I rise only to let you know that we're

1 willing to consent that the nine rabbi trusts at issue in
2 this cases are grantor rabbi trusts.

3 THE COURT: Okay.

4 MS. BAKKER: Thank you.

5 THE COURT: Thank you.

6 MR. ROSEN: Judge, may I approach, please?

7 THE COURT: You may. Thank you.

8 MR. ROSEN: Your Honor, what I have just handed to
9 the Court as well as to opposing counsel are copies of each
10 of the nine trust agreements and the ten plan agreements
11 which are the subject of today's motion, and, Your Honor, if
12 I could ask that they be admitted into evidence at this time.

13 MS. BAKKER: We have no objection, Your Honor.

14 THE COURT: Alright, they'll be admitted.

15 MR. ROSEN: Your Honor, with that I would like to
16 call as a witness, Mr. Craig Klinkhammer.

17 THE COURT: Okay. Please remain standing so you can
18 be sworn.

19 CRAIG KLINKHAMMER
20 having been duly sworn testifies as follows:

21 THE CLERK: Please state your full name and spell
22 your last name.

23 THE WITNESS: Craig Matthew Klinkhammer, that's K-l-
24 I--k-h-a-m-m-e-r.

25 THE CLERK: Thank you.

1 DIRECT EXAMINATION

2 BY MR. ROSEN:

3 Q. Mr. Klinkhammer, by whom are you currently employed?

4 A. Washington Mutual, Inc.

5 Q. And when did you join Washington Mutual, Inc.?

6 A. In December of 2008.

7 Q. And what is your current position?

8 A. Manager of the insurance portfolio.

9 Q. What does that mean? What are your responsibilities?

10 A. I'm responsible for managing all of the bank-owned - or
11 Washington Mutual, Inc.'s, owned life insurance policies, and
12 the rabbi trust assets.

13 Q. And prior to joining WMI, by whom were you employed?

14 A. Washington Mutual Bank.

15 Q. And what was your position at Washington Mutual Bank?

16 A. I was a treasury analyst lead. I was responsible for
17 managing the bank owned life insurance contracts and rabbi
18 trust assets.

19 Q. And before working for WMB, where did you work, sir?

20 A. I worked for Kibble & Prentice in benefit solutions.

21 Q. And what did you do in that role?

22 A. They're both insurance brokerage firms. I was a lead
23 analyst in placing life insurance assets to informally fund
24 unqualified benefit plans, CERPS, BOLI/COLI; BOLI being bank
25 owned life insurance, COLI being corporate and life

1 insurance, and helping with the administration of those plans
2 ongoing.

3 Q. Are you familiar with the motion that's before the Court
4 today?

5 A. Yes, I am.

6 Q. Generally, could you please describe what is being
7 requested?

8 A. There's an objection put forth -

9 Q. Not with the objection, sir, what is it that the debtors
10 are asking for?

11 A. The debtors are asking to liquidate the trust and have
12 the funds come back to the estate to pay off general
13 creditors.

14 MR. ROSEN: Your Honor, may I approach the witness,
15 please?

16 THE COURT: You may.

17 BY MR. ROSEN:

18 Q. Mr. Klinkhammer, I just handed to you a binder which
19 contains the nine trusts and ten plan agreements that have
20 already been admitted into evidence. Are you familiar with
21 these documents?

22 A. Yes, I am.

23 Q. Could you briefly describe what the trusts are?

24 A. The trusts, there's nine of them, they hold monies to pay
25 out benefits to the plan participants.

1 Q. And briefly describe the plans.

2 A. There's ten plans. I believe seven are deferred
3 compensation plans, which were deferrals from the employees
4 and three are retirement plans which provide a pension-like
5 benefit to employees after retirement.

6 Q. And how do the plans generally work?

7 A. For the deferred compensation plan, typically, the
8 employee would defer a portion of their salary or bonus, and
9 that balance is essentially accrued until they elect to have
10 the funds distributed to them. It could be at retirement or
11 before.

12 Q. Are all the plans the same or is there one deferred plan
13 that is different than the others?

14 A. They are all very similar. They're targeting different
15 groups of employees, but the deferred compensation plans are
16 all very similar as well as the three retirement plans.

17 Q. Okay. Could you generally describe when participants are
18 entitled to receive a payment under the seven deferred comp.
19 plans?

20 A. Before, they have to make an election prior to a deferral
21 period, elect ten percent of salary, that is deferred. At
22 the time of election, they also choose when they want to
23 receive those funds. These particular plans had a seven-year
24 minimum, but they can choose anything after seven years or
25 they can choose to have the money at separation of service or

1 retirement. They can also choose to have it paid in
2 instalments or a lump sum.

3 Q. Could you generally describe the three retirement plans
4 that are in the binder?

5 A. Two of them are a supplemental executive retirement plan,
6 the CERT, and then there's a senior supplemental executive
7 retirement plan. Those plans target typically a percentage
8 of salary which that percentage gets higher and higher as the
9 employee's stay is employed, and then it's paid out in the
10 form of a joint survivor or single life annuity, and the
11 other one is a outside director's retirement plan for outside
12 directors.

13 Q. In which plans did the participants who are represented
14 by counsel participate in?

15 A. They participated in the loan agent's elective deferred
16 compensation plan, the 1989 contingent deferred compensation
17 plan -

18 THE COURT: Start over again. Do you want to say
19 that again, which ones are they involved in?

20 THE WITNESS: The loan agents -

21 THE COURT: What number on the exhibit list?

22 THE WITNESS: Number 3.

23 THE COURT: The loan agents were in 3.

24 THE WITNESS: Right. Number 3 - the 1989 contingent
25 deferred compensation plan. Number 11, the loan agents

1 elective deferred compensation plan; 13, the loan consultant
2 capital accumulation plan.

3 BY MR. ROSEN:

4 Q. Is there a fourth one?

5 A. I think there is a fourth one, I'm trying to - I don't
6 see it on here. Capital accumulation plan, number 1.

7 Q. I'm sorry, what was that?

8 A. Capital accumulation plan.

9 Q. And what number is that?

10 A. One.

11 Q. Thank you. You heard that the parties have stipulated
12 that the trusts, which are included in here are a grantor or
13 rabbi trust. Briefly, what is it that makes something a
14 grantor or rabbi trust?

15 A. Typically the company is the owner of the trust, but they
16 set aside assets from their general assets into the trust to
17 pay plan benefits.

18 Q. Are these funded or unfunded?

19 A. The trust is funded. The plans are not funded.

20 Q. So they're unfunded plans. Okay. Who pays taxes on the
21 trust assets?

22 A. Washington Mutual, Inc.

23 MR. ROSEN: Your Honor, if you give me a minute, I'm
24 trying to remove things based upon the stipulation.

25 BY MR. ROSEN:

1 Q. Are any of the trust assets segregated into separate
2 accounts for each of the plan participants?

3 A. No.

4 Q. Is there a tracking of separate accounts with respect to
5 the participants?

6 A. Their balances are tracked by the record keeper.

7 Q. So, there is no specific asset set aside then; is that
8 correct?

9 A. No. Or, yes, that is correct.

10 Q. What types of assets do the trusts currently contain?

11 A. They're invested. There's some cash, mostly government
12 securities, Fannie-Maes, mortgage-backed securities and a few
13 corporate debt instruments.

14 Q. Have you reviewed Exhibit A to the debtors' motion?

15 A. Yes, I have.

16 Q. And could you briefly describe to the Court what that is.

17 A. Exhibit A is a listing of the nine trusts and the assets
18 that are contained between cash, government securities, and
19 corporate securities.

20 Q. And do you believe that schedule represents an accurate
21 reflection of the trust assets at this time?

22 A. Yes, I do.

23 Q. What is the approximate current value of the assets in
24 the trust?

25 A. Sixty-nine million.

1 Q. And who owns these assets?

2 A. Washington Mutual, Inc.

3 MR. ROSEN: Your Honor, at this point I would say
4 that I could cease the direct examination of Mr. Klinkhammer,
5 but I would reserve for purposes of redirect or in fact
6 rebuttal based upon counsel's presentation.

7 THE COURT: Alright. Cross?

8 MS. BAKKER: Your Honor, we have no cross.

9 THE COURT: Alright, thank you, you may step down.

10 MR. ROSEN: Your Honor, based upon the stipulation
11 as to the rabbi trust or the grantor trust, the nature of
12 these trusts we believe that, of course we have already put
13 on a case sufficient to satisfy the requisites under the
14 applicable law, but I realize also that counsel would like to
15 make a presentation as to why something else may occur.

16 THE COURT: So, let's hear.

17 MS. BAKKER: Thank you, Your Honor. Again, my name
18 is Jeanne Bakker. I'm with Montgomery, McCracken, Walker &
19 Rhoades, and I represent five of the individual objectors to
20 WMI's motion to exercise ownership assets over the rabbi
21 trusts that support the Ahmanson plans. To distinguish my
22 clients from the other objectors, I'm going to refer to them
23 as the participants. The Ahmanson plans are the sole
24 remaining legacy deferred compensation plans that WaMu and
25 WMI acquired through the years -

1 THE COURT: Well, before - I think we were going to
2 get testimony and facts in before we hear argument.

3 MR. ROSEN: Yes.

4 MS. BAKKER: Okay. Well, then, I would like to call
5 Geoffrey Olsen to the stand.

6 THE COURT: Okay. Please remain standing so you can
7 be sworn.

8 GEOFFREY OLSEN
9 having been duly sworn testifies as follows:

10 THE CLERK: Would you state your full name, spelling
11 your last name, please.

12 THE WITNESS: It's Geoffrey Olsen. It's spelled G-
13 e-o-f-f-r-e-y, Olsen, O-l-s-e-n.

14 THE CLERK: Thank you.

15 DIRECT EXAMINATION

16 BY MS. BAKKER:

17 Q. Mr. Olsen, why are you here?

18 A. I am a participant under the HF Ahmanson accumulation
19 plan. Well before the filing of the bankruptcy by Washington
20 Mutual, Inc., I made a demand for payment of my benefits
21 under the plan. I was entitled to those benefits to be paid,
22 but I was not paid -

23 MR. ROSEN: Your Honor, if we could have just a
24 simple direct question, asked and answered?

25 THE COURT: No, I'll let him tell his story, why

1 he's here.

2 THE WITNESS: Thank you, Your Honor. I was entitled
3 to have those monies paid. They weren't paid so I'm asking
4 here today to have the Court grant relief.

5 THE COURT: Alright.

6 BY MS. BAKKER:

7 Q. Mr. Olsen, how is it that you came to have an interest in
8 the Ahmanson plan. Well, first, let's be clear to the Court,
9 which Ahmanson plan were you a participant in?

10 A. I think it's number 1 in the notebook that was referred
11 to, which is the capital accumulation plan.

12 Q. Capital accumulation plan of HF Ahmanson & Company.

13 A. That's correct.

14 Q. Thank you. And for purposes of the testimony, I'll refer
15 to that plan as the Ahmanson plan. Mr. Olsen, how is it that
16 you came to have an interest in the Ahmanson plan?

17 A. When I started my employment with Home Savings, I was
18 offered employment benefits including medical, dental, et
19 cetera, also the election to participate in that plan.

20 Q. And generally, how much of your compensation did you
21 defer into the plan?

22 A. Unfortunately, I contributed 50 percent of my salary and
23 a 100 percent of my bonuses.

24 Q. When you were at Home Savings, who was the record keeper
25 for the Ahmanson plan?

1 A. The record keeper of the plan was Mullins Consulting.

2 Q. What happened in October of 1998?

3 A. In October of 1998, there was a merger that occurred in
4 which Home Savings which merged into Washington Mutual Bank
5 and the parent company of Home Savings, which is HF Ahmanson
6 & Company was merged into Washington Mutual, Inc.

7 Q. After the merger who is your employer?

8 A. My employer was Washington Mutual Bank.

9 Q. From what period of employment does your interest in the
10 Ahmanson plan derive?

11 A. It started when I started my employment with Home Savings
12 which is in February of 1998, and it continued up until the
13 time that there was a conversion of the payroll plans that
14 occurred between Home Savings and Washington Mutual, which
15 was more toward the latter part of 1999.

16 Q. Does any part of your interest in the Ahmanson plan
17 derive from your employment with Washington Mutual Bank?

18 A. No, it's 100 percent of the wages and salary paid during
19 Home Savings.

20 Q. After the merger, did you receive any information or
21 statements regarding your interests in the Ahmanson plan?

22 A. Other than quarterly statements that I received from
23 Mullins Consulting, I received no information whatsoever.

24 Q. After you became an employee of Washington Mutual Bank,
25 did you participate in any employee benefit plans sponsored

1 by the bank?

2 A. Yes. After the conversion of the payroll period, I was
3 offered benefits at Washington Mutual Bank including benefits
4 in the Washington Mutual deferred compensation plan.

5 Q. Mr. Olsen, what was your relationship with Washington
6 Mutual Bank's Human Resources Department?

7 A. Well, that was a very special department. I have four
8 kids, so we have a lot of benefit issues. So, I worked with
9 them closely in terms of benefit issues, my elections, how to
10 structure my benefits. When it came to my deferred comps in
11 terms of different terms of how to structure my payment
12 plans, if it was going to be a five-year plan or a ten-year
13 plan, if it was going to be invested in interest only versus
14 stock. They were very knowledgeable regarding those plans so
15 I talked to them often to find out how best to have those
16 benefits treated.

17 Q. When you had questions regarding your interest in the
18 Ahmanson plan or the Washington Mutual Bank deferred
19 compensation plan, who did you turn to?

20 A. Again, I would turn to the Benefits Department to help
21 answer those questions.

22 Q. What happened in October 2007?

23 A. I was attending an offsite meeting in which one of the
24 guest speakers was the former vice-chairman of Washington
25 Mutual, and he spoke about what his forecast was of the

1 economy, included a very negative picture of things that
2 would likely occur. During that offsite meeting, the stock
3 price of Washington Mutual continued to basically drop. So
4 while at that meeting, I became very much concerned about my
5 Washington Mutual and Ahmanson plan benefits.

6 Q. So what did you do?

7 A. I contacted the Benefits Department and asked to have my
8 monies paid under both plans.

9 Q. Who did you speak to?

10 A. Robin Duer (phonetical).

11 Q. And what did she say?

12 A. I first talked about - when I called on the phone -

13 MR. ROSEN: Your Honor, objection, hearsay.

14 MS. BAKKER: Your Honor, this establishes that he
15 made a demand for his benefits, and he was improperly denied
16 his benefits.

17 THE COURT: Well, I'll allow what he said, although,
18 is Duer a representative of the debtors? I'll allow it, I'll
19 hear to the extent it may be an admission.

20 MS. BAKKER: Thank you.

21 MR. ROSEN: Your Honor, Ms. Duer, I believe, worked
22 for Washington Mutual Bank, not one of the debtors.

23 THE WITNESS: Your Honor, I could maybe supplement
24 it if it's permissible.

25 THE COURT: Supplement what?

1 THE WITNESS: I was told by Ms. Duer that they -

2 THE COURT: Well, before you tell me what she said,
3 was she an employee of Washington Mutual, Inc.?

4 THE WITNESS: She acted on their behalf. They
5 administered the plan on behalf of Washington Mutual, Inc.

6 THE COURT: I'll allow the testimony.

7 BY MS. BAKKER:

8 Q. What did Ms. Duer tell you?

9 A. She first told me that under the Washington Mutual plan
10 that the plan was in the process of being amended to provide
11 for an early payout in which after the plan was amended, the
12 monies in that plan could be paid out in six months. So I
13 was very relieved to hear the fact that the Washington Mutual
14 plan was being amended to provide for that immediate payout.
15 I then asked her the question of whether or not the same
16 treatment would take place dealing with the Ahmanson plan.

17 BY MS. BAKKER:

18 Q. What did she say?

19 A. And she told me, No, that there was no instruction
20 provided to her by the plan administrator to go ahead and do
21 that, and I told her that I thought that was unfair, that
22 there should be some retrieval, but she said, No, that the
23 plan would not be amended. I then -

24 q. Did you do anything else to try to get your interests out
25 of the Ahmanson plan?

1 A. I told her that I wanted my monies paid, that I was very
2 concerned, and I said, Under any circumstances, I want my
3 monies paid. And she told me that there was no ability to
4 have my money paid under the Ahmanson plan and that was it.
5 So then in talking to her, I asked her, I was talking about
6 different ways in which I could get my money, then the issue
7 came up about to shorten my payout period, so perhaps I could
8 have the money payable upon separation, thinking that I could
9 then quit my employment and be paid. She indicated that she
10 wasn't sure that that could take place and for me to go check
11 with an attorney and would get back with me.

12 Q. And what happened after that?

13 A. A couple of days later I received a communication back
14 indicating that it was permissible to change my election to
15 allow for a lump sum payment upon separation and they
16 requested me to make a written election to have that done.

17 Q. Did you do that?

18 A. I did that in November of 2007, and she indicated it
19 would take a one-year time period before that election would
20 be effective.

21 Q. Did you have any other conversations regarding the
22 Washington Mutual Bank deferred compensation plan?

23 A. Within a day or so after that, I spoke to an attorney
24 that was the attorney at the bank that represented Washington
25 Mutual, Inc., and Washington Mutual Bank dealing with the

1 Washington Mutual deferred compensation plan and discussed
2 the amendment of the Washington Mutual plan. He told me that
3 the plan was being amended really at the request of -

4 MR. ROSEN: Your Honor, just for the record, same
5 objections.

6 THE COURT: Alright, I'll overrule.

7 THE WITNESS: - of Kerry Killinger, who was the ten
8 president of Washington Mutual Bank and Washington Mutual,
9 Inc. I was told that the plan had about \$100 million of
10 assets in the plan and about \$40 million of those assets were
11 attributable to Mr. Killinger, and that he was the proponent
12 for the management of the plan, but because he did not have
13 an interest in any of the legacy bank plans, there was no
14 interest to amend those legacy plans.

15 MR. ROSEN: Relevance to this.

16 THE COURT: Overruled, I'll allow it.

17 BY MS. BAKKER:

18 Q. Mr. Olsen, why didn't you pursue an immediate
19 distribution of your Ahmanson plan benefits?

20 A. Well, I did. I did make that demand upon the benefits to
21 have it paid. I did that in October 2007.

22 Q. Did you receive any other information about a
23 distribution from the Washington Mutual Bank deferred
24 compensation plan?

25 A. Several days after that initial call that occurred in

1 October 2007, I did receive a written communication from
2 Washington Mutual Bank, Washington Mutual, Inc., concerning
3 the amendment to the Washington Mutual deferred comp plan
4 that provided for an election form along with a document that
5 I think was entitled, "Frequently Asked Questions".

6 MS. BAKKER: Your Honor, may I approach?

7 THE COURT: You may.

8 MS. BAKKER: Your Honor, this is a document that's
9 been previously marked as Plan Participants Exhibit 2.

10 BY MS. BAKKER:

11 Q. Mr. Olsen, is this part of the information that you
12 received in November of 2007 relating to a distribution from
13 the Washington Mutual Bank deferred compensation plan?

14 A. Yes.

15 Q. Would you read for the Court, Fact Number 9.

16 A. It's a question number 9. It says, "I have deferrals in
17 a separate non-qualified plan that Washington Mutual
18 acquired. Although the balances are not included in the WaMu
19 DCP, can I elect to a accelerate payment of that too? No,
20 not at this time."

21 Q. Mr. Olsen, how does Fact 9 compare to what was told you
22 by the Washington Mutual Bank Human Resources Department?

23 A. It was comparable to what they told me that I could not
24 receive payment of my monies under the Ahmanson plan.

25 Q. What was your reaction to Fact Number 9?

1 A. Obviously, I, number one, had no reason to say that that
2 was not correct, because I relied upon what I was told by the
3 Benefits Department.

4 Q. What happened in December of 2008?

5 A. In December of 2008, I received a letter from the
6 Benefits Department requesting me to sign off on an amendment
7 form to the Ahmanson plan indicating that there was a change
8 that was required to be made before the end of the year due
9 to changes in the Internal Revenue Section 409(A), and in
10 that letter -

11 Q. What did you do when you received that information?

12 A. Well, I first realized that there was a plan document
13 that existed that was being amended, and in the letter it
14 actually identified sections of the plan that were being
15 amended. So I immediately contacted the Benefits Department,
16 Robin Duer and asked for a copy of that plan document.

17 Q. Before you got this letter regarding an amendment to
18 comply with 409(A) were you aware that a plan document
19 existed for the Ahmanson plan?

20 A. No, I was not.

21 MR. ROSEN: Your Honor, if I could just for purposes
22 of clarifying the record, because I think we're all confused,
23 I just don't want to take up the Court's time. I think the
24 testimony was December of '08, but I think counsel may have
25 meant December of '07.

1 THE WITNESS: No.

2 MR. ROSEN: Okay, I apologize.

3 THE COURT: Okay. Alright, you can continue.

4 MS. BAKKER: Thank you, Your Honor.

5 BY MS. BAKKER:

6 Q. Did there come a time when you ultimately received a copy
7 of the plan document that describes the capital accumulation
8 plan of HF Ahmanson & Company?

9 A. Yes.

10 Q. And what was your reaction when you saw the document?

11 A. Well, I read the document and there's a section in there
12 that talks about being able to receive payment of my monies
13 before or after change of control by paying either a 10
14 percent penalty or a 5 percent penalty, and obviously I was
15 just shocked at the fact that I could have received that
16 payment by paying that penalty.

17 Q. Mr. Olsen, if I could direct you to the binder in front
18 of you, Tab 1, page 22. Would you please read for the Court
19 the first ten lines or so on that page.

20 A. "Notwithstanding any other provisions of the plan, at any
21 time before or after a change in control the participant or a
22 beneficiary of a deceased participant may elect to receive an
23 immediate lump sum payment of the balance of this account for
24 any deferral unit reduced by a penalty which shall be
25 forfeited to the company equal to 10 percent before a change

1 in control or 5 percent after change in control of the
2 balance of such account in lieu of payments in accordance
3 with the forum previously elected by the participant." Do
4 you want me to continue reading?

5 Q. That's fine, thank you very much. How does what you just
6 read compare to what was told you by the Benefits Department
7 back in October of 2007?

8 A. It's totally inconsistent. I was told that I could not
9 receive immediate payment of my money under any
10 circumstances, and here this document says I could by paying
11 a penalty.

12 Q. Mr. Olsen, I refer you to a document that's in front of
13 you that's been previously marked. It's Plan Participant
14 Exhibit 2, which is the fact sheet that was given in
15 connection with the amendment of the Washington Mutual Bank
16 deferred compensation plan. How does Fact 9 compare to
17 Section 5.9(B) of the Ahmanson plan?

18 A. Again, the statement there is inconsistent with what's
19 contained in the Ahmanson plan.

20 Q. What would you have done if you had known about the
21 existence of this term in the plan document?

22 A. Just like I did with my Washington Mutual deferred comp
23 plan, I wanted my money and I was prepared to basically take
24 the money then. When I took my Washington Mutual money, I
25 had to pay a heavy income tax in the year I got it. I would

1 have done the same thing here.

2 Q. What is your current interest in the plan?

3 A. The amount of money is approximately \$445,338.

4 Q. And what does this money represent to you?

5 A. This is hard-earned money. It's money that was deducted
6 from my paychecks when I was paid. It's money that I had
7 planned for my future with my retirement. I have four
8 children, it was going to be tuition money. So it's
9 something that was very desperate to me and my family.

10 Q. Thank you very much.

11 MS. BAKKER: No more questions, Your Honor.

12 THE COURT: Cross?

13 MR. ROSEN: Please, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. ROSEN:

16 Q. Mr. Olsen, the answers to the questions about Kelly
17 Killinger, that all has to do with the Washington Mutual
18 plan; right? What you were talking about before.

19 A. About amending the Washington Mutual Plan, that's
20 correct.

21 Q. Right. Does the Washington Mutual Plan have anything to
22 do with what we're here to talk about today?

23 A. Yes.

24 Q. Isn't it the HF Ahmanson plans that we're talking about
25 today and the HF Ahmanson trust?

1 A. We're talking about my benefits under the Ahmanson trust,
2 that's correct.

3 Q. Okay. And it has nothing to do with a Washington Mutual
4 plan; is that correct? And a Washington Mutual trust?

5 A. We're talking about equal treatment.

6 Q. Sir, just focus on the question, please. Is the focus or
7 the subject of the motion today the HF Ahmanson trust and
8 plan; is that correct?

9 A. That's correct.

10 Q. And we are not talking about anything having to do with
11 the Washington Mutual plan except what you said on direct
12 examination; is that correct?

13 A. That's correct.

14 Q. Okay. You made a point of reading what's on page 22 of
15 Tab 1 of the document; is that correct, sir?

16 A. That's correct.

17 Q. Could you go back to page 21. What's the title to 5.9?

18 A. Change in Control and Lump Sum Payments.

19 Q. You also went through a whole process of talking about an
20 amendment to the plan. Is this document an amendment to the
21 plan or is this the original plan itself?

22 A. To my knowledge it's the original plan.

23 Q. Okay. So the discussion about a December '08 amendment
24 has nothing to do with what you were talking about then; is
25 that correct? What you read was the original plan; is that

1 correct, sir?

2 A. What I read was the original plan.

3 Q. Okay, and do you recall when Washington Mutual, Inc.,
4 filed for Chapter 11?

5 A. September 26th, 2008.

6 Q. Okay, and so, what you're referring to, some discussion
7 that you may have had with some Benefits Department was a
8 post-petition discussion with an entity other than the
9 Chapter 11 debtor; is that correct?

10 A. It was with Robin Duer.

11 Q. Who works for Washington Mutual Bank; is that correct?

12 A. She spoke on behalf of Washington Mutual, Inc.

13 Q. How do you know that, sir?

14 A. She was the one that was one that was responsible
15 regarding the plan.

16 Q. Washington Mutual, Inc., is in Chapter 11 and she is a
17 JPMorgan employee. Do you think she was really working and
18 talking on behalf of Washington Mutual, Inc.?

19 A. We were told by Mullins Consulting at the time to talk
20 with Robin Duer with any questions regarding the plan.

21 Q. Is she currently working with Washington Mutual Bank?

22 A. I do not know.

23 Q. But was she working with Washington Mutual Bank in
24 December of '08?

25 A. I don't know if she was working on behalf of Washington

1 Mutual Bank or Washington Mutual, Inc., in December of '08,
2 but she was the spokesperson in terms of the benefits under
3 that plan.

4 Q. Go back to Tab 1 and specifically on page 21, and it says
5 "change of control", and you were responding to some sort of
6 question that was asked about whether or not you were
7 entitled in November of '07 to your money, and then you were
8 expressing your dismay that in fact this existed and you
9 didn't know about it. I think that was correct; is that
10 right, sir?

11 A. That's correct.

12 Q. In November of '07, was there a change of control with
13 Washington Mutual, Inc.?

14 A. A change of control occurred, I believe, in October of
15 1998.

16 Q. October of 1998, and you made no request at that point in
17 time for a distribution, you only made a request when, sir?

18 A. I made a request in October of 2007.

19 Q. And you were told at that point in time that it would
20 take a year to November of 2008; is that correct?

21 A. No, I was told it would take a year to change my election
22 in terms of a payout payable upon separation, but -

23 Q. I thought your testimony was, sir, that it would take a
24 year for you to receive the distribution.

25 A. No, I didn't. What I said, if you want me to clarify

1 what I said.

2 Q. Please.

3 A. Two things: One is I asked to have my money immediately
4 paid. I was told that my money could not be immediately
5 paid. I then asked for any other way to have my money paid.
6 They talked about you could be payable upon separation. I
7 then asked to have my election changed to have my money
8 payable upon separation.

9 Q. And you were told that that would take one year to become
10 effective; is that correct, sir?

11 A. That's correct.

12 Q. So, one year from November of '07 would take you to
13 November of '08; is that correct, sir?

14 A. That's correct.

15 Q. Okay, and that would take you to a post-petition period
16 in Washington Mutual, Inc.'s bankruptcy; is that correct?

17 A. That's correct.

18 Q. Okay.

19 MR. ROSEN: Your Honor, I have no more questions for
20 Mr. Olsen.

21 REDIRECT EXAMINATION

22 BY MS. BAKKER:

23 Q. Mr. Olsen, I just want to ask you a few questions because
24 I think counsel is confused as to the timeline of your
25 request and the nature of your request. When did you first

1 make your request for an immediate distribution while you
2 were still employed of your interest in the Ahmanson plan?

3 A. It was in October of 2007. I attended an offsite meeting
4 in San Francisco, and it occurred right during that time
5 frame, October 2007.

6 Q. And was this the first time you were told that you could
7 not get a distribution under the plan under any
8 circumstances?

9 A. That's correct.

10 Q. And what did you do after you were told that?

11 A. Well, I relied upon what they said, and then I went ahead
12 and talked to them about was there any way in which I could
13 get my money, and we talked about changing my election to
14 have it payable upon separation.

15 Q. So you asked to change your elections only after you had
16 been told that you could not get a distribution under any
17 circumstances while you were still employed?

18 A. Yes.

19 Q. And this occurred in October of 2007.

20 A. That's correct.

21 Q. Thank you, Mr. Olsen.

22 THE COURT: Any further recross?

23 MR. ROSEN: No, Your Honor.

24 THE COURT: Thank you, you may step down.

25 THE WITNESS: Thank you.

1 MS. BAKKER: Your Honor, I would like to call Kari
2 Noomen to the stand.

3 THE COURT: Same thing, remain standing so you can
4 be sworn.

5 KARI NOOMEN
6 having been duly sworn testifies as follows:

7 THE CLERK: Please state your full name and spell
8 your last name for the record.

9 THE WITNESS: Kari Noomen. The first name is
10 spelled K-a-r-I, and Noomen is -o-o-m-e-n.

11 THE CLERK: Thank you, you may be seated.

12 DIRECT EXAMINATION

13 BY MS. BAKKER:

14 Q. Thank you, Ms. Noomen. Would you please tell the Court
15 why you're here.

16 A. I am here because I did make demands for my monies in the
17 Ahmanson account. Those demands were wrongly denied, and I'm
18 here to seek redress from the Court.

19 Q. Thank you. Just so we're clear for the Court, I want to
20 specify which Ahmanson plans you participated in?

21 A. I participated in the loan consultant capital
22 accumulation fund and the loan consultant elected deferred
23 compensation plan, not fund, plan.

24 THE COURT: Just so we have a record?

25 MR. ROSEN: Eleven and 13, Your Honor.

1 MS. BAKKER: Yeah, thank you, 11 and 13, thank you.

2 THE COURT: Okay.

3 BY MS. BAKKER:

4 Q. For ease in questioning, I'm going to refer to both plans
5 as the Ahmanson plan. How is it that you came to have an
6 interest in the Ahmanson plan?

7 A. When it was time to do open enrollment for benefits, I
8 believe in 1995, I was offered to get into the Ahmanson plan
9 along with my medical, my dental, and my 401(k) plan at the
10 same time.

11 Q. Generally, how much of your compensation did you defer
12 into the Ahmanson plan?

13 A. I deferred 50 percent of my paycheck on a monthly basis.

14 Q. When you were at Home Savings, who was the record keeper
15 of the plan?

16 A. Home Savings, Mullins Consulting.

17 Q. What happened in October 1998?

18 A. October of 1998, Home Savings merged with Washington
19 Mutual.

20 Q. And who was your employer after the merger?

21 A. Washington Mutual Bank.

22 Q. From what period of your employment does your interest in
23 the Ahmanson plan derive?

24 A. It was derived from my income that I made at Home Savings
25 of America.

1 Q. Does any of your interest derive from your employment
2 with Washington Mutual Bank?

3 A. No.

4 Q. After the merger of Washington Mutual Bank and Home
5 Savings of America, did you have any conversations regarding
6 your interest in the Ahmanson plan with Mullins Consulting?

7 A. Yes, I did. I called to talk to them about some balances
8 and things like that. While I was on the phone, they told me
9 that Home Savings -

10 MR. ROSEN: Same objections, please.

11 MS. BAKKER: It's admissions against interest, Your
12 Honor.

13 MR. ROSEN: Your Honor, we're not even talking about
14 a Washington Mutual, Inc., or Washington Mutual Bank entity.

15 THE COURT: Yeah, we're talking about Mullins, why
16 is that an admission against -

17 MS. BAKKER: Her testimony will go to how the trust
18 was funded in the first place with the assets at issue here.

19 THE COURT: Yeah, but why is not hearsay? The out-
20 of-court statement of a third party?

21 MS. BAKKER: I'll just move on, Your Honor.

22 THE COURT: Alright.

23 BY MS. BAKKER:

24 Q. After the merger did you receive any informational
25 statements regarding your interest in the Ahmanson plan?

1 A. I received periodic statements of my account balances. I
2 was given from Washington Mutual, Inc., or Bank, I was given
3 absolutely no communication, no correspondence. I was never
4 given a copy of the plan. There was no letters. There were
5 no brochures. There were no training sessions, and there was
6 nothing telling me about my deferred compensation plan
7 whatsoever during my tenure.

8 Q. After you became an employee of Washington Mutual Bank,
9 did you participate in the bank's employee benefits plans?

10 A. Yes, I did.

11 Q. Did you participate in the Washington Mutual Bank
12 deferred compensation plan?

13 A. Yes, I did.

14 Q. What was your relationship with the Human Resources
15 Department?

16 A. Well, the Human Resource Department handled all the
17 benefits that I was involved in, my medical plan, my dental
18 plan, my 401(k) plan, and my deferred comp plan.

19 Q. Did you rely on the Human Resources Department to help
20 you to understand the nature of your benefits plan?

21 A. Absolutely. There was no one else to talk to. That's
22 all there was to talk to was the people at the department if
23 I had a problem whether it be my medical plan and something
24 wasn't working or I couldn't find who the doctors were or
25 bills weren't being paid, I called those people. The same

1 with my dental, if I had elections to make with 401(k) or
2 find out what was available, I'd talk to them as well as with
3 regards to my deferred comp.

4 Q. When you say "deferred comp" do you mean the Ahmanson
5 plan or the Washington Mutual Bank deferred compensation
6 plan?

7 A. Both.

8 Q. Alright. What happened in November 2007?

9 A. In November 2007, that is when Washington Mutual was
10 allowing one time exit from their deferred compensation plan.

11 Q. Did you participate in a conference call at that time?

12 A. Yes, there was a conference call at that time, and they
13 gave out documents and were talking about, you know, giving
14 us information. We also had the FAQs -

15 MR. ROSEN: Your Honor, excuse me. Objection,
16 relevance. The witness is talking about the Washington
17 Mutual plan -

18 THE COURT: I'm going to allow it, I think it gives
19 context. Go ahead.

20 BY MS. BAKKER:

21 Q. What did you do after the conference call regarding the
22 Washington Mutual Bank deferred compensation plan?

23 A. I called the only person I knew to call, which was the
24 Benefits Department, Robin Duer, and I asked her if there was
25 any way I could get money out of my Ahmanson plan, and that I

1 noticed that in the FAQs that they had given us, that they
2 had said that we could not under any circumstance get our
3 funds out of those plans.

4 Q. And what did she say?

5 A. She said, No, they were not making that available at this
6 time. You could not get out of the plan.

7 Q. What happened in December 2007?

8 A. In December of 2007, I had a opportunity to speak with a
9 member of the Executive Committee and the stock had gone down
10 over the last few months, so I asked him, How were things
11 going? And he said that things were really bad. At that
12 time, I really got -

13 Q. By "bad" do you mean bad for the Bank?

14 A. Yeah, the bank, yeah, bad for the bank.

15 Q. So what did you do after that?

16 A. I called up to my Benefits Department and I asked them,
17 you know, if I could get my funds out. I was very nervous
18 and I was basically - I had been told in the past, I was told
19 that I couldn't have the funds. I said, Well, what if I was
20 under some financial hardship, could I get my funds out, and
21 I was told under no uncertain terms, I could not have my
22 funds out.

23 Q. Why didn't you pursue, do something more to try to get an
24 immediate distribution of your benefits from the Ahmanson
25 plan?

1 A. I had been told in writing. I had been told personally
2 on the phone several times, it was very intimidating to keep
3 calling up and asking somebody for monies that they told you
4 were not possible to have.

5 Q. When was the first time you found out that the terms of
6 the plan provide for a distribution immediately while you're
7 still employed subject only to a penalty?

8 A. I found that out in 2008 after Washington Mutual, Inc.,
9 had filed bankruptcy.

10 Q. Ms. Noomen, there should still be - is there a binder
11 there in front of you?

12 A. Yeah, but I - Do you want me - I can't read without my
13 glasses on.

14 Q. Oh, okay.

15 A. I can get them, but I can't read anything.

16 THE COURT: Do you want to get the glasses?

17 MS. BAKKER: Get the glasses.

18 BY MS. BAKKER:

19 Q. If you would turn to Tab 11 of the binder in front of
20 you. Go to page 21 of Tab 11. If you would read for the
21 Court subparagraph (B) through the end of page 21 and the
22 first line on page 22.

23 A. Okay. "Notwithstanding any other provisions of the plan,
24 at any time before or after a change in control, a
25 participant or a beneficiary of a deceased person may elect

1 to receive an immediate lump sum payment of the balance of
2 his account for any deferral unit reduced by a penalty which
3 shall be forfeited to the company equal to 10 percent before
4 a change in control or 5 percent after a change in control of
5 the balance of such account in lieu of the payments in
6 accordance with the forms previously elected by the
7 participant."

8 Q. Thank you, Ms. Noomen, that's fine. If you would turn
9 now to Tab 13, page 21 of Tab 13. If you would read for the
10 Court subparagraph (B) at the beginning on page 21 through
11 the next several lines, about seven lines down on page 22.

12 A. Okay. "Notwithstanding any other provisions of the plan
13 at any time before or after a change in control, a
14 participant or beneficiary of a deceased participant may
15 elect to receive an immediate lump sum payment of the balance
16 of his account for any deferral units reduced by a penalty
17 which shall be forfeited to the company equal to 10 percent
18 before a change in control, or 5 percent after a change in
19 control of the balance of such account. In lieu of payments,
20 in accordance -"

21 Q. Fine, thank you. How do these two provisions compare to
22 what was told you when you requested an immediate
23 distribution of your benefits back in November 2007?

24 A. Well, they're opposite. They're contrary totally to
25 everything I was told by the people that I was supposed to

1 talk to.

2 Q. Ms. Noomen, did there come a time when you received
3 information regarding a distribution from the Washington
4 Mutual Bank deferred compensation plan?

5 MR. ROSEN: Your Honor, I think this has been
6 already asked and answered.

7 THE COURT: I'm not sure.

8 MS. BAKKER: May I approach the witness?

9 THE COURT: Yes.

10 THE WITNESS: No, I don't.

11 THE COURT: What is -

12 BY MS. BAKKER:

13 Q. I just handed you a document that's been previously
14 marked as Plan Participants Exhibit 2.

15 THE COURT: Okay, thank you.

16 BY MS. BAKKER:

17 Q. Did there come a time when you received this information
18 in connection with the opportunity to get a distribution from
19 the Washington Mutual Bank deferred compensation plan? Would
20 you please refer to Fact 9 of that document. How does Fact 9
21 compare to what was told you in November of 2007 when you
22 made a request for an immediate distribution of your interest
23 in the Ahmanson plan?

24 A. This actually tells me that I could not have my funds out
25 at this time. I could not have my funds.

1 Q. And how does Fact 9 compare to the two provisions of the
2 plan that you just read to the Court?

3 A. They're totally contrary.

4 Q. Ms. Noomen, when did you first find out that the terms of
5 the plan, which you just read, provide for a distribution
6 subject to a penalty immediately while you were still
7 employed?

8 A. Can you ask the question again, please.

9 Q. Sure, sorry. I did not ask it very well. When did you
10 first find out that the terms of the two Ahmanson plans that
11 you participated in contained the provision that allowed for
12 an immediate distribution of your benefits subject only to a
13 penalty?

14 A. Oh, that was December of 2008.

15 Q. What would you have done if you had known that the plan
16 contained these provisions?

17 A. I would have been willing to pay the penalty to receive
18 my funds.

19 Q. What is your current interest in the plan?

20 A. My current interest is about \$1,834,000.

21 Q. And what does this money represent to you?

22 THE COURT: What is the amount again?

23 THE WITNESS: It's not exact, but it's within about
24 \$5,000. I think it's \$1,834,000.

25 THE COURT: Thank you.

1 BY MS. BAKKER:

2 Q. And what does this represent to you?

3 A. This represents to me monies that I made with my paycheck
4 that I deferred at 50 percent. It was working 50 to 70 hours
5 a week, giving up weekends and nighttimes, being away from my
6 children and my husband, and sacrificing for the family and
7 our retirement.

8 Q. Thank you, Ms. Noomen.

9 CROSS-EXAMINATION

10 BY MR. ROSEN:

11 Q. Ms. Noomen, I think you said that in - I think it was
12 November of 2007, that you saw the stock going down, and you
13 called the Benefits Department and you tried to get your
14 money, and you were told no at that time.

15 A. No, I didn't say I saw the stock going down.

16 Q. You spoke to someone and you saw the stock going down,
17 and you said, How can I get my money out?

18 A. No. I had noticed the stock had gone down, but I asked
19 someone in December of 2007 who was in the Executive
20 Committee, that's what I testified.

21 Q. Okay. I'm sorry. And in November you testified about
22 Washington Mutual allowing a one-time exit; is that correct?

23 A. Yes, I did. Yes, I did.

24 Q. Okay, and I think in response to the question about what
25 did you do about it, you said you didn't want to do anything

1 because you had been told in writing so many times that you
2 couldn't get your money out; is that right?

3 A. That's -

4 Q. I wrote down bold in writing.

5 A. Yes, they had told me in writing and verbally that I
6 could not have my funds, yes.

7 Q. Do you have a copy of that writing?

8 A. Yes, I just read it here. It was -

9 q. Oh, so, you were referring to their plan number 2 or PP-
10 2, I think it was, as to when you couldn't get it; is that
11 right?

12 A. Let me read it for you. It says, "I have deferrals in a
13 separate non-qualified plan that Washington Mutual acquired."

14 Q. No, ma'am, I think that's Fact No. 9 as your counsel
15 talks about; is that right? And you were just reading that,
16 but I thought the time period - when did you receive that,
17 ma'am?

18 A. This was in November of 2007.

19 Q. And I thought you said your request or when you were told
20 that you didn't want to pursue it any more because you were
21 told in writing, I thought you were referring to actually
22 receiving other writings. Are you saying this is the only
23 writing you've ever received?

24 A. This is the only writing other than verbal comments from
25 the people that we asked all of our questions for our

1 benefits for. There were no people that I know of at
2 Washington Mutual, Inc., that were available to answer
3 questions about that. I was never told in any documents or
4 any paperwork. Those were the people we were told to talk
5 to.

6 Q. Okay. Did you ever make a request for an early
7 distribution from the plan?

8 A. Which plan are you referring to? The Ahmanson plan?

9 Q. Uh-huh.

10 A. Yes, I asked on the phone. I did not put it in writing,
11 no.

12 Q. Did you ever get an early distribution?

13 A. I never got a distribution, no.

14 MS. BAKKER: Objection, Your Honor. If counsel
15 would clarify which plan he's referring to.

16 THE COURT: He's talking about the Ahmanson.

17 MS. BAKKER: Alright.

18 MR. ROSEN: Thank you, Your Honor.

19 THE WITNESS: I have never - Well, actually I did
20 get a small distribution but several years ago about \$50,000,
21 but at this time I did not receive any kind of early
22 distribution.

23 MR. ROSEN: Your Honor, may I approach the witness
24 and the bench?

25 THE COURT: You may.

1 THE WITNESS: Yes, I had just said that I had - When
2 at Ahmanson when we made our - or at Home Savings, we made
3 our election every single year, we could ask for an early
4 distribution, and I did ask for this, which I said before you
5 gave this to me, I think at one time I got \$50,000 out, which
6 is accurate.

7 BY MR. ROSEN:

8 Q. You did. And I just - I'm showing you this. This is in
9 fact something that verifies that; is that correct, Ms.
10 Noomen?

11 A. Yes. And what happened is, each year -

12 Q. No, no, just -

13 A. - we were given the opportunity -

14 THE COURT: She can explain. She can explain, go
15 ahead.

16 MR. ROSEN: Okay.

17 THE WITNESS: Each year when I worked at Home
18 Savings, they gave us forms and they asked us how much we
19 wanted to defer and they asked us if we wanted to make an
20 early distribution, and we gave the forms back to them, and
21 this was one time that I had done this.

22 MR. ROSEN: May I approach, Your Honor?

23 THE COURT: Yes.

24 THE WITNESS: Yeah, uh-huh.

25 THE COURT: Thank you.

1 BY MR. ROSEN:

2 Q. Ms. Noomen, is this the form that you were referring to?

3 A. Yes.

4 Q. And this was the request then to receive money in January
5 of '04 or about that for \$50,000; is that correct?

6 A. Yes.

7 Q. Okay. So, now we have a form that you filled out and
8 then we have the evidence that you actually received the
9 \$50,000; is that correct?

10 A. Yes, I did.

11 Q. Okay.

12 MR. ROSEN: Your Honor, I'd like to have these two
13 documents admitted into evidence.

14 THE COURT: Any objection? Well, let's wait till
15 after redirect.

16 MR. ROSEN: Okay, Your Honor.

17 BY MR. ROSEN:

18 Q. So, you knew how to get an early distribution if you
19 wanted it, because you've done it before; is that correct,
20 Ms. Noomen?

21 A. Actually every year they gave me an opportunity. The
22 Benefits Department made these available when we had open
23 enrollment while I was at Home Savings only. The minute I
24 went to Washington Mutual Bank, no election forms were given,
25 nothing, not even a benefit plan was given to us.

1 Q. I'm sorry. When did you go to Washington Mutual Bank?

2 A. I believe it was October 1998, I think.

3 Q. And when did you make this early distribution, in 2004?

4 A. No, no, no. As you can see here, it's 11/20 of '96.

5 Q. Right. And you received money in 2004? So you were
6 getting money every year then, \$50,000?

7 A. No, no, no. No, no. Every year when I was at Home
8 Savings, when it came to open enrollment, you were given a
9 form like this, and you could fill it out and tell them how
10 much money you wanted taken out of your paycheck, and then if
11 you wanted to have a distribution of a deferral, then you
12 would let them know when they gave you the form in open
13 enrollment, and this year when I did it, which was in 1996,
14 11/20/1996, I asked for \$50,000 -

15 Q. Right.

16 A. I asked for that in 2004.

17 Q. Okay, and you did receive that then.

18 A. Yeah, I did.

19 Q. Okay.

20 A. I might have had one other time. I just don't have any
21 documents and don't have a memory of it, but I might have
22 asked for distribution another time.

23 Q. Okay.

24 A. But -

25 Q. Did you put that in writing, the other time?

- 1 A. Yes. What had happened is, when I worked with the
2 Benefits Department at Home Savings of America, every time we
3 had open enrollment, they gave us a form like this. All I
4 had to do was fill out my name, sign my name, and if I wanted
5 a deferral, I put it in there, and so that's how I did it.
- 6 Q. Okay. But there was a form and you had to fill out the
7 form if you needed it.
- 8 A. Well, the Benefits Department upon open enrollment gave
9 me these forms, just like they gave me the forms to fill out
10 what I wanted for my medical -
- 11 Q. Great.
- 12 A. And all my other benefits, yes.
- 13 Q. Okay. You read very nicely from two different documents.
14 Are you a lawyer, Ms. Noomen?
- 15 A. No.
- 16 Q. What was your role at Washington Mutual Bank?
- 17 A. I was an employee, and I was a loan consultant.
- 18 Q. A loan consultant.
- 19 A. And I'm not a manager or an executive or a lawyer.
- 20 Q. Okay.
- 21 A. I'm so honored.
- 22 Q. Did you analyze the document and what the change of
23 control provision is within the document?
- 24 A. This document here?
- 25 Q. No, no, no, the two documents that you read from numbers

1 11 and 13.

2 A. I never had these documents until -

3 Q. So when you worked at Home Savings, they never gave you
4 the document?

5 A. Never.

6 Q. Okay. So you never read them at all and someone
7 subsequently told you that in their mind a change of control
8 had occurred and you would have been entitled to it; is that
9 right?

10 A. No.

11 Q. Oh, okay.

12 A. I didn't know that I could - I didn't know when I could
13 get my funds. I didn't know that I could get the funds.

14 Q. I mean it says that -

15 A. What did a change in control have to do with it.

16 Q. Ah, see, only in the change of control situation are you
17 allowed to get those distributions that you read about from
18 the two documents. Ms. Noomen, you said that you have about
19 a million eight in your Ahmanson deferred comp plan; is that
20 correct, ma'am? Ms. Noomen. You said approximately a
21 million eight is in your deferred comp plan?

22 A. That was what the statement said on September of 2008,
23 from Mullins, yes.

24 Q. Okay. And if in fact - Do you know what will happen if
25 in fact the relief that's requested in the motion is granted,

1 meaning the money goes to the estate. Do you know what would
2 happen to your deferred comp plan at that time?

3 A. At what time are you talking about?

4 Q. When the money in the trust, which belongs to WMI because
5 they're rabbi trusts, when that comes back to the estate, do
6 you know what would happen to the claim that you would have?

7 A. Right now today?

8 Q. Do you know?

9 A. No, I don't know.

10 Q. Did you file a proof of claim in the case?

11 A. Yes, I did.

12 Q. Okay. What was the amount of the claim?

13 A. I believe it was the million eight.

14 Q. A million eight.

15 A. A million eight thirty something.

16 Q. Eight thirty-four, I think, was your number. I just
17 rounded it.

18 A. Something like that, yeah.

19 Q. Would it surprise you that if in fact the money comes
20 back to the estate you would have an allowed claim for the
21 million eight?

22 A. If what?

23 Q. Your proof of claim for the million eight thirty-four
24 would deem to be an allowed claim; would that surprise you?
25 So that you would receive a distribution from the WMI

1 bankruptcy case?

2 A. I don't understand your question.

3 THE COURT: Go on. Move on.

4 MR. ROSEN: Okay.

5 THE COURT: You're asking a legal question.

6 BY MR. ROSEN:

7 Q. Have you been told that you would get no money though
8 from Washington Mutual, Inc, if in fact the motion is granted
9 today?

10 A. Who would I - I don't know -

11 Q. Did Mr. Olsen tell you, you wouldn't receive any money?

12 A. I don't know. I don't know what the procedure is.

13 Q. If you were to receive money from Washington Mutual's
14 bankruptcy case on account of your claim, your proof of
15 claim, would that be okay for you?

16 A. I mean if they took the monies out of -

17 Q. If the money in the trust as you have already agreed
18 belongs to Washington Mutual, Inc., and you would have a
19 claim -

20 A. Well, I'm not agreeing with that.

21 Q. You did though.

22 THE COURT: That's not helpful.

23 MR. ROSEN: Okay.

24 THE COURT: It's not part of the factual dispute.

25 THE WITNESS: I don't think I did. If I did it, I

1 did it unknowingly.

2 THE COURT: Alright, Ms. Noomen, that's fine.

3 BY MR. ROSEN:

4 Q. Okay. Just one last time, have you been told that you
5 would receive a distribution from Washington Mutual on
6 account of your claim?

7 A. No, that's why I'm here.

8 Q. Okay.

9 MR. ROSEN: No more questions, Your Honor.

10 THE COURT: Thank you. Any redirect?

11 MS. BAKKER: Yes, Your Honor, thank you.

12 REDIRECT EXAMINATION

13 BY MS. BAKKER:

14 Q. Ms. Noomen, I just would like to gain a greater
15 understanding of the opportunity to get distributions similar
16 to the one that you received in 2004 from your 1997 deferral.

17 A. Are you talking about this?

18 Q. Yes.

19 A. Okay.

20 Q. Would you please explain how you understood early
21 distributions such as the one that you received worked.

22 A. Yes. I was told that if I wanted an early distribution,
23 I filled out this form and they gave it to me.

24 Q. When was this -

25 A. When the time on the form came up. It had nothing to do

1 with the change of control in my mind. I don't even know
2 where he's coming from with that. I was just told here every
3 year, I could make an election every single year to get
4 monies out if I wanted to.

5 Q. That was my next question. What was the occasion of your
6 receiving this form?

7 A. The occasion was - it usually was around October or
8 November at Home Savings. We had something called Open
9 Enrollment, and all of your benefits, you decided which
10 medical plan you wanted to go to. If you wanted to pay for
11 the real expensive one or the cheap one, you decided what
12 your 401(k), you decided your dental, you decided how much
13 money you wanted to put in your deferred comp or whether you
14 wanted to put anything in it, and if you wanted the deferral,
15 you wrote that down too. So, I said, what the heck, let's
16 get \$50,000 in five or six years.

17 Q. Was the opportunity provided for under this form made
18 available to you at any time other than open enrollment?

19 A. The only time it was made available was during open
20 enrollment at Home Savings.

21 Q. Was October 2007 a period of open enrollment?

22 A. Yes.

23 Q. October of 2007.

24 A. Oh, no, okay. October of - I'm sorry, I thought you said
25 '97.

1 Q. I'm sorry.

2 A. Sorry. October of 2007 -

3 Q. Well, let me ask you this question -

4 A. Well, actually that was - in November is when open
5 enrollment - October/November is when open enrollment started
6 with Washington Mutual Bank, yes.

7 Q. Okay. Was your request to get an immediate distribution
8 of 100 percent of your benefit under the Ahmanson plan in
9 connection with the opportunity made available to you as part
10 of open enrollment?

11 A. You mean, did they give me a form and say I could make an
12 election?

13 Q. Yes.

14 A. I never received this form ever or anything like it from
15 the time I started with Washington Mutual Bank or like I said
16 earlier, I never even had a copy of the plan. So I had no
17 idea. I was given nothing other than my request and told
18 that I was - and the only person that I knew to talk to, my
19 whole time at Washington Mutual was the Benefits Department,
20 because there was no communication whatsoever about the plan
21 ever during my tenure.

22 Q. Right. Just so that I'm clear and so the Court is clear
23 as well, the opportunity described in this document was only
24 made available by Home Savings?

25 A. Yes.

1 Q. And not by Washington Mutual Bank?

2 A. No.

3 Q. Alright, thank you very much.

4 A. Well, not for the Ahmanson plan, no.

5 Q. For the Ahmanson plan, no. Thank you.

6 MR. ROSEN: Just a question or two, Your Honor?

7 THE COURT: Sure.

8 MR. ROSEN: Sorry, Your Honor.

9 RECCROSS-EXAMINATION

10 BY MR. ROSEN:

11 Q. You said that the plan that Ahmanson was merged into
12 Washington Mutual Bank; is that correct, ma'am?

13 A. No. I said that Home Savings merged into Washington
14 Mutual Bank.

15 Q. I apologize, yes. In order to get a distribution, did
16 you have to put something in writing?

17 A. Yes.

18 MS. BAKKER: Objection, Your Honor, which plan is he
19 referring to?

20 MR. ROSEN: I'm only focused on Ahmanson.

21 MS. BAKKER: Alright.

22 BY MR. ROSEN:

23 Q. Did you have to put something in writing, Ms. Noomen?

24 A. Yes.

25 Q. You did.

1 A. Yes.

2 Q. Did you ever submit anything in writing for distribution
3 under the Ahmanson plan?

4 A. No, I did not because I was told I couldn't get one. I
5 was clearly told we could not get our monies.

6 Q. And you were told that by that piece of paper that PP-2,
7 I think it was, question number 9?

8 A. You know, this happened ten years ago. I had been given
9 nothing regarding my Ahmanson plan the whole time I worked
10 with Washington Mutual Bank with regards to getting any funds
11 out. In fact, I was told I couldn't amend my plan or get my
12 funds out.

13 Q. Did you ever ask for any thing from the Benefits people
14 at Washington Mutual Bank, because you said you never
15 received anything, did you ever ask for anything?

16 A. Well, I asked for my money.

17 Q. Okay. Did you ever ask for any forms?

18 A. Well, I never asked Home Savings for any forms, they made
19 them available to me, and I did ask for my money and I was
20 told I could not have it.

21 Q. Okay. So you never asked for any forms and you never
22 submitted anything in writing; is that correct?

23 A. No, I didn't.

24 MR. ROSEN: Thank you, Your Honor.

25 RE-REDIRECT EXAMINATION

1 BY MS. BAKKER:

2 Q. Ms. Noomen, did anyone ever provide you with any
3 documentation that described the appropriate procedure for
4 submitting a written request for a distribution from the
5 Ahmanson plan while you were employed by Washington Mutual
6 Bank?

7 A. Never.

8 Q. Did you ever receive any written description of the
9 Ahmanson plan from Washington Mutual Bank?

10 A. Never.

11 Q. Did you receive anything from Washington Mutual Bank
12 regarding the Ahmanson plan?

13 A. No.

14 MS. BAKKER: Thank you.

15 RE-RE-CROSS EXAMINATION

16 BY MR. ROSEN:

17 Q. Did you ever ask for it?

18 A. I didn't ask them. I can tell you why I didn't ask.

19 Q. That's alright, thank you.

20 THE COURT: You can answer.

21 THE WITNESS: Okay, I'd like to answer that. When
22 the merger took place, I called Mullins Consulting, and I was
23 told at that time that Home Savings had funded my plan
24 because before it was non-funded plan, and that the funds
25 were in Union Bank of San Francisco, and they were in trust

1 for me there. And at that point, I thought my funds were
2 safe, and since I received no communication, no
3 correspondence, no copy of a plan, no anything like had
4 happened to me at Home Savings, no giving any document,
5 nothing, I had no idea that Washington Mutual, Inc., was the
6 sponsor of this plan.

7 MR. ROSEN: Your Honor, I just want to renew again
8 for the record all the hearsay objections.

9 THE COURT: Alright, I'll sustain the objection and
10 strike that but are you through?

11 THE WITNESS: Yes, ma'am.

12 THE COURT: Okay. Anything further? Alright, Ms.
13 Noomen, you may step down.

14 THE WITNESS: Thank you.

15 MS. BAKKER: Your Honor, I'd like to call Dotti
16 Jensen to the stand.

17 DOTTI JENSEN

18 having been duly sworn testifies as follows:

19 THE CLERK: Please state your full name and spell
20 your last name for the record.

21 THE WITNESS: Dotti Jensen, J-e-n-s-e-n.

22 THE CLERK: Thank you.

23 DIRECT EXAMINATION

24 BY MS. BAKKER:

25 Q. Good afternoon, Ms. Jensen. Ms. Jensen, would you please

1 tell us why you're here.

2 A. Yes. I participated in the HF Ahmanson capital
3 accumulation plan. I put my hard-earned money in it. I
4 understand I had the right to get it out and made a request
5 for my money, and I was told I couldn't have it, and I'm here
6 to ask for redress from the Court.

7 MS. BAKKER: Just so, the Court is clear, Ms. Jensen
8 participated in the document that's attached at Tab 1 of the
9 binder.

10 THE COURT: D-1.

11 MS. BAKKER: Capital accumulation plan of HF
12 Ahmanson & Company.

13 BY MS. BAKKER:

14 Q. Ms. Jensen, how is it that you came to have an interest
15 in the Ahmanson plan?

16 A. I was an employ of HF Ahmanson and I was given the right
17 as part of my benefits to participate in a capital
18 accumulation plan.

19 Q. And generally how much did you defer into the plan?

20 A. Well, I was a single mother, so I started out small, but
21 I averaged about 35 to 45 percent of my salary and my bonus.

22 Q. Ms. Jensen, there was some testimony earlier today, just
23 to avoid some of the accumulative testimony, about a merger
24 that occurred in 1998 when Washington Mutual Bank acquired
25 Home Savings. After the merger who was your employer?

1 A. After the merger, my employer was Washington Mutual Bank.

2 Q. From what period of employment does your interest in the
3 Ahmanson plan derive?

4 A. Only when I was an employ of Home Savings.

5 Q. After the merger, did you receive any information or
6 statements regarding the Ahmanson plan?

7 A. I did receive quarterly statements from Mullins, who was
8 the record keeper for the funds.

9 Q. Did you ever receive any information about the plan from
10 Washington Mutual?

11 A. No, I did not.

12 Q. After you became an employee of Washington Mutual Bank,
13 did you participate in the bank's employee benefit plan?

14 A. I did.

15 Q. Did you participate in the Washington Mutual Bank
16 deferred compensation plan?

17 A. Yes, I did, the Washington Mutual plan also.

18 Q. What was your relationship with the Human Resources
19 Department?

20 A. Well, I contacted them about all of my benefits. I mean
21 I was given also insurance and dental plans and 401(k)s and I
22 went to them, they were the one source that we had to go to
23 for all the questions that we had about our benefits. So, I
24 trusted them. I relied on them. I assumed that - they gave
25 me good advice for other items, so I trusted them and relied

1 on what they told me.

2 Q. If you had questions about the Ahmanson plan, who did you
3 turn to?

4 A. Well, I first turned to Mullins who told me that all they
5 could give me as my balance, and I had to talk to the HR
6 Department, Human Resources Department of Washington Mutual.

7 Q. If you wanted any other information.

8 A. Yeah, other than what my balance was, the quarterly
9 statement I received.

10 Q. Okay. What happened in October 2007?

11 A. Well, the company was not doing well, and I got nervous,
12 as most of the employees did, and I contacted the Human
13 Resources Department and found out that they were going to
14 restructure the Washington Mutual plan so that we could elect
15 for an early distribution if we wanted to, and I said, yes, I
16 wanted to, and I had at that time asked if I could get my
17 money if that would also apply to the HF Ahmanson plan, where
18 I had my money, and they said, No, at that time, it would
19 not. That this just applied to the distribution from
20 Washington Mutual.

21 Q. What happened in November 2007?

22 A. Well, I became even more nervous and when I was making my
23 election, I also sent an email asking for my Ahmanson
24 distribution also, and I received an email back from the HR
25 Department telling me that I could not under any

1 circumstances get my HF Ahmanson money.

2 MS. BAKKER: May I approach?

3 THE COURT: Yes, you may.

4 MS. BAKKER: Your Honor, this is the document that's
5 been previously marked as Plan Participants Exhibit No. 3.

6 BY MS. BAKKER:

7 Q. Ms. Jensen, is this the email that you were just
8 referring to?

9 A. Yes, it is.

10 MS. BAKKER: If there are no objections, I'd like to
11 move the admission of this document.

12 THE COURT: Any objection?

13 MR. ROSEN: No, Your Honor.

14 THE COURT: It is admitted.

15 MS. BAKKER: Thank you.

16 BY MS. BAKKER:

17 Q. Ms. Jensen, did you do anything else to try to get a
18 distribution of your interests from the Ahmanson plan?

19 A. I did. I called to ask if I could change my - at that
20 time it was paid out over a period of time, and I said that
21 the only option that I had was that I could change it to a
22 lump sum distribution upon my severance from the company.
23 So, at that time I changed my election. At the same time I
24 was asking for all of my money from Washington Mutual, I
25 changed my election to a lump sum distribution when I left

1 the company.

2 Q. Ms. Jensen, why didn't you pursue further an immediate
3 distribution of your interests from the Ahmanson plan while
4 you were still working for Washington Mutual Bank?

5 A. The only people I knew to ask was the Human Resources
6 Department and I had asked and I had been told in writing I
7 couldn't get it. I didn't know - I wouldn't have thought of
8 anything else to do. I thought I had done all that - since I
9 trusted the department, I had done that I thought I could do
10 to get my money.

11 Q. Ms. Jensen, did there come a time in November of 2007
12 when you received additional information regarding the
13 distribution from the Washington Mutual Bank deferred
14 compensation plan?

15 A. Yes, yes.

16 Q. There should be in front of you a document that's been
17 previously marked as Plan Participants Exhibit 2.

18 A. Yes.

19 Q. Was this part of the information you received in
20 connection with the Washington Mutual Bank deferred
21 compensation plan?

22 A. Yes, it is.

23 Q. Would you please refer to Fact 9 on that document.

24 A. "I have deferrals in a separate non-qualified plan that
25 Washington Mutual acquired. Although the balances are not

1 included in the WaMu DCP, can I elect to accelerate payment
2 of that too? No, not at this time."

3 Q. What was your reaction to this in November of 2007 when
4 you received it?

5 A. Well, it was consistent with what I had been told and it
6 had been put in writing that I couldn't get my distribution,
7 so, I assumed what I had been told always was true.

8 Q. What happened in December 2008?

9 A. In December 2008, we were told that they were going to
10 amend the plan, amend the Ahmanson plan, and that we would
11 have to sign a document allowing for that amendment to that
12 plan.

13 Q. And what did you do when you received that information?

14 A. Well, I'm not an attorney, I'm a real estate girl, so I
15 called the person that I knew and trusted which was Jeff
16 Olsen and asked him, you know, what he was going to do. I
17 knew he was participating in the same plan.

18 MR. ROSEN: Your Honor, objection, hearsay.

19 THE COURT: Well, what she told him isn't hearsay,
20 so -

21 MR. ROSEN: No -

22 THE COURT: - I'll allow this. Don't tell us what
23 Mr. Olsen told you.

24 THE WITNESS: Okay.

25 BY MS. BAKKER:

1 Q. What happened after that?

2 A. After that, I made a request for the plan, which I had
3 never seen, and I received a copy of the plan, and I was -

4 Q. What did you do when you received a copy of the plan?

5 A. Well, I was surprised and shocked that there was a
6 provision in there where I could have gotten my money even
7 though I'd been told by people I trusted that I couldn't.

8 Q. What would you have done if you had known that the terms
9 of the plan provided for an immediate distribution while you
10 were so employed?

11 MR. ROSEN: Your Honor, calls for speculation?

12 THE COURT: Overruled, I'll allow it.

13 THE WITNESS: I would have done what I did with my
14 Washington Mutual plan, I would have asked for my
15 distribution.

16 BY MS. BAKKER:

17 Q. Would you have done that notwithstanding the penalty?

18 A. Absolutely. I paid a high tax when I took my Washington
19 Mutual money. I know I was going to have to pay taxes. I
20 thought I'd pay it at a lower rate when I was retired, but of
21 course I would have gotten my money.

22 Q. What is your current interest in the plan?

23 A. \$206,950.45.

24 Q. And what does this represent to you?

25 A. It was my retirement. It was my hard-earned money. It

1 was what I was going to base my retirement on for when I was
2 allowed to retire.

3 Q. Thank you, Ms. Jensen.

4 CROSS-EXAMINATION

5 BY MR. ROSEN:

6 Q. Ms. Jensen, just to be clear, the \$206,000, that refers
7 to the Ahmanson plan only?

8 A. Yes. I took out my Washington Mutual plan.

9 Q. You did take that out, okay.

10 A. Uh-huh.

11 Q. Could we turn your attention to PP-3, which was the email
12 that your counsel provided you with.

13 A. Yes.

14 Q. What does it mean in the first paragraph where there was
15 expressed concern. It says, "This decision cannot be taken
16 lightly, especially considering that if we make this option
17 available the plan will be come subject to 409(A), and
18 accordingly the grandfathered provisions that potentially are
19 for greater flexibility to the participants in the plan."
20 And accordingly lose the grandfather; what does that mean?

21 MS. BAKKER: Objection, Your Honor. This calls for
22 speculation on the part of Ms. Jensen.

23 THE COURT: Overruled. I'll allow her if she knows.

24 THE WITNESS: I'm sorry, I don't. I don't know.

25 BY MR. ROSEN:

1 Q. Do you know what 409(A) is?

2 A. I understand it has some - I don't.

3 Q. You understand it and then you stopped. You understand
4 what?

5 A. No, I believe that it has something to do with some
6 taxes, but I have no idea.

7 Q. So it could subject the plan to some tax ramification
8 then?

9 A. I don't know, sorry.

10 Q. The second paragraph, could you read that for the record,
11 please.

12 A. "The HF Ahmanson cap is a non-qualified plan and it is
13 unsecured and unfunded, just like the WaMu DCP."

14 Q. Okay, thank you.

15 MR. ROSEN: Your Honor, may I approach the witness?

16 THE COURT: You may.

17 BY MR. ROSEN:

18 Q. Ms. Jensen, who is Talal Arimah, and I apologize if I
19 mispronounced that? That's A-r-I-m-a-h.

20 A. He was the person that we contacted at Mullins.

21 Q. And could you tell us what has been marked as D-25 is.

22 A. It is an email from Robin Duer to Dotti Jensen.

23 Q. And the bottom email, what is that?

24 A. It's an email from Dotti Jensen to Talal.

25 Q. Talal Arimah, I guess it is?

1 A. Uh-huh.

2 Q. What is the bottom portion which is your email? What are
3 you asking there?

4 A. Well, this is money that - "my election to distribute my
5 account effective on the first business day in January 2009."

6 Q. So you were asking then for your money under this cap
7 plan to be given to you in January of 2009; is that correct?

8 A. Then and the assumption was that I would be separated
9 from the company because of the concern I had about
10 Washington Mutual Bank.

11 Q. Okay. Well, this is dated September 23, 2008. Do you
12 know when Washington Mutual Bank was seized by the -

13 A. A year ago today.

14 Q. September 25. So two days later than when you wrote
15 this.

16 A. Yes, that's correct.

17 Q. Two days after you wrote this.

18 A. Uh-huh.

19 Q. So two days before the seizure, you wrote and said,
20 Please give me my money January 2 of 2009; is that correct?

21 A. That's correct. I was changing my election.

22 Q. Okay. So you didn't ask for an immediate distribution
23 and as it turns out you've asked for a distribution that was
24 after Washington Mutual filed for Chapter 11; is that right?
25 Washington Mutual, Inc.

1 A. Right. I was told I couldn't get it out prior to my
2 separation from the company.

3 Q. Okay.

4 A. Okay?

5 Q. The top part of that email, which was Robin Duer sending
6 something back to you. Can you read that for the record,
7 ma'am?

8 A. "Dotti: We already have your account separately earmarked
9 to the extent provided by applicable law and the plan within
10 the trust. At this time the plan and current regulations
11 don't allow us to accept a distribution election that differs
12 from your original election."

13 Q. Okay, thank you.

14 A. Uh-huh.

15 MR. ROSEN: Your Honor, I would ask for the
16 admission of D-25, as well as the two prior exhibits, Your
17 Honor, that we have not dealt with yet, D-23, and D-24.

18 THE COURT: Any objection?

19 MS. BAKKER: No.

20 THE COURT: Alright, they're admitted.

21 MR. ROSEN: Thank you, Your Honor.

22 BY MR. ROSEN:

23 Q. Going back to PP-3, Ms. Jensen, just to be clear, where
24 in your email there do you ask for the money to be given to
25 you? In November 26, 2007.

1 THE COURT: Which exhibit?

2 MR. ROSEN: PP-3, Your Honor, which was the one page

3 -

4 THE WITNESS: Well, the election that I was making
5 was for the Washington Mutual money.

6 BY MR. ROSEN:

7 Q. You just asked that the election applied; correct.

8 A. That the election applied to - which was to get my money
9 applied to my HF Ahmanson money.

10 Q. So you asked if the election applied? That was it;
11 right?

12 A. Yes.

13 Q. Okay.

14 MR. ROSEN: Your Honor, I have no more questions for
15 Ms. Jensen, thank you.

16 MS. BAKKER: Your Honor, I have no more questions.

17 THE COURT: Alright, thank you. You may step down.

18 MS. BAKKER: Your Honor, at this time I'd like to
19 call my final witness, which is Kevin McDonough.

20 THE COURT: Thank you.

21 KEVIN McDONOUGH

22 having been duly sworn testifies as follows:

23 THE CLERK: Please state your full name and spell
24 your last name for the record.

25 THE WITNESS: Kevin McDonough, last name, M-c-D-o-n-

1 o-u-g-h.

2 DIRECT EXAMINATION

3 BY MS. BAKKER:

4 Q. Good afternoon, Mr. McDonough. Would you please tell the
5 Court why you are here?

6 A. I'm here because I made demand on monies that were held
7 in the Ahmanson accumulation plan, and my demands were - they
8 turned them down, so I'm here to seek redress from the Court.

9 Q. Just so the Court is clear, you participated in a capital
10 accumulation plan at HF Ahmanson & Company?

11 A. Yes.

12 Q. That's the plan found at Tab 1 in the binder? Mr.
13 McDonough, how did you come to have an interest in the
14 Ahmanson plan?

15 A. When I was an employee of Home Savings from May of '94
16 through the merger in '98, probably through then to that pay
17 period, October '98.

18 Q. How much of your compensation did you defer into the
19 plan?

20 A. It varied from year to year, but I think it was either 10
21 or 20 percent.

22 Q. There was testimony earlier today about a merger that
23 occurred on October of 1998 when Washington Mutual Bank
24 acquired Home Savings. Who was your employer after the
25 merger?

1 A. Washington Mutual Bank.

2 Q. From what period of employment does your interest in the
3 Ahmanson plan derive?

4 A. From the period with Home Savings, so from May of '94
5 through the merger.

6 Q. Thank you. After the merger, did you receive any
7 information or statements regarding your interest in the
8 Ahmanson plan?

9 A. The only thing I ever received were quarterly statements
10 from Mullins Consulting showing balances.

11 Q. Did you ever receive any other information or description
12 of the terms of the plan from Washington Mutual?

13 A. No.

14 Q. After you became an employee of Washington Mutual, did
15 you participate in any of the bank's employee benefit plans?

16 A. I did. I enrolled in the Washington Mutual, Inc.,
17 deferred compensation plan.

18 Q. What was your relationship with the Washington Mutual
19 Human Resources Department?

20 A. I was in close contact with them because I have a young
21 family. I have two children and so I was in contact with
22 them about all of my medical, all my dental, 401(k), the
23 deferred compensation plan. So they were the point person
24 for everything leading to benefits.

25 Q. If you had any questions regarding the Ahmanson plan, who

1 did you turn to?

2 A. Well, I would call Mullins, just for balances and things
3 like that, but whenever it was a question that went outside
4 the scope of balances they always referred us up to the
5 Benefits Department of Washington Mutual.

6 Q. What happened in November of 2007?

7 A. On November 17th, there was a conference call with the
8 Benefits Department and in there they said that they're going
9 to amend the Washington Mutual, Inc., deferred compensation
10 plan to allow for a one-time early withdrawal.

11 Q. And what did you do?

12 A. On November 28th, I filled out the paperwork and I sent it
13 in because I was concerned the direction the bank was going.
14 I was concerned about my money, so I was willing to take it
15 out even taking the tax hit.

16 Q. And what else did you do in November 2007?

17 A. I also contacted Mullins Consulting because they held
18 some monies of mine, and -

19 Q. They held monies under the Ahmanson.

20 A. Under the Ahmanson capital accumulation plan, and so, I
21 asked them, you know, if it was possible to take the money
22 out, and they said, No, not at this time. And they also said
23 that they felt that what they were being told was that the
24 Board of Directors of Washington Mutual, Inc., was voting as
25 to whether to let us take the money out. And then after

1 that, then they referred me up to Robin Duer in our Benefits
2 Department.

3 Q. Did you contact the Benefits Department?

4 A. I did.

5 Q. And what did you find out?

6 A. I talked to Robin and she pretty much reiterated the same
7 thing, said that there as no allowance for an early
8 withdrawal out of the plan, that the Board had to vote on it,
9 and they hadn't done so yet.

10 Q. Did you do anything else to try to follow up and get a
11 distribution from the Ahmanson plan?

12 A. I did. I made repeated calls over the next few months
13 just checking on the status to see if it had been voted on
14 and to see if we would be able to get out money out. At the
15 time our stock was tanking and things were not going well,
16 so, we were all very concerned about it.

17 Q. Did there come a time when you received some additional
18 information about the distribution option from the Washington
19 Mutual Bank deferred compensation plan? You received
20 information, the election forms, that kind of thing?

21 A. From the WaMu, Washington Mutual Bank? Well, that would
22 be in November when we got the amendment to choose a one-time
23 election if we wanted to take it out.

24 Q. You should have in front of you Plan Participants Exhibit
25 2.

1 A. A lot of papers up here.

2 Q. It's a FAQ list, FAQ.

3 A. Okay. I do.

4 Q. I'd like to refer you to Fact 9.

5 A. Okay.

6 Q. Would you please read that for the Court.

7 A. Sure. "Fact 9. Question: I have deferrals in a separate
8 non-qualified plan that Washington Mutual acquired. Although
9 the balances are not included in the WaMu deferred
10 compensation plan, can I elect to accelerate payment of that
11 too? Answer: No, not at this time."

12 Q. What was your reaction to Fact 9?

13 A. Well, it was consistent with what I was being told by
14 Robin Duer in our Benefits Department. So, it was just, in
15 writing, it reiterated what they were saying verbally.

16 Q. When did you first become aware that the Ahmanson plan
17 provides for an immediate distribution before or after a
18 change of control, subject only to a penalty?

19 A. It was in December of '08.

20 Q. What would you have done if you had known about this
21 provision in the plan back in November 2007?

22 MR. ROSEN: Same objection, Your Honor, calls for
23 speculation.

24 THE COURT: Overruled.

25 THE WITNESS: I would have done the same thing I did

1 with my Washington Mutual deferred compensation. Obviously
2 the company was going down, and I would have chosen to pay
3 the tax and get the money out rather than run the risk of not
4 getting anything.

5 BY MS. BAKKER:

6 Q. What is your interest in the plan?

7 A. It's approximately 202,000.

8 Q. And what does it represent to you?

9 A. Well, it's money that I put away, you know, years ago for
10 my future. At the time I wasn't married and didn't have
11 kids, so now it represents retirement for my wife and I and
12 college tuition and things for my kids in a few years. So,
13 it's - I mean, it wasn't bonus money paid in the future. It
14 wasn't some sort of corporate rewards program, it wasn't
15 stock options. This was money that every month, twice a
16 month, came out of my paycheck.

17 Q. Thank you.

18 CROSS-EXAMINATION

19 BY MR. ROSEN:

20 Q. Mr. McDonough, what was your position at Washington
21 Mutual Bank?

22 A. I was - at Washington Mutual?

23 Q. Yeah.

24 A. A loan consultant.

25 Q. Are you still employed by Washington Mutual Bank?

1 A. Yes, well, Chase now.

2 Q. JPMorgan Chase. And are you aware that JPMorgan Chase
3 makes no claims to - Well, let me rephrase that. Have you
4 read the motion that is the subject of today's hearing?

5 A. I have not read it thoroughly. I mean, I'm not a lawyer
6 so, you know, to dissect it the way you would.

7 Q. Okay. Are you aware JPMorgan Chase makes no claim to any
8 interest in the Ahmanson money?

9 A. Yes.

10 Q. Okay. And as you just said, JPMorgan Chase is the entity
11 that owns Washington Mutual Bank; is that correct?

12 A. (No audible response.)

13 Q. You mentioned something about December of '08 and knowing
14 that you might have had something before, and you've heard
15 the prior testimony also about some sort of amendment that
16 might have been suggested to occur in December of '08; is
17 that correct?

18 A. Well, it wasn't suggested, it was a piece of paper they
19 sent us to sign.

20 Q. JPMorgan sent you something?

21 A. No.

22 Q. Washington Mutual Bank sent you something.

23 A. Washington Mutual Bank, yes.

24 Q. And Washington Mutual Bank, as we just said -

25 A. Let me backtrack - I'm not sure if it was Washington

1 Mutual or Chase, I'm not sure.

2 Q. Okay, but it wasn't Washington Mutual, Inc.; was it?

3 A. I don't know.

4 Q. Okay. Do you know if JPMorgan Chase or Washington Mutual
5 Bank had any authorization to send any sort of document like
6 that?

7 A. I wouldn't know that.

8 Q. Okay. Did you ever submit anything in writing for a
9 distribution from the HF Ahmanson plan?

10 A. I did not, no.

11 Q. Okay.

12 MR. ROSEN: Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MS. BAKKER:

15 Q. Mr. McDonough, during the entire time that you were
16 employed by Washington Mutual Bank, did you ever receive any
17 description in a summary of the terms of the Ahmanson plan?

18 A. No, no. The only thing we got were the quarterly
19 statements from Mullins. There was absolutely nothing that
20 came from Washington Mutual.

21 Q. Did you have any reason to believe that there was a
22 requirement or a claims procedure in place for making claims
23 for a distribution of your interest under the Ahmanson plan?

24 A. No. The only - I mean, you've got to remember when
25 Washington Mutual bought Home Savings, we effectively lost

1 control of this plan. We couldn't put any more money in. We
2 couldn't change the elections or anything. So all we got was
3 we got these quarterly statements from Mullins and then any
4 questions that we asked them, they just sent us up to the
5 Benefits Department.

6 Q. Thank you.

7 THE COURT: Any further cross?

8 MR. ROSEN: No, Your Honor.

9 THE COURT: Alright, thank you, you may step down.

10 MR. ROSEN: Give me a moment.

11 THE COURT: Alright, nothing more from the
12 objectors. Does the debtor have any -

13 MR. ROSEN: I'd like to put Mr. Klinkhammer back on
14 the stand, Your Honor.

15 THE COURT: Alright. You're still under oath.

16 CRAIG KLINKHAMMER (Previously Sworn)

17 DIRECT EXAMINATION

18 BY MR. ROSEN:

19 Q. Mr. Klinkhammer, are you familiar with the response that
20 was filed by the debtors to the objections that have been
21 interposed?

22 A. Yes.

23 Q. In connection with the preparation of that response, did
24 you cause to be conducted a search of WMI's books and records
25 for evidence of any payment demands made by the plan

1 participants with respect to the plans in which they
2 participated?

3 A. Yes, I did.

4 Q. Pursuant to the search, did you find any record of any of
5 the objections participants having made an accelerated
6 payment demand in 2007 with respect to any of the deferred
7 comp plans in which they participated?

8 A. No.

9 Q. Did you find any evidence of any other plan participants
10 having made payment demands in 2007 with respect to the
11 plans?

12 A. No.

13 Q. Did you find any emails from the plan administrator in
14 November - excuse me, stating that a few plans had informally
15 inquired about withdrawing funds?

16 A. Yes, a few, yeah.

17 Q. Okay. Did you find any evidence of any payment demand
18 made at any time by one or more of the plan participants?

19 A. No.

20 Q. Well, I want to refer you then back to what has been
21 marked as Debtors-25. What is that?

22 A. It's not up here.

23 MR. ROSEN: I hoped it would still be up there.

24 MS. JENSEN: Are you looking for page 25? Is this
25 what you're looking for?

1 MR. ROSEN: That's the one. Thank you very much.

2 BY MR. ROSEN:

3 Q. Does this refresh your recollection as to what you found
4 in the records.

5 A. Yeah, this is in 2008. I thought you were referring to
6 2007.

7 Q. I'm sorry.

8 MR. ROSEN: Your Honor, may I approach the witness?

9 THE COURT: Yes.

10 BY MR. ROSEN:

11 Q. Mr. Klinkhammer, I've handed you what has been marked as
12 D-26. Could you please state what that is for the record.

13 A. It's an email from Robin Duer dated September 24, 2008 to
14 Jeff Wilson and Jerry Brady.

15 Q. Okay. And what is the substance of these emails?

16 A. These emails is correspondence between Jeff and Talal and
17 Carla Morrison and Robin Duer and Gary Brady regarding
18 requests to accelerate payment and be paid in January 2009.

19 Q. I'm sorry, to be paid in January 2009?

20 A. Yes.

21 Q. So this is similar to D-25, to what Ms. Jensen had asking
22 for the January distribution; is that correct?

23 A. Yes.

24 Q. Were there any other requests that you've been able to
25 locate in the records of WMI for a distribution?

1 A. No.

2 Q. Why does WMI want to terminate the trust and transfer the
3 assets or take charge of the assets again?

4 A. Removing the assets from the trust would put it into our
5 account for the creditors. Also it would alleviate
6 administration fees, trustee fees, et cetera.

7 Q. Is there any liquidation of assets that has to occur?

8 A. Yes.

9 Q. And why do you want to liquidate those?

10 A. It's costly to administer. We pay to people to manage
11 that money, and so they're in fixed income instruments that
12 we'll have to liquidate.

13 Q. You heard Mr. Olsen testify that he made a payment demand
14 in October of 2007. Did you find anything in the records of
15 WMI that evidences that payment demand?

16 A. No, I did not.

17 Q. Is the only demand that you found with respect to Mr.
18 Olsen D-26?

19 A. Yes.

20 Q. And Ms. Noomen, did you find anything, a payment demand
21 for her at all?

22 A. No, I did not.

23 Q. Did WMI have an HR Department or was the only HR
24 Department Washington Mutual Bank?

25 A. It was Washington Mutual Bank.

1 Q. You heard some brief testimony and my questions then from
2 Mr. McDonough with respect to this supposed amendment that
3 was to occur in December of '08. You've been employed by WMI
4 since when, sir?

5 A. December 2008.

6 Q. And do you know of anyone at WMI who sought to amend the
7 HF Ahmanson plan?

8 A. No.

9 Q. And so, did WMI authorize anyone to send anything out
10 with respect to amending the HF Ahmanson plans and trusts?

11 A. No.

12 Q. Do you know if these plans in any way were governed by
13 ERISA?

14 A. I believe they're ERISA plans, yes.

15 Q. And do you know if there was a provision that said - Is
16 there a provision in these agreements as to what a
17 participant should do in the event that they disagreed with
18 any treatments pursuant to the plans?

19 A. There's a process in place, there's a Committee that
20 rules over the plans that's still in place, and there's
21 verbiage in the plan documents that talk about disputes.

22 Q. So this would be the plan claims procedures that are
23 referred to?

24 A. Yes.

25 Q. Okay. And the Committee follows these plans; is that

1 correct?

2 A. Yes.

3 Q. Okay.

4 MR. ROSEN: Your Honor, I have no more questions for
5 Mr. Klinkhammer.

6 THE COURT: Cross.

7 CROSS-EXAMINATION

8 BY MS. BAKKER:

9 Q. Good afternoon, Mr. Klinkhammer.

10 A. Good afternoon.

11 Q. Just a couple of questions. You said that you undertook
12 a search of the books and records of Washington Mutual Bank
13 to determine if there had ever been any claims made by the
14 individuals who testified here today. Does your search
15 include a search for verbal requests?

16 A. No.

17 Q. Are you familiar with 409(A) of the Internal Revenue
18 Code?

19 A. Generally.

20 Q. Are you aware then that under 409(A) and the Internal
21 Revenue Service regulations promulgated pursuant to 409(A)
22 that non-qualified deferred compensation plans had to be
23 amended to conform with 409(A)?

24 A. (No audible response.)

25 THE COURT: You have to answer verbally.

1 THE WITNESS: I'm sorry. Yes, I've heard that.

2 BY MS. BAKKER:

3 Q. And can you please tell us, if you know, the time frame
4 during which pursuant to the regulations non-qualified
5 deferred compensation plans have to be amended to conform
6 with 409(A)?

7 A. The dates changed. So it was originally I think 2007 and
8 then it changed to 2008. The service -

9 Q. The IRS kept pushing the date back.

10 A. Right.

11 Q. Right. Isn't it true that the capital accumulation plan
12 of HS Ahmanson & Company is a non-qualified deferred
13 compensation plan that had to be amended at some point
14 between 2006 and 2008 to conform with 409(A)?

15 A. I wouldn't know if that would -

16 Q. Is it the type of plan that would have to be amended for
17 409(A)?

18 A. I believe they allowed certain plans to have
19 grandfathering status.

20 Q. If they're not grandfathered, would they need to be
21 amended for 409(A)?

22 A. I couldn't tell you.

23 Q. Is it your understanding that the Internal Revenue
24 Service regulations that the time period for amending non-
25 qualified compensation plans extended through December 2008?

1 A. That is my understanding.

2 Q. Thank you.

3

REDIRECT EXAMINATION

4 BY MR. ROSEN:

5 Q. I want to refer you to PP-3. Again, this is - Do you
6 have that there? Ms. Jensen?

7 MS. JENSEN: Yes. Oh, boy. Sorry.

8 BY MR. ROSEN:

9 Q. I'm going to refer you to the first paragraph there, to
10 the last sentence and specifically the last half of that
11 third line. It says, "Accordingly, you lose the
12 grandfathered provisions that potentially offered greater
13 flexibility to the participants in the plan." So, does that
14 give you any sense as to whether or not these plans were
15 grandfathered? If you know.

16 A. That would give me a sense that they were grandfathering
17 and there is . . . (indiscernible).

18 Q. And if these massive distributions that people were
19 requesting without some sort of modifications or compliance
20 with any IRS laws were to occur, what would happen to all the
21 other participants in the plan?

22 A. There would be a constructive receipt issue, and the
23 whole plan would be deemed taxable.

24 Q. And would all the other participants be taxed for the
25 money that's in the plan then?

1 A. Yes.

2 MR. ROSEN: Your Honor, I have no further questions
3 for Mr. Klinkhammer.

4 THE COURT: Is this true, if the distribution is
5 taken under a change of control provision?

6 THE WITNESS: The distribution under - to
7 accelerate, out of change typically, out of a change of
8 control you can elect to get your money immediately. This
9 plan predated any of the 409(A) regulations which allowed for
10 acceleration for this, but since the new regulations have
11 come out, they came out to specifically stop people
12 accelerating their payments. The fact of not having the
13 constructive receipt issue would be is if you violated a plan
14 provision and you were audited and it was found, you could
15 subject - the whole plan really does not exist if you don't
16 follow it, and if the plan didn't exist, then they would tax
17 - distribute all the funds and it would be immediately taxed.

18 THE COURT: So the effect of this would be that all
19 of the funds would immediately become funds of the
20 beneficiaries?

21 THE WITNESS: The plan would - yeah. So no matter
22 if you made an election or not, the plan would cease to
23 exist, and the balances would be distributed.

24 THE COURT: Okay.

25 MR. ROSEN: Your Honor, I think you said two things,

1 and I want to be clear.

2 BY MR. ROSEN:

3 Q. The funds may not be distributed but they wouldn't be the
4 assets of the beneficiaries of the plan; is that correct?

5 A. If the plan is terminated, everybody is immediately taxed
6 and their balances are paid to the participants.

7 Q. Out of general assets of the estate, not necessarily of
8 the trust?

9 A. Right.

10 THE COURT: Would the trust be terminated?

11 THE WITNESS: The trust? I mean, the trust would
12 not have to be terminated. The trust is for the benefit of
13 the - I mean, it's earmarked money that's for the benefit of
14 the plan participants. In all events, those monies only can
15 come out either to pay the beneficiaries or in bankruptcy
16 like we're in now, but it does not promulgate that it would
17 have to come from the trust.

18 THE COURT: Okay. Thank you. Anybody else have any
19 further questions?

20 MS. BAKKER: I think I neglected to move the
21 admission of Plan Participants Exhibit 3?

22 THE COURT: Do you have anymore questions of the
23 witness?

24 MS. BAKKER: No, thank you.

25 THE COURT: Alright, you can step down then.

1 Alright, PP-3 you're asking to be admitted. Any objection to
2 that?

3 MR. ROSEN: No, Your Honor, and I would just say
4 that all - if there's no objection to the other documents
5 that have been proffered here be admitted as well.

6 THE COURT: Alright, they're all admitted.

7 MS. BAKKER: Thank you, Your Honor.

8 MR. ROSEN: Your Honor, we have no further testimony
9 or evidence that we would like to submit. We would however,
10 if the Court was interested, address the Court about these
11 issues, but we certainly have described them at length in our
12 response.

13 THE COURT: Well, I have some questions, and I don't
14 know if I need additional testimony on this or whether the
15 parties can stipulate to this. Robin Duer was in the WMB HR
16 Department?

17 MR. ROSEN: Yes, Your Honor.

18 THE COURT: Is it agreed that the WMB HR Department
19 acted as the HR Department for WMI as well?

20 MR. ROSEN: Yes, Your Honor.

21 THE COURT: Alright. I'm going to ask the parties
22 for briefs. I know you've briefed part of it, but based on
23 the testimony I've heard, and the lateness of the hour.

24 MR. ROSEN: That's fine, Your Honor. We're happy to
25 do that instead of oral argument. I don't know if counsel is

1 - We're prepared to do that, Your Honor.

2 THE COURT: Is that okay?

3 MR. ROSEN: I know it should be dynamic, but -

4 MS. BAKKER: May I consult, Your Honor?

5 THE COURT: Yes.

6 MR. ROSEN: Your Honor, I'm also willing to come
7 back at another time since it's only oral argument and we
8 wouldn't necessarily require the folks to fly in from Seattle
9 again. Counsel's in Philadelphia. Your Honor -

10 THE COURT: Uh-huh.

11 MR. ROSEN: Is there a particular aspect that you
12 would like us to brief or would you like us to take to the
13 testimony that we've heard and apply it to what we know the
14 law to be and submit that to the Court?

15 MS. BAKKER: I'm sorry, I didn't quite hear -

16 THE COURT: What issue I'm troubled by.

17 MR. ROSEN: Exactly.

18 THE COURT: I'm troubled by the statement of a
19 representative of the debtor that these individuals could not
20 take their money out, which appears to contradict the plan
21 documents.

22 MR. ROSEN: With all due respect, Your Honor, we
23 don't have Robin Duer here and it is hearsay, and I know the
24 Court allowed these people to say it, but if the Court is
25 focused on that issue, I would ask the Court to revisit the

1 hearsay objection because it's the sole basis for which the
2 Court has a question.

3 THE COURT: Well, Mr. Klinkhammer just said that she
4 - the HR Department at WMB was the HR Department for the
5 debtor, so is it an admission against interest?

6 MR. ROSEN: Your Honor, while it may be, I don't
7 know if in fact that is what Ms. Duer said. It's certainly
8 an incomplete statement. I would renew the objection, Your
9 Honor.

10 THE COURT: I'm not sure it's incomplete. I mean,
11 that's the record I have.

12 MR. ROSEN: Well, Your Honor, again, we're happy to
13 brief this issue and we're certainly happy to again brief the
14 issue about constructive trusts which is the sole theory on
15 which they can move, and unfortunately, we believe we know
16 what the outcome is, but we're happy to do that again for the
17 Court.

18 MS. BAKKER: Your Honor, we're happy to brief the
19 issue. I'm also happy to address the issue of constructive
20 trust for 10 minutes or so, if that would be helpful.

21 THE COURT: Well, they're asserting it's not
22 available because there's a statute that tells you what
23 you're entitled to.

24 MS. BAKKER: It's our position that it's not
25 preempted by ERISA and that it's a procedural mechanism for

1 enforcing an ERISA liability, which this is.

2 THE COURT: Well, why don't you brief that issue for
3 me.

4 MS. BAKKER: I'd be happy to, thank you.

5 MR. ROSEN: Your Honor, if I could request then that
6 we get a copy of the transcript and then - and I don't know
7 how long that would take, but if we would be permitted two
8 weeks after we get that transcript then to submit something
9 to the Court?

10 THE COURT: That's fine with me, and I'll leave it
11 to you to order the transcript.

12 MR. ROSEN: Simultaneous submissions, Your Honor.

13 THE COURT: Any objection to that?

14 MR. ROSEN: Unless you need more time?

15 MS. BAKKER: No, I would just like to have an
16 opportunity to reply to your brief.

17 MR. ROSEN: That's why I said simultaneous
18 submissions.

19 THE COURT: So there will be initial submissions and
20 then a reply?

21 MR. ROSEN: I didn't think we had to do that, but if
22 counsel wants to do a second look, we'll take the second look
23 as well, Your Honor.

24 MS. BAKKER: We would like . . . (microphone not
25 recording).

1 THE COURT: Alright then, an additional two weeks to
2 reply.

3 MR. ROSEN: Thank you, Your Honor.

4 THE COURT: Just alert the Court when briefing is
5 completed. Somebody can give me a notice of completion of
6 briefing.

7 MR. ROSEN: That's fine, Your Honor.

8 THE COURT: And the briefs. Alright. Thank you,
9 we'll stand adjourned then.

10 MR. ROSEN: Thank you, Your Honor.

11 (Whereupon at 6:11 p.m., the hearing in this matter
12 was concluded for this date.)

13

14

15

16

17

18 I, Elaine M. Ryan, approved transcriber for the
19 United States Courts, certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter.

22

23 /s/ Elaine M. Ryan September 28, 2009
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