

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
WASHINGTON MUTUAL, INC., et al.)
)
) Case No. 08-12229 (MFW)
) (Jointly Administered)
Debtors.) **Hearing Date: May 19, 2010 at 11:30 a.m.**
)

**WMB NOTEHOLDER GROUP'S (I) STATEMENT CONCERNING RULE 2019 AND
(II) REQUEST THAT SANCTIONS BE ENTERED AGAINST THE DEBTORS**

This Statement is being filed by certain holders of senior and subordinated notes (the "WMB Noteholder Group" or the "Group") issued by Washington Mutual Bank ("WMB") as a result of the Debtors' Amended Notice of (A) Required Compliance with Provisions of Bankruptcy Rule 2019(a) and (B) Hearing to Show Cause Why Sanctions or Limitations Pursuant to Bankruptcy Rule 2019(b) or Otherwise Should Not Be Imposed [Dkt. No. 3447] (the "Notice").¹

SUMMARY OF STATEMENT

1. There are two related but separate matters at issue here. The primary matter is whether Bankruptcy Rule 2019 should be applied to creditors whose only participation in a Chapter 11 case is in defense of a debtor's objection to claims they are asserting on behalf of a separate estate. The secondary matter is whether there should be any consequences when a debtor serves a Notice that is fundamentally inconsistent with the notice that the Court requested be served, particularly when the improper Notice asserts that the Court issued a "directive" when it did no such thing.

¹ As stated at the Claims Hearing (defined below), separate counsel has been engaged to address all matters arising out of the direct misrepresentation claims asserted in the Proof of Claim. Upon information and belief, the WMB Noteholder Group understands that Grant & Eisenhofer P.A. intends to file a 2019 statement on behalf of the Group members asserting such claims. This Statement only addresses the claims for recovery on behalf of the WMB Receivership estate.

Docket No.: 3759

Date Filed: 5-17-10

2. As to the applicability of Rule 2019, the WMB Noteholder Group respectfully submits that (i) since Rule 2019 applies to claims against the Debtors, and the claims being asserted against the Debtors in the Proof of Claim belong to the Receivership, the details of the WMB Noteholder Group's claims against WMB, a non-debtor affiliate, are irrelevant in the context of Rule 2019, (ii) Rule 2019 should not be applied to groups who do not otherwise participate in the case, and (iii) even if Rule 2019 does apply, this Court has the discretion not to order any remedies under Rule 2019 at this time due to the unique facts and circumstances of this case.

3. As to the Debtors' Notice, it states (among other things) that this Court "directed" the WMB Noteholder Group and others to file a Rule 2019 statement no later than May 17, and that any relevant party who fails to do so *risks being sanctioned* at the hearing on May 19 (the "**2019 Hearing**").² While this Court directed no such thing, the WMB Noteholder Group has felt compelled as a protective matter to file this Statement and appear in person at the 2019 Hearing when, but for the Notice, the Group would not have filed a pleading and would likely have appeared only telephonically. As a result of this unnecessary expense directly related to the Debtors' inappropriate Notice, the WMB Noteholder Group believes that sanctions *against the Debtors* are appropriate in the form of an award of the attorneys' fees incurred by the WMB Noteholder Group in connection with this filing and the 2019 Hearing. To state it bluntly, the Debtors have intentionally misrepresented what this Court required and such unethical conduct simply cannot be permitted without consequence.

² The original Notice actually required compliance by April 19 for the April 21 hearing; the Debtors unilaterally changed the dates when they served the Amended Notice.

BACKGROUND

4. On March 27, 2009, certain members of the WMB Noteholder Group (the "**WMB Noteholder Group POC Participants**") each timely filed Proof of Claim number 2480 (the "**Proof of Claim**") against Debtor Washington Mutual, Inc. ("**WMI**").

5. On February 5, 2010, the Debtors filed their Corrected Twentieth (20th) Omnibus (Substantive) Objection to Claims [Dkt. No. 2326] (the "**Claims Objection**") seeking an order immediately disallowing and expunging the Proof of Claim as well as the proofs of claim filed by the participants in another noteholder group (collectively, the "**Claims**" and the "**Claimants**").

6. At the April 6, 2010 hearing (the "**Claims Hearing**") regarding the legal issues raised in the Claims Objection, the Debtors asserted that the two WMB noteholder groups involved in the Claims Hearing should not be heard because they had not complied with this Court's December 2, 2009 Opinion concerning Rule 2019 [Dkt. No. 1952] (the "**2019 Opinion**"). Preliminary Transcript from April 6, 2010 Omnibus Hearing 29:21-30:2, attached hereto as Exhibit A and hereinafter "**Tr.**".

7. On its face, the 2019 Opinion only applied to the so-called WMI Noteholder Group. The Court acknowledged this but also noted that Rule 2019 permitted the Court to act *sua sponte*. As a result, the Court permitted the Claimants to continue to participate in the Claims Hearing but, at the same time, the Court expressed its view that Rule 2019 ought to be applied to any relevant group in the case and accordingly scheduled a hearing to consider the matter further:

I'm not going to preclude [those parties who have not filed a 2019 Statement] from being heard today. I agree that the Rule should apply to such groups in this case. I appreciate why some don't want to file a motion requiring that, but I do note that Rule 2019 allows a Court *sua sponte* to direct that. So, I will schedule a

hearing at the next omnibus hearing . . . April 21st. And any party that believes Rule 2019 does not apply to them, any attorney representing more than one creditor in this case who believes that Rule does not apply to them, should appear and be heard to argue why I shouldn't issue an order as to all.

Tr. 35:7-18.

8. At the conclusion of the Claims Hearing, undersigned counsel sought clarification as to whether the Court intended that the WMB Noteholder Group should also participate in the 2019 Hearing. The Court affirmed that it intended to include all relevant groups and requested the Debtors "to do a notice for the next omnibus hearing basically saying any party that purports to represent more than one creditor – ". The Transcript implies that the Court did not finish its sentence, only that counsel for the Debtors interrupted to say, "We will do that, Your Honor."

Tr. 131:5-20.

9. The Transcript is clear as to what the Court expects to occur at the 2019 Hearing. The Court intends at the 2019 Hearing to issue an Order similar to the 2019 Opinion that applied to all relevant groups, not just the WMI Noteholder Group. However, before issuing such Order, the Court stated that, "any party that believes Rule 2019 does not apply to them . . . should appear and be heard to argue why I shouldn't issue an order as to all." Tr. 35:14-18.

10. One would expect that the notice that the Debtors issued in response to the Court's request would simply quote (or paraphrase) what the Court stated on the record. The Notice as issued, however, did far more than that. The Notice is attached as Exhibit B and its multiple misrepresentations will be addressed in Section II of this Statement below.

STATEMENT

I. Rule 2019 Does Not Apply to the WMB Noteholders' Claims Against WMB and Should Not Be Applied to the WMB Noteholder Group Due to Their Limited Participation in This Case

11. For the purposes of this Statement, the WMB Noteholder Group does not propose to reargue this issue of whether Rule 2019 applies to ad hoc groups generally. The 2019 Opinion is currently the law of the case. Instead, the WMB Noteholder Group argues in the alternative either that (i) since Rule 2019 applies to claims against the Debtors, and the claims being asserted against the Debtors in the Proof of Claim belong to the Receivership, the details of the WMB Noteholder Group's claims against WMB, a non-debtor affiliate, are irrelevant in the context of Rule 2019; (ii) Rule 2019 should not be applied to the WMB Noteholder Group in any event under the particular facts of this case; and (iii) even if the Court concludes that Rule 2019 does apply, the Court should exercise its discretion and not order any relief against the WMB Noteholder Group at this time.

A. Rule 2019 Applies Only to Claims Against the Debtor

12. The WMB Noteholder Group did not locate any case law involving a fact pattern similar to that presented here. This is not surprising. A typical proof of claim states on its face the amount of the creditor's claim against the debtor and, if based on a writing, attaches a writing that indicates how and when the claim arose. Thus, the information required by Rule 2019 is usually already disclosed in the proof of claim or, if an objecting party seeks further detail, such party can do so via discovery requests.

13. As was apparent at the Claims Hearing, the Proof of Claim is not typical. As relevant here (*see* footnote 1 above), the Claimants are not seeking a recovery on their own behalf; they are seeking recoveries on behalf of the WMB Receivership. Thus, whether the Claimants are owed 2 billion dollars or 2 dollars is not actually relevant, let alone when they

acquired their claims and what they paid for them. The only relevant "claims" are the claims that the Receivership has against WMI, and those claims are already spelled out in the Proof of Claim as well as in the proofs of claim filed by the other WMB noteholder group and by the FDIC itself.

14. Rule 2019 can only be read to apply to the "claims" against the debtors that are being asserted. There is nothing in Rule 2019 to suggest that a claim against any other person is relevant or must be described in detail. The Debtors have never disputed that the members of the WMB Noteholder Group hold claims against the Receivership, nor did the FDIC object to their claims within the relevant statutory time period. If the Debtors insist that the terms of Rule 2019 must be literally applied to the *members* of a group who are merely filing and defending claims on behalf of someone else, then that same literal application must also be applied to the *claims* that are being asserted. Applying the words of Rule 2019 as written, the addendum to the Proof of Claim already (i) identifies the name of the creditor – it is the FDIC as Receiver; (ii) identifies the nature and amount of the claims being asserted, as well as when they arose – this Court held at the Claims Hearing that the Proof of Claim was sufficient on its face to inform the Debtors of the claims that were being asserted; (iii) recites the facts and circumstances of the entity – the creditor is the Receivership and the Proof of Claim describes the facts and circumstances of the Receivership; and (iv) identifies the amounts of claims, etc. – see (ii) above.

15. Accordingly, if Rule 2019 is to be applied to the WMB Noteholder Group at all, it can only be applied to the claims they are asserting against WMI, not to their separate (and undisputed) claims against the Receivership. Because this Court has already held that the Proof of Claim adequately describes the claims the Group is asserting against WMI, Rule 2019 (if it applies) has already been complied with.

B. Rule 2019 Should Only Be Applied to Groups Who Participate Actively in a Case

16. As noted above, the WMB Noteholder Group again acknowledges that there is no case law directly on point. However, there are various decisions that favor the position of the WMB Noteholder Group that Rule 2019 ought not to be applied to a group that is only defending a proof of claim (other than several situations not relevant here that involved a purported "class" proof of claim that did not include evidence of due authorization by the class members).

17. For example, at least one court has recognized that Rule 2019 was not meant to apply to parties that only filed a proof of claim. In *In re Craft*, 321 B.R. 189 (Bankr. N.D. Tex. 2005), in determining whether class representatives were required to comply with Rule 2019, the Court noted that "Rule 2019 clearly contemplates disclosure by entities *active* in a chapter 9 or chapter 11 case." *Id.* at 197 (emphasis added). In coming to this conclusion, the court reviewed the predecessor to Rule 2019 and noted that such a rule "clearly deal[t] with the ability of an entity to participate in all phases of a chapter X case." *Id.* Additionally, the court looked to the general bankruptcy rule framework, and in particular at Rule 9010, and noted that the fact that "Rule 9010 makes provision for disclosure of authority by an agent in circumstances *other than* mere filing of a claim also suggests Rule 2019 was not intended to monitor claim filings." *Id.*

18. *Craft* was dealing with class action representatives rather than ad hoc groups, but the WMB Noteholder Group submits that the proposition stated in *Craft* makes sense: Rule 2019 is concerned with *active* participation in a case and not every appearance by a creditor should be construed as active participation. As the Debtors' counsel stated at the Claims Hearing, "we have for the first time the appearance in court of [counsel for the WMB Noteholder Group] . . . [and] we've only seen a proof of claim filed by them [until now]." Tr. 29:12-18. Not

only has the WMB Noteholder Group not *actively*³ participated in this case, the Group would not be participating at all but for the Debtors' objection to the Proofs of Claim. For that matter, the Group would not even be filing this Statement but for the inappropriate Notice, as discussed in more detail below.

19. There are several cases in which courts held that failure to file a Rule 2019 statement was grounds for disallowance of a proof of claim. One of those cases, in particular, actually supports the WMB Noteholder Group's position here. Specifically, in *Reid v. White Motor Corp. (In re Reid)*, 886 F.2d 1462 (6th Cir. 1989), the court disallowed a class proof of claim filed by an attorney who failed to demonstrate requisite authority to act on behalf of the class members. This makes sense, as the issue in *Reid* was not whether the class intended to participate actively in the case but whether the attorney actually represented the members of the class on whose behalf the attorney claimed it had authority to file a proof of claim. Here, the Proof of Claim was separately signed by each WMB Noteholder Group POC Participant itself, so the issue of attorney authority is not relevant. Additionally, in *Reid*, the court held that where an attorney or other agent does not demonstrate via Rule 2019 that it has authority to file the class proof of claim, courts have the discretion to extend the bar date and give the individual members an opportunity to file their own separate proofs of claim. *Id.* at 1472.

20. Recognizing that this Court was not focused on the WMB Noteholder Group at the time or on the implications of filing and defending a proof of claim, it is nevertheless worth noting that this Court also focused on *active* participation as a reason why it made sense to apply Rule 2019 to the WMI Noteholder Group:

³ As the undersigned counsel noted at the hearing, the Group did appear once in the early days of the case to reserve Noteholders' and all other parties' rights on a determination of the ownership of the Deposit accounts. The matter was adjourned and never decided. Rights to the Deposits are asserted in the Proof of Claim. The Group has not appeared or filed papers since.

- "Through counsel, the WMI Noteholders Group has been active in these cases." 2019 Opinion at 3.
- "Counsel for the WMI Noteholders Group has filed responsive pleadings relating to several contested matters and appeared at numerous hearings." *Id.* at 3-4.
- "Rather the pleadings and appearances by counsel demonstrate" *Id.* at 7.
- "The WMI Noteholders Group counsel has repeatedly filed papers and made appearances at various hearings representing the constituent members as part of the WMI Noteholders Group." *Id.* at 8 n.8.
- "This is especially true, for example, where a group or committee controls one-third of a class of claims, which might allow the group to block confirmation of a plan." *Id.* at 20.

21. Here, the WMB Noteholder Group (i) has not been active in these cases, (ii) has not filed responsive pleadings related to any contested matters other than the objection to their own Proof of Claim⁴ (and now this Statement as a result of the Debtors' inappropriate Notice), (iii) has not appeared at numerous hearings, (iv) has not demonstrated any intentions via pleadings and appearances other than the intention to assert and defend items contained in the Proof of Claim, (v) has not repeatedly filed pleadings, and (vi) does not control one-third of any class of claims against the Debtors.

22. In other contexts, this Court has recognized that the filing of a proof of claim does not subject a claimant to the full application of the Bankruptcy Code or the full jurisdiction of the bankruptcy court. Citing precedent from the United States Court of Appeals for the Third Circuit, this Court has held that by filing a proof of claim the claimant submits to the jurisdiction of the bankruptcy court *only* for resolution of the claim and any counterclaims asserted by the debtor. *See, e.g., In re PRS Ins. Group, Inc.*, 331 B.R. 580, 586 (Bankr. D. Del. 2005), *reh'g denied* 335 B.R. 77 (Bankr. D. Del. 2005) ("[w]hen a creditor files a proof of claim, it subjects

⁴ *See supra* note 3.

itself to the jurisdiction of the Bankruptcy Court to hear all matters *related to* the allowance of that claim . . . including affirmative counterclaims that may be set off against that claim." (emphasis added).

23. The Third Circuit has also embraced the concept of bankruptcy court jurisdiction being limited to the resolution of the proof of claim and matters related to the claim. See *In re Carnell Constr. Corp.*, 424 F.2d 296 (3d Cir. 1970), cert. denied *Masterson v. Valley Nat'l Bank of Long Island*, 400 U.S. 828 (1970). In *Carnell*, the Third Circuit noted "[i]t also appears to be fairly well settled that a creditor who files his claim in the Bankruptcy Court impliedly consents to be sued on counterclaims arising out of the same transaction, *but that such a filing does not constitute implied consent to be sued on an alleged cause of action arising out of a different subject matter.*" *Id.* at 298 (emphasis added) (quoting *In re Beasley-Gilberts, Inc.*, 285 F. Supp. 359, 361 (S.D. Ohio 1968); see also *In re Copeland*, 531 F.2d 1195, 1201 (3d Cir. 1976) ("Clearly, in cases where a creditor has filed a proof of claim with the bankruptcy court, that court may entertain summary jurisdiction over an appropriate counterclaim, where the counterclaim arises out of the transaction that is the subject matter of the creditor's claim.") (citing *Carnell*); *In re Donahue*, 16 B.R. 335, 343 (Bankr. D. Mass. 1982) (recognizing that a creditor may assert rights in a bankruptcy court, i.e. reclamation rights, without submitting to the general jurisdiction of the bankruptcy court).

24. Moreover, the United States District Court for the District of Delaware has recognized the limited effect that filing a proof of claim can have. Specifically, the Delaware District Court has held that where a proof of claim contains a reservation of rights and is filed under the compulsion of the bar date, the proof of claim does not necessarily operate to transform a non-core claim into a core claim. See *In re Northwestern Corp.*, 319 B.R. 68, 74 n.1

(D. Del. 2005) (citing *In re Mid-Atlantic Handling Sys., LLC*, 304 B.R. 111, 124 (Bankr. D.N.J. 2003) (concluding that filing of proof of claim with reservation of rights does not necessarily transform pre-petition state law claims into core proceedings, particularly where claim was filed on the eve of the bar date).

C. The WMB Noteholder Group Is Different than the Other Groups the Court Is Concerned About

25. The WMB Noteholder Group is not proposing that there be some magical black-letter test that states that filing a proof of claim does not require a 2019 filing while filing a pleadings does. As already noted above, there are situations where the filing of a proof of claim clearly does merit a 2019 filing, such as when the claim is purportedly on behalf of an entire class of creditors, yet the authority of the attorney signing the claim is not apparent on its face. Rather, the Court should consider all the facts and circumstances of the particular group's participation in the case compared to the participation of other relevant groups.

26. Here, the WMB Noteholder Group stands alone. The other WMB noteholder group has actively participated throughout this Chapter 11 case on numerous issues. The WMI Noteholder Group has also actively participated and, in fact, the original 2019 Order is specifically directed at them.

27. There is also a group of WMI subordinated noteholders (the "**Subordinated Group**") that should be subsumed within this Court's Order to be issued at the 2019 Hearing. The Subordinated Group has apparently filed only a single pleading (as well as a non-complying 2019 statement) and, while it has attended numerous Court hearings (according to the sign-in sheets), apparently it has not participated in oral argument. Nevertheless, the Subordinated Group differs from the WMB Noteholder Group in two critical respects.

28. First, the Subordinated Group is pursuing its own claims against the Debtors. If Rule 2019 applies to them, it would require relevant disclosure as to such claims against the Debtors. However, as noted above, the WMB Noteholder Group (as relevant here) is pursuing only the Receivership's claims against the Debtors, not their own claims. As a result, even if Rule 2019 were to apply to the WMB Noteholder Group, the claims to which it would apply would be the Receivership's claims against the Debtors, not the claims of the members of the WMB Noteholder Group against WMB, a non-debtor affiliate.

29. Second, it is apparent from the draft Disclosure Statement and the proposed Plan of Reorganization that the Subordinated Group has participated heavily in the plan process. In fact, the Plan indicates that the members of the Subordinated Group, which include the "Appaloosa Parties," the "Aurelius Parties," the "Centerbridge Parties" and the "Owl Creek Parties" are actually serving as the "Backstop Purchasers" under the Plan, they are specifically named as persons to be released and indemnified, and they are even signatories to the proposed settlement among the Debtors, JPMorgan and the FDIC.

30. Thus, the WMB Noteholder Group is not proposing that a proof of claim, or a pleading, or an oral argument, should be determinative as to whether a group has "actively participated" in a case. It should be the *nature* of the participation under the particular facts of the case. A class action lawyer proposes to participate in a case on behalf of an entire class of creditors – it makes sense that such lawyer should be required to submit appropriate evidence as to its authority to represent the members of the class. A creditor group that files numerous pleadings and participates in numerous oral arguments has also made the conscious decision to be an active participant in the case. A creditor group that negotiates and backstops a chapter 11 plan should be considered a classic example of a group that has engaged actively in the case even

if the group has not filed any pleadings or made any arguments in its own name. None of the foregoing applies to the WMB Noteholder Group.

D. Even If Rule 2019 Applies Here, the Court Should Exercise Its Discretion and Not Enter Any Relief Against the WMB Noteholder Group

31. Even if this Court concludes that Rule 2019 does create a black-letter test and that the 2019 Opinion should be extended to include the WMB Noteholder Group, the Group requests that the Court not enter any relief against the Group at this time. Relief for failure to comply with Rule 2019 is discretionary, not mandatory. Rule 2019(b) prescribes what a court "may" do, not what a court "shall" do. *See In re Argose, Inc.*, 372 B.R. 705, 707-08 n.2 (Bankr. D. Del. 2007) (Walrath, J.) (holding that "there is a big difference between may and must" and noting that the term "may" indicates the action in question is discretionary); *see also In re Kaiser Aluminum Corp.*, 327 B.R. 554, 559 (D. Del. 2005) ("It has been recognized that Rule 2019 need not always be strictly applied."); *In re Hudson Shipbuilders*, No. Civ. S.84-0757, 1985 U.S. Dist. LEXIS 17654, at *14 (S.D. Miss. July 22, 1985) (noting that "Bankruptcy Rule 2019(b) affords the court the discretion, and does not mandate" that the court must order a remedy); *In re North Bay Gen. Hosp., Inc.*, 404 B.R. 443, 453 (Bankr. N.D. Tex. 2009) ("The consequences of a purported agent's failure to comply with Rule 2019 are largely a matter for the bankruptcy court's discretion."); *In re I. G. Servs. Ltd.*, 244 B.R. 377, 389 (Bankr. W.D. Tex. 2000), *rev'd on other grounds*, 263 B.R. 505 (W.D. Tex. 2000) (declining to apply Rule 2019 where it would serve no useful purpose).

32. None of the cases just cited are factually on point with the current situation but this does not diminish the basic point: where Rule 2019 says the court "may" enter various forms of relief, the court has the discretion to consider whether relief is appropriate. Whatever relevance Rule 2019 may have with respect to claimants who are seeking to use the leverage of

their own claims to take positions in a Chapter 11 case, it is difficult to see any relevance in the context of creditors of a different estate who are merely seeking to preserve the claims their estate has against the debtor, not their own claims. This Court concluded in the 2019 Opinion that Rule 2019 has an important purpose and that such purpose applies to ad hoc groups. Without rearguing the applicability of Rule 2019 in general, the WMB Noteholder Group respectfully submits that there is simply no purpose under the current highly atypical circumstances to applying Rule 2019 (or its remedies) to the *sui generis* situation of the WMB Noteholder Group.

II. The Debtors Should Be Sanctioned for Their Inappropriate Notice

33. This Court asked the Debtors to send out a simple notice advising all relevant groups to appear on April 21 if they wanted to argue that the 2019 Opinion should not be extended to include them (as noted above, the Debtors unilaterally postponed the 2019 Hearing to May 19). Instead, here are the multiple statements made in the Notice as actually issued, followed by the WMB Noteholder Group's comment on such statement:

- a. According to the Notice: "(a) in accordance with the Court's directive of April 6, 2010 (the "Directive"), and (b) consistent with the [2019 Opinion], on or prior to May 17, 2010 at 5:00 p.m., . . . every entity or committee representing more than one creditor or equity security holder in the above-reference chapter 11 cases shall file a verified statement (the "Statement") . . . consistent with the provisions of Rule 2019(a)"

WMB Noteholder Comment: The only "directive" by the Court was that any relevant group who did not believe the 2019 Opinion should be extended to include them "should appear [at the next omnibus hearing] and be heard to argue why I shouldn't issue an order as to all." The Court did not expressly or implicitly direct, request or suggest that anyone had to file anything in advance of the hearing, let alone that all relevant parties *must* file a Rule 2019 Statement on or before May 17.

- b. According to the Notice: The Statement must "set[] forth . . . [list of information]."

WMB Noteholder Comment: Not only did this Court not "direct" the foregoing, the Notice fails to mention the limitations in Rule 2019 itself as to claims "acquired more than one year prior to the filing of the petition." As repeatedly emphasized, many of the members of the WMB Noteholder Group are original par purchasers who acquired their notes when issued, which was well before one year prior to the petition date. Yet, the Debtors have stated that this Court affirmatively directed parties to provide information even beyond what is required by Rule 2019.

- c. According to the Notice: The Statement must set forth all of the foregoing information even as to "claims against Washington Mutual Bank which form the basis of alleged claims against Washington Mutual, Inc. . . ."

WMB Noteholder Comment: Not only did this Court not "direct" the foregoing, there is nothing in Rule 2019 that suggests or implies that information must be provided as to any "claims" other than claims against the debtors. *See* discussion in Section I.A above.

- d. According to the Notice: "[A] Statement [that] includes claims . . . which were the subject of a proof of claim . . . must reflect [certain information]."

WMB Noteholder Comment: As already discussed, the Court did not "direct" this and the Rule does not require this.

- e. According to the Notice: "[I]n accordance with the Directive, any entity or committee . . . that fails to file a Statement consistent with the provisions of Bankruptcy Rule 2019(a) and the [2019] Opinion, is required to appear before [this Court] on May 19, 2010, at 11:30 a.m., to show cause why the Court should not impose sanctions or limitations pursuant to Bankruptcy Rule 2019(b) or otherwise."

WMB Noteholder Comment: This is the meat of the Notice. To paraphrase: "The Court has directed that you file a Statement by May 17 or risk being sanctioned on May 19, not only pursuant to Rule 2019 *but otherwise*." This is not stated in terms of "what the Debtors might request the Court to do," it is literally stated as "what the Court has directed."

34. While anyone who was in court or on the phone for the Claims Hearing, or otherwise has access to the Transcript, cannot help but find the misrepresentations, mischaracterizations and pure fabrications in the Notice laughable, it is no laughing matter. The Debtors will presumably argue that this is just a matter of semantics and the WMB Noteholder Group knows what the Court actually said. However, the Debtors have represented not only to

the other parties who were in court but also to "every entity or committee" – without regard to whether they were even aware there was a Claims Hearing – that this Court has *directed* them to take certain actions by May 17 *or risk being sanctioned* on May 19. And notwithstanding the WMB Noteholder Group's confidence that the words of this Court must surely control, not the blatant misrepresentation of this Court's words as set forth in the Notice, the WMB Noteholder Group felt compelled that it had to file "something" by May 17 justifying why it should not be sanctioned on May 19.⁵ The WMB Noteholder Group also feels that the possibility of sanctions being ordered against it on May 19, including (according to the Notice) sanctions beyond what is set forth in Rule 2019, gives the Group no choice but to appear in person on May 19 rather than telephonically.

35. In the context of the millions of dollars of fees being incurred by the professionals in the WMI case, the fees that the Notice has forced the WMB Noteholder Group to incur must seem insignificant. They are not, however, insignificant to the members of the WMB Noteholder Group.

36. The WMB Noteholder Group recognizes the possibility that this Court will disagree with all of Section I of this Statement and will order the WMB Noteholder Group to file a Rule 2019 statement that discloses substantial information about claims that are *not* being asserted against the Debtors. The WMB Noteholder Group further recognizes that, if the Court so orders and the members of the Group do not comply, the Court may order one or more of the remedies set forth in Rule 2019(b). The WMB Noteholder Group does not recognize, however, how a debtor can file a notice bordering on the unethical without suffering some consequence therefor. The WMB Noteholder Group suggests that the consequence be, at a minimum, the

⁵ Indeed, the Notice itself requires any relevant person or group to serve a notice on the Debtors and the Committee if they do *not* intend to file a Rule 2019 statement. This Statement serves as such notice to the Debtors and the Committee.

payment of the Group's fees in filing this Statement and appearing in person on May 19. There is "zealous advocacy" and there is "crossing the line." The Debtors crossed the line with their Notice and should be sanctioned for it.

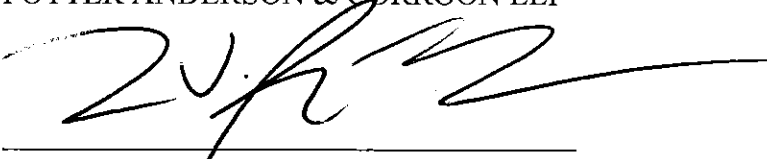
CONCLUSION

WHEREFORE, the members of the WMB Noteholder Group respectfully request that this Court hold either that (a) Rule 2019 does not apply to the WMB Noteholder Group or (b) even if Rule 2019 could be interpreted as applying, it will not order any remedies against the WMB Noteholder Group at this time. In addition, as a result of the Debtors' inexcusable conduct in serving a Notice that went well beyond what the Court requested, the WMB Noteholder Group requests that this Court enter such sanctions against the Debtors as this Court considers appropriate, including the payment of the Group's attorneys' fees.

Dated: May 17, 2010

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PAC 966544/33537

Exhibit A

Preliminary Hearing Transcript, April 6, 2010

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW); Adv. Case No. 10-50731 (MFW)

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In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- - - - -x

OFFICIAL COMMITTEE OF

EQUITY SECURITY HOLDERS,

Plaintiff,

-against-

WASHINGTON MUTUAL, INC.,

Defendant.

- - - - -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 6, 2010

1:59 PM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

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HEARING re Debtors' First Omnibus (Substantive) Objection to
Claims [Docket No. 1087; filed 5/29/09]

HEARING re Debtors' Fifth Omnibus (Substantive) Objection to
Claims [Docket No. 1233; filed 6/26/09]

HEARING re Debtors' Sixth Omnibus (Substantive) Objection to
Claims [Docket No. 1234; filed 6/26/09]

HEARING re Plaintiffs' Buus et al. Motion for Relief from the
Automatic Stay [Docket No. 1568; filed 9/1/09]

HEARING re Motion of Debtors Pursuant to Section 105 and 363 of
the Bankruptcy Code for Order Approving Procedures for the Sale
of Certain Intellectual Property [Docket No. 1701; filed
10/7/09]

HEARING re Debtors' Sixteenth Omnibus (Substantive) Objection
to Claims [Docket No. 1911; filed 11/18/09]

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HEARING re Motion of Debtors Pursuant to Section 105(a) of the
Bankruptcy Code and Bankruptcy Rule 9019(a) for Approval of
Settlements with Old Republic Insurance Company, Zurich
American Insurance Company and JPMorgan Chase Bank, N.A.
[Docket No. 2082; filed 1/4/2010]

HEARING re Debtors' Objection to Proof of Claim Filed by
Egencia LLC (Claim No. 3678) [Docket No. 2083; filed 1/4/2010]

HEARING re Debtors' Nineteenth Omnibus (Substantive) Objection
to Claims (Litigation Claims) [Docket No. 2087; filed 1/5/2010]

HEARING re Debtors' Twenty-First Omnibus (Substantive)
Objection to Claims [Docket No. 2310; filed 2/2/2010]

HEARING re the Official Committee of Equity Security Holders'
Motion for Summary Judgment, or in the Alternative, for Relief
from the Automatic Stay [Docket No. 2501; filed 3/11/2010]

HEARING re Supplemental Motion of Debtors Pursuant to Section
362 of the Bankruptcy Code for Order Modifying Automatic Stay
to Allow Advancement Under Insurance Policies Regarding the
Department of Labor Subpoenas [Docket No. 2473; filed 3/5/2010]

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HEARING re Debtors' Motion for an Order Authorizing the Debtors to File Under Seal (A) Exhibits A, B, C and D to the Motion of Washington Mutual, Inc. for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving Settlement Agreements Between Washington Mutual, Inc. and Certain Employee Benefit Plan Participants and (B) Any Order Granting the Motion, as Entered by the Court [Docket No. 2536; filed 3/16/2010]

HEARING re Motion of Washington Mutual, Inc. for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving Settlement Agreements Between Washington Mutual, Inc. and Certain Employee Benefit Plan Participants [Docket No. 2537; filed 3/16/2010]

HEARING re Application Pursuant to Fed. R. Bankr. P 2014(a) for Order Under Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Peter J. Solomon Company, as Financial Advisor and Consulting Expert to the Official Committee of Equity Security Holders Nunc Pro Tunc to February 12, 2010 [Docket No. 2448; filed 3/2/2010]

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2 HEARING re Application for an Order Pursuant to 11 U.S.C.
3 Sections 328, 330 and 1003 and Fed. R. Bankr. P. 2014
4 Authorizing the Retention and Employment of Ashby & Geddes,
5 P.A. as Delaware Counsel to the Official Committee of Equity
6 Security Holders of Washington Mutual, Inc., et al. Nunc Pro
7 Tunc to March 4, 2010 [Docket No. 2523; filed 3/15/2010]

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9 HEARING re Debtors' Twentieth Omnibus (Substantive) Objection
10 to Claims [Docket No. 2205; filed 1/22/2010]

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24 Transcribed By: Clara Rubin

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5 JOHN MACIEL

6 CHRIS WELLS

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8 ANCHORAGE ADVISORS

9 Interested Party

10 BY: HAL F. GOLTZ

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12 AURELIUS CAPITAL MANAGEMENT

13 Interested Party

14 BY: DAVID TIOMKIN

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16 BANK OF AMERICA SECURITIES

17 Creditor

18 BY: ALEXANDER KLIPPER

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20 BARCLAYS CAPITAL, INC.

21 Interested Party

22 BY: JAMES RUSSO

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CENTERBRIDGE PARTNERS

Creditor

BY: JED HART

CHAPDELAINE CREDIT PARTNERS

Interested Party

BY: GREN DAY

CREDIT SUISSE FIRST BOSTON

Interested Party

BY: ANDREW REBAK

CRT CAPITAL GROUP, LLC

Creditor

BY: KEVIN STARKE

DEBTWIRE

BY: TIBITA P. KANEENE, IN PROPRIA PERSONA

DEUTSCHE BANK

Party-in-Interest

BY: JAMES MACINNIS

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2 ESOPUS CREEK ADVISORS LLC

3 Member of Official Committee of Equityholders

4 BY: ANDREW SOLE

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6 FARALLON CAPITAL MANGEMENT

7 Creditor

8 BY: MICHAEL LINN

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10 JPMORGAN CHASE & CO.

11 Creditor

12 BY: TRAVIS EPES

13 LAWRENCE N. CHANEN

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15 MILLER TABACK SECURITIES

16 Interested Party

17 BY: MATTHEW DUNDON

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19 MORGAN STANLEY

20 Creditor

21 BY: JIM F. FARNER

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23 ONE EAST PARTNERS

24 Interested Party

25 BY: MICHAEL D. ADAMSKI

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2 ONEX CREDIT PARTNERS

3 Creditor

4 BY: STUART KOVENSKY

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6 OWL CREEK MANAGEMENT

7 Interested Party

8 BY: MARK KRONFELD

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11 Creditor

12 BY: JOHN T. MIRANOWSKI

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14 TALAMOD ASSET MANAGEMENT, LLC

15 Creditor

16 BY: JAY STEEN

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18 THE SEAPORT GROUP

19 Interested Party

20 BY: GEORGE BRICKFIELD

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22 THIRD AVENUE MANAGEMENT, LLC

23 BY: JONATHAN M. KRAUTMANN

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TUDOR INVESTMENT

Creditor

BY: MITCHELL E. SUSSMAN

UBS SECURITIES LLC

Interested Party

BY: ARIN J. WOLFSON

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Debtor

BY: DOREEN LOGAN

ROBERT WILLIAMS

CHAD SMITH

KRAIG KLINKHAMMER

GAVASKAR BALASINGAM

For Creditor, Davidson Kempner

DAN BULLOCK

In Propria Persona

ANNA KALENCHITS

Interested Party

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2 TED SHIUNG

3 In Propria Persona

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WASHINGTON MUTUAL, INC., et al.

1 PROCEEDINGS

2 THE CLERK: All rise. Please be seated.

3 THE COURT: Good afternoon.

4 MR. JANG: Good afternoon, Your Honor. For the
5 record, Chun Jang on behalf of the debtors. Your Honor, we did
6 file an amended agenda because we noticed that we missed a
7 couple replies, and we apologize for that, for the lateness of
8 that delivery.

9 THE COURT: Well, you're lucky I have no other cases.

10 MR. JANG: Thank you, Your Honor. I'll count that as
11 my lucky start for the day.

12 Your Honor, today we have Patrick O'Toole and Thomas
13 Frongillo of Weil, Gotshal & Manges here today; they will be
14 arguing one of the items. And we did submit pro hac vice
15 motions for them, but I'm not sure if orders have been entered,
16 but I ask they be admitted for today's purposes.

17 THE COURT: They will be.

18 MR. JANG: Okay. With that, Your Honor, I believe we
19 go all the way to item 15 on the agenda, but before then I'd
20 like to turn this over to Mr. Rosen of Weil, Gotshal & Manges
21 for some preliminary comments.

22 MR. ROSEN: Good afternoon, Your Honor. Brian Rosen,
23 Weil, Gotshal & Manges. Mr. Jang is correct; we jumped down a
24 good ways on the agenda, and specifically, Your Honor, I
25 believe we go to page 8, as far as I'm concerned, is the first

WASHINGTON MUTUAL, INC., et al.

1 uncontested matter with certification of no objection. And
2 items 12, 13 and 14 were submitted with a CNO. I believe,
3 Your Honor, also, item 14, you may have already entered an
4 order yesterday approving that compromise and settlement.

5 THE COURT: I also did on 12. I --

6 MR. ROSEN: Oh, I'm sorry, I had missed that one, Your
7 Honor.

8 THE COURT: -- didn't make a note on 13, but I assume
9 that I did. I believe that I did.

10 MR. ROSEN: Okay. With respect to item 15, Your
11 Honor, that is the application of the equity committee for the
12 retention of Peter J. Solomon as financial advisor. And as far
13 as we know, no objections have been interposed, and I know from
14 the debtors' perspective we have not interposed an objection.

15 Likewise, item 16 was the application of the equity
16 committee to retain local counsel Ashby & Geddes, and as far as
17 I know no objections have been interposed there. I believe
18 that counsel for the equity committee is here.

19 MR. BOWDEN: Your Honor, good afternoon. Bill Bowden
20 of Ashby & Geddes as proposed Delaware counsel for the equity
21 committee. Your Honor, as a preliminary matter, I'd like to
22 introduce Your Honor to Judy Liu of the Dewey LeBoeuf firm,
23 which is retained as -- been retained as lead counsel for the
24 equity committee, and we have filed a notice of substitution of
25 counsel just before the hearing began today.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: Okay.

2 MR. BOWDEN: Your Honor, with respect to the Peter J.
3 Solomon engagement, we did file a certification of counsel
4 yesterday afternoon, which did not make it onto the amended
5 agenda. And, I'm not sure, given --

6 THE COURT: I didn't get it.

7 MR. BOWDEN: You did -- Your Honor did not receive it;
8 understood. I have copies with me, Your Honor, and it resolves
9 the informal comments we've received from the Office of the
10 United States Trustee and the official committee of unsecured
11 creditors. If I might approach with a clean and a blackline;
12 I'm happy to walk Your Honor through that.

13 THE COURT: You may.

14 MR. BOWDEN: Thank you, Your Honor.

15 THE COURT: Good morning.

16 MS. LIU: I just wanted to mention, Your Honor, that
17 we'll be -- probably be filing our retention application by
18 next week, and my partner Martin Bienenstock and I will be
19 appearing in the case on behalf of the equity committee on a
20 going-forward basis.

21 THE COURT: All right. Thank you.

22 MS. LIU: Thank you.

23 MR. BOWDEN: Permission to approach, Your Honor?

24 THE COURT: (No audible response.)

25 (Pause)

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: All right, let me see --

2 (Pause)

3 THE COURT: All right, the revisions look fine and
4 I'll enter that order, then.

5 MR. JOHNSON: Good day, Your Honor. This is Robert
6 Johnson from Akin Gump, on behalf of the creditors' committee.
7 We just wanted to note for the record that we had filed a
8 reservation of rights and that the blackline and the modified
9 order that was presented by counsel for the equity committee
10 does reflect the changes that we had requested. Thank you.

11 THE COURT: So they do reflect --

12 MR. JOHNSON: Yes.

13 THE COURT: -- the changes you requested? Okay.

14 MR. BOWDEN: Your Honor, thank you. The next item on
15 the agenda is the --

16 Mr. Rosen, I apologize, did you want to be heard on
17 this?

18 MR. ROSEN: No, no, no. Go ahead.

19 MR. BOWDEN: -- is the application of the equity
20 committee to retain Ashby & Geddes as Delaware counsel. Your
21 Honor, we filed a certification of no objection on this
22 application yesterday as well, and I -- if Your Honor did
23 receive the certification of counsel, I'm sure Your Honor did
24 not receive the certification -- the certificate of no
25 objection.

WASHINGTON MUTUAL, INC., et al.

1 Your Honor, and it's just as well, I noted in
2 reviewing the retention application in preparation for court
3 today, in paragraph 7 of my supporting affidavit there is an
4 open item that I need to complete that was omitted from my
5 affidavit. If you take a look, Your Honor, at paragraph 7 of
6 my declaration. And I have a copy of it with me if it makes it
7 easier for me to hand it up to Your Honor.

8 THE COURT: I had it here.

9 (Pause)

10 MR. BOWDEN: It's page 3 of the affidavit, Your Honor.

11 THE COURT: I have it. Now, what's the open item?

12 MR. BOWDEN: The language in brackets on the fourth
13 line.

14 THE COURT: Oh, "any" --

15 MR. BOWDEN: Yes.

16 THE COURT: I missed it. And did you fill that in?

17 MR. BOWDEN: I need to file a supplemental affidavit,
18 Your Honor, completing that. I have determined that there is
19 one very old open nonbankruptcy-related matter which I think is
20 subsumed within the disclosure that JPMorgan Chase is a current
21 client. But given the way this affidavit is set up, I think I
22 should file a supplemental affidavit.

23 THE COURT: Okay.

24 MR. BOWDEN: Thank you, Your Honor. Unless Your Honor
25 has any questions, that's all I have.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: All right, thank you.

2 MR. ROSEN: Your Honor, with respect to those items
3 that just concluded, I would say that, while we're happy to
4 have the Dewey LeBoeuf people involved as counsel for the
5 equity committee, I would note that, as we previously reserved
6 rights with respect to the retention of Venable and their fees
7 that they have incurred, we are going to be filing a formal
8 objection to their fee application, based upon the fact that
9 there was no value provided to these estates.

10 Your Honor, the next item on the calendar, and the
11 last item on the calendar, although it will be quite a lengthy
12 one, is the debtors' twentieth omnibus substantive objection to
13 claims and what we have referred to as the bank bondholder
14 claims. And based upon the agreement of the parties, what is
15 going forward today, Your Honor, is the legal issues associated
16 with those claims that have been filed and that have been
17 briefed.

18 But before I turn the podium over to my partner Mr.
19 Frongillo, I would like to reiterate a comment that we have
20 made throughout these proceedings, Your Honor, and as of today
21 has really gone unfulfilled by the parties on the other side of
22 the podium; specifically, Your Honor, the compliance with
23 Bankruptcy Rule 2019. Last time we were here, the Court spoke
24 to Mr. Anker and asked him very nicely to file an amended 2019
25 statement, and Mr. Anker did so; it was an amended verified

WASHINGTON MUTUAL, INC., et al.

1 statement, but it was -- if I had to go back to a movie,
2 President -- All the President's Men; it was a nondenial
3 denial. He didn't say anything in there, Your Honor. He
4 didn't way to say anything in there. He said he wasn't going
5 to say anything in there, and he said I'm not going to say
6 anything, because nobody else is saying anything. So -- and he
7 specifically looked to two other law firms involved in the case
8 who have not made an appearance in quite some time, or ever,
9 and said that's the reason he's not going to comply with 2019,
10 and by the way, the Court's ruling is on appeal, so he sees no
11 reason to comply with 2019.

12 Likewise, Your Honor, we have for the first time the
13 appearance in court of Mr. Flaschen from Bracewell Giuliani,
14 and he has never filed a 2019 statement in this case as far as
15 we can tell. And I -- if we have overlooked it, I apologize,
16 but as far as we know, we've only seen a proof of claim filed
17 by them and the multitudes of holders that are within their
18 group. And we have seen a pleading filed, his preliminary
19 response to the relief that is being requested by the debtors
20 today.

21 So, Your Honor, I think as a starting point we should
22 address the 2019 or lack of compliance with 2019 and sort of
23 ask the other side when they're going to choose to comply, and,
24 if they choose not to, which it seems to be the way that Mr.
25 Anker wants to go, whether the Court should even entertain the

WASHINGTON MUTUAL, INC., et al.

1 pleadings that they have filed here today. Thank you, Your
2 Honor.

3 MR. ANKER: Good afternoon, Your Honor. Philip Anker,
4 Wilmer Cutler Pickering Hale and Dorr. I represent certain
5 bankholders of bonds issued by the bank. We did file an
6 amended 2019 statement; I do believe it complies. I would have
7 appreciated, had Mr. Rosen disagreed, he actually communicated
8 with me prior to his statements literally one second ago. I
9 had no notice --

10 THE COURT: Do you have a copy of it?

11 MR. ANKER: I do, Your Honor. May I approach?

12 THE COURT: Yes.

13 (Pause)

14 THE COURT: Well, you don't disclose when they
15 purchased their positions or what they paid for them.

16 MR. ANKER: Your Honor, may I direct you to paragraph
17 8?

18 (Pause)

19 THE COURT: Well --

20 MR. ANKER: Pardon me, Your Honor?

21 THE COURT: What does "at a discount to par" mean, or
22 "at or near par"?

23 MR. ANKER: The largest holder in our group, Your
24 Honor, purchased pre-petition its entire position, as I
25 understand it, at par, except to the extent that there may have

WASHINGTON MUTUAL, INC., et al.

1 been any discount to par pre-petition, and I don't believe
2 there was any. I believe the bonds sold pre-petition at one
3 hundred cents on the dollar.

4 With respect to people who purchased post-petition,
5 Your Honor, if you flip the page onto page 6, we note that
6 people who have bought post-petition have done so either
7 between the petition date and the date of this filing. And we
8 give the price range during that period, which is the sixteen
9 cents on the dollar to forty-seven cents on the dollar.

10 As I said, if Your Honor believes this is inadequate,
11 we will supplement it. But I will say that it strikes me that
12 counsel could have raised the issue with me --

13 (Gap in audio from 2:11:32 p.m. until 2:16:36 p.m.)

14 THE COURT: All right, sorry to interrupt.

15 MR. ANKER: Again, Your Honor, obviously technical
16 difficulties are not Your Honor's fault. I actually want to
17 apologize. I was starting to lose my temper, and that's not an
18 appropriate thing to do in a courthouse. But I am troubled,
19 and I will try to say it in a calm voice.

20 I did get a letter from Mr. Rosen prior to our filing
21 of this amended 2019 statement on February 19 of this year,
22 some seven weeks ago. I told Mr. Rosen we would be filing an
23 amended 2019 statement that I believed complied with the Rules.
24 We filed this 2019 statement, I represent to you, on the date
25 it is shown. We served the debtor with a copy, and I represent

WASHINGTON MUTUAL, INC., et al.

1 to you as an officer of this court I have not heard one peep
2 out of Mr. Rosen or any of his colleagues up until when he
3 stood up right now. I would ask that in the future I not get
4 sandbagged that way.

5 Secondly, I believe this complies. It says what it
6 says. If Your Honor thinks it doesn't, Your Honor, we will --
7 I will talk to members of my group; those who choose to comply
8 will do so, and those who don't will face the consequences.
9 But I would ask that we have the same rules apply to everyone.

10 The WMI notes traded on September 25th, 2008, many of
11 the issues at less than one cent on the dollar I am told. I
12 also have reason to believe that major holders in this case who
13 from my perspective are the reason we don't have a settlement
14 today, notwithstanding efforts that I and others made all last
15 week -- I now have bonds trading at over a hundred cents on the
16 dollar. I would ask that they too make disclosure of exact
17 dates of purchases and exact dollar amounts. Let us have a
18 level playing field, because what you will see if you get that
19 is that the speculation and profits on the WMI notes side are
20 dramatically, dramatically, dramatically greater.

21 THE COURT: Okay.

22 MR. ANKER: Your Honor, I will make one final point.
23 I understand Your Honor's ruling. I will say that the scope of
24 2019 and what it does require and doesn't require is the
25 subject not only of hot debate within the bar but within the

WASHINGTON MUTUAL, INC., et al.

1 bench. As Your Honor is no doubt aware, a judge in this
2 district came to a different view than you did, and so too
3 did -- I apologize, the judge presiding in the Philadelphia
4 Newspapers case.

5 THE COURT: That's Rich Lavitch (ph.).

6 MR. ANKER: I apologize, Your Honor. The name escaped
7 me.

8 I suspect this issue is going to have to either get
9 resolved through amendments to the Rules -- and there are
10 amendments underway; how they come out I'm not sure. There's a
11 lot of -- to be blunt, a lot of lobbying going on.

12 THE COURT: Both sides. I understand.

13 MR. ANKER: There is. Or if the Rule doesn't get
14 amended, it's going to have to get resolved, I think, candidly,
15 by the Court of Appeals for this circuit. With due respect, I
16 personally believe Judge Sontchi and -- got it right, but I
17 will respect Your Honor's decision.

18 We attempted to comply here. And the notion that
19 giving as to each individual the specific date of purchase and
20 whether the purchase was at, instead of 20 cents on the dollar,
21 26.2 cents on the dollar, I suggest, doesn't provide --

22 THE COURT: Well, I don't want to --

23 MR. ANKER: -- meaningful --

24 THE COURT: -- I don't want to reargue. Is there any
25 possibility that this is something that a direct appeal might

WASHINGTON MUTUAL, INC., et al.

1 be warranted?

2 MR. ANKER: Your Honor, I think it would. Here's one
3 problem: I don't think I'm a party to Your Honor's order in
4 the sense -- and I have not appealed it. Your Honor's order --
5 as Your Honor may recall, the motion came before you on a
6 motion filed by JPMorgan Chase to require Mr. Sheller's (ph.)
7 client, who stands in the -- sits in the back of the courtroom,
8 and the White & Case group, to make disclosures. That order
9 was directed to them, and at least to the White & Case group,
10 if not to Mr. Sheller, but I thought it was to both, and his
11 clients, and they have not, to my knowledge, made any filing at
12 all. They did file a notice of appeal, Your Honor. I don't --
13 I believe what I'm about to say is accurate, but I'm happy to
14 have the record corrected. I don't think that appeal has gone
15 anywhere to date. And it was an appeal not to the Third
16 Circuit; it was an appeal to the district court.

17 Be that as it may, we -- I mean, if Your Honor thinks
18 this really is inadequate, that we need to give the very, very
19 date and the very, very specific dollar amount, I will talk to
20 my clients and tell them that is what Your Honor meant. I
21 thought this complied. But I will reiterate, I would simply
22 ask that the rules apply to everyone. And I would ask that if
23 Mr. Rosen or anyone else in this case has a problem with
24 anything I file, that they give me a heads-up before raising
25 the point in court. Thank you, Your Honor.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: Thank you.

2 Well, let me do this. I do believe, respectfully,
3 disagreeing with my colleagues Judges Sontchi and Rich Lavitch,
4 that Rule 2019 does require that a group of creditors being
5 represented by counsel as a group comply with 2019 and
6 specifically state when the position was acquired and the
7 amount paid for it. I'm not going to preclude you from being
8 heard today. I agree that the Rule should apply to such groups
9 in this case. I appreciate why some don't want to file a
10 motion requiring that, but I do note that Rule 2019 allows a
11 Court sua sponte to direct that. So I will schedule a hearing
12 at the next omnibus hearing --

13 MR. ROSEN: April 21st.

14 THE COURT: April 21st. And any party that believes
15 Rule 2019 does not apply to them, any attorney representing
16 more than one creditor in this case who believes that Rule does
17 not apply to them, should appear and be heard to argue why I
18 shouldn't issue an order as to all.

19 MR. ANKER: Thank you, Your Honor.

20 MR. ROSEN: Your Honor, the reason we brought it up,
21 just for the record, is because it goes to the heart of many of
22 the claims that Mr. Anker has raised in the proofs of claim.
23 His arguments about injury by fraud and the date of acquisition
24 is very important as a result of that. So that is why we raise
25 it yet again, Your Honor, and we hope that there will be

WASHINGTON MUTUAL, INC., et al.

1 specific compliance.

2 With that, Your Honor, I'd like to hand the podium
3 over to Mr. Frongillo, who will handle a portion of our
4 objection to the claim, then Mr. O'Toole will handle some after
5 that, and then Mr. Kirpalani will be handling the third aspect
6 of the objection to the claim.

7 THE COURT: Okay.

8 MR. FRONGILLO: Good afternoon, Your Honor. I'm
9 Thomas Frongillo from Weil, Gotshal & Manges, and I have some
10 source materials that I'm going to be referring to during the
11 argument. If I may have the Court's permission, I can provide
12 you with a set. I've provided counsel with a set.

13 THE COURT: You may.

14 (Pause)

15 MR. FRONGILLO: At the outset, Your Honor, I'll give
16 you a roadmap as to who's going to be arguing what. I'm going
17 to be arguing the standing issue, the 12(b)(6) issue and why
18 dismissal of the piercing the corporate veil/alter ego claims
19 is appropriate, as well as the substantive consolidation.

20 Mr. O'Toole will be arguing the 12(b)(6) aspect of the
21 objection pertaining to breach of fiduciary duty and the
22 misrepresentation claims, and Mr. Kirpalani is going to be
23 arguing why it's appropriate for the Court to dismiss the
24 actual fraudulent transfer claims.

25 Before I address the standing issue, I'd like to

WASHINGTON MUTUAL, INC., et al.

1 briefly talk about some facts which will be germane to the
2 issues across the board. In December of 2005, the bank
3 commenced a global note program in which it sought to raise
4 twenty-two billion dollars in debt financing. The bank issued
5 senior and subordinated global notes, and these notes were
6 issued only to sophisticated, institutional, accredited
7 investors under the securities laws. They were issued pursuant
8 to an offering circular, which the Court has before it, the
9 first page in tab 1. And what's important about the offering
10 circular is what it said and who's responsible for the notes.

11 In the third paragraph of the offering circular, in
12 clear and unequivocal language, it's stated that each note
13 issued by the issuer will be an obligation solely of the issuer
14 and will not be an obligation of or otherwise guaranteed by
15 Washington Mutual, Inc., WMI, the ultimate parent corporation
16 of the issuer, or any affiliate of WMI.

17 The notes do not evidence deposits of the issuer and
18 are not insured by the United States Federal Deposit Insurance
19 Corporation, the FDIC, or any issuer. The notes are unsecured
20 and uninsured direct general obligations of the issuer.

21 The terms of the notes were as follows: They were
22 270-plus days maturity; interest was fixed or floating; and the
23 payment terms were due based on various pricing supplements
24 that were issued with each note.

25 The notes were issued from 2006 to the end of the

WASHINGTON MUTUAL, INC., et al.

1 second quarter 2007; there's an eighteen-month period of time.
2 The bank was current on payments of all notes up until the time
3 of the receivership. There was no default. At the
4 receivership, the payments ceased on the notes. And as the
5 Court's well aware, the assets of the bank were sold to
6 JPMorgan, which did not assume the liability of the notes. The
7 next day, September 26, this proceeding was filed by the
8 debtors.

9 Now, the notes at issue in this case are actually the
10 subject of two proceedings: One is the receivership, and the
11 second of course is this proceeding. The bondholders have
12 filed a proof of claim in the receivership where they have
13 privity with the issuer, and the FDIC, in that proceeding, has
14 acknowledged that these are legitimate liabilities of the
15 receivership.

16 In this particular case, there are two groups of
17 bondholders that have filed proof of claims: There's what are
18 called the WMB noteholders that filed Claim 2480, and they
19 filed seven claims: tax refund; goodwill litigation awards;
20 deposit accounts; possible regulatory violations; fraudulent
21 transfer; breach of fiduciary duty; and misrepresentation.
22 They admit in their proof of claim that each and every single
23 one of these claims is owned by the bank. Effectively, it is a
24 derivative claim, with the exception of one, and that one is
25 the misrepresentation claim.

WASHINGTON MUTUAL, INC., et al.

1 And this appears -- and if you would turn to tab 2,
2 I've included paragraph 37 from the proof of claim filed by the
3 WMB noteholders, and it says as follows: "The claims stated in
4 sections 2 through 7 are for the benefit of the WMB
5 receivership estate." And, accordingly, any distribution on
6 those claims should be made to the FDIC as receiver of the WMB
7 receivership estate. The claims stated in section 8 is a
8 direct claim of the WMB noteholders, and therefore any
9 distribution on such claim should be made directly to the WMB
10 noteholders.

11 We've also provided you with a chart, which is tab 3,
12 in which you will see that virtually every claim, with the
13 exception of the misrepresentation claim -- there are separate
14 and distinct admissions or concessions in the proof of claim
15 that each of those claims is owned by the WMB estate and that
16 they're claims of WMB. And I've provided that to you as a
17 summary that you can refer to after the proceeding.

18 Now, the Marathon Credit claimants, which refer to
19 themselves as the bond -- the bank bondholders, they filed the
20 same group of claims here, but they've added four more:
21 corporate veil piercing and alter ego; substantive
22 consolidation; undercapitalization; failure to support, or
23 looting of the bank; and, finally, proceeds from the sale of
24 REIT trust-preferred securities. And on page 15 of the bank
25 bondholders' brief, even they suggest that some or all of these

WASHINGTON MUTUAL, INC., et al.

1 claims may be derivative claims.

2 And so that's by way of factual background. I'd now
3 like to move to the standing argument, and I'm going to give
4 you first just a synopsis of the summary of what the argument
5 is, and then I'll talk about the specific aspects of it. But
6 the overview of the argument is that basically the claims --
7 all of the claims, with the exception of the fraudulent
8 transfer claim, must be dismissed for lack of standing, which
9 of course is a jurisdictional ground, and that's because they
10 are classic derivative claims; they assert injuries that have
11 been caused by alleged mismanagement and looting. And the
12 Third Circuit in *In re Sunrise Securities Litigation* has
13 specifically held and rejected what the bondholders are
14 attempting to do here, and that is to add a misrepresentation
15 gloss to a pleading that clearly pleads mismanagement and
16 looting, for the express purpose of an attempt to gain standing
17 when derivative claims are in fact alleged.

18 The bondholders here admit that the harm occurred when
19 the bank failed. That's no different harm that was suffered
20 from any other creditor in the case, and only the FDIC can
21 bring the claims. And what I'm going to specifically address
22 is only four of the claims, and the big one is the
23 misrepresentation claim. And I think Mr. Rosen correctly
24 pointed out that the deficiency in the 2019 filing has bearing
25 on that, because to the extent that any of these bondholders

WASHINGTON MUTUAL, INC., et al.

1 acquired these bonds after the receivership, they can hardly
2 come before this Court to claim that they were fraudulently
3 induced due to public statements before the receivership that
4 were false, to acquire the bonds, claiming that they were false
5 statements about the health of the bank. So that point is very
6 much germane and relevant to why at least an admitted group of
7 these bondholders have no standing to bring any type of
8 misrepresentation claim.

9 So I'm going to address misrepresentation, corporate
10 veil, alter ego, substantive consolidation or breach of
11 fiduciary duty, spending most of my time on the
12 misrepresentation claim, because, as you probably note from the
13 briefing, that seems to be the most heated dispute.

14 In cases such as this, the Court is required to make a
15 legal determination of whether the claims are derivative or
16 whether the claims are direct. And what's critical is that the
17 parties' labeling of a claim is irrelevant. The Third Circuit
18 noted that in the Sunrise case. It -- the Court has to focus
19 on the allegations of the proof of claim, not what a party
20 calls it, and that will require the Court to take these two
21 proofs of claim, one of which is fifteen single-spaced pages
22 and the other is ten pages long, and drill down on the factual
23 allegations. But when you do, you will find that it is
24 unequivocal that the thrust of these claims are all based on
25 alleged and purported mismanagement and looting of the bank by

WASHINGTON MUTUAL, INC., et al.

1 WMI. And we've provided you with a chart of the allegations,
2 which is tab 4 in your binder. And there are a number of
3 express and clear statements of mismanagement and looting that
4 are set forth in the claims.

5 But basically I'll give you a synopsis. What these
6 allegations state is that WMI undercapitalized the bank; WMI
7 siphoned billions of dollars from the bank, caused transfers of
8 billions of dollars from the bank to itself; that those
9 transfers left the bank in a position where it was unable to
10 conduct business; it damaged all creditors across the board; it
11 caused the bank to fail, the FDIC to step in on September 25th
12 and to place the bank into receivership; and that JPMorgan did
13 not assume liability in the notes. And what they are seeking
14 is unpaid principal and interest on the notes. That's the
15 synopsis of what it is that they're alleging.

16 The injury, which is a critical factor in determining
17 whether or not a claim is a derivative or a direct claim, the
18 injury here that is alleged was caused by the bank's failure,
19 not any alleged misrepresentation. There was no default prior
20 to receivership. The bank halted payments when it was placed
21 in receivership. The default caused the injury, because that's
22 when the payments stopped, and that is an injury that is not a
23 particularized or individual injury to these bondholders; it is
24 an injury that occurred to all creditors, which is why it's a
25 derivative claim and not a direct claim.

WASHINGTON MUTUAL, INC., et al.

1 And all you have to do is go so far as to look at
2 Exhibit 5, or tab 5, which is the very first page of the proof
3 of claim by the bank bondholders. And in the first paragraph
4 they tell you what it is that they're seeking to recover, which
5 makes it clear that this is a derivative claim. They state
6 that the amounts of the claim asserted in the amended proof of
7 claim, the bank bondholder claims, includes full principal
8 balance of the senior notes held or to be acquired by the bank
9 bondholders, plus all unpaid interest and other amounts due on
10 the senior notes held by the bank bondholders in any and all
11 other amounts payable or recoverable by or from the debtor WMI
12 Investment Corporation.

13 So what they're looking for here is what they weren't
14 paid because of the default. Classic derivative claim.
15 Injuries not individualized to the bondholders. The injuries
16 are indirect; they're caused by the bank closing; they're
17 injuries that are common to all creditors; and they're injuries
18 that were caused by the closing of the bank.

19 Now, what they've tried to do is they've tried to, if
20 I could, throw a curveball here by adding misrepresentation
21 gloss to the proof of claims. They're trying to take this out
22 of being a standard classic derivative claim, which it is, by
23 claiming that they were fraudulently induced by a number of
24 public statements that were made pre-receivership, only four of
25 which they allege were made during the period of time in which

WASHINGTON MUTUAL, INC., et al.

1 the bonds were issued. The rest were made, the other eight,
2 after the bonds were issued. They claim that they relied on
3 public statements about the, generally speaking, the health of
4 the bank, and that this caused them to acquire the bonds and
5 therefore they somehow have direct or individualized harm,
6 which means they've got direct claims. That's not what this
7 case is about. It's not about misrepresentation; it's about
8 their allegations of purported mismanagement and looting.

9 And, again, I go back to the point that Mr. Rosen made
10 on 2019. To the extent that any of these bondholders acquired
11 their interest in the bonds post-receivership, they're totally
12 out of luck. They can't reasonably come before this Court in
13 good-faith pleading and say that they relied on public
14 statements made before the receivership about the health of the
15 bank. And I don't know how many of those bondholders there
16 are, but they are listed in the 2019 submission in paragraph 8.
17 There is an admission that there are holders that acquired
18 positions after WMB was placed into receivership. What if
19 that's ninety percent of them? These -- this claim in this
20 case looks radically different if the vast majority of these
21 bondholders acquired their position after the receivership. We
22 just don't know.

23 The reason why the misrepresentation gloss fails is
24 because of a controlling opinion in the Third Circuit, and
25 that's the Sunrise opinion, which I discussed earlier. And

WASHINGTON MUTUAL, INC., et al.

1 we've provided the Court with a chart, which is tab 6, on the
2 Sunrise opinion, and we did a chart because the facts are so
3 remarkably close to the facts of this case. And since this is
4 controlling law, it is on point factually; it really forecloses
5 these claims as being claims for misrepresentation and tells
6 you what they really are, which are claims, derivative claims,
7 based on purported mismanagement and looting.

8 Briefly, I'll touch upon the facts, because this is
9 such an important case. In the Sunrise case, the plaintiffs
10 acquired CDs, which, like the bonds, paid interest and
11 principal when they matured. They bought them from an entity
12 that ended up insolvent and taken over by a receiver, which
13 then transferred all the assets to a new entity. So we have an
14 old Sunrise and a new Sunrise. The plaintiffs in that case,
15 like the bondholders here, claimed that they relied on certain
16 public statements about the health of the bank, which induced
17 them, just like they argued, to buy their CDs at the bank.
18 They also claimed that the bank failed because of gross
19 mismanagement and self-dealing by the third parties, which in
20 that case happened to be lawyers, auditors, officers and
21 directors, no different than what they've alleged here.
22 They've alleged that third parties caused the bank to fail.
23 They also claimed that there was nondisclosure of the fact that
24 the bank was in rough shape, just like the bondholders here in
25 this case have argued that there was nondisclosure of material

WASHINGTON MUTUAL, INC., et al.

1 facts. They're all laid out in this chart.

2 And at the end, what did the Third Circuit do when
3 faced with this situation? The Third Circuit ruled that the
4 misrepresentation claim was a derivative claim, that -- it
5 rejected the concept that these individuals had sustained
6 direct injuries based on fraudulent inducement, relying on the
7 public statements. It held that their injury was not distinct
8 from depositors' -- other depositors', in that the injury was
9 caused by mismanagement of the bank. It specifically said that
10 the labeling of the claims as direct does not convert a
11 derivative mismanagement claim into a direct misrepresentation
12 claim. It doesn't magically get transformed just because they
13 say so. So that case is right on point and it parallels the
14 situation that the Court has here.

15 And I also would like to point out a brief passage in
16 that opinion, which is before the Court at tab 7, that really
17 tells the whole story on page 883, where the Third Circuit
18 says, "The essence of the complaint is that the defendants
19 misrepresented the financial condition of Old Sunrise by
20 failing to disclose that they had mismanaged Old Sunrise,
21 rendering the institution insolvent, and that they had employed
22 deceptive operating practices, which prevented federal and
23 state regulators from acting in a timely manner to forestall
24 the insolvency of Old Sunrise. Defendants' mismanagement and
25 wrongdoing brought about the insolvency of Old Sunrise and may

WASHINGTON MUTUAL, INC., et al.

1 have contributed to the insolvency of New Sunrise, thus
2 injuring the depositors indirectly. The asserted injury
3 emanated from mismanagement, not fraud. Furthermore, in this
4 case, the depositors' loss cannot be separated from the
5 injuries suffered by the institutions and all other depositors,
6 and damages recoverable are assets of the institutions."
7 That's this case.

8 There are other cases that I'll just note: the
9 Fourth's Circuit opinion in Hamid (ph.); the Seventh Circuit's
10 opinion in Courtney; the District Court in Arizona's opinion in
11 Braselin (ph.); the Totilo case out of the Northern District of
12 Georgia; and the recent opinion about a month ago in Courtney
13 v. Pritzker; it's a related case to the Fourth Circuit case
14 that came out of the Illinois Appellate Court. These cases are
15 right in line with the Sunrise case, and they apply.

16 Now, they've argued in their brief that, no, Sunrise
17 is distinguishable, and the reason being is that Sunrise is
18 simply one of these cases involving a frustrated depositor.
19 And the reason why that case was a derivative claim is because
20 the receiver, the FDIC, under 1821(d)(2)(A)(ii) has the power
21 to bring claims for depositors. And they claim that by the
22 same token the FDIC doesn't have the power to bring a direct
23 unsecured claim against a third party by a creditor.

24 The FDIC, by statute, under this section of FIRREA,
25 absolutely has the right to step into the shoes of the insured

WASHINGTON MUTUAL, INC., et al.

1 depository institution and bring a claim on behalf of that
2 institution, and they have the authority to do it here. So
3 that attempt to distinguish the case falls far short of the
4 mark.

5 They cite three cases, and I'll touch on them briefly;
6 they're all factually distinguishable, they're inapposite, and
7 they don't control resolution of the standing issue. The first
8 is the Supreme Court's opinion in Kaplan v. Marine Midland.
9 Justice Marshall wrote this opinion in 1972. It's a direct-
10 claim case. It's an opinion in which the Court acknowledged
11 that the trustee in bankruptcy did not have standing to bring
12 the claims of people who had bought debentures that had been
13 issued by a company, and the program had been overseen by a
14 trustee, an indentured trustee. And the reason why it was a
15 direct claim and it could not have been brought by the debtor
16 is because the debtor was in *pari delicto*, according to the
17 Court. The debtor was an alleged wrongdoer in that case. So
18 the claims had to be brought as direct claims; they could not
19 have been brought on behalf of the debtor. And they were
20 direct claims, and the Court found them as such, and the case
21 just is inapplicable because this does not involve a direct
22 claim.

23 They also cite Howard v. Haddad, an opinion out of the
24 Fourth Circuit. Easily distinguishable. That case involved a
25 single shareholder who alleged that direct misrepresentations

WASHINGTON MUTUAL, INC., et al.

1 were made to him, and him only, by a director of the insolvent
2 bank. He relied on those misrepresentations in connection with
3 his purchase of a share -- or of shares of the company, and the
4 Court said, well, they aren't of similarly situated damaged
5 creditors, it is a direct claim. That's not the case here,
6 certainly.

7 The last case that they try to really hang their hat
8 on is the Hayes v. Gross case, which was also written by the
9 Third Circuit, after Sunrise. And that case is also factually
10 distinguishable because that case involved direct claims by
11 purchasers of stock. And what happened in that case, and the
12 Third Circuit spent a lot of time explaining why its opinion in
13 Hayes could be reconciled with Sunrise, in the Hayes case there
14 were public statements made that the plaintiffs claimed were
15 false. They relied on those public statements and bought
16 securities. They specifically alleged in their complaint that,
17 as a result of the misrepresentations, they paid an inflated
18 value for the shares of stock. What was important to the Court
19 in that case was that the alleged injury occurred at the time
20 of the purchase of the shares of stock. The Court determined
21 that the subsequent insolvency of the institution was not the
22 reason for the injury; it occurred at the time of the purchase,
23 because of the inflated value.

24 So timing was important and cause was important. And
25 the Court pointed out that the plaintiffs in the Sunrise

WASHINGTON MUTUAL, INC., et al.

1 case -- their injury didn't occur when they bought the CDs,
2 just like the bondholders. There was no default. These bonds
3 were being paid in full up until the time of receivership.
4 They couldn't have brought a cause of action; they didn't have
5 one at that point. It'd be like a bank trying to foreclose on
6 a mortgage when the person who borrowed the money had made all
7 their monthly payments. They didn't have the claim at that
8 point in time.

9 So in this situation it's clear that Sunrise, and not
10 Hayes, governs, and that's why these misrepresentation claims
11 should be dismissed for lack of standing.

12 I'm going to spend less time on the veil and
13 substantive consolidation and breach of fiduciary duty, but I
14 wanted to address the misrepresentation claim in detail, given
15 the length at which it was briefed.

16 Corporate veil/alter ego. Only one of the groups of
17 bondholders have brought that claim. And, in summary, what
18 they've alleged is that: WMI dominated the bank, its finances
19 and business; WMI defrauded the bank's creditors; WMI
20 undercapitalized the bank and siphoned money from it; and that
21 the bank is the mere instrumentality of WMI. They're basically
22 conclusory allegations, but that's the crux of what they claim.

23 When you turn and you look to tab 8, there's a very
24 telling statement in the proof of claim about what it's really
25 about, or what they claim it's really about. And in paragraph

WASHINGTON MUTUAL, INC., et al.

1 2 of what is the paragraph numbered 8, the second paragraph of
2 paragraph numbered 8, what the bondholders allege is that WMI
3 dominated not only the bank's finances but also its business
4 practices, and defrauded the bank and its creditors, including
5 the bank bondholders.

6 So they said two things here that make it clear that
7 that's a derivative claim: One, they claim that the bank owns
8 the claim, that the bank has been defrauded; secondly, they
9 claim that, whatever fraud occurred, occurred to all creditors.
10 Classic derivative claim. And they say, by the way, we're a
11 subset of those creditors. So there's no question about the
12 point that even they admit, the bank bondholders, that this is,
13 again, a derivative claim. They dispute it in their papers.

14 And, effectively, what the Court has to do here is
15 what it did in the OODC case. State law governs whether or not
16 piercing the corporate veil is a derivative or direct claim.
17 Washington law has no cases on point. There is a majority
18 position on this as to whether a subsidiary can bring a
19 piercing-the-corporate-veil claim against the parent. And as
20 the Court noted in the OODC opinion issued in 2005, the clear-
21 cut majority position is that it can. What they have done is,
22 without explanation as to why, is to urge this Court to apply a
23 minority position. They want you to look to the state of
24 Arkansas and apply Arkansas law instead of looking to the
25 majority position, which includes Delaware. And the Court

WASHINGTON MUTUAL, INC., et al.

1 shouldn't do that. There's no reason that the Court should
2 deviate from the majority position, particularly given the fact
3 that their claim states that they defrauded the bank and all
4 creditors. It's an outright admission; it forecloses them on
5 standing. They have no jurisdiction to raise that point.

6 Substantive consolidation. This is an interesting
7 claim, because the whole claim of substantive consolidation, as
8 the Court is well aware, is not for a particular creditor.
9 They now claim they want partial -- carve us out, we want
10 partial substantive consolidation. This is the merger of the
11 estates of two separate and distinct entities, because,
12 allegedly, they've held themselves out as one in pre-petition
13 conduct or, secondly, in post-petition conduct you can't
14 possibly unravel their assets and liabilities. And so
15 substantive consolidation is appropriate there.

16 But, again, all we need to do is to turn to the
17 language of the proof of claim, which is tab 9. And paragraph
18 9 says the following: "WMI's domination of WMB, and its
19 intertwining of WMB's assets and liabilities with its own,
20 appears so substantial to warrant substantive consolidation, at
21 least to the extent that the assets of the debtor and its
22 estate should be made available to satisfy the claims of the
23 bank's creditors, including the bank's bondholders." They
24 admit in the claim itself that this is a claim that is suitable
25 for all of the bank's creditors and not simply them.

WASHINGTON MUTUAL, INC., et al.

1 So there's no question that this is, by its very
2 nature -- and as the Court knows, it's an extraordinary remedy
3 to begin with, but it's quite clear here that it is a remedy
4 that would be applied in only the most drastic circumstances,
5 for the benefit of all and not a specifically carved-out group.

6 Lastly, breach of fiduciary duty. The noteholders
7 admit -- and if you look to tab 10, the noteholders is a
8 different group than the bondholders. But paragraph 27 of
9 noteholders' proof of claim makes it quite clear they conceded
10 breach of fiduciary duty, which we all know is, again, a
11 derivative claim. In this case, they allege WMB may also have
12 claims based on -- upon breaches of fiduciary duties owed by
13 the directors of WMI to WMB, and the liability of WMI in
14 connection therewith. Finished. Done. They've admitted that
15 that's a classic derivative claim. And now, for no reason,
16 we've got an argument here that it's a direct claim, and it
17 runs squarely into the Sunrise opinion where these allegations
18 of mismanagement and breach of duty by the Third Circuit were
19 concluded to be derivative claims. There's no plausible reason
20 for the Court to provide them standing on a claim such as that.

21 The last point that I have to make about standing's
22 got to do with what I consider to be a total red herring, this
23 business about duplicative claims that's been argued in the
24 briefs. It is true that the bondholders and the FDIC have
25 overlapping claims, and we point that out largely for two

WASHINGTON MUTUAL, INC., et al.

1 reasons: One, it's clear that the FDIC believes that it has
2 standing to bring those claims, but, secondly, to the extent
3 that the FDIC has brought those claims, the bondholders can't
4 claim that the FDIC is unjustifiably refusing to bring
5 derivative claims that would confer standing to them.

6 Also, as we know from the WMB noteholders' pleading,
7 they agree that most of these -- if -- all the duplicative
8 claims are derivative claims. Whether the FDIC has brought the
9 claims for veil-piercing, misrepresentation, substantive
10 consolidation, is of no moment. That's not the analytical test
11 of whether the FDIC has brought the claim, to determine whether
12 they're direct or derivative. Going back to Sunrise, the test
13 is look at the allegations of the claim, not the labels that
14 parties place on them.

15 In the Northern District of Georgia, district court
16 addressed this issue square-up in the Totilo case. In the
17 Totilo decision, that very same argument was made where a bank
18 depositor was claiming that the FDIC didn't bring a particular
19 claim and therefore it had a right to bring it as a direct
20 claim, and the Court outright rejected that. You don't make a
21 determination legally and analytically as to the status of a
22 claim based on whether the FDIC has brought it.

23 Which leads to the last point on the duplicative
24 claim. There's an argument that's being made is, because we
25 have not sought dismissal for standing on the fraudulent

WASHINGTON MUTUAL, INC., et al.

1 transfer claim, that somehow this miraculously means that
2 they've got standing on all their other claims. I don't quite
3 understand what their argument is, but the fact of the matter
4 is this: The Washington Uniform Fraudulent Transfer Act
5 provides and confers specific claims to creditors, and they've
6 brought a claim and have standing to bring a claim under that
7 statute. So we have not argued lack of standing for that
8 claim. We do -- we will argue -- Mr. Kirpalani's going to
9 argue that those claims are insufficient under 12(b)(6).

10 Which leads me to 12(b)(6). There, again, in the
11 brief is quite a bit of argument about whether or not this
12 Court should endorse application of the Federal Rules of Civil
13 Procedure to these claims, and whether the Court should step in
14 and hold these claimants to the heightened pleading standards
15 of 12(b)(6). And of course the Court should. The Court is
16 empowered to do it under -- once we filed the objection to this
17 claim, it became a contested matter, and as a contested matter
18 the claim was governed by 9014. 9014 directs the Court to
19 apply the rules of part 7 at any stage in the proceedings, and
20 Rule 7012 specifically authorizes the Court to apply Rule
21 12(b)(6) and other aspects of Rule 12 to contested proceedings.

22 So the Court is empowered by law to do it. And the
23 Fifth Circuit in the Clowd (ph.) case, in the Southern District
24 of New York in the Flake (ph.) case, they did it and applied
25 12(b)(6) to proofs of claims and upheld -- in one case they

WASHINGTON MUTUAL, INC., et al.

1 upheld -- in both cases, dismissal was upheld. Why should the
2 Court do it here if it's a discretionary matter? Well, the
3 fact of the matter is eighteen months have passed since this
4 proceeding began. Ample opportunity has been given for them to
5 spell out their claim.

6 THE COURT: Well, before you say -- use the term of
7 art "proceedings", since this is in an adversary proceeding, it
8 hasn't been eighteen months since the claim objection has been
9 filed.

10 MR. FRONGILLO: Correct. It's been about sixty days.

11 THE COURT: Okay.

12 MR. FRONGILLO: So -- but the chance to gather the
13 facts to be able to formulate the claim -- there's been a year
14 and a half that have passed. We engaged them, filing the
15 objection that made this a contested matter. And in fact what
16 they have said in their pleadings is bring it on, Your Honor,
17 our pleadings meet the standard of Rule 12(b)(6).

18 They have filed fulsome pleadings here. In fact, the
19 noteholders have even tried to grab a complaint that deals with
20 different securities altogether; it's a hundred pages long.
21 And they've asked you to look at a totally irrelevant document
22 to try to buttress what their claims are.

23 I think there's also a couple of other reasons why the
24 Court should exercise its discretion and apply 12(b)(6) here.
25 Bearing in mind that what they're trying to do is they're

WASHINGTON MUTUAL, INC., et al.

1 trying to get around the clear-cut language of the offering
2 circular in which they knew that these were obligations of the
3 bank and the bank only, and that WMI wasn't guaranteeing them
4 and WMI was not responsible for them. They're trying to pull
5 an end run around the offering circular in coming into this
6 court, and they're trying to do it with creative pleading,
7 using misrepresentation gloss on mismanagement and looting
8 claims, and arguing indirect liability under theories of
9 piercing the corporate veil, which is a -- as the Court knows,
10 requires rigorous pleading standards and requirements.

11 And I think that, given the fact that fraud claims
12 typically have to be pled with particularity, and the fact that
13 they are essentially trying to cut in line as to creditors that
14 exist in this proceeding, they should be held to, at a minimum,
15 stating a claim upon what relief could be granted before this
16 Court, rather than engaging in expensive discovery on claims
17 that don't exist. And you've already heard good reasons why
18 most of those claims don't exist. They don't even have
19 standing for most of them.

20 The Court, I'm sure, is well familiar with the Iqbal
21 standard, having recently applied it in the Euckelson (ph.)
22 case, piercing-the-corporate-veil case here. And I'd like to
23 now turn to the veil argument as to why the veil -- corporate
24 veil and alter ego claim should be dismissed, because it does
25 not state a plausible claim under the standards of 12(b)(6) as

WASHINGTON MUTUAL, INC., et al.

1 interpreted by Iqbal and by the Third Circuit in Fowler.

2 THE COURT: Excuse me --

3 MR. ANKER: Excuse me, Mr. Frongillo, I don't mean to
4 interrupt your argument.

5 I just want to ask the Court, do you want -- and I
6 gather there's going to be three different lawyers on here --

7 THE COURT: Yeah, let's do it separately. Let's deal
8 with the standing issue first.

9 MR. ANKER: Okay. Do you want me just at this point
10 to address standing and opposed to, sort of, the 12(b)(6)
11 standards --

12 THE COURT: Yes.

13 MR. ANKER: -- that Mr. Frongillo spoke to?

14 My apologies. I don't mean to interrupt you.

15 MR. FRONGILLO: That's okay.

16 (Pause)

17 MR. ANKER: Your Honor, we too have some hand-ups I've
18 given Mr. Frongill -- I apologize, is it Mr. [fronjillo]? Am I
19 pronouncing your name correctly?

20 MR. FRONGILLO: Yes.

21 MR. ANKER: I apologize.

22 -- copies. May I approach, Your Honor?

23 THE COURT: You may.

24 (Pause)

25 MR. ANKER: Your Honor, again for the record, Philip

WASHINGTON MUTUAL, INC., et al.

1 Anker, Wilmer Cutler Pickering Hale and Dorr. I represent the
2 group that Mr. Frongillo, I think, referred to once as the
3 Marathon creditors, a reference to one of the members of our
4 group, and at other times as the bank bondholders. Mr.
5 Flaschen represents the -- what I think has been referred to as
6 the WMB noteholders.

7 I can address standing. There are other counsel here.
8 Mr. Flaschen is here; I know wants to speak briefly. And then
9 with respect to the securities claims, the misrepresentation
10 claims, Mr. Schwartz of the Drinker Biddle firm, and Mr. Jarvis
11 of the Grant & Eisenhofer firm, are here to speak to those with
12 respect to their clients. I'm here entirely on my own. I'm
13 being triple-teamed on one side and triple-teamed on the other,
14 but I'll do the best that I can.

15 Your Honor, let me start with a basic principle.
16 Claims of creditors belong to creditors; the U.S. Supreme Court
17 decided that issue dispositively in the Kaplan case. I was
18 quite surprised to read the debtors' and, more frankly, the
19 committee's response which suggested that Kaplan has been
20 overruled. I will say to this Court it's been cited with
21 approval probably over 1,000 times since 1972, including by
22 Judge Easterbrook last week. It stands for the basic
23 proposition that claims of creditors belong to creditors, and
24 with the exception in bankruptcy of 544 claims -- and I
25 acknowledge that there's a 544 exception in bankruptcy for

WASHINGTON MUTUAL, INC., et al.

1 certain types of avoidance claims -- may not be brought at all
2 by the trustee. That proposition, I submit, is absolutely
3 settled law in this circuit, indeed in the Supreme Court.
4 Indeed, in Kaplan, the U.S. Supreme Court said we're
5 interpreting the old Bankruptcy Act -- there was a case in '72
6 before the Bankruptcy Code of '78 -- Congress may want to
7 consider overruling us. And indeed, Your Honor, the
8 legislative history of the '78 Code shows that a bill was
9 proposed -- I believe, in the House; it may have been the
10 Senate -- that would have explicitly overruled Kaplan. That
11 bill was rejected by Congress. The legislative history on that
12 point is discussed in the Ozark Restaurant Equipment case in
13 the Eighth Circuit, which we've cited, 816 F.2d 1222, and by
14 the Ninth Circuit in Williams v. California First Bank,
15 859 F.2d 664.

16 To the extent a claim is direct, it belongs to the
17 creditors. No "if", no "and", no "buts". No exceptions. That
18 is the rule in bankruptcy. Well, is it the rule -- and it's a
19 legitimate question -- under the Federal Deposit Insurance Act?
20 The answer is yes. Let's look at the relevant provision of the
21 Federal Deposit Insurance Act. And, Your Honor, on the slides
22 that I handed you, what I would refer you to now is the very
23 first slide. And there's a large copy there. I'm happy to
24 hand out other copies to others in the courtroom.

25 It's the relevant provision and it says that the FDIC,

WASHINGTON MUTUAL, INC., et al.

1 as conservator or receiver, and by operation of law, shall
2 succeed to all rights, titles, powers and privileges of the
3 insured depository institution -- so that would be Washington
4 Mutual Bank -- and of any stockholder, member, accountholder,
5 depositor -- I raised my voice on that word because I'm going
6 to come back to it -- officer or director of such institution
7 with respect to the institution and the assets of the
8 institution.

9 Now, I think there is a debate about what the words
10 "and of any stockholder, member, accountholder, depositor,
11 officer or director" mean. I think WMI, which is the
12 stockholder of the bank, does not believe that the FDIC has
13 sole authority to assert WMI's causes of action. But even if
14 it meant that, even if it meant that, there's no mention of
15 creditors here. Congress could have written "all rights,
16 titles, powers and privileges of the insured depository
17 institution and of any creditor of such institution"; it did
18 not, and that omission has to be assumed, particularly after
19 Kaplan, to have been intentional.

20 That's the first proposition: Direct claims belong to
21 us. The second proposition, I would say to Your Honor, is
22 that, with respect to derivative claims, the law is less black-
23 and-white than Mr. Frongillo would have you believe. In the
24 Gheewalla case, and I -- Your Honor, I'm going to butcher the
25 name, I apologize. It's the Delaware Supreme Court case

WASHINGTON MUTUAL, INC., et al.

1 dealing with zone of insolvency. That case is often cited,
2 indeed it's cited in the WMI papers, for the proposition that
3 even though when a company becomes insolvent creditors of
4 the -- even though a fiduciary duty then arises for directors
5 in favor of the creditors, the creditors may not bring a direct
6 claim. But what the Delaware Supreme Court said, by my count
7 when I read the opinion yesterday, six separate times in the
8 opinion is that creditors may bring a derivative claim. And
9 indeed, of course, in this circuit, in both the Lande (ph.) and
10 the Sunrise case, the Sunrise case which counsel is
11 championing, the courts -- the Third Circuit said even
12 shareholders of an insolvent bank may bring derivative claims.
13 So the law isn't as clear. That's proposi -- there are lots of
14 circumstances where derivative claims are brought; they're
15 brought all the time.

16 Third comment: The line between direct and derivative
17 that counsel would have you believe is as bright as can be
18 isn't so. If anyone should be protective here -- and let's
19 step back and see what we're talking about. We're talking
20 about whether we are interloping on claims that belong to the
21 Federal Deposit Insurance Corporation. Its counsel is in this
22 room. Its counsel filed a pleading. Here's what its counsel
23 had to say on that very question. If I could ask you to turn
24 to tab 3.

25 (Pause)

WASHINGTON MUTUAL, INC., et al.

1 MR. ANKER: I apologize, Your Honor. One moment.

2 (Pause)

3 MR. ANKER: This was a pleading, Your Honor, filed
4 after we had put in our opposition. The debtors were courteous
5 enough to give the FDIC a short extension of time within which
6 to file its response. So they had the benefit of seeing our
7 response. And they wrote, and I quote, "The FDIC receiver
8 agrees with the WMB bondholders that it is premature for the
9 Court to determine the boundary between such direct and
10 derivative claims, however, and therefore it would be
11 inappropriate at this time to expunge the claims of the WMB
12 bondholders on this basis." Those are the parties whose rights
13 we are allegedly trampling on.

14 Why did they say that? Well, Your Honor, I would
15 submit to you that the law in the FDI Act context is, if
16 anything -- how do I put it? It's less clear and less well-
17 developed than the Bankruptcy Code context. It's less clear
18 because it's a statute that, frankly, isn't as extensive, and
19 there's much less case law.

20 Let me give an example. And there is an
21 acknowledgment here that we have standing to bring all the
22 fraudulent conveyance claims. Your Honor may ask why is that.
23 I mean, if WMB was in bankruptcy, the argument would be that
24 the debtor-in-possession or trustee succeeds to the claims
25 under 544, and not only does it have standing but we are

WASHINGTON MUTUAL, INC., et al.

1 divested, if you will, of standing. The jurisdictional grant,
2 or the standing grant, is exclusive.

3 There does not appear to be -- and I say those words
4 carefully, because it is not a statute. I'm a bankruptcy
5 lawyer; I'm not a banking lawyer. It is a statute that makes
6 me at times scratch my head and wonder what Congress was
7 writing and meaning. But there does not appear to be a 544
8 provision. And while there is a fraudulent conveyance
9 provision, akin to 548, Your Honor, it's very strangely
10 written. It talks about avoiding transfers, giving the FDIC
11 standing, to avoid not transfers of the debtor, of the bank,
12 but transfers made by debtors of the bank.

13 So imagine that the bank was owed money by Joe Blow.
14 If Joe Blow transferred his assets away, the statute seemingly
15 says the FDIC has standing to seek to recover that transfer,
16 but not a transfer of assets of the bank itself or of property
17 of the bank, unlike 548 of the Bankruptcy Code which explicitly
18 gives standing to the trustee to bring claims to avoid
19 transfers of property of the debtor.

20 And given the concession, I don't need to spend a lot
21 of time -- concession that we have standing, I don't need to
22 spend a lot of time on that. I raise it because it shows why
23 the FDIC thinks we need to work through these issues and figure
24 out factually what the questions are and what the evidence and
25 what the arguments are. And indeed, as to some of these

WASHINGTON MUTUAL, INC., et al.

1 claims, Mr. Frongillo is very quick to say that the alter
2 ego/veil-piercing claims are derivative. As to those claims,
3 they have not been asserted by the FDIC. The FDIC -- and the
4 misrepresentation claims as well. The FDIC does not assert
5 that they are their claims. They've not brought those claims.
6 And indeed they've said repeatedly that as to any direct claims
7 we have, they do not stand in our shoes.

8 Let me turn now with -- and let me raise one other
9 principle. Your Honor has been invited -- and I'm giving this
10 by way of example. I don't agree with very much, Mr. Frongillo
11 said; I agree with one thing: We have not located a single --
12 if Your Honor decides that the alter ego standing decision
13 turns on applicable state law, Mr. Frongillo and I agree on two
14 things: First, the applicable state law is the law of the
15 state of Washington; two, neither Weil, Gotshal & Manges nor
16 Wilmer Cutler Pickering Hale and Dorr, two pretty competent law
17 firms with a lot of bright associates who are working on
18 limited sleep, have found a single decision at any level in the
19 Washington court system on that issue. None. Not any.

20 Well, I think one of the questions Your Honor has to
21 wrestle with is am I going to spend the time today to predict
22 how the Washington courts will come out on an issue as to which
23 other courts have split, when, when -- and this is not true as
24 to the alter ego claim; I will acknowledge the FDIC hasn't
25 brought it -- as to many of these claims there are overlaps

WASHINGTON MUTUAL, INC., et al.

1 with the FDIC. And whether we are held to lack standing or
2 not, the FDIC will have standing. And the U.S. Supreme Court
3 has, and we've cited the cases in our brief, on more than one
4 occasion, on at least two occasions, explicitly said the right
5 course of action when a party -- when at least one part clearly
6 has standing, and another party's standing is called into
7 question but who's on the same side of the V, is simply not to
8 reach the issue, because as long as one party has standing, the
9 Court's jurisdiction is properly invoked and therefore the
10 Court need go no further. That's U.S. Supreme Court
11 jurisprudence.

12 I'm going to flip and see if I can find, Your Honor,
13 quickly the citations to those cases, but I won't take too long
14 because I don't want to delay the Court in its resolution.

15 That principle -- the two cases, Your Honor, that we
16 have cited are *McConnell v. FEC*, 540 U.S. 9 -- there's a typo
17 here, Your Honor, on my outline; it says "93, 233". One of
18 those numbers must be wrong, and I apologize. But the quote
19 is, "Because both the city of New York and the healthcare
20 appellees have standing, we need not consider whether the
21 appellee unions also have standing to sue." The other case is
22 *Clinton v. City of New York*, 524 U.S. 417, 431, note 19. "It
23 is clear," and I'm reading the quote, "however, that the
24 Federal Election Commission has standing, and therefore we need
25 not address the standing of the intervenor-defendants whose

WASHINGTON MUTUAL, INC., et al.

1 position here is identical to the FEC's." Those are guiding
2 principles.

3 Now let me turn to the claims. I will say to Your
4 Honor, and I'm going to try to say this respectfully, there are
5 many arguments made on the other side that I saw coming and I,
6 frankly, would make if I were in their shoes. The argument
7 that the misrepresentation claim is not direct is not one of
8 them.

9 Let me try to put this in some context. There is a
10 class action pending right now in the Western District of
11 Washington, brought by bondholders and shareholders of
12 Washington Mutual, Inc. against underwriters, I think directors
13 and officers, and I think also lawyers and other professionals.
14 The Washington -- you heard, the Washington Mutual bank bonds
15 did not default until the petition date. Well, guess what, the
16 Washington Mutual, Inc. bonds did not default until the
17 petition date. If their argument is right, then that claim is
18 property of WMI's estate, and that cause of action is a
19 violation of the automatic stay. That claim cannot -- under
20 their theory, it is a claim of the debtor.

21 I have spent a lot of my time over the last two years
22 in litigation coming out of the Adelpia bankruptcy and the
23 Revco bankruptcy, including litigation that both Weil Gotshal
24 and the Quinn Emmanuel firm are involved (sic); some litigation
25 brought by bankruptcy trustees, by liquidating trusts created

WASHINGTON MUTUAL, INC., et al.

1 post-confirmation, but also securities class actions. In those
2 cases, there was no default until the petition date. There was
3 no default in Enron; there was no default in Adelphia; there
4 was no default in Global Crossing, in Revco, in every fraud
5 case; and yet securities class actions go on in every single
6 one of those cases.

7 The Hayes case in the Third Circuit says and holds
8 that, with respect to a securities misrepresentation claim, the
9 claim belongs to the creditors, not to -- and by the way, Your
10 Honor, not to the debtor. We've heard how this claim is
11 uncommon. Securities litigation -- I'll let Mr. Jarvis speak
12 to this who lives this for his living. The lawyers who do this
13 bring class actions. What is a class action? It's an action
14 brought by creditors-in-common. Everyone who bought stock
15 between period -- date X and Y, everyone who bought bonds
16 between date X and Y, the fact that the claim is in common to a
17 body of security purchasers does not mean, does not mean, that
18 it's a claim of the debtor.

19 Let's focus on injury, Your Honor. When you talk
20 about who has the claim, you got to ask the question who was
21 injured. What are we talking about? We're talking about a
22 claim that WMB issued bonds and received money for those bonds
23 in excess of what the bonds were worth, because there was a
24 failure to disclose and misleading disclosure of various
25 critical factors. Was WMB injured by that? It benefited: It

WASHINGTON MUTUAL, INC., et al.

1 issued securities worth X and it got in response triple-X or
2 quadruple-X or five times X. The notion -- and, Your Honor, in
3 a securities fraud claim, the claim under Section 10(b) has to
4 be brought by a purchaser. Section 10(b)'s private right of
5 action is a right of action for a purchaser or a seller. But
6 we're talking here about purchasers of bonds. WMB didn't buy
7 its own bonds. We bought our clients its bonds.

8 So what is their answer to that? It's to rewrite my
9 complaint. It's to say, Mr. Anker, you're entirely right, the
10 problem is I want to rewrite your complaint for you and I want
11 to tell you you're not bringing a misrepresentation claim,
12 you're really bringing a breach-of-fiduciary-duty claim. And
13 we do bring a breach-of-fiduciary-duty claim, but that's a
14 separate claim.

15 Let me refer you to the actual claim, and I'll use the
16 notebook that counsel, Mr. Frongillo, handed up. My claim is
17 at tab number 13. The misrepresentation claim is on page 9,
18 Your Honor; it begins on page 9, paragraph 13.

19 THE COURT: Okay.

20 MR. ANKER: And let me just read what the claim is:
21 "The bank issued the senior notes starting in the first quarter
22 of 2006 and continuing through the first half of 2007. During
23 this time period and continuing thereafter, WMI made material,
24 false and misleading statements or omitted material facts
25 necessary in order to make the statements made not misleading

WASHINGTON MUTUAL, INC., et al.

1 regarding the bank, its operations and its financial condition.
2 WMI and its officers and employees repeatedly misrepresented
3 that the bank was doing well and that its credit and loan
4 underwriting policies and operations were conservative and
5 minimized risk to investors, including holders of the senior
6 notes. As WMI knew at the time, those statements were false
7 and misleading. WMI knowingly failed to disclose the true
8 facts in connection with their purchase of the senior notes.
9 The bank bondholders and the market," that's a reference to the
10 fraud and the market theory, "for the senior notes, relied on
11 the misrepresentations and material omissions. As a result,
12 the debtor is liable to the bank bondholders for all resulting
13 damages." That's a misrepresentation claim.

14 And, so the Court is clear, the claim is not limited
15 to misrepresentations about financial condition. I'll tell you
16 what the greatest misrepresentation here was. The greatest
17 misrepresentation here -- and let me turn you, if I can, to
18 slide number 2. Your Honor, this comes out of an offering of
19 WMI notes. I will acknowledge it comes out an offering of WMI,
20 not WMB, notes, but what was in the market and what was said to
21 everyone. And that is -- you're going to hear all day from the
22 three people who are going to be arguing against me, WMI and
23 WMB were separate companies, your claim is only against WMB.
24 You heard the reference to the offering statement from my bonds
25 saying you can look to WMB, this is an issuance of WMB, and

WASHINGTON MUTUAL, INC., et al.

1 that's true. What was represented was that WMB had every asset
2 and that the creditors of WMI would not see a penny, not a red
3 cent, until the bankholder -- bank bondholders were paid in
4 full. That's what was said to the market. And I believe
5 that's true, but this entire bankruptcy has been about turning
6 that whole principle upside-down.

7 There has never -- I shouldn't say "there has never".
8 I've practiced in this area many years. I stand to be
9 corrected if I am wrong. There has never to my knowledge been
10 a case in which deeply subordinated creditors of a holding
11 company receive more in distributions than senior creditors of
12 the operating company. And that wasn't disclosed. It wasn't
13 disclosed that the holding company took the position that the
14 tax refunds were all it, even though the banks generated them
15 all. It wasn't disclosed that they were going to put in cash
16 at the bank in the form of deposits rather than capital, even
17 though they repeatedly said it would all be in the form of
18 capital. It wasn't told and disclosed to the bank bondholders
19 that they -- that WMI would loot the bank, taking five billion
20 dollars within a week of the bank -- of the receivership.
21 Those facts weren't disclosed. So it's not all about
22 mismanagement. It's about failure to comply with and failure
23 to tell the truth about structural subordination.

24 The bank bonds had a lower coupon than the WMI bonds.
25 Why? Because it was told to the market that the bank bonds are

WASHINGTON MUTUAL, INC., et al.

1 where all the assets are. The WMI bonds were, in effect,
2 equity. They were equity -- preferred equity to the common,
3 but they were equity, not to receive a penny until the
4 creditors of the bank were paid in full. This is a misrep
5 plan.

6 Let me go to the Sunrise case. First, Sunrise is a
7 case brought by depositors. The Federal Deposit Insurance Act
8 explicitly gives the FDIC standing to bring claims of
9 depositors. Secondly -- that's what the statute says.
10 Secondly, it's not a securities fraud case.

11 I'm going to defer to Mr. Jarvis, who's an expert in
12 this area, but I don't believe a bank deposit is a security. I
13 bank at Citibank. I don't think I have a security for my loan
14 balance. I think I have an unsecured loan to Citibank, with an
15 FDIC guarantee on to, but I don't think I can sue -- I don't
16 think it's a security.

17 We've got securities. But, third, it's a RICO case,
18 and RICO has its own standing requirements. Fourth, it's a
19 case under Florida law. And, fifth, it is a case in which the
20 Third Circuit concluded that the gravamen of the claim was not
21 misrepresentation but, rather, was mismanagement. We do have a
22 mismanagement claim, but we also have a separate
23 misrepresentation claim, and as to that claim the gravamen of
24 the claim is misrepresentation; no "ifs", no "ands", no "buts".

25 What caused the injury? The injury is the difference

WASHINGTON MUTUAL, INC., et al.

1 between what the securities were worth had the truth been told,
2 and what they were represented to be worth. Had they told the
3 truth -- WMI told the truth, the bonds on our level -- I mean,
4 Your Honor, our bonds are trading today at forty-five cents on
5 the dollar. Had they said "Excuse me, WMI's going to have all
6 the assets, not WMB, and by the way we don't have all these
7 supposedly conservative underwriting standards," our bonds
8 would not have been worth par and they would not have traded at
9 par.

10 I want to refer you, Your Honor, to a quote from Judge
11 Gerber. I deeply respect the bench and this Court, maybe
12 because I'm a New Yorker and I practice there all the time. I
13 deeply respect Judge Gerber, even though once or twice he's
14 ruled against me. But he's a pretty learned guy. And he said
15 in the Adelphia Communications Corp. case in 2007 -- we cite
16 this in our brief -- 365 B.R. 24, 67, note 178 -- I think this
17 may have been his confirmation decision -- quote: "Claims for
18 harm to public investors or the public generally would plainly
19 belong to any actual investors or others personally injured,
20 and not to the debtors or the debtors' official committees
21 suing on the debtors' behalf."

22 Your Honor, I think I've dealt with the
23 misrepresentation claim. I will say the Hayes case is the
24 seminal case in this district.

25 I'll make one last point. The committee says, well,

WASHINGTON MUTUAL, INC., et al.

1 the real difference -- and I didn't hear Mr. Frongillo make
2 this argument and, I think, for good reason. The committee
3 says, um, the bank bondholders are holders of debt instruments.
4 Hayes is a case about equity shareholders, and Sunrise was
5 about deposits, which is debt, and therefore Sunrise is
6 controlling.

7 The Kaplan decision, Your Honor, the seminal U.S.
8 Supreme Court decision, as Mr. Frongillo mentioned, is a case
9 about debentures. It's a case about debt instruments. The
10 class action that is pending in the Western District of
11 Washington is brought on behalf of a class of WMI purchasers of
12 equity securities and debt securities. The Adelpia and Revco
13 cases I referenced were classes of debt securities, and perhaps
14 classes of equity as well, as I think about it. But debt
15 securities are securities, and purchasers of them who purchased
16 them based on misrepresentations have standing to bring their
17 direct claims.

18 Let me turn to the veil-piercing claim, or alter ego
19 claim. Your Honor, I would make two arguments here. The -- I
20 think three arguments here, I apologize. The first is -- I
21 would refer Your Honor to the Ozark case in the Eighth Circuit,
22 and I would refer Your Honor -- and I think it is the Williams
23 case in the Ninth Circuit, both of which are cited in our
24 brief. Those are federal -- I grant you, they are not Third
25 Circuit -- they are federal appellate court decisions, one of

WASHINGTON MUTUAL, INC., et al.

1 which the Ninth Circuit includes Washington State. Both of
2 those cases hold explicitly that debtors and trustees do not
3 have standing to bring alter ego or veil-piercing claims to
4 pierce their own veil. I think I have the Williams case here,
5 Your Honor. And if I do I'll just read you the relevant quote.
6 This is 589 F.2d 664 at page -- it's the last paragraph of the
7 opinion, Your Honor. I'm having trouble figuring out what the
8 jump cite is.

9 THE COURT: All right.

10 MR. ANKER: 667. "We agree with the Eighth Circuit
11 that Congress' express decision not to overrule Kaplan is
12 extremely noteworthy. We also share the Court's certitude
13 that" -- not quoting the Eighth Circuit "Congress' message is
14 clear, no trustee whether a reorganization trustee as in Kaplan
15 or a liquidation trustee has the power under the code to assert
16 general causes of action such as an alter ego claim on behalf
17 of the bankruptcy estate's creditors. That's point one.

18 Point two is if you are to look at state law, and I
19 grant you I do read Your Honor's decision in the OODF case.

20 THE COURT: OODCF.

21 MR. ANKER: Okay. My apologies, Your Honor. I do
22 read it to say that Your Honor thinks this is a question of
23 state law. There is no decision in Washington State. I do
24 think, and I'm not going to repeat the brief, I understand
25 counsel wants to disparage Arkansas. It's not my favorite

WASHINGTON MUTUAL, INC., et al.

1 state in the union; it is what was at issue in the Eighth
2 Circuit. I had a case that kept me there for a lot of time,
3 Your Honor. But it's case law and it's law on alter -- the
4 substance of alter ego and corporate disregard claims is
5 virtually identical to that of Washington. And, therefore,
6 it's relevant, and it's relevant because it's what the Eighth
7 Circuit was interpreting in Ozark.

8 I will also point out to you, and I'm not going to
9 repeat what's in our brief, the Washington Courts have for
10 better or worse rejected on several occasions Delaware case
11 decisions on Delaware law.

12 The third point I'll make is a point I went to a
13 moment ago. Do you really want to get into this thicket of
14 predicting what Washington would do when there's not a case out
15 there. If imagine that we're wrong and it is a claim that
16 belongs to the FDIC, the FDIC hasn't brought this claim. Then
17 let us bring it derivatively just like Gheewalla does.

18 I have said in my pleading and I will say it again as
19 a representation to this Court, to the extent that our claims
20 are derivative, I acknowledge that any recovery must go into
21 the receivership estate and does not go to my holders
22 themselves. I also acknowledge that there can't be duplicative
23 recoveries. So the extent the claim is derivative is a claim
24 brought on behalf of the estate. Now, I will say something
25 Your Honor for interest of full disclosure. At the moment if

WASHINGTON MUTUAL, INC., et al.

1 you look at the receivership estate and there's a bunch of
2 disputed claims, but there's both senior bonds and junior
3 bonds. The senior bonds are about 6.1 billion plus accrued
4 interest. The last time the FDIC published a report the total
5 other claims were ten million dollars. So we would be 99.99
6 percent of that estate. But I acknowledge that if the claim
7 that if the claim is derivative it has to go into the
8 receivership estate for the benefit of all creditors.

9 THE COURT: Then don't -- why don't you admit that the
10 proper party to bring it is the receiver?

11 MR. ANKER: If it is derivative. I think that
12 turns --

13 THE COURT: That's true.

14 MR. ANKER: If it is -- Your Honor, let me answer your
15 question twofold. One, I don't concede it's derivative. As I
16 said earlier, I agree with Ozark, I agree with Williams, and I
17 think our reading of what Washington would do if it's a matter
18 of state law is right that would mean it's a direct claim.

19 THE COURT: Right.

20 MR. ANKER: If it is derivative I point out to you
21 that the FDIC has not brought the claim. And in those
22 circumstances in particular it is perfectly appropriate to
23 allow someone to bring a derivative claim.

24 THE COURT: Well, isn't it they have to refuse to
25 bring it?

WASHINGTON MUTUAL, INC., et al.

1 MR. ANKER: We have made -- Your Honor, part of the
2 problem here is -- and I don't want to go past the pleadings.
3 I don't want to go past the pleadings, but I want to be careful
4 what I want to say.

5 THE COURT: Well, is it clear from the FDIC's claims
6 in this case that their not asserting all derivative claims
7 they may have?

8 MR. ANKER: Your Honor, the claims as to them would be
9 direct. I do not take issue.

10 THE COURT: Are they direct, they're not bringing
11 claims on behalf of WMB?

12 MR. ANKER: Your Honor, they are bringing claims on
13 behalf of WMB. What I mean by -- I'm sorry, they stand in the
14 shoes of WMB. So it seems to me when the claim is asserted by
15 them if it's WMB's claim it's direct.

16 THE COURT: But WMB can bring derivative actions.

17 MR. ANKER: Umm.

18 THE COURT: The corporation.

19 MR. ANKER: I think, though, the derivative action,
20 Your Honor, maybe I'm thinking of it improperly, I think if a
21 shareholder is bringing a derivative action on behalf of the
22 corporation or a creditor's bringing derivative actions on
23 behalf of a corporation. I don't think of the corporation.

24 THE COURT: But if the corporation brings the claim
25 directly the derivative action should not be brought, cannot be

WASHINGTON MUTUAL, INC., et al.

1 brought.

2 MR. ANKER: Unless there's a conflict in interest, in
3 which case the derivative claim may proceed. I agree with
4 that. And I'm saying your point is I do not disagree -- I
5 don't want to speak for Mr. Clark who's in the room. I do not
6 disagree with counsel for the debtor that the alter ego veil-
7 piercing claims were not brought by the receiver in this case.
8 I do not read their proof of claim to assert those claims.

9 THE COURT: Okay.

10 MR. ANKER: They may disagree, but I -- this is,
11 again, a point where I agree with Mr. Frongillo.

12 But, Your Honor, what I'm saying is really two
13 arguments, if you will. First, I think the claim is direct not
14 derivative, both because I think as a matter of federal law the
15 Eighth Circuit and the Ninth Circuit got it right. And is a
16 matter of state law, if you look to state law, I think it's not
17 a direct claim. I mean, it's strange to me to think of a
18 company piercing its own veil. I understand Delaware law
19 allows that. But secondly, even if it is derivative it seems
20 to me we have standing, because it's standing to bring a
21 derivative claim.

22 Substantive consolidation. Ninety-nine -- I'll talk
23 about the merits of substantive consolidation later. Let me
24 just refer to standing. 99.9 percent of substantive
25 consolidation motions in my experience are brought by

WASHINGTON MUTUAL, INC., et al.

1 creditors, that's who brings them. Now, there's been an
2 acknowledgement and admission that we are -- we have standing
3 to bring fraudulent conveyance claims. So we are a creditor.
4 It may be a disputed claim, but we are a creditor of WMI. Who
5 is to bring a substantive consolidation motion other than a
6 creditor? I guess a debtor could. But the notion that a
7 creditor does not have standing to seek some form of
8 substantive consolidation is silly, I mean, to use a
9 colloquialism. Who else is going to seek it.

10 And, indeed, the injury being sought to be redressed
11 here is the taking of all of our assets. I'm perfectly fine.
12 I will say this. I am perfectly fine with having no
13 substantive consolidation. Just give -- just be consistent
14 with what you said. Give all the assets to the bank. And then
15 whatever's left after all the bank creditors are paid in full
16 it can be up-streamed to WMI as a shareholder. Or if WMI has
17 valid claims bring them on in the receivership. And if they're
18 valid they can be pari passu.

19 But in a world in which they have completely
20 misrepresented what they would do, we are the injured part, and
21 so we have standing.

22 Breach of fiduciary duty, the final claim that I
23 believe counsel mentioned. A couple of points here. What -- I
24 would refer Your Honor to the Gheewalla case. The Gheewalla
25 case specifically says creditors have standing, albeit the

WASHINGTON MUTUAL, INC., et al.

1 claim may be derivative. And they can bring the claim on
2 behalf of the estate. And, again, I refer you to the FDIC's
3 own statement that the line between direct and derivative
4 claims is very difficult in this case and can't be resolved
5 until issues are finally determined. And I'll say again
6 pushing things off to allow there to be a factual record is not
7 going to harm anyone. If they don't want to reserve for us at
8 confirmation we can have an estimation hearing. I do not
9 believe that whatever Your Honor does -- if Your Honor denies
10 their motion to dismiss I do not contend that that precludes
11 them bringing a 502(c) estimation hearing where we can have
12 some sort of proceeding on that question.

13 The fact is these claims need to get resolved. And
14 when I hear the debtor, and I know you don't want me to get
15 into right now the 12(b)(6) issue. But when I hear the debtor
16 say this case has been going for eighteen months, I want to --
17 I want to scream. I've been asking for discovery, I've been
18 asking to bring this litigation on. I've been asking to get
19 going not for eighteen months, but for a long, long time. And
20 you know how many documents I've had produced to me by WMI?
21 Zero; 0.0. Every time it's all premature, it's all premature.
22 It's all premature. We're eighteen months into this case
23 because they don't want to litigate these issues. You can draw
24 your own conclusion why they don't want to litigate these
25 issues. But I -- as certain as the day as they don't want to

WASHINGTON MUTUAL, INC., et al.

1 litigate these issues. So I would submit to Your Honor these
2 claims are going to have to get resolved, whether in my hands
3 or the FDIC's hands. And to the extent the FDIC has brought
4 the claims. I would submit to you that Clinton and other cases
5 say you don't need to decide the standing question. Let's get
6 going and get the claims resolved. Let's find out whether I'm
7 full of it, and all of these claims have no merit. Or whether
8 what I'm saying is right. Let's get it resolved so that
9 whoever the legitimate creditors are of this estate can get
10 paid.

11 For those reasons, Your Honor, I would ask that you
12 deny the standing motion.

13 I want to say one other thing as a prefatory comment.
14 I think Mr. Rosen and Mr. Frongillo conceded this, but I want
15 to make it clear. The agreement that the parties worked out is
16 that this is a hearing on purely the legal issues. Their
17 original motion is filled with affidavits. When we get to the
18 merits I'm going to -- it's going to be one of the themes
19 you're going to hear out of my mouth a lot. They're trying to
20 put their own facts into -- before you. Those affidavits and
21 all the factual assertions in the debtor's responsive papers
22 have to be disregarded for purposes of today's hearing. This
23 is a hearing on my complaint. And do you have to accept -- do
24 you have to accept conclusions by me where there aren't well-
25 pled facts? No. But you can't let them put in contradictory

WASHINGTON MUTUAL, INC., et al.

1 facts and have that be decided. I've got a right to take
2 discovery on what the facts are. I have a right before summary
3 judgment to depose people and to learn what the truth is and
4 put in my own evidence. So this really should be a hearing
5 purely on legal issues and only if the Court is clear that
6 either the claim fails as a matter of law, or there is no
7 standing should the Court grant relief.

8 And, you know, Your Honor, one of the things I thought
9 was on the agenda for today is a discovery schedule. We are
10 prepared to have that at the conclusion of this, so we can for
11 once and for all, finally, get a schedule to move this forward.

12 Your Honor, I'm happy to turn to the 12(b)(6) standard
13 if you want me to. Counsel spoke to it. I'm only going to
14 speak for a few minutes. Do you want me to do it?

15 THE COURT: No.

16 MR. ANKER: Okay. Thank you, Your Honor.

17 MR. FLASCHEN: Good afternoon, Your Honor. Evan
18 Flaschen of Bracewell & Giuliani for the so-called WMB
19 noteholders.

20 I'm going to start with an unusual request. Which is
21 WMB noteholders actually have a pretty large dog in this hunt;
22 several billion dollars worth. We have very strong views on
23 the issues. We've already heard counsel express very strong
24 views on both sides quite well. Because of that it's not our
25 desire to repeat or reiterate the WMB bondholder group's

WASHINGTON MUTUAL, INC., et al.

1 argument, because saying them twice does not make them more
2 effective than saying them once.

3 We, instead, have relatively limited arguments that
4 are part about standing, but also part about the overall
5 merits. So if Your Honor would be so willing we would ask for
6 you to take under advisement the standing issue, at least until
7 the end of today's hearing, at which time we would make our
8 arguments. And possibly until after the hearing when you
9 consider the issues.

10 If Your Honor's prepared to decide now on standing
11 before the merits we can make our comments. It might be more
12 efficient if we did it all at once.

13 THE COURT: Yeah, I'd like to hear the standing first.

14 MR. FLASCHEN: Okay, Your Honor, thank you.

15 Your Honor saw my true reason, which is I didn't want
16 to be seen with my glasses on.

17 Let me start by answering questions. Potter Anderson
18 told me that before Your Honor raises the 2019 issue we should.
19 I'm afraid Mr. Rosen beat us both to the punch.

20 You must be wondering who are we, why haven't you seen
21 us before, and why haven't we filed a Rule 2019 motion. You
22 haven't seen this in eighteen months. We are a group of
23 noteholders of Washington Mutual Bank. Between our proof of
24 claim and members who have joined the group since then more
25 than two billion dollars, probably larger than the Marathon

WASHINGTON MUTUAL, INC., et al.

1 Group. We include senior holders but also subordinated holders
2 of the bank, probably a little more subordinated than senior,
3 but a nice healthy chunk of both.

4 We are primarily institutional investors in the
5 insurance company's mutual funds and the like. We bought their
6 debt in the open market or at original issuance. Paid 100
7 cents on the dollar more or less.

8 So while we have many things in common with the
9 Marathon Group, we have some things in difference. And we
10 heard counsel talk about how much the WMI bonds paid their one
11 cent versus their forty cents, whatever it was, both looking,
12 as they're entitled to, for how much profit they can make.
13 Members of our group for the most part are looking for how much
14 they're going to lose on this. They pay full value for their
15 notes, they are going to lose substantial amounts. The only
16 question is how much.

17 So it isn't just greedy WMI bondholders versus greedy
18 WMB bondholders, real main street institutions. As we heard in
19 Congress too many times main street America whose insurance
20 companies and investment funds and pension funds are losing
21 hundreds of millions, billions of dollars because of their
22 investment in Washington Mutual Bank.

23 We had not filed a Rule 2019. In fact, we have not
24 filed a request for service. We haven't appeared in these
25 cases.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: Until today.

2 MR. FLASCHEN: It happens until in the very beginning
3 of the case there was a pro hac vice from if you're wondering.

4 The reason we are even here today is we filed a proof
5 of claim, it's been objected to. That's it. We have not
6 sought to intervene in the Chapter 11 case. We have not sought
7 to be heard on any matter in the Chapter 11 case. We filed a
8 proof of claim, it's been objected to.

9 If you turn to 2019, in addition to the fact there's
10 been no motion directed at us, because we haven't been here,
11 how could they. I understand Your Honor can sua sponte
12 request. The remedies of 2019 are -- have the right, but not
13 the obligation to disallow our votes on a plan. We haven't
14 voted on the plan. To reject our objection to a plan of
15 disclosure statement, we haven't filed an objection. To cause
16 us not to be heard further in the case one can have semantics
17 about contested matters versus cases. But we haven't sought
18 once to be heard in this case, we are here purely as a
19 defensive matter because we are being told today our proofs of
20 claim are invalid. And, in fact, if Your Honor throws out our
21 proofs of claim today I don't think there's anything more for
22 us to be heard about. If there is, at that time we may file a
23 2019 or decide not to be heard.

24 Our focus from the beginning, because we do have a lot
25 of money at stake and we're not merely lazy in not

WASHINGTON MUTUAL, INC., et al.

1 participating in this Court, has been on the FDIC, both as the
2 receiver of the WMB estate, but also with our conflicting role
3 as FDIC corporate. And that's what makes them a little bit
4 different.

5 We have a proposed settlement, for example, which the
6 FDIC no longer supports. But ostensibly it's with the receiver
7 of the bank estate negotiating very heavily for releases of
8 FDIC corporate. You would not see a Chapter 11 debtor doing
9 that, they're two different people. We are concerned, we have
10 been concerned, we have expressed our concern to the FDIC that
11 it can be at times difficult for them to distinguish between
12 their fiduciary duties to us as the receiver of the bank and
13 their separate corporate interests as the FDIC.

14 For example, one irony is WMI has sued FDIC corporate
15 for fraudulent transfer. You sold those assets to JPMorgan too
16 cheaply. It happens we agree. But the assets that were sold
17 were assets of the bank. They didn't sell the stock of the
18 bank. If the assets were sold too cheaply then more should
19 have been paid for them, more should have gone into the bank,
20 more should go to the bondholders.

21 Counsel has rightly pointed out the irony that a
22 thrift holding company whose only material asset was stock of
23 the bank at the moment is debating with Your Honor whether
24 common shareholders should get a recovery, after senior debt,
25 after subordinated after -- junior subordinated after,

WASHINGTON MUTUAL, INC., et al.

1 preferred shareholders, they need common shareholders to get a
2 recovery we're asking whether senior and some subordinated
3 bondholders of the bank to get even half their money back.

4 I'm not asking today decide that's right or wrong.
5 But it surely raises the question is that right? Is that
6 possible? Is it logical? And even if there is some logic
7 under which that could make sense the question has to be why.
8 And the purpose of our proofs of claim, the purpose of our
9 discussions with the FDIC is we need to explore how this could
10 come to pass. Either it can't come to pass, which we think is
11 the case which is why we filed the claims in which to pursue
12 them. Or if it did, something's fundamentally wrong. Outside
13 of your jurisdiction the fundamentally wrong, meaning the FDIC
14 did something wrong here. And we have draft pleadings ready to
15 go against them, not in this Court, that's for another day. We
16 have -- there is a -- the permanent subcommittee of
17 investigations of the Senate has opened a file in the FDIC,
18 including in connection with this case, and we have been in
19 communication with them, providing them white papers. We are
20 pursuing our rights diligently, not in this venue, there's no
21 proof of claim, but elsewhere.

22 So please do not mistake our silence today or our
23 general deference to pleadings filed by the WMB bondholder
24 group as an indication that we don't have a dog in this, we
25 have a very large one.

WASHINGTON MUTUAL, INC., et al.

1 In terms of standing at some point our claims should
2 go away. We didn't hide in our proof of claim that recoveries
3 should be on behalf of the bank. We put it right in footnote
4 number 1. We put it in each count, other than the count on
5 misrepresentation, which separate counsel will address.

6 I hesitate to use the word derivative because it's a
7 term of art, but we are not asking put money in our pocket for
8 particular things they did other than misrepresentation. That
9 is different than saying therefore today our claims should be
10 dismissed.

11 If the FDIC were a trustee, a debtor-in-possession,
12 whose sole duty was to maximize the estate we'd feel a lot more
13 comfortable than an FDIC who is receiver on the one hand and
14 corporate on the other. And, if nothing else, the purpose of
15 our proof of claim is to remind them on occasion of the
16 diligence which they should pursue their claims against the WMI
17 estate.

18 And I'll give you just one example. One of the big
19 issues in contention are tax refunds. Tax refunds that arose
20 pre-receivership or as a result of the sale of assets of the
21 receivership, and then a -- just look what happened, ma,
22 Congress just passed a new NOL law, there's another three
23 billion dollars just sitting there for the taking. Pretty good
24 deal.

25 WMI's disclosure statement -- I'll probably get this

WASHINGTON MUTUAL, INC., et al.

1 wrong. On page 109 acknowledges that substantially all of the
2 income, and substantially all the net operating losses
3 resulting in both those tax refunds were generated by the bank
4 or the bank's subsidiary. There was a proposed settlement
5 which the FDIC originally apparently agreed to, because Your
6 Honor was told that, where billions of dollars of those two tax
7 refunds would go to WMI. It wasn't their income, it wasn't
8 their net operating losses. They would get several billion
9 dollars. We would argue that can't be right, but at least it
10 should be explored as to why they think that is remotely
11 possible, other than FDIC saying we want to get a release for
12 the corporation.

13 And, again, we're talking to the FDIC about this,
14 that's not your problem. It does suggest it may be premature
15 to disallow our claims while there are still serious issues
16 like that.

17 You have to ask why isn't the FDIC supporting
18 dismissal here? The very beginning of the case -- we actually
19 did show up once, it wasn't me it was my partner, prepared for
20 three days straight. Got up, Your Honor said sit down. So
21 that was the end of our participation.

22 But then you said sit down because the FDIC said hey,
23 we're the receiver not you guys. You said they kind of are.
24 They're not saying that today. They're saying yes, our claims
25 may overlap, but whether they do, in fact, is a factual

WASHINGTON MUTUAL, INC., et al.

1 determination which can only be developed after discovery. It
2 says it in their pleadings. I encouraged them to stand up to
3 stay if they don't have that position anymore, but they're not
4 sitting here. And it's their claims that we're supposedly
5 pursuing. So it's not as much their concern, it should be the
6 FDIC's concern.

7 And then let me hit on what is unstated in all of
8 this. You've heard excellent legal argument all around. This
9 case, that case, Arkansas. I often find that by diving into
10 all the legal issues one can miss the overall context. There
11 is a context here. As I said one of the contexts is FDIC
12 receiver versus corporate, and all we ask that that be
13 preserved. Another context is there was announced settlement
14 that is no longer a settlement.

15 Your Honor, we got an agreement with JPMorgan, with
16 the WMI committee, with the FDIC, here it is. That is no
17 longer the case. FDIC no longer supports that agreement.
18 Whether they support something close to it, far away from it,
19 don't know, but they've announced publicly they're no longer in
20 support of that agreement, and the disclosure statement does
21 say that. FDIC says nice words like we're in discussions and
22 we are hopeful, but they're not in support.

23 The settlement as proposed had a number of elements,
24 including several billion dollars of tax refunds to WMI which
25 is completely mystifying. And most of the rest to JPMorgan, is

WASHINGTON MUTUAL, INC., et al.

1 a TARP recipient, which was equally mystifying. Which we have
2 pointed out to them and to the Senate.

3 The settlement must have the approval of the FDIC.
4 Self-evident, but it states they don't have that yet. They
5 hope the settlement will have the approval of the bondholders
6 at the bank. Recognizing they only speak for their particular
7 clients, we speak for ours, neither of us is speaking for the
8 whole bank estate, and I'm not just saying that for 2019
9 reasons, I'm saying it because it is the case. Nevertheless,
10 they have said they hope that our two groups will be supportive
11 of a settlement, it's clear we're not. They said if we're not
12 then the claim should be disallowed.

13 Today we put the card before the horse. There is not
14 a settlement yet. At the time there was a settlement and they
15 said all we need is to disallow those pesky claims and we're
16 off to confirmation. That's not the case today. Regardless of
17 whether our claim to disallow today, there's not a settlement,
18 there still needs to be one.

19 We think, respectfully, it is in their interest, not
20 just ours, not to disallow our claims. Not today.

21 The FDIC, whether one can question how long it took
22 them to come to this realization, nevertheless now realizes it
23 does have its own bondholders. There are creditors to whom it
24 owes some sort of duty, and it should listen to them and it has
25 started to listen. And maybe the Senate has helped, maybe not.

WASHINGTON MUTUAL, INC., et al.

1 Permanent subcommittee the same folks who did the McCarthy
2 investigations, we hope this isn't similar, but they're an
3 important subcommittee. And the FDIC has said okay, we're
4 going to put our brakes in the settlement, we want to listen to
5 what folks said. It is relevant to the FDIC. This is
6 speculation, not settlement discussion. But it should be self-
7 evident whether its bondholders are supportive. They said they
8 can settle without us, perhaps they can, but it would be nice,
9 as it would be nice for any debtor to have its committee be in
10 support.

11 Here's the crux of it. There's a curious provision in
12 the proposed settlement. Certain of the tax refund amounts
13 payable to the bank are payable either to the bank or as the
14 FDIC directs. It's an odd phrase. It is a very intentional
15 phrase. There's always two components to value for creditors.
16 One is how much you get, the other is when you get it; time,
17 value, money.

18 In the bank receivership we hope there are just 6.1
19 billion of senior claims, 7.6 billion of subordinated bonds.
20 But there's lots of other asserted claims; like thirty-nine
21 billion. The FDIC won't tell us what they are. We filed a
22 freedom of information act, they said sorry, privately, won't
23 tell you, but there are other people asserting claims like they
24 do in Chapter 11s, it could take some time to resolve those
25 claims. Class action claims, misrepresentation, directors and

WASHINGTON MUTUAL, INC., et al.

1 officers, whatever it is, could take months, could take years.
2 In the context of the WMI case, WMI's pleadings said it would
3 take years to resolve litigation like the one that these folks
4 have run.

5 So not only would we respectfully like to lose less by
6 getting a larger recovery, we'd like to get it sooner rather
7 than later. The language that the FDIC had agreed to at one
8 point, and I'm going to say are still sticking by, whatever new
9 settlement there may or may not be, they're sticking by that
10 language, is a vehicle. It is a vehicle to provide potential
11 recoveries to bondholders. Not to my clients, not to his
12 clients, to bondholders as a group, as the FDIC directs. Under
13 FIRREA and their general statutes, they have broad discretion.
14 They could say -- they may or may not, but they could say that
15 we direct that so much of the tax refund be distributed today
16 on bondholder claims. That gives us not only a recovery but a
17 recovery today not three years from now. By disallowing the
18 claims before we get to a settlement that may or may not be
19 with our approval would take that very important leg out from a
20 potential settlement. It would make it less likely we would
21 support a settlement. And if it's less likely we support a
22 settlement, it's less likely the FDIC supports a settlement.
23 Not impossible, they've settled once before without us, and
24 they may do it again.

25 So I'm not going to sit here and say our proof of

WASHINGTON MUTUAL, INC., et al.

1 claim doesn't say what it did. It said it. It said it right
2 in footnote 1, right in every class. These claims are to
3 recover on behalf of the estate, other than representation,
4 we'll get to. I respectfully request that it's premature,
5 today, to disallow our claims.

6 We don't say -- and again, I'm distinguishing us, now,
7 Mr. Anker's group -- we don't say deny disallowance forever,
8 deny it with prejudice. Have this hearing continued for six
9 months. Have it continued until such time as the FDIC requests
10 on twenty days' notice that they would not like to support this
11 allowance. Take your decision under advisement for several
12 months.

13 While we agree with counsel's arguments as to why the
14 claims should not be disallowed as a matter of law, we really
15 do request that the Court consider the context and not disallow
16 them as a matter of making it more difficult to resolve these
17 cases consensually. Those claims are helpful. The FDIC had
18 that language in the settlement for a reason. Removing our
19 claims makes it that much harder.

20 With that, Your Honor, I'd like to turn it over to co-
21 counsel to talk about the representation forms.

22 MR. JARVIS: Good afternoon, Your Honor. My name is
23 Geoff Jarvis. I'm with the firm of Grant & Eisenhofer, and I
24 am, I guess, the securities lawyer who's in here. So, he felt
25 triple-teamed. I feel I don't know how many teamed, here, but

WASHINGTON MUTUAL, INC., et al.

1 I'm by no means a bankruptcy lawyer. So Mr. Jeff Schwartz of
2 the firm Drinker, Biddle & Reath is here to represent the same
3 clients that I do, but he'll actually answer bankruptcy
4 questions, as opposed to things that deal with securities laws.

5 Let me sort of set the stage for who we are, why we're
6 here. You've obviously never seen us before. We represent
7 seven financial institutions, primarily large insurance
8 companies, although in at least one case, a mutual fund or
9 investment fund complex, ING that you see all around us. They
10 bought approximately 600 million dollars worth of WMB
11 subordinated and senior debt. We paid par for it. We bought
12 it all prior to the bankruptcy. So we were people who
13 purchased during the period when alleged misrepresentations
14 were occurring and then lost substantially all of their
15 investment as a result of the bankruptcy. But that is not when
16 the injury occurred, as I will get to in just a second.

17 We were formally part of the group that is represented
18 by Mr. Flaschen, and as to the nonmisrepresentation claims, the
19 seven institutions I represent continue to be represented by
20 Mr. Flaschen. However, with respect solely to the misrep
21 claims, which we consider, sort of, the federal securities law
22 and the related claims, I will be counsel, as will Mr. Schwartz
23 and his firm. So we've carved out a small piece just for the
24 misrep claim. My clients felt they wanted a securities lawyer
25 to basically pursue securities claims. To the extent that this

WASHINGTON MUTUAL, INC., et al.

1 claim became a contested matter, it would effectively involve
2 litigation of the federal securities laws, and as someone who
3 does that for a living, I am here to represent them in that
4 regard. So that's sort of how we differ from everybody else.
5 And as I say, we're entirely par purchasers; we're entirely
6 purchasers during what would be considered a relevant period
7 for securities fraud. I mean, I'm not saying that some of the
8 other clients Mr. Flaschen represents might not meet that, but
9 certainly the seven do meet those criteria.

10 We're going to -- I was actually going to -- my
11 initial was to let Mr. Schwartz deal with the direct derivative
12 distinction, but I think I'd like to start, primarily because
13 Mr. Anker kept saying you have a securities lawyer, and these
14 seem to be securities questions. And if I get something wrong
15 from a bankruptcy perspective, I'll let Mr. Schwartz tap me on
16 the shoulder and tell you the truth.

17 THE COURT: That's fine. Or explain it to me.

18 MR. JARVIS: What is this claim about? Well, it's
19 certainly not what counsel for the debtors seem to suggest, but
20 I was listening to counsel as to tell me what my
21 misrepresentation claim was. It didn't sound at all like what
22 I thought it was. So I think I'll tell you what I think it is
23 that we were actually seeking to bring a claim for.

24 There is, in the securities world, as Your Honor is
25 well aware, a body of law and of federal securities laws that

WASHINGTON MUTUAL, INC., et al.

1 allows people who have purchased what is known as a security,
2 which has a specific definition, to seek redress from persons
3 who made false statements regarding -- in connection with the
4 purchase or sale of the security. Doesn't necessarily have to
5 be the issuer of the security. In fact, as Your Honor, I'm
6 sure, is aware, in many cases it's people like accounting
7 firms, law firms, investment banks, others, who make a false
8 statement in connection with the purchase or sale of a security
9 that you're held liable under the federal securities laws. In
10 this case, even though counsel for debtors eloquently read that
11 the WMB bonds are obligations solely of WMB, that does not
12 eliminate the fact that to the extent that WMI and/or its
13 officers and directors made false statements that induced the
14 purchase or -- in connection with, not even induced -- in
15 connection with the purchase of the securities that my clients
16 purchased, that to the extent that those statements were false
17 and made for at least some of my claims, with knowledge of
18 falsity, there is a claim under the federal securities laws
19 against the makers of those statements. And in this case, that
20 would be the directors and officers of WMI.

21 Well, there's been a lot of talk, and I think we'll
22 get to it more when we talk about, I think, the crux of this
23 matter. And just to tell you where I'm going, I think the crux
24 of this case, on the direct road we're standing, is where is
25 the line between Sunrise and Hayes, and how do you reconcile

WASHINGTON MUTUAL, INC., et al.

1 those two decisions. And I think that the first thing you have
2 to understand and is something that Mr. Anker quite clearly
3 pointed out is that we purchased securities. We did not
4 purchase a deposit. Well, what is a security?

5 Can I have that piece of paper? I had given it to Mr.
6 Schwartz, but one of the key requirements of a security under
7 the United States -- under the Securities Act of 1934,
8 Federal -- actually, the Securities Exchange Act, 1934 -- is it
9 must be an obligation of greater than nine months. Well, I
10 think that's something to be remembered. Nine months. How
11 long is nine months? Nine months is approximately 270 days.
12 Well, do you recall when counsel for debtors got up and he read
13 you the front page of that bond offering? Says these things
14 are to be not less than 270 days. Well, what does that make
15 it? It's quite clear that the intent was that these bonds are
16 intended to be securities within the meaning of the federal
17 securities laws.

18 So what do we buy? We bought securities, which are,
19 albeit, not the same as equity, but for the purposes of the
20 federal securities laws, not effectively different, either.
21 They are both subject to the protections of Sections 10(b) of
22 the Securities Exchange Act, 1934, Section 11, Section 12,
23 Section 15 of the Securities Act, 1933. So that's the first
24 thing you need to know. We bought a security. We didn't buy a
25 deposit; we bought a security.

WASHINGTON MUTUAL, INC., et al.

1 Well, why did we buy this? Why did my clients buy
2 these securities? They bought these securities because there
3 was an enormous amount of information in the marketplace
4 disseminated by, primarily, WMI because most of the public
5 statements that came out of the holding company structure, you
6 know, WMI at the top, WMB. Well, who's doing the talking?
7 It's not like WMB has a whole bunch of people out there doing
8 all the talking. All the talking, the discussions of the
9 performance of the business are being made by the officers and
10 directors, and primarily officers, of WMI.

11 And what were they saying, that we think is somehow
12 improper? The allegations of falsity -- and I'm not going to
13 go into specific false statements. I can if you like, but I
14 don't necessarily think it's necessary.

15 THE COURT: I don't think that's necessary.

16 MR. JARVIS: Fall into sort of four general
17 categories. They were sort of -- they were failing to
18 describe, adequately, what -- they say WaMu. When they mean
19 WaMu, they mean WaMu Bank because WaMu Inc. didn't really do
20 very much. WaMu risk management policies. The false
21 statements dealt with the appraisal process that WaMu Bank used
22 in connection with its issuance of loans. They dealt with the
23 abandonment of underwriting standards at WaMu Bank, and they
24 dealt with misrepresentations of WaMu Bank's financial results.
25 And of most significant interest there, what they dealt with

WASHINGTON MUTUAL, INC., et al.

1 was, they said they had a certain amount of assets. Well
2 these, or many of these were, of course, loans that they had
3 made. They didn't take proper reserves against those assets.
4 They made a whole bunch of false statements in that area.

5 Well, what's the effect of that? Well, I'm buying a
6 bond or my clients are buying bonds, and they thought they were
7 buying bonds in a company that had strict risk management, good
8 appraisals, strong underwriting, proper reservation of
9 reserves, so that the assets were, in fact, properly stated.
10 That's not what they bought. They bought a company that was
11 doing none of those things, at least arguably. And to the
12 extent it was not doing those things, what would my clients
13 have done? Would they have paid a hundred cents on the dollar
14 for those bonds? I assure you they would not. They would have
15 paid fifty cents or forty cents or some other number, which for
16 frankly -- as I stand here today, I won't tell you what it is.
17 I don't know. If, when we get to the contested proceeding,
18 which I hope we'll get to, I will hire experts who will sit in
19 that chair right there and tell Your Honor exactly what those
20 things should have been worth, but for the false statements.

21 So what did they buy? They bought a bond at a hundred
22 that was probably worth fifty. When were they injured? Were
23 they injured when WMB went bankrupt? No, they were injured
24 when they bought a bond that was worth far less than they paid
25 for it. And they -- why is it worth less? Because it was a

WASHINGTON MUTUAL, INC., et al.

1 risky, risky enterprise that was not disclosed. When you buy a
2 bond, it has a certain interest rate. If the extent of the
3 bond or the company appears less risky, you may actually pay a
4 little premium. In other words, let's say it's paying eight
5 percent and you think it's less risky, you might pay only six
6 percent. And how do you do that? You pay a little bit above a
7 hundred. To the extent you think that the company in which you
8 are investing through debt securities is more risky, then you
9 pay less than a hundred. You pay ninety-seven or you pay
10 ninety-five or you pay fifty. And my clients bought at a
11 hundred when they should have bought at fifty. And the injury
12 occurred because they bought into a business that was
13 considerably riskier than it was represented to be because of
14 the false and misleading statements of the defendants, WMI --
15 or, the debtor, I guess. I'm not -- so used to, you know,
16 securities law, but the debtor in this case.

17 And the fact of the matter is those false statements
18 have absolutely nothing to do with whether a bank was
19 mismanaged, was looted, anything else. The bank, quite
20 frankly, for my purposes, could have been the most efficiently
21 and effectively run financial institution in America. To the
22 extent that they, nonetheless, made false statements about the
23 way it was run and the financial health of the business, even
24 if run as well as possible, there is, in fact, a securities
25 fraud case, having nothing whatsoever to do with the

WASHINGTON MUTUAL, INC., et al.

1 mismanagement or anything else about the management of the
2 bank. In fact, in the securities context, we always see people
3 claiming, well, we're not crooks. We're just stupid. We
4 mismanaged the business; we didn't lie to you about it. And in
5 fact, that rarely works because the key to these cases is that
6 you made a knowing -- at least for 10(b) -- a knowing
7 misrepresentation. And we claim that they do. And I might
8 add, and it's been often referred to, the Court in Western
9 District of Washington dealing with these exact same
10 misrepresentations, albeit in the context of WMI, but about the
11 operations of the banks. Bank was, for all intents and
12 purposes. The Court there held that, in fact, if they had pled
13 to the standards of 9(b) and the heightened pleading standards
14 of PSLRA, that these false statements were made with scienter
15 and were false. The exact same ones that if Your Honor says,
16 if this were a contested proceeding, file a complaint, I'll
17 file a complaint, I'll put the same false statements in, and we
18 can go from there.

19 So we've got a security purchased with false --
20 subject to false statements, damage, injury incurred upon the
21 time of purchase.

22 Well, what damages are we seeking? Another point that
23 debtors' counsel made was, well, gee, these guys want their
24 interest, all their principle. I don't know where we got that
25 from. That's not what we're asking for. We're asking for the

WASHINGTON MUTUAL, INC., et al.

1 difference between what we paid for the bonds and what we
2 should have paid for the bonds. And how will we do that?
3 Ultimately, we will provide an expert who will be a financial
4 economist or a finance professor at some business school who
5 will tell you about the very extensive models he has run at
6 great and glorious expense to all of us, or at least to me, and
7 he will tell you why these bonds that were purchased at a
8 hundred should have been purchased at X, fifty, seventy,
9 whatever the number is, and that the damage -- the difference
10 between those two numbers are the damages we will seek. And
11 they will be damages; they will not be all that we were
12 entitled to from WaMu Bank, but what we were entitled to
13 because we were lied to by WaMu Inc. I think when you get
14 there, what is this -- this sort of, I think, brings up, I
15 think what, to me, is the whole crux of the matter.

16 They have argued that this case is governed by
17 Sunrise. It's just like Sunrise. And I look at Sunrise and I
18 say, I don't see hardly any similarities between this case and
19 Sunrise. What does Sunrise involve? It involved people who
20 deposited money, either through a certificate of deposit or a
21 demand account, in a bank. Well, when you buy a CD, last time
22 I checked, you don't look at the bank and say, gee, that bank
23 isn't doing so well. I think I'll pay sixty bucks for that
24 hundred dollar CD. You give them a hundred bucks, they give
25 you a CD, they promise to give you the hundred bucks plus

WASHINGTON MUTUAL, INC., et al.

1 interest back in a year. That is a fundamentally different
2 thing than a security where I can look at it and say based on
3 the risk, it might be risk increased because of something in
4 the media, maybe Moody's downgraded their bonds, maybe Standard
5 & Poor's downgraded their bonds. I'm only going to pay seventy
6 because I think it's much riskier; I need that extra interest
7 in order to make my investment.

8 Sunrise dealt explicitly with depositors. They didn't
9 bring securities claims. Why? Well, they didn't have
10 securities. They couldn't bring securities claims, and they
11 tried to essentially gin what was "I didn't get all my money
12 back, which I gave to them in good faith" into something else.
13 And the Court, I think quite rightly in that case -- and when
14 did they lose the money? Did they have the opportunity to buy
15 at a lower price such that they could have incurred a loss at
16 the time when they made the actual initial investment? No,
17 they had a choice of giving them the money or not giving the
18 money. The injury in that case occurred at the end when the
19 entity went bankrupt.

20 Well, what is Hayes? Where's the difference in Hayes?
21 Hayes involved securities. Now, everybody wants to say, oh,
22 that was an equity security, not a debt security. As a
23 securities lawyer, Your Honor, I've got to tell you the
24 differences are in -- they're minor. I mean, they actually
25 come to debt, you do damages a little bit differently, maybe,

WASHINGTON MUTUAL, INC., et al.

1 because the prices will have moved differently. As far as the
2 theories on asserts, there simply is no difference. A security
3 is a security. And we know from what counsel had to say, more
4 than 270 days out, this is a security for the purposes of
5 federal securities laws.

6 Hayes says, when you got a claim for a security it's a
7 direct claim. You own it. We're not depositors trying to get
8 our money. The FDIC doesn't -- I think everybody has quite
9 clearly pointed out, the FDIC is not protecting us. We're
10 sitting there on, you know, as a group at large, twelve,
11 thirteen billion dollars worth of stuff. My personal clients
12 have 600 million dollars plus of the stuff. Their losses
13 exceed 400 million dollar. Now, I'm not saying all that loss
14 is damages. Probably not all of it is, but certainly a good
15 percentage of it is damages. And we have a case that is on all
16 fours with Hayes and there's no resemblance that I can discern
17 to Sunrise, other than the fact that it involves banks. And I
18 guess there's lots of ways to put money into a bank, and you
19 know, probably better to do it as a depositor when the bank
20 goes bust and not as good to do it as a bondholder. But then
21 we get different remedies than they do, and this is one of
22 them.

23 And on that note, I think I will sit down unless Your
24 Honor has any questions.

25 THE COURT: I have no questions. Thank you.

WASHINGTON MUTUAL, INC., et al.

1 MR. JARVIS: Should -- next we have Jeff. They call
2 us the Geoff and Jeff show. I don't know, its sort of seems
3 humorous to me.

4 MR. SCHWARTZ: And Your Honor, I think that actually
5 gives me a good chance to kind of sum up what you've heard of
6 securities law and how it applies here in this bankruptcy
7 proceeding. And I think the first thing I'm going to ask of
8 you, Your Honor, is when you look at these issues, you've got
9 to look at them claim by claim. In the proof of claim by the
10 WMB bondholders, there are eight allegations. One of them is a
11 misrepresentation. I think what's happening here is all of the
12 allegations are being lumped together in one sum. When you go
13 through the source materials and the charts that were put
14 together by the debtors, you'll see that they lump everything
15 together in four, allegations and the claims, and there's
16 actually, if you look at the allegations and the claims,
17 there's only one allegation that they cite to in claim 2480,
18 and that's our claim, and that's the second to last one, and
19 that has absolutely nothing to do with the securities fraud
20 claims that we're pursuing as a misrepresentation. So I think
21 it's really important to look at the claim, and that's what
22 both Sunrise and Hayes say.

23 And why is this case Hayes, as opposed to Sunrise?
24 You've heard it, but the Court summed it up in Hayes, which
25 came after Sunrise, of course, and they said that in Sunrise,

WASHINGTON MUTUAL, INC., et al.

1 only mismanagement was alleged. In Hayes, plaintiffs allege
2 more than mismanagement. Plaintiffs allege that defendants
3 made affirmative representations inconsistent with the state of
4 corporate affairs they knew to exist. There was more than just
5 that. There was a securities law claim which is an individual
6 claim, solely to purchasers that can be brought only by those
7 individuals. In the arguments by the debtor earlier, Your
8 Honor, I thought it was curious that there was an argument made
9 that this is a derivative claim but the claim cannot consist of
10 those bondholders who bought after the receiver was appointed.
11 Well, if it's derivative, it belongs to everybody. That's the
12 flaw in the difference between the securities law claim and the
13 other types of claims that were dealt with.

14 In addition, Your Honor -- so we think Hayes is really
15 on point. And they say well, Hayes is different because the
16 damages that you're alleging occurred at different times. And
17 again, they forget that in our case, it's a security. The
18 damages were incurred when we purchased the bond at a price for
19 more than it was worth. Under their argument, there'd be no
20 securities law claims that noteholders could bring in the event
21 of a bankruptcy against third parties because those claims
22 would always belong to the debtor's estate. Enron, Global
23 Crossings, whatever case it is, that case would always belong
24 to the debtor's estate. And we know that's not true because
25 those claims go on and are going on now as we speak.

WASHINGTON MUTUAL, INC., et al.

1 In addition, Your Honor, one other thing is, that we
2 want you to look at, they keep saying that mismanagement is
3 what we're really going after, here, and I think as Mr. Jarvis
4 stated, and I do want to emphasize it, the mismanagement's
5 irrelevant to the false statements. As he said, they could
6 have said true statements: Hey, we're running this company
7 into the ground. In that event, we don't have a securities law
8 claim. Or they could have had a terrific company that was
9 doing -- or a company that they were running great, but it was
10 just a lousy company. And in that case, if they didn't tell of
11 certain things, we would have a securities law claim even
12 though there was no mismanagement. There isn't an element in a
13 securities law or 10(b) claim that we have to go ahead and
14 prove that there was mismanagement. It's irrelevant to what we
15 have to find. And that was why the Court decided Hayes the way
16 it did.

17 They say this analysis is entirely consistent with the
18 proposition that an individual stockholder may sue officers and
19 directors based on an injury, distinct from the injury to the
20 corporation and the indirect injury to stockholders generally.
21 This is the type of the injury alleged in this case presently
22 before us. Plaintiff's claim is based on specific
23 misrepresentations that affected prospective purchasers
24 similarly situated to plaintiff, differently than existing
25 stockholders. Plaintiff here seeks to recover the difference

WASHINGTON MUTUAL, INC., et al.

1 between the alleged inflated price he paid for his stock and
2 the price he would have paid if defendants had made accurate
3 statements regarding such subjects as the adequacy of Bell's
4 loan reserves and the strength of Bell's assets. Those are the
5 exact -- the adequacy of the loan reserves and the strength of
6 the assets are the exact type of misrepresentations that were
7 made here.

8 And the one other thing I'd like to do, Your Honor is,
9 we also cite to a Fourth Circuit case that we think is on all
10 fours with Hayes and right on point. And that's Howard. And
11 Howard was a securities law claim. And the debtors seek to
12 differentiate that securities law claim by the fact that it was
13 only made to a single shareholder. But if you look at Hayes,
14 Your Honor, and if you look at -- on page 106 of Hayes, it says
15 what the statements were. It says he alleges the defendants
16 made affirmative representations. And those statements, Your
17 Honor, it goes on to say, were in its 1988 annual report; were
18 in its report to stockholders for the quarter ended December 31
19 and/or in its 1989 annual report. It was made publicly to
20 everybody, not privately to anybody.

21 So just because the Howard case said it was only made
22 to one party isn't relevant to the Third Circuit case. They
23 both agree with each other. And the Third Circuit says it can
24 be made to everybody. So the distinction that they use for
25 Howard also falls by the wayside.

WASHINGTON MUTUAL, INC., et al.

1 And, Your Honor, I'd also cite you to Warren v.
2 Stafford, which is a Third Circuit case, which noted that, "If
3 a defendant represents that its lending practices are
4 conservative and that its collateralization is adequate, the
5 securities laws are clearly implicated if it nevertheless
6 intentionally or recklessly omits certain facts contradicting
7 those representations."

8 So it's abundantly clear that Hayes is on point in
9 this case, and the securities laws claims should go ahead.
10 There is no way to distinguish them by the fact that we're more
11 closely to depositors. Mr. Jarvis dealt with that. There's no
12 way to distinguish it that, oh, it was made to everybody. The
13 Third Circuit said that's okay.

14 So what I want Your Honor to remember is to look at
15 the claims individually. And if you look at the securities
16 fraud claims and the misrepresentations claims, it's clear that
17 those fall under Hayes and that they belong to the individual
18 stockholder or the individual holders, Your Honor.

19 Let me just see if there is anything else that I
20 wanted to follow up on. I think that's all, Your Honor, that
21 we have.

22 MR. JARVIS: If I may briefly, on a different issue?
23 At the outset it was raised the question that certain people on
24 our side had not filed Form 2019 disclosures. I just wanted to
25 tell Your Honor that: A) since we entered this case with the

WASHINGTON MUTUAL, INC., et al.

1 filing of our opposition to their objection, no one ever asked
2 us to file a 2019 or suggest that we should. Notwithstanding
3 that, we are absolutely prepared to do so. All of my people
4 bought at par during the period, and we're happy to do it.
5 When Your Honor issues an order saying everybody do it, we will
6 promptly comply with that. I just wanted to tell that to Your
7 Honor.

8 THE COURT: All right. Thank you.

9 I think there's -- before we have a reply, any more?

10 MR. CLARK: Your Honor, John Clark from DLA Piper,
11 counsel for the FDIC receiver. I'm standing reluctantly. I
12 was hoping I wouldn't have to. But I don't think that I was
13 given much of a choice after Mr. Flaschen's comments.

14 I want to start by saying that I'm not going to
15 respond to Mr. Flaschen point by point. I don't think this is
16 the forum for that, nor do I think it would be appropriate.
17 It's off point. But the fact that I'm not going to respond to
18 it point by point should not be taken by anybody as accepting
19 any comment that he made.

20 THE COURT: Understood.

21 MR. CLARK: With regard to the settlement, Your Honor,
22 if you'll forgive me for looking at my BlackBerry here at the
23 podium, I have to do it, because I have a document that I don't
24 have handy that I would like to read, because it was the FDIC's
25 public statement on March 26th. It didn't put out a press

WASHINGTON MUTUAL, INC., et al.

1 release, but it was available for inquiries. And I think it
2 basically speaks for itself. And I'd like to read a paragraph
3 from that statement for the record.

4 This was -- on March 26th, as the Court knows, the
5 debtor filed a plan of reorganization and a proposed disclosure
6 statement and settlement agreement. The settlement agreement
7 was a proposed settlement agreement, and it was described as
8 such in those filings; and the disclosure statement indicated
9 we hadn't yet finished it, but that we -- I think the debtors
10 said they were hopeful that that would happen soon.

11 "The FDIC is working with all parties involved to
12 reach agreement with respect to all terms of the proposed
13 settlement. The plan disclosure statement and settlement
14 agreement that were filed today do not reflect the continuing
15 discussions among the parties. Once finalized, the agreement
16 is subject to approval by the FDIC's board of directors."

17 In no part of that statement, Your Honor, did the FDIC
18 say that it rejected this settlement or it no longer supports
19 the settlement. The FDIC continues to discuss open points with
20 all parties in the hope that we can resolve those points, as is
21 true in every complicated negotiation; reach a definitive
22 agreement; present that to our board of directors and get it
23 approved. That is our firm hope. But we aren't there yet. So
24 whatever conclusions Mr. Flaschen wants to draw, that's the
25 record.

WASHINGTON MUTUAL, INC., et al.

1 With regard to the FDIC's statement regarding
2 standing, I just -- the Court asked a question about that, and
3 I thought it was important for me to give you an opportunity to
4 ask if you'd like. I don't think there's any dispute among any
5 of the parties that there are certain claims asserted by these
6 bondholders that are clearly bank claims and that however you
7 want to parse 1821(d)(2)(A), it is the FDIC receiver that steps
8 into the shoes of the bank to assert those claims. And those
9 claims -- they include some of the --

10 THE COURT: Well, tell me what they are.

11 MR. CLARK: Well, it's -- that's -- and that's why we
12 made our statement, Your Honor. That's exactly the reason we
13 made our statement, because we're not the -- and now let me say
14 exactly what I'd like to -- what I meant to say on that. We're
15 not the judge of the line. We're a party. We have -- we
16 certainly have views. Certainly, I think, I wouldn't have any
17 debate from Mr. Anker or maybe Mr. Flaschen, I don't know, but
18 I wouldn't have any debate from the bank bondholders that there
19 are some pure claims that are obviously bank claims. Like, to
20 the extent that the bank has a claim to tax refunds, that's the
21 FDIC's claim to assert as the receiver for the bank.

22 The fight about the trust preferred securities, I just
23 don't think there's any debate that the FDIC receiver is the
24 party to assert that claim. And there's a whole list of claims
25 in our proof of claim that relate to that kind of disputed

WASHINGTON MUTUAL, INC., et al.

1 asset. And there are some other claims for breach of fiduciary
2 duty, etcetera, that we have asserted in our proof of claim,
3 which we think are clearly bank claims that the FDIC receiver
4 has, and not any other party asserting them derivatively.

5 We haven't briefed the doctrines of what happens if
6 the FDIC receiver chooses not to assert a claim or what happens
7 if a party asserts that the FDIC receiver has a conflict of
8 interest. If the Court is interested in briefing on that, I
9 would request the opportunity to provide that briefing, because
10 that part -- we haven't had an opportunity to do that. It
11 wasn't presented by the debtors' twentieth omnibus objection.
12 All we said was, there may be some claims, they may be the
13 misrepresentation claims that you've heard a lot about.

14 Mr. Kirpalani is going to talk about fraudulent
15 transfer claims. And we and the debtors have a difference of
16 opinion about that. But that, again, is not presented today --
17 whether the FDIC receiver has standing to assert fraudulent
18 transfer claims, is not presented by the twentieth omnibus
19 objection, because our claim has not been objected to. And we
20 will be happy to brief that if that ever happens, and we're
21 hopeful it never will, because we're working towards that
22 definitive settlement, and maybe that will resolve all of this.

23 The point we were trying to make in our filing, which
24 I just -- I think it's a point -- a factual point, is that
25 there is a line between the claims that are clearly bank claims

WASHINGTON MUTUAL, INC., et al.

1 and those that are perhaps capable of being asserted. But that
2 line is the line, it's the standard common law line between
3 direct and derivative claims. And Mr. Frongillo, I'm sure is
4 about to get up on that, so I won't spend a lot more time on
5 that.

6 Ultimately, we're not the judge, we're just a party.
7 That was a point that we wanted to make. But it's up to the
8 Court to decide where that line is. And if you would like
9 further submissions about what we think in particular claims,
10 we're happy to do that. We have -- we didn't -- we weren't
11 asked to do that as part of the objection. We just wanted to
12 protect our rights as a claimant, because our claim hasn't been
13 objected to. And any of this proceedings shouldn't affect that
14 claim.

15 THE COURT: Okay. Thank you.

16 MR. CLARK: Thank you, Your Honor.

17 MR. GLUECKSTEIN: Good afternoon, Your Honor. Brian
18 Glueckstein from Sullivan & Cromwell LLP on behalf of JPMorgan
19 Chase.

20 The claims at issue today are not against our client.
21 We've reserved our rights. But with respect to the standing
22 issue, which is important to JPMorgan Chase, I just wanted to
23 note that we've heard a lot today about the misrepresentation
24 claim, and we heard a little bit about the fraudulent transfer
25 claim. With respect to the other claims that are pending,

WASHINGTON MUTUAL, INC., et al.

1 especially with respect to the claims that have been brought by
2 the FDIC receiver in this action, it seems clear that everybody
3 seems to be conceding that these are derivative claims.

4 And JPMorgan would submit that to the extent that
5 these are derivative claims with respect to assets that are
6 either claims being brought on behalf of the receivership
7 estate, that are either going to be property of the estate or
8 of JPMorgan Chase, pursuant to the purchase and assumption
9 agreement that JPMorgan Chase entered into with the FDIC, those
10 claims must be dismissed under FIRREA, under Section
11 1821(d)(2)(A), that it is the FDIC receiver who has standing to
12 bring those claims.

13 And all of this discussion about whether parallel
14 claims should prevail, everyone seems to be in agreement,
15 putting the two claims aside, misrepresentation and fraudulent
16 transfer where there seems to be a great deal of dispute today,
17 that those are derivative claims on behalf of bank or creditors
18 as a whole. And we would submit that those claims must be
19 dismissed from this action.

20 In addition, there are claims pending in a case that's
21 been discussed in this court, the ANICO litigation pending in
22 D.C., the District Court in the District of Columbia, in which
23 certain bondholders have asserted claims against JPMorgan Chase
24 and the FDIC receiver. Both of those parties, JPMorgan Chase
25 and the FDIC receiver, in that action, has taken the position

WASHINGTON MUTUAL, INC., et al.

1 that derivative claims can only be pursued by the FDIC.

2 So again, reserving our rights as with respect to the
3 substantive issues, as we did in our written papers, we would
4 submit that any of the derivative claims pending today,
5 certainly all of the claims that the FDIC receiver has brought,
6 should be dismissed. Thank you.

7 THE COURT: Thank you.

8 MR. ANKER: Your Honor, if I could appear for one
9 second in light of those remarks? Just so the record is clear
10 and so Your Honor isn't confused, because counsel has said
11 everyone agrees, I think it was clear from my remarks, we do
12 not agree that the alter ego, veil piercing claims -- corporate
13 disregard claims -- are derivative. And if they are, we assert
14 that we should be able to bring them, in particular, because
15 the FDIC -- and I don't -- didn't hear Mr. Clark dispute this,
16 has not.

17 Similarly, substantive consolidation, I don't claim --
18 I don't think is derivative. As to other claims that may be
19 derivative, I think what the FDIC said in its pleading is
20 right, and that is that the line is hard to draw, that frankly
21 it doesn't matter, because at the end of the day, no one's
22 arguing there's going to be a double recovery. And if it is a
23 claim they've asserted, then they -- you know, we're not going
24 to step into their shoes unless ultimately the Court holds
25 there's a conflict, and we are able to assert it derivatively.

WASHINGTON MUTUAL, INC., et al.

1 But this Court need not wade into that issue and
2 figure out exactly where that line is, when the claims are
3 going to go forward anyway, if there's an overlap -- if there
4 truly is an overlap and they've been asserted. They're going
5 to -- that's exactly what the Supreme Court said in Clinton.
6 It's exactly what it said in the other case.

7 I didn't want the Court to be confused in light of
8 counsel's statement that there is agreement. There is not.
9 Thank you, Your Honor.

10 THE COURT: I think the debtor can reply.

11 MR. FRONGILLO: Well, today you've heard a new theory
12 of damages that does not appear in the proof of claims. You've
13 heard, for the first time, that the bondholders are seeking a
14 claim for damages that is above and beyond what they paid; that
15 they paid an inflated price for bonds. You will not find that
16 in these proof of claims. In fact, the section that I read to
17 you was that what they are looking for for damages is the fact
18 that there was a default on the bonds when the bank closed its
19 doors and had to stop making the payments. And they're looking
20 for the balance of the principal and interest.

21 Now, they've effectively -- I was accused of rewriting
22 their complaint or their proofs of claims, and they have
23 effectively tried to do that by way of argument before you
24 today.

25 THE COURT: Well, don't they say that in paragraph 13,

WASHINGTON MUTUAL, INC., et al.

1 the misrepresentation and material omission portion of their
2 proof of claim?

3 MR. FRONGILLO: I don't believe there's any argument
4 in here, whatsoever, that anybody paid an inflated price for
5 the bonds and that they're now seeking --

6 THE COURT: Well --

7 MR. FRONGILLO: -- the difference.

8 THE COURT: -- but they're -- in connection with their
9 purchase of the senior notes, they relied on these
10 misrepresentations and material omissions.

11 MR. FRONGILLO: Well, they do say that.

12 THE COURT: And therefore the debtors are liable for
13 resulting damages.

14 MR. FRONGILLO: But they don't describe the theory of
15 what it is that they're looking for. The only time they spell
16 out what their actual damages are, Your Honor -- and they do,
17 they spell it out with specificity --

18 THE COURT: Well, I don't think in a complaint you
19 have to lay out your damages. You lay out your claim.

20 MR. FRONGILLO: Well, I think that what they have done
21 here basically, they've now written two or three more lines as
22 to what they're looking for for relief, and what the value of
23 their claim is. Because prior to this, the value of their
24 claim, they haven't even cited a federal securities statute.
25 They haven't even cited a state securities statute. They just

WASHINGTON MUTUAL, INC., et al.

1 do a vague pleading allegation. And when they do come to claim
2 and damages, they spell out what it is that they're looking
3 for.

4 But the point is basically this, because it goes back
5 to, I think, an issue that was raised right at the outset of
6 the discussion. Who bought what and when? Because if anybody
7 bought a bond after the receivership, this argument that's
8 being made that they've been defrauded under the federal
9 securities laws or state securities laws, goes right out the
10 window. Nobody can argue that they relied on a publicly made
11 statement about the health of the bank that was made before the
12 receivership, when they bought the bonds after the
13 receivership. It goes back to the crux of the issue here.

14 You have no idea, other than representations of
15 counsel today, as to which of these bondholders bought what
16 bond, how much and when. And I do take issue with Mr. Jarvis
17 in terms of his comparison of the Sunrise case -- a certificate
18 of deposit and a bond. What is a certificate of deposit?
19 Somebody decides that they want to buy a certificate in a
20 certain amount at an agreed-upon interest rate. What is a
21 bond? It's effectively an IOU. Somebody agrees to pay -- to
22 loan money, which is what this was -- this was a debt
23 financing. They write a check for a certain amount of money,
24 and they get the bond back. It's like an IOU. There are
25 payments made based on interest rates on the amount that they

WASHINGTON MUTUAL, INC., et al.

1 loaned to the bank or a company, whoever issues the bonds.

2 THE COURT: Well --

3 MR. FRONGILLO: And there's a payment schedule.

4 THE COURT: -- would a CD be covered by the definition
5 of a security under the securities laws?

6 MR. FRONGILLO: I don't believe so. The only
7 distinction --

8 THE COURT: But a bond clearly is.

9 MR. FRONGILLO: A bond can be a security. I think
10 there's cases going both ways, but I do not dispute that a bond
11 can be a security. But the way the bond is paid is the same
12 way -- this is critical as to how somebody suffered an injury,
13 because if the interest rate is keyed on the amount of the
14 payment, if they overpaid, it means that they're getting
15 overpaid in the amount of the interest that they're making
16 because the interest is keyed in to how much money they paid.
17 And there's no default on the bond until the closing of the
18 bank whereas with a security, when a security is bough, a
19 security doesn't pay interest --

20 THE COURT: Well, but they

21 MR. FRONGILLO: It doesn't have --

22 THE COURT: It may receive dividends.

23 MR. FRONGILLO: There's a possibility it may receive
24 dividends but if you're looking at a --

25 THE COURT: And they may be based on highly inflated

WASHINGTON MUTUAL, INC., et al.

1 financial statements --

2 MR. FRONGILLO: Possibly.

3 THE COURT: -- as well.

4 MR. FRONGILLO: Possibly. But if you look at the way
5 a bond is paid out. A bond is paid out oftentimes on a monthly
6 basis interest or part of the principle. And that stopped when
7 the bank closed its doors. The same thing with a CD. What
8 would cause somebody to buy a certificate of deposit at a bank?
9 If they've been reading public statements about a bank,
10 obviously they believe that the bank is a healthy institution.
11 So they loan the money to the bank, the bank agrees to pay them
12 an interest bank the same way it does with a bond and when the
13 CD matures, they get the payment.

14 THE COURT: Um-hum.

15 MR. FRONGILLO: It operates the same way. The
16 security --

17 THE COURT: Are CDs insured by the FDIC?

18 MR. FRONGILLO: Yes, they are. Up to a certain point.

19 THE COURT: But bonds are not.

20 MR. FRONGILLO: That's true.

21 THE COURT: Okay.

22 MR. FRONGILLO: That's true. These were uninsured and
23 that was made clear in the offering circular that I read to you
24 at the outset in Exhibit number 1. So, the issue here is some
25 people -- the people in the Sunrise case who bought the

WASHINGTON MUTUAL, INC., et al.

1 securities, relied on statements which are virtually identical
2 to the ones that these bondholders are saying here. To say
3 that that case -- that we must be reading a different case is
4 ignoring the language of the Third Circuit. It couldn't be
5 clearer.

6 In the Sunrise case, the statements were made in press
7 releases, periodic reports, publicly disseminated information
8 about the business techniques and lending practices of the bank
9 as being sound, prudent, secure, intrasensitive, the loans were
10 fully secured, adequately collateralized, well controlled, the
11 institution was profitable -- does that familiar? Exactly what
12 they're arguing here.

13 And they've argued that we've tried to rewrite their
14 complaint and take away their misrepresentation claim. That's
15 exactly what the plaintiffs in Sunrise argued. The exact same
16 set of facts. They made an investment decision to put their
17 money into CDs based on these types of representations. But
18 the Court determined that that's not when the harm occurred.
19 The harm occurred when the door -- when the doors of the
20 bank -- when the bank became insolvent and they lost money on
21 their CDs and that's what happened here.

22 You don't have any civil lawsuits, Your Honor, where
23 anybody claimed a default on any of these bonds before the
24 receivership. Nobody claimed that they weren't being paid in
25 full and, in fact, they can't because they were.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: Um-hum.

2 MR. FRONGILLO: The injury occurred when the payments
3 stopped. And the payments stopped at the time the bank was
4 forced to close its doors when it was put into receivership.
5 So, the argument, if you will, that this looks more like a
6 security, a security's an equity. You hope that when you buy
7 it will increase in value. That is a hope. But it doesn't pay
8 you every single month, typically, interest and principle and
9 then mature at the end and you get it all back. That's not the
10 way it operates. It's fundamentally a different type of an
11 instrument. And I think that this is closer to -- aside from
12 the label, security, this factually in closer to Sunrise than
13 it is with Hayes.

14 But I want to make another point, since now we're
15 engaged in the issue, is that we have not gone forward with
16 this argument yet, although I believe we've mentioned it, is
17 that under 510(b) of the code, there's going to be -- if the
18 Court permits this claim to go forward, one must be careful
19 what one wishes for. Because under Section 510(b) of the code,
20 under the doctrine of equitable subordination, it's very clear
21 as to what's going to happen here. Is that for a claim for
22 damages arising out of the purchase or sale of a security, that
23 claim shall be subordinated to all claims of interest that are
24 senior or equal to the claim or interest represented by such
25 security.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: Um-hum.

2 MR. FRONGILLO: So, to the extent that they want to go
3 down that road and now try to recast their claim for damages
4 and try to use a security basis for damages, they're going to
5 have a serious issue under 510(b) but we'll leave that for
6 another day. I think that rather than carry on this issue
7 further, I think the Court understands what the arguments are
8 and I know that it's getting near the 5 o'clock hour --

9 THE COURT: Yeah.

10 MR. FRONGILLO: -- and I'm prepared to move forward at
11 this time on the 12(B)(6) arguments on veil piercing and
12 substantive consolidation. Again, the batting order, if you
13 will, Your Honor, was that --

14 THE COURT: Well --

15 MR. FRONGILLO: -- Mr. O'Toole is going to address the
16 dismissal claims for breach of fiduciary duty and the
17 misrepresentation claims and Mr. Kirpalani was going to address
18 the 12(B)(6) on fraudulent transfer.

19 THE COURT: Well, I --

20 MR. FRONGILLO: I only raised that --

21 THE COURT: -- I'd like to skip the 12(B)(6) --

22 MR. FRONGILLO: Okay.

23 THE COURT: -- and here's why. Because I think that I
24 don't like them when they're filed in adversary cases. But I
25 certainly think given the reams of paper and the argument

WASHINGTON MUTUAL, INC., et al.

1 today, I don't think parties can -- I don't think it's helpful
2 to suggest that -- that proofs of claim are so deficient that
3 they should be dismissed for failure to state claim, if you
4 will. And even if I did grant it, I'd allow them to amend
5 their proofs of claim.

6 So I don't think of it as a helpful exercise to go
7 through that. But I did think the standing argument was
8 significant enough that it should be addressed right out front.
9 But did the noteholder respond --

10 MR. ANKER: You know, I know it's late in the day and
11 surreplies are often not permitted. I was hoping I just had
12 one minute to respond on the misrep claim.

13 THE COURT: You can have one minute.

14 MR. ANKER: I hope you'll let me get to the podium
15 before my minute starts counting.

16 MR. FRONGILLO: Maybe I'll wait a minute.

17 MR. ANKER: I will simply point out as -- and this is
18 at the risk of repeating myself. There have been securities
19 claims brought by debt -- for debt securities since time
20 immemorial and in every one of the cases that I'm aware of, the
21 Revco class action, the Global Crossing class action, etcetera,
22 there had been no default until the bankruptcy. Nevertheless,
23 the injury is the difference between the value of the security
24 had there been full disclosure at the time of purchase and what
25 was paid for it.

WASHINGTON MUTUAL, INC., et al.

1 And I will simply point out WMI class action in
2 Washington that is going forward today is not only an equity
3 but a debt class action. If their theory is right, that action
4 is a violation of the automatic stay and these people are
5 breaching a fiduciary duty by not assert -- taking over that
6 plan. You can't reconcile it. On 510, we can get to it if and
7 when there's a 510 subordination motion. I simply will note it
8 says you get subordinated to all claims or interests that are
9 senior to or equal to plan. Well, my position is there's no
10 claim at WMI that is senior to or equal to the plan of the bank
11 because the bank bondholders were told they would be senior. I
12 hope, Your Honor, that was less than a minute. If not, I
13 didn't have a clock on me.

14 MR. JARVIS: If he got a minute, can I have thirty
15 seconds, Your Honor?

16 THE COURT: Yes.

17 MR. JARVIS: Okay. Two quick points. One, counsel
18 kept conflating the idea that the only security is really an
19 equity security. We have to keep in mind that debt security is
20 an equity; they're exactly the same, no difference. Second, he
21 kept saying that the only time anyone ever gets hurt in a bond
22 is when someone defaults and I would have to suggest that's not
23 so. I was counsel in class in the Tyco Securities litigation.
24 I can tell Your Honor -- I'll represent as an officer of the
25 Court, that in fact, in that case, we submitted billions of

WASHINGTON MUTUAL, INC., et al.

1 dollars in damages on defaulted bond, a settlement of more than
2 three billion on debt equity securities existed and bondholders
3 received, literally, hundreds of millions of dollars in a
4 settlement on non-defaulted bonds.

5 So, the idea that the only time damage occurs and is
6 recompensed under the federal security laws when there is a
7 default, is simply not so. And that's all.

8 THE COURT: Okay. Well, I'm prepared to make a ruling
9 on the standing issue with the hope that this moves things
10 along. First of all, with respect to the misrepresentation
11 claims and the securities fraud claims, I think this case is
12 much more similar to Hayes than to Sunrise. I think Sunrise is
13 distinguishable, it was a RICO claim by depositors who bought
14 CDs. CDs are not securities. I appreciate there are some
15 similarities but I think, in this instance, the bondholders
16 have asserted a securities fraud-type claim.

17 The essence of the claim is that the debtor
18 misrepresented the financial condition of itself and WMB and I
19 think that they've stated a claim for that. Although Sunrise
20 says no matter what you call it, you look at the essence of it,
21 I think the essence of their claim is a direct claim not a
22 derivative claim. And I think Hayes made that clear.

23 With respect to the corporate veil alter ego, in OODC
24 I made it clear that state law applies. Washington State has
25 no law on this issue as to whether it's a direct or a

WASHINGTON MUTUAL, INC., et al.

1 derivative claim. There's a split of authority. I don't know
2 what Washington courts may decide. And therefore, I think at
3 this stage of the proceeding, I will not decide that issue.
4 There may be applicable state law by the time this issue really
5 needs to be decided.

6 In addition, even if it is a derivative claim, if the
7 FDIC does not pursue it, the noteholders may ask for standing
8 to bring it on behalf of all creditors. If the FDIC does
9 pursue it and either wins the litigation or settles it, then
10 the noteholders would not have separate standing to bring it.

11 With respect to substantive consolidation, I think the
12 Third Circuit has -- although has said that in deciding the
13 claim you have to look at it from the perspective of all
14 creditors. It did not hold that a creditor, a single creditor,
15 did not have standing to bring that action. In fact, single
16 creditors have brought such actions on numerous occasions. So
17 I think that claim is a direct claim, although in evaluating it
18 I must consider the interest of all creditors.

19 With respect to those -- all the other claims that I
20 think there is agreement that they are derivative and not
21 direct claims, again, at this stage I'm not going to dismiss
22 them because in the event the FDIC does not pursue them, the
23 noteholders may be given the right to pursue them. At this
24 stage, however, I will hold that to the extent there is any
25 overlap with any -- with the FDIC claim, that I will not permit

WASHINGTON MUTUAL, INC., et al.

1 discovery by the bondholders with respect to those claims until
2 the FDIC refuses to pursue them.

3 With that said, I think the parties can talk about
4 scheduling discovery relating to the direct claims.

5 MR. FLASCHEN: Your Honor, very briefly, before we get
6 to that, I want to tie up a loose end. Your -- you said that
7 anyone represented by counsel should show up on a 2019 hearing.
8 May I clarify that I'm not sure that applies to us unless we
9 actually try to appear in the case or intervene or something
10 else? We're just defending a claim right now. Or can you
11 reserve judgment on that until someone files a motion trying to
12 compel us to file a 2019? I had to spend my client's money to
13 show up at a hearing when we haven't shown up at hearings to do
14 2019 activity.

15 THE COURT: Well, you're going to have to show up.

16 MR. FLASCHEN: All right. Thank you, Your Honor.

17 THE COURT: All right. I'd ask the debtor to do a
18 notice for the next omnibus hearing basically saying any party
19 that purports to represent more than one creditor --

20 MR. GLUECKSTEIN: We will do that, Your Honor. Your
21 Honor what about the fraudulent transfer claims which are on
22 for today?

23 THE COURT: Oh. I --

24 MR. ANKER: On standing the debtor -- I don't want to
25 put words in the debtors' mouth.

WASHINGTON MUTUAL, INC., et al.

1 THE COURT: Concede it --

2 MR. ANKER: I believe the debtor has conceded we have
3 standing. I think the issue there is a 12(B)(6) issue.

4 MR. GLUECKSTEIN: No, it's a 9(B) issue --

5 MR. ANKER: Okay. I'm sorry it's a 9 --

6 THE COURT: An actual fraud.

7 MR. ANKER: On 9(B). If Your Honor wants to hear it,
8 we will argue it. I think it's pretty clear but whatever Your
9 Honor wants to do.

10 THE COURT: Do you want to amend your proof of claim
11 to specify the actual fraud?

12 MR. GLUECKSTEIN: I would love to see that.

13 MR. ANKER: If Your Honor believes that we need to
14 amend, I will. I will say Your Honor noted your own decision
15 in the -- and I will get the initials wrong. The OODC case.
16 In that case, Your Honor said all 9(B) requires is that notice
17 be given of the allegedly fraudulent acts. Here the acts are
18 the payments including, within days of the receivership, within
19 days of the bankruptcy, transfers of billions of dollars out of
20 WMB. And I will note that 9(B) itself says that intent can be
21 averred generally.

22 So if Your Honor thinks that we -- you know, my
23 argument, Your Honor, is I think that the proof of claim is
24 more than adequate to meet the standards that Your Honor has
25 set forth with respect to all of the fraudulent transfer. If

WASHINGTON MUTUAL, INC., et al.

1 Your Honor disagrees, then yes, I would like to be given an
2 opportunity to amend.

3 I will simply say to you on the amendment front, we're
4 go -- I mean, they can serve interrogatories on us. We're
5 going to delay the resolution here if we don't get going. And I
6 will say one thing on the discovery schedule. I'm prepared to
7 address it today. I will say we did not have a meet and confer
8 in advance. If Your Honor believes it would be better -- I
9 have a proposed schedule.

10 If Your Honor believes it would be better instead for
11 us to sit down and do what -- frankly, I don't want to sandbag
12 people. Sit down and have a meet and confer and see if we can
13 agree on a schedule, then I will do it. But I will either -- I
14 will proceed in either way Your Honor wants and, frankly, how
15 the debtor wants with respect to scheduling. As I say, on
16 intentional fraudulent transfer I think they're adequate. I
17 think they more than meet Your Honor's standard. If you
18 disagree, yes, I would like an opportunity to amend.

19 MR. KIRPALANI: Your Honor, I'm mindful of the hour.
20 Let me just be very brief.

21 THE COURT: Okay.

22 MR. KIRPALANI: Susheel Kirpalani on behalf of -- of
23 Quinn Emanuel on behalf of the debtors. First, I know it
24 serves Mr. Anker's clients well to gloss over a lot of things
25 but he handed out this demonstrative which, perhaps purposely,

WASHINGTON MUTUAL, INC., et al.

1 he's not wanting anybody to see or maybe Your Honor to see,
2 there are three separate silos of fraudulent transfer claims.
3 It's critical to understand them in reverse order.

4 The last one shows up for the very first time in a
5 brief filed a couple of weeks ago. There's a complete failure
6 to plead, forget about Rule 9(B), Your Honor, the transfer
7 itself is nowhere in the proof of claim. Your Honor's
8 undoubtedly familiar with Pioneer. Undoubtedly familiar with
9 the Third Circuit's case in Hefta. The reason that Mr. Anker
10 never filed a motion under Pioneer is because he knows he'd
11 have to cite the controlling authority in the circuit in Hefta
12 where the Third Circuit said the negligence of counsel must be
13 imputed to the client.

14 There's absolutely no authority whatsoever to permit
15 Mr. Anker to supplement a proof of claim with a 922 million
16 dollar new transfer that he's known about in a case he's
17 intervened for over six months. That is payments on account of
18 a tax reimbursement liability. That's the quote "billions of
19 dollars" transferred on the eve of bankruptcy. There's no
20 billions of dollars. Your Honor, he's referring to one of the
21 other transfers; the deposits.

22 And Your Honor knows and can take judicial notice of
23 the fact that Your Honor learned in the summary judgment
24 proceedings where Mr. Anker adopted the declarations of J.P.
25 Morgan where the whole argument was did cash even ever leave

WASHINGTON MUTUAL, INC., et al.

1 WMB. Because Your Honor will recall the cash was there, it was
2 withdrawn, re-deposited in the subsidiary of WMB. Well, Your
3 Honor, all we're saying is we definitely want to see where the
4 intent to actually defraud someone could possibly lie when what
5 we've done -- what we did --

6 THE COURT: Well, what is he going to say? He's going
7 to say they intended to defraud.

8 MR. KIRPALANI: And how was he harmed by that in light
9 of a federal law that depositors take priority over general
10 creditors of a bank? We were a depositor.

11 THE COURT: Aren't we getting to the merits of it and
12 not to -- you know what he's alleging. I mean he's given three
13 pages in the proof of claim, deals with fraudulent transfers.

14 MR. KIRPALANI: Yeah, but, Your Honor, he doesn't want
15 you to read the pages. He just wants you to count them.

16 MR. ANKER: I'm happy to have you read them.

17 MR. KIRPALANI: If Your Honor reads them -- sit down,
18 Mr. Anker, I'm sorry.

19 THE COURT: Please.

20 MR. KIRPALANI: If Your Honor would read page 5 of the
21 proof of claim, the only statements that go to actual
22 fraudulent intent --

23 THE COURT: Um-hum.

24 MR. KIRPALANI: -- is what the Supreme Court called an
25 Iqbal, the formulaic recitation of a statute. It's quote "the

WASHINGTON MUTUAL, INC., et al.

1 transfers are avoidable because a, they were made with actual
2 intent to hinder, delay or defraud a creditor of the bank
3 including without limitation the bank bondholder." Washington
4 statute Section 19.40.

5 Other than saying that, the intent to transfer a
6 deposit from WMB, as a depositor, the FSB and then cause FSB to
7 let the cash stay with WMB. Your Honor, you tell me. You've
8 been doing this much longer than I've been doing this. Where
9 could there be an intent to defraud a general creditor of WMB
10 when, in light of federal law, the depositor always comes first
11 over a general creditor? If we did nothing. We were just a
12 depositor of WMB.

13 THE COURT: Again, I think that's your defense. I
14 think Iqbal talked about whether or not, you know, the transfer
15 was made, identify the transfer. You can't just say transfers
16 within the ninety days before bankruptcy are avoidable --

17 MR. KIRPALANI: Sure.

18 THE COURT: -- because the debtors presumed to be
19 insolvent. You have to identify what the transfers are.

20 MR. KIRPALANI: But what it all gives Your Honor the
21 power to do -- judicial common sense. Your Honor sees
22 fraudulent transfer claims every week.

23 THE COURT: Um-hum.

24 MR. KIRPALANI: We are not here asking to expunge
25 constructive fraudulent transfer. The range of discovery that

WASHINGTON MUTUAL, INC., et al.

1 Mr. Anker wants to lodge against individuals going to actual
2 intent, he has not even met the slightest burdens under Rule
3 9(B). There's a reason, Your Honor. There's a reason Rule
4 9(B) says what it says. It's because the burdens are different
5 on defendants and for these purposes we are the defendant. He
6 can't just say this was a constructive fraudulent transfer and
7 because it's a parent company, it's actual intent. It doesn't
8 work under Rule 9(B), Your Honor.

9 We're allowing the constructive fraudulent conveyance
10 claims to continue past today but he's got to meet his burdens.
11 And I know Your Honor is very liberal with allowing parties who
12 file claims to just state forth what's the basis of those
13 claims. When a creditor alleges actual fraudulent intent, they
14 have to be held to the standards of Rule 9(B) and Your Honor
15 does have to think about it with your judicial common sense as
16 well. And that's all we're asking Your Honor to do.

17 With respect to the antiquated billions of dollars of
18 upstream dividends, 2006 and 2007 are the transfers we're
19 talking about. Those are the dividends, Your Honor. Those are
20 the dividends. These dividends were, by the claimants own
21 admission, fully disclosed and following those transfers, Your
22 Honor knows and can take notice from the same securities
23 filings and similar ones that WMI down-streamed six and a half
24 billion dollars downward.

25 THE COURT: But --

WASHINGTON MUTUAL, INC., et al.

1 MR. KIRPALANI: Your Honor, just -- for actual
2 fraudulent intent purposes only; I'm not talking about
3 constructive fraudulent transfers.

4 THE COURT: But that's not in his proof of claim. The
5 down-streaming.

6 MR. KIRPALANI: Well, Your Honor --

7 THE COURT: So --

8 MR. KIRPALANI: -- his proof of claim talks about net
9 transfers --

10 THE COURT: Um-hum.

11 MR. KIRPALANI: -- from 2006 to September 25, 2008.
12 His proof of claim cites -- the FCC filing cites the OTS and
13 Your Honor can take judicial notice under Rule 201 of those
14 types of regulations because there is no legitimate dispute
15 that those actually did occur. We're not asking you to take
16 notice of things that I'm trying to argue from the podium here,
17 Your Honor. These are matters of public record. There's no
18 legitimate dispute as to them.

19 And the point, again, is on actual fraudulent intent
20 what can he say? That in 2006 and in 2007 there was an actual
21 intent to siphon money away form the bank. Of course, six and
22 a half billion dollars went the other way two years later.

23 THE COURT: All right.

24 MR. KIRPALANI: Thank you, Your Honor.

25 THE COURT: Thank you.

WASHINGTON MUTUAL, INC., et al.

1 MR. ANKER: Do you want me to respond, Your Honor?

2 THE COURT: Yes.

3 MR. ANKER: It's late in the day and I'm not sure I
4 have the issues at hand. So I apologize, Your Honor, if I jump
5 around. First, I believe our proof of claim put at issue all
6 of the various transfer at issue. And yes, there are three
7 potential categories. Dividends, deposits and the 920 -- I
8 think it's 922 million dollars which I think is also a deposit
9 although it was -- I'm sorry, Your Honor -- for taxes as well.

10 I would just ask the Court to look at the proof of
11 claim. You know, the notion that the Court would throw out --
12 we tried to be specific, we also tried to be general. We began
13 by saying before the bank was forced into receivership, the
14 debtor caused the bank to transfer billions of dollars in cash
15 and other assets to the debtor, an insider of the bank. These
16 transfers are avoidable. We went on to say the bank
17 bondholders have not had an opportunity to take discovery yet
18 and therefore have not yet uncovered all the cash and other
19 property WMI caused to be stripped but based on the limited
20 information available to date, the transfers that may be
21 avoided and recovered from WMI and its estate include without
22 limitation and it then talked about both dividends and
23 deposits. As I say, I think that the 922 million involved a
24 deposit balance. So I think we put it all at issue. I'm happy
25 to clarify or amend if that's not clear.

WASHINGTON MUTUAL, INC., et al.

1 On fraudulent intent, Your Honor said -- Your Honor
2 said and this seems to me you just said the same thing. And
3 I'll quote you from the OODC case. "To state a claim for
4 fraud, all the plaintiff need do is inform the defendant of the
5 particular conduct which is alleged to have been fraudulent."
6 As Your Honor just said, the particular conduct that is
7 allegedly fraudulent is each of these transfers.

8 The answer -- I mean, we argued about the debate the
9 merits but I'll debater the merits. On the deposit I'll make
10 three points. First, Mr. Kirpalani's argument assumes it was a
11 deposit and it can't properly be viewed as a capital
12 contribution or otherwise recharacterized. Fact issue; we
13 don't so concede that it's properly a deposit.

14 Second, on the deposit preference. It's a preference
15 and this is, I think, related to the first point but not the
16 same as the first point. The federal deposit insurance act
17 says that depositors get preference but shareholders don't.
18 And so what happens when a shareholder has -- is the purported
19 depositor? It's not a third party. And it's a shareholder who
20 we allege -- I understand he disagrees; that's what litigation
21 is about -- has undercapitalized the bank dramatically. Those
22 get recharacterized as not being deposits and the FDIC -- I may
23 not agree with Mr. Clark about everything but the FDIC has
24 enormous powers in a FDIC receivership to do lots of things
25 including recharacterizing and subordinating.

WASHINGTON MUTUAL, INC., et al.

1 In any event, in any event, what could have happened
2 even if it were a deposit and even if it were not subordinated,
3 is WMB could have simply frozen the deposit and set off against
4 its billions of dollars of claims. Now, he says that wouldn't
5 have happened because the J.P. Morgan transaction would have
6 transferred the deposit balance. I don't so allege. I think
7 had the deposit been at the bank the FDIC would have done the
8 smart thing and kept the deposit at the bank and prevented them
9 from getting it.

10 And I think they made the transfer and yes, I so
11 allege, for the very purpose of preventing setoff by the FDIC.
12 The 922 million was transferred on the eve of the bankruptcy.
13 In respect of an alleged debt that had been around for years
14 and years and years. Why all of a sudden make the transfer?
15 Obviously, because they knew that insolvency proceeding were
16 coming and I do so allege and they wanted to get it out of --
17 indeed, they say in their pleading, it was done to get it from
18 a -- from one bank to a more solvent bank. Which is a way of
19 saying, in cute language, the purpose was to hinder, delay and
20 defraud creditors of the insolvent bank. So, so I allege.

21 I understand he is entitled to dispute everything I
22 just said. But to say that this doesn't state a claim, I
23 respectfully submit that is beyond the pale. These are the
24 sorts of allegations you get. The transfers are identified.
25 If they want a more particular statement, we will amend it if

WASHINGTON MUTUAL, INC., et al.

1 Your Honor really thinks that's useful. I think what would be
2 useful is to get going towards litigation of the facts and
3 hopefully, Your Honor -- and I want to underscore something Mr.
4 Flaschen said. Hopefully, frankly, a settlement. A settlement
5 that includes everyone.

6 But if people think it's productive to spend time
7 having me write the words that I just stated orally, I will
8 write the words that I just stated orally. Thank you. Your
9 Honor, if Your Honor doesn't have questions, I'll cede the
10 podium to Mr. Kirpalani.

11 MR. KIRPALANI: I'm going to try and make this as
12 simple as I possibly, humanly can. I understand Your Honor's
13 inclination already with respect to actual fraudulent transfer,
14 okay? What I want to stress, because, like I said earlier, it
15 serves Mr. Anker's clients to put some clouds on things and
16 I've been in that situation many times.

17 The issue that I want to stress with Your Honor is
18 this tax reimbursement claim which shows up for the very first
19 time is a brief that Mr. Anker filed. I honestly feel that it
20 is disingenuous for him to stand up here and say I think that
21 might have to do with a deposit. Come on, Your Honor. Six
22 months the summary judgment motion has been briefed. He
23 actively participated. He knows exactly what he's talking
24 about. He never filed a motion under Pioneer. And if Your
25 Honor is going to say to me, Mr. Kirpalani, I appreciate what

WASHINGTON MUTUAL, INC., et al.

1 you're saying, I think there's a lot of factual issues, actual
2 fraud, I don't need to see Mr. Anker's podium speech put down
3 on a piece of paper, my judicial common sense says this is good
4 enough, I'll sit down on those points.

5 I can't sit down on a brand new claim filed by this
6 well represented claimant a year after the bar date when we've
7 got a Chapter 11 plan on file. There's clear Third Circuit
8 authority on this, Your Honor. You can't let him out of this
9 problem he's found himself in. If he wants to file a motion
10 under Pioneer, I'll be happy to come back and argue it but he
11 can't do it this way. Your Honor, you can't let him do it with
12 a brief.

13 THE COURT: Well, as far as the Pioneer issue, I'll
14 decide that as part of the merits of the claim. I'm not going
15 to preclude the debtor from raising that that it's not included
16 in the claim. But I will not require modification or amendment
17 of the proof of claim. I think there is -- the claimants have
18 stated a claim for actual fraud. Again, I don't know what more
19 they could've stated. I think the parties are not going to be
20 sandbagged by their claims.

21 So, I would encourage the parties to talk and get
22 together a scheduling order.

23 MR. ANKER: And we'll discuss that on the 16th, Your
24 Honor? Is that how you'd like to proceed?

25 THE COURT: Yes.

WASHINGTON MUTUAL, INC., et al.

1 MR. SPEAKER: Your Honor, do you want -- I'm sorry. I
2 thought you said the next omnibus was the 16th. Did I mishear?

3 MR. ANKER: I apologize. The 21st.

4 THE COURT: The 21st. Okay.

5 MR. ANKER: I don't mean to move it up. Whatever date
6 it is, it is. Your Honor, do you want us to submit an order --
7 settle an order on today's hearing?

8 THE COURT: Yes.

9 MR. ANKER: We will do so. Thank you, Your Honor.

10 THE COURT: All right. Then we're adjourned?

11 MR. SPEAKER: Yes, ma'am.

12 THE COURT: All right. Thank you.

13 (Proceedings concluded at 5:11 PM)

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I N D E X

R U L I N G S

DESCRIPTION

PAGE

LINE

Application for Order Authorizing the

26

4

Employment and Retention of Peter J.

Solomon Company, as Financial Advisor

and Consulting Expert to the Official

Committee of Equity Security Holders

Nunc Pro Tunc to February 12, 2010, granted

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

Clara Rubin
AAERT Certified Electronic Transcriber (CET**D-491)

Veritext
200 Old Country Road
Suite 580
Mineola, NY 11501

Date: April 7, 2010

Exhibit B

Debtors' Amended Notice of Required Compliance with Bankruptcy Rule 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

-----X
:
In re : Chapter 11
:
WASHINGTON MUTUAL, INC., et al.,¹ :
:
Case No. 08-12229 (MFW)
:
Debtors. : (Jointly Administered)
:
Hearing Date: May 19, 2010 at 11:30 a.m.
:
Submission Deadline: May 17, 2010 at 5:00 p.m.
-----X

**AMENDED NOTICE OF (A) REQUIRED COMPLIANCE WITH
PROVISIONS OF BANKRUPTCY RULE 2019(a)
AND (B) HEARING TO SHOW CAUSE
WHY SANCTIONS OR LIMITATIONS
PURSUANT TO BANKRUPTCY RULE 2019(b)
OR OTHERWISE SHOULD NOT BE IMPOSED**

NOTICE IS HEREBY GIVEN that, (a) in accordance with the Court's directive of April 6, 2010 (the "Directive"), and (b) consistent with the Court's Opinion, dated December 2, 2009 [Docket No. 1952] (the "Opinion"), on or prior to May 17, 2010, at 5:00 p.m., **rather than April 19, 2010, at 5:00 p.m. as previously noticed**, every entity or committee representing more than one creditor or equity security holder in the above-referenced chapter 11 cases shall file a verified statement (the "Statement") with the Clerk of the Bankruptcy Court consistent with the provisions of Rule 2019(a) of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules"), including, without limitation, setting forth (1) the amount of claims or equity interests owned by the entity or the members of the committee (including claims against Washington Mutual Bank which form the basis of alleged claims against Washington Mutual, Inc. ("WMI")), (2) the date on which any such claims or equity interests were acquired, (3) the amounts paid therefor and (4) the date of any sales or other dispositions thereof and the amounts received in connection therewith.


NOTICE IS HEREBY FURTHER GIVEN that, to the extent that a Statement includes claims or equity interests which were the subject of a proof of claim filed with the Court on or prior to March 31, 2009, such Statement must reflect which (a) claims (including the amounts thereof) or equity interests were the subject of such proof of claim, and (b) claims (including the amounts thereof) or equity interests were not the subject of such proof of claim.

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

NOTICE IS HEREBY FURTHER GIVEN that each Statement must be served upon (a) Weil, Gotshal & Manges LLP, attorneys for WMI, 767 Fifth Avenue, New York, New York 10153, Attn: Brian S. Rosen, Esq., (b) Akin, Gump, Strauss, Hauer & Feld LLP, attorneys for the Creditors' Committee, One Bryant Park, New York, New York 10036, Attn: Fred S. Hodara, Esq., and (c) Ashby & Geddes, P.A., attorneys for the Equity Committee, 500 Delaware Avenue, 8th Floor, Wilmington, Delaware 19801, so as to be received by 5:00 p.m. (EDT), on May 17, 2010, **rather than by 5:00 p.m. (EDT), on April 19, 2010, as previously noticed.**

NOTICE IS HEREBY FURTHER GIVEN that, in accordance with the Directive, any entity or committee representing more than one creditor or equity security holder that declines to file a Statement consistent with the provisions of Bankruptcy Rule 2019(a) and the Opinion, is required to (a) serve a notice of such declination upon (i) Weil, Gotshal & Manges LLP, attorneys for WMI, 767 Fifth Avenue, New York, New York 10153, Attn: Brian S. Rosen, Esq., (ii) Akin, Gump, Strauss, Hauer & Feld LLP, attorneys for the Creditors' Committee, One Bryant Park, New York, New York 10036, Attn: Fred S. Hodara, Esq., and (iii) Ashby & Geddes, P.A., attorneys for the Equity Committee, 500 Delaware Avenue, 8th Floor, Wilmington, Delaware 19801, so as to be received by 5:00 p.m. (EDT), on May 17, 2010, and (b) appear before the Honorable Mary F. Walrath, United States Bankruptcy Judge, Fifth Floor Courtroom Number 4, of the United States Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware on May 19, 2010, at 11:30 a.m., **rather than on April 21, 2010, at 11:30 a.m., as previously noticed,** to show cause why the Court should not impose sanctions or limitations pursuant to Bankruptcy Rule 2019(b) or otherwise.

Dated: April 15, 2010
Wilmington, Delaware

By: 
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DEBTORS IN POSSESSION