

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

IN RE:) Case No. 08-12229(MFW)
) (Jointly Administered)
) Chapter 11
WASHINGTON MUTUAL, INC.,)
et al.,) Courtroom 4
) 824 Market Street
Debtors.) Wilmington, Delaware 19801
)
) January 29, 2010
) 10:31 A.M.

TRANSCRIPT OF CONTINUED HFA TRUST HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

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1 THE COURT: Good morning.

2 MS. DiBLASI: Good morning, Your Honor. Kelly
3 DiBlasi from Weil Gotshal & Manges on behalf of the debtors.

4 As Your Honor's aware, we are here today on what we
5 hope to be the last hearing regarding the debtors' motion to
6 liquidate certain trust assets related to the HFA deferred
7 compensation plans.

8 As you may recall, the last time that we were before
9 the Court on this matter, it was in connection with the
10 debtors' motion to supplement the record with declarations from
11 Robbyn Dewar and Laura Malafronte.

12 Your Honor granted that order, but required that the
13 debtors make those witnesses available for cross examination by
14 opposing counsel. And we do have those witnesses present with
15 us in the courtroom today.

16 Before I turn the podium over to Ms. Bakker, I would
17 like to move into evidence copies of the declarations that the
18 debtors filed on behalf of Ms. Dewar and Ms. Malafronte in lieu
19 of putting those witnesses on the stand for direct testimony.

20 THE COURT: All right. Any objection to that?

21 MS. BAKKER: No, Your Honor.

22 THE COURT: All right. It will be considered part of
23 the record.

24 MS. BAKKER: Good morning, Your Honor. Jeanne Bakker
25 with Montgomery McCracken Walker & Rhoades for the participants

1 in this matter.

2 MS. DiBLASI: Your Honor, may I approach with a copy
3 of the declarations?

4 THE COURT: You may.

5 (Pause)

6 THE COURT: Do you wish to cross examine either of
7 the declarants?

8 MS. BAKKER: Yes, Your Honor. I would like to begin
9 by cross examining Ms. Malafronte. If she could come to the
10 stand?

11 THE COURT: Okay. Please step up there and remain
12 standing so you can be sworn.

13 LAURA MALAFRONTE, DEBTORS' WITNESS, SWORN

14 CLERK: Please state your name, and spell your last
15 name.

16 THE WITNESS: Laura Mulcahy Malafronte.

17 CROSS EXAMINATION

18 BY MS. BAKKER:

19 Q Good morning, Ms. Malafronte. My name is Jeanne Bakker.
20 I represent the independent objectors in this matter who are
21 participants in the H.F. Ahmanson plans. In particular, it's
22 Jeff Olson, Kary Newman, Kevin McDonough, Dotty Jenson, and
23 Donald Cook. Ms. Malafronte, are you being paid by Washington
24 Mutual, Inc. for your testimony here today?

25 A No.

1 Q Are you being paid by any other person or entity for your
2 testimony here today?

3 A Other than regular employment with my employer, but not
4 for the testimony, no.

5 Q Thank you. Ms. Malafronte, who is your employer?

6 A My employer is Mullin TBG.

7 Q Isn't it true that Mullin is the nation's largest
8 independent provider of services for nonqualified deferred
9 compensation plans?

10 A Yes, that's correct.

11 Q How long have you worked at Mullin?

12 A I've worked there 12 years.

13 Q That would be since August of 1997?

14 A Yes.

15 Q What is your current position?

16 A My current position is Senior Director, I'm a department
17 head for the Client Service Department.

18 Q Would you please describe for the Court your duties and
19 responsibilities in that role at Mullin?

20 A In my current role, I am responsible for the client
21 service teams who are taking participant calls, they are
22 administering the benefit by generating statements, entering
23 data into our system. And I'm overseeing the quality control
24 and processes for that.

25 Q Is it fair to say then in that role that you're well

1 versed in the operation of nonqualified deferred compensation
2 plans?

3 A I think it's fair to say that I have a good general
4 knowledge.

5 Q Over your 12 years of experience?

6 A Yes.

7 Q Your knowledge and the operation of nonqualified deferred
8 compensation plans includes the period before 2004, isn't that
9 right?

10 A Yes.

11 Q Prior to 2004, isn't it true that a common feature of
12 nonqualified deferred compensation plans was a so-called call
13 right or unscheduled withdrawals?

14 A Yes.

15 Q Would you please explain for the Court what is meant by a
16 call right or an unscheduled withdrawal?

17 A It was a plan feature that offered participants the
18 opportunity to request a portion of their money with a penalty.

19 Q And isn't it true that the amount of the penalty prior to
20 2004 typically imposed under an unscheduled withdrawal
21 provision was about 10 percent?

22 A I couldn't say for sure. That would be -- that would vary
23 plan by plan.

24 Q Okay.

25 (Pause)

1 MS. BAKKER: Your Honor, may I approach the witness?

2 THE COURT: You may.

3 BY MS. BAKKER:

4 Q Ms. Malafronte, do you recognize this article?

5 A No, I don't.

6 Q Do you know who Steven Barry is?

7 A No, I don't.

8 Q Ms. Malafronte, this document is a document that I
9 actually printed off of the Mullin web site from your Knowledge
10 Center button.

11 A Um-hum.

12 Q It provides that Steven Barry and Kevin Bachler
13 (phonetics), the authors, are two longtime employees of Mullin.

14 A Yes, that may be true.

15 Q Would you turn to Page 2 of the document? If you would
16 look at the first full paragraph, the second paragraph on Page
17 2, would you, please, read for the Court the last -- the second
18 to last sentence of that paragraph, beginning with the phrase
19 "Two key features" through the end of Subparagraph A, please?

20 A "Two key features that developed during this period
21 included a call right on schedule withdrawal, the ability to
22 receive a benefit currently subject to a partial forfeiture of
23 the account balance, typically 10 percent, and benefit payment
24 flexibility."

25 Q That's fine. Thank you.

1 A Okay.

2 Q Since your employment with Mullin in 1997, you've been
3 responsible for providing record keeping services for the H.F.
4 Ahmanson deferred compensation plans, isn't that right?

5 A Yes, that's correct.

6 Q Now, for brevity, I'm going to refer to the H.F. Ahmanson
7 deferred compensation plans as the Ahmanson plans going
8 forward.

9 A Okay.

10 Q Is it fair to say based on your responsibility as an
11 administrator or record keeper of the Ahmanson plans that
12 you're fairly familiar with the terms of the Ahmanson plans?

13 A I would say -- I wouldn't want to quote today because I
14 don't read the documents or the provisions, but in general,
15 yes.

16 Q Okay. And that would include the unscheduled withdrawal
17 provisions in the Ahmanson plan, isn't that right?

18 A Yes.

19 Q And isn't it true that the Ahmanson plans' unscheduled
20 withdrawal provision provides that a participant can request an
21 immediate lump sum distribution of his or her account balance
22 subject to either a 10 percent penalty before a change of
23 control or a five percent penalty after a change of control,
24 isn't that right?

25 MS. DiBLASI: Objection, Your Honor. You know, the

1 documents say what they say, they've been entered into
2 evidence. I'm not sure why Ms. Malafronte needs to testify as
3 to the contents of the plan.

4 THE COURT: Well, I think it is relevant given her
5 affidavit regarding what was told the employees. So, I'll
6 allow it.

7 MS. BAKKER: Thank you, Your Honor.

8 A Yes, it was 10 percent before, and five percent after.
9 What I couldn't testify to is the immediate. I would have to
10 see the plan document.

11 MS. BAKKER: Your Honor, may I approach the witness?

12 THE COURT: You may.

13 MS. BAKKER: Your Honor, this is a document that has
14 been previously been entered into an evidence, and that if Your
15 Honor will allow, I'd like to use as a sample document since
16 the plan provisions and all of the Ahmanson plans documents are
17 nearly identical.

18 THE COURT: That's fine.

19 MS. BAKKER: This would be the capital accumulation
20 plan of H.F. Ahmanson & Company.

21 BY MS. BAKKER:

22 Q Ms. Malafronte, I'd like to refer you to Page 22 of the
23 document I've just placed in front of you. Now, isn't it true
24 that Section 5.9(b) of the Ahmanson plans provides for an
25 immediate unscheduled withdrawal subject to the applicable

1 penalties?

2 A You'll have to give me a moment to read it.

3 Q Sure. Take your time.

4 (Pause)

5 A I'm sorry. I'm not seeing "immediate."

6 Q Would you --

7 A I'm sorry, I might not --

8 Q Third line down from the top.

9 A Okay. Oh, it's kind of highlighted over. Okay, I see the
10 word "immediate."

11 Q So, is it fair to say it is your understanding that the
12 Ahmanson plan provided for immediate unscheduled withdrawals
13 subject to the applicable penalties.

14 A That is what the document says.

15 Q Thank you. So, in your experience as a record keeper for
16 the plan -- for the Ahmanson plans since 1997, when a
17 participant in one of the Ahmanson plans requested an
18 unscheduled withdrawal, they received an immediate distribution
19 subject to the applicable penalty or forfeiture.

20 A I'm sorry. Could you repeat that question?

21 Q I would be happy to. In your experience as the Ahmanson
22 plans record keeper, as an employee and senior manager at
23 Mullin, is it your experience that when an Ahmanson plan
24 participant requested an unscheduled withdrawal, they were
25 provided with an immediate withdrawal subject to the applicable

1 penalty?

2 MS. DiBLASI: Objection, Your Honor. Lack of
3 foundation.

4 THE COURT: Overruled. As the record keeper, I think
5 she can answer.

6 A You know, I don't -- I have not experienced -- I cannot
7 say that I experienced an H.F. Ahmanson unscheduled withdrawal
8 from my memory. There were not any in recent -- so, I cannot
9 say that I experienced one.

10 MS. BAKKER: Your Honor, may I approach the witness?

11 THE COURT: You may.

12 BY MS. BAKKER:

13 Q Ms. Malafronte, do you recognize this document?

14 A I do.

15 Q I'd like to refer you to the second page of the document.
16 In particular to the e-mail exchange from you to Ms. Robbyn
17 Dewar dated November 27, 2007. Would you please read for the
18 Court the subject line of that e-mail?

19 A "Unscheduled Withdrawals, HFA Plans."

20 Q Would you please read the text of that e-mail for the
21 Court?

22 A Where would I -- which --

23 Q Beginning with the words, "The plan doc specifies."

24 A Okay. "The plan doc specifies 10 percent prior to a
25 change in control, and five percent post change in control.

1 The plan has always operated this way."

2 Q Thank you.

3 A Did you want me to finish the rest of it?

4 Q No, that's fine. Thank you. Now, from the period 1997 to
5 2007, to your knowledge, was there ever any concern at Mullin
6 that the Ahmanson plans' unscheduled withdrawal provision
7 caused the Ahmanson plans' participants to be in constructive
8 receipt?

9 MS. DiBLASI: Objection, Your Honor. Ms. Malafronte
10 is not a lawyer. Mullin was only a record keeper. They did
11 not provide services where they interpreted the applications of
12 the plans.

13 MS. BAKKER: Your Honor, I'm not asking for an
14 interpretation of the plan. She was an employee, and record
15 keeper, longtime record keeper of the plans. I'm asking --

16 THE COURT: What is the question, again?

17 MS. BAKKER: I'm asking if she was aware of any
18 concern at Mullin that the unscheduled withdrawal provision
19 caused the Ahmanson plans participants to be in constructive
20 receipt of their plan benefits.

21 THE COURT: Well, I'll allow it -- I'll allow the
22 question. Are you aware?

23 THE WITNESS: It wouldn't be something that Mullin
24 would be contemplating because we were just providing record
25 keeping services.

1 MS. BAKKER: Thank you.

2 BY MS. BAKKER:

3 Q To your knowledge, Ms. Malafronte, as a longtime record
4 keeper for the plans, did the Internal Revenue Service ever
5 challenge the Ahmanson plans' unscheduled withdrawal provisions
6 by asserting that the provision caused the Ahmanson plans
7 participants to be in constructive receipt of their plan
8 benefits?

9 A I'm sorry, could you repeat that again?

10 Q Sure. To your knowledge, as the long-term record keeper
11 for Ahmanson -- Ahmanson plans, did the Internal Revenue
12 Service ever challenge the Ahmanson plans' unscheduled
13 withdrawal provision by asserting that it caused the
14 participants to be in constructive receipt of their benefits?

15 A No.

16 Q Thank you. Now, Ms. Malafronte, isn't it true that no
17 participant made any additional contributions to the Ahmanson
18 plans after 1998?

19 A I can't remember for certain. I do -- after the change of
20 control, at a certain point, deferrals were frozen. But I
21 can't say that that date is perfect.

22 Q But would it be about the -- the change -- the change of
23 control you're referring to is WMI's acquisition of Home
24 Savings of America?

25 A Yes.

1 Q And H.F. Ahmanson?

2 A Yes.

3 Q Okay. And that change of control occurred in around
4 1998 --

5 A Yes.

6 Q -- isn't that right?

7 A Yes.

8 Q So, isn't it true that there were no additional
9 contributions following the change of control which occurred
10 around 1998?

11 A I can't say for certain the date that they stopped. There
12 were several change of controls I was involved in. And some of
13 them allowed deferrals for a period of years before they frozen
14 the plan. So, that's why I couldn't say for certain for H.F.
15 Ahmanson when they stopped.

16 Q Ms. Malafronte, isn't it true that the Ahmanson plans are
17 grandfathered under 409(A)?

18 A Under 409(A), it was possible for the company to
19 grandfather them.

20 Q Ms. Malafronte, I'd like to, again, refer you to the
21 document I just placed in front of you which was previously
22 marked as Participant's Exhibit Number 7. I'd like you to now
23 turn to Page 3 of that document, which is a continuation of the
24 e-mail that you just read into the record.

25 A Okay.

1 Q Would you please read for the Court the first sentence at
2 the top of that page?

3 A "I am not" -- beginning with, "I am not sure?"

4 Q Yes, please.

5 A Okay. "I am not sure why counsel would think the penalty
6 needed to be higher when it is specified in the plan, which is
7 nonqualified and grandfathered."

8 Q Thank you. Now, Ms. Malafronte, in your role at Mullin,
9 isn't it true that you are also responsible for providing
10 record keeping services for the WMI deferred compensation plan?

11 A No, we do not provide services for WMI plan, or have ever.

12 Q Okay. Now, you stated in your declaration that Mullin
13 provided participants with certain Ahmanson plan information at
14 the time that they enrolled in the plan, isn't that right?

15 A Yes.

16 Q Isn't it true, Ms. Malafronte, that even though Mullin
17 provided participants with plan information, that you and
18 others on your staff still receive phone calls from time-to-
19 time?

20 A Yes, that's true.

21 Q And these phone calls were from participants in the
22 Ahmanson plans, is that right?

23 A Yes, that's the service we provided.

24 Q And in those phone calls, they had questions about the
25 terms of their plan, isn't that right?

1 A Yes, that's correct.

2 Q And how the plan was operated?

3 A About plan features, yes.

4 Q And those plan -- when you say plan features, that would
5 include the unscheduled withdrawal distribution feature, isn't
6 that right?

7 A It would include any feature.

8 Q And it was your job, as well as the job of other members
9 on your staff as record keeper for Mullin, to answer those
10 questions for Ahmanson plan participants?

11 A Yes.

12 Q So, just because participants had been given plan
13 information when they initially enrolled, they continued to
14 have questions regarding plan operation and administration
15 record keeping, isn't that right?

16 A It's possible.

17 Q Isn't that what you just testified to? That they would
18 call from time-to-time with questions?

19 A Yes, I was just saying the prevalence is how to get them
20 on the web site, but, yes.

21 Q Okay. Ms. Malafronte, did there come a time in the fall
22 of 2007 when you or other members of your staff received
23 telephone calls from Ahmanson plan participants seeking an
24 unscheduled withdrawal?

25 A During the fall of 2007, I would say the staff received a

1 number of calls in general. And I don't know that they were
2 specifically requesting an unscheduled withdrawal. But, yes,
3 they were asking at times how they could get their money out of
4 the plan.

5 Q And what did you tell them?

6 A I did not speak to any of them because, at that point, I'm
7 not taking calls. So, the staff would generally relay whatever
8 Washington Mutual had told us was the status of any sort of
9 options.

10 Q If it -- isn't it true, Ms. Malafronte, that during this
11 period when you received telephone calls from the Ahmanson plan
12 participants that the typical response was to direct the
13 participant to WMI for answers to their questions?

14 A Yes.

15 Q Thank you.

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

17 THE COURT: Any redirect?

18 REDIRECT EXAMINATION

19 BY MS. DiBLASI:

20 Q Good morning, Ms. Malafronte.

21 A Good morning.

22 Q Ms. Malafronte, are you a lawyer?

23 A No.

24 Q As you may recall, your declaration does describe the type
25 of service that Mullin provided and continues to provide to

1 Washington Mutual, Inc. with respect to these HFA deferred
2 compensation plans. But can you, please, generally state what
3 those services encompassed?

4 A They encompass reporting, producing benefit statements,
5 providing corporate reports, and helping people to navigate
6 through our web site.

7 Q So, in its role as record keeper for WMI with respect to
8 these plans, did Mullin interpret -- was it Mullin's job to
9 interpret the plan terms?

10 A No.

11 Q Was it Mullin's job to offer opinions as to the legality
12 of the terms?

13 A No, we don't give legal advice.

14 Q When participants in the plans called and spoke to your
15 employees, were your employees instructed to interpret the plan
16 terms?

17 A No.

18 Q As record keeper for these plans, would you have reason to
19 know if the IRS was conducting an audit with respect to the
20 plan terms?

21 A I don't know. I haven't -- I don't know.

22 Q Do you know whether the IRS audits plans generally on a
23 regular basis?

24 A I don't know.

25 Q Ms. Malafronte, I'd like to refer you to the document that

1 Ms. Bakker gave you that's marked at the bottom "Plan
2 Participant's Exhibit Number 7," it's the exchange of e-mails.

3 A Um-hum.

4 Q And Ms. Bakker asked you to read aloud into the record the
5 statement at the bottom of Page 2 where you noted "the plan has
6 always operated this way."

7 A Um-hum.

8 Q Can you please explain what you meant by that statement?

9 A I meant that that's what the document and the enrollment
10 materials stated. So, it would be my understanding that that
11 would be the operations.

12 Q Did WMI ever make a distribution pursuant to the
13 unscheduled withdrawal provision in any of the HFA plans?

14 A Not to my memory.

15 Q Referring to the same document that we were just looking
16 at on the next page, you noted at the top, and you read aloud
17 into the record the statement referring to the fact that the
18 plans were grandfathered. If a plan was grandfathered from
19 application of Section 409(A), was it still possible that the
20 plan could be subject to constructive receipt concerns?

21 MS. BAKKER: Objection, Your Honor.

22 THE COURT: Sustained.

23 MS. BAKKER: Thank you.

24 MS. DiBLASI: Your Honor, may I approach the witness?

25 THE COURT: You may.

1 BY MS. DiBLASI:

2 Q Ms. Malafronte, what I've just handed you is a binder.
3 And if you open it, the first document at Tab 1 is the
4 declaration that you signed, and the debtors filed in support
5 of their motion. This has been marked Debtors' Exhibit 76 and
6 entered into the record. And attached to this exhibit are --
7 attached to this declaration are several exhibits. I would ask
8 you to please turn to Exhibit B, it's -- there's a tab labeled
9 Exhibit B.

10 Ms. Malafronte, can you -- have you seen this
11 document before?

12 A Yes.

13 Q And can you please describe what this document is?

14 A This is an internal document that we would use to instruct
15 the team as how to prepare the enrollment packages that went to
16 the participants when they were eligible for enrollment.

17 Q Okay. And what did those enrollment packages contain
18 typically?

19 A They typically contained a brochure that described the
20 plan with enrollment forms, because we were hard copy back
21 then. And possibly a retirement calculator for them to
22 estimate their retirement earnings based on the number of
23 deferrals.

24 Q And does this enrollment procedures document instruct the
25 Mullin employees to include those types of documents in the

1 enrollment packages?

2 A Yes, it does.

3 Q Ms. Malafronte, I'd now like to ask you to please turn to
4 Exhibit D, as in David. And have you seen this document
5 before?

6 A Yes, I have.

7 Q And can you please describe generally what this is?

8 A This is the enrollment brochure which gives -- in layman's
9 language, the terms of the plan.

10 Q And was this included among the documents that were
11 typically mailed to participants upon enrollment?

12 A Yes, definitely.

13 Q And I'd ask you to please turn to Page 11 of this
14 document. I realize some of the numbers got cut off at the
15 bottom, I apologize.

16 A I found it.

17 Q Were you able to find it? It says distribution at the top
18 in bold.

19 A Yes.

20 Q And right underneath where it says distribution, can you
21 please read aloud what it -- what's written in bold on the
22 left-hand side?

23 A "Unscheduled withdrawal."

24 Q And can you just explain generally what's on the right-
25 hand side?

1 A It's telling participants that they could elect a partial
2 or complete distribution of their account with a 10 percent
3 penalty before a change of control. Or it could be elected
4 with a five percent penalty after change of control, and the
5 consequences to that, ceasing deferrals.

6 Q So, it's a summary of the provision that's in the full
7 plan document?

8 A Yes.

9 Q And can you please turn two pages to Page 13?

10 A Um-hum.

11 Q And all the way at the bottom of that, can you please read
12 the very last sentence of that page?

13 A "A copy?"

14 Q Yes.

15 A "A copy of the plan is available at your request from
16 corporate human resources."

17 Q Okay. And two paragraphs up from that, you'll see on the
18 left-hand side, it says, "Important information."

19 A Yes.

20 Q The paragraph that's just to the right of that, there is a
21 sentence that begins, "No assets." Could you please read that
22 aloud?

23 A Yes. "No assets will be held under any trust or as
24 security for the payment of benefits under this plan."

25 Q And continue reading the next sentence, as well.

1 A "You are an unsecured general creditor of the company with
2 respect to your plan benefits."

3 Q And just for clarity, this is describing the HFA capital
4 accumulation plan, correct?

5 A Yes.

6 Q Okay. And I'm going to ask you to turn -- let me see.
7 Unfortunately, I think at some point the pages stop being
8 numbered. One, two -- seven pages. It's a document that at
9 the top says "Capital Accumulation Plan Outline."

10 A Okay. Yes.

11 Q Okay. Was this document included as part of the brochure
12 that was mailed to participants upon enrollment?

13 A Yes, it was.

14 Q Okay. And if you could please look about halfway down the
15 page underneath where it says, "Severe financial hardship," can
16 you please read the next line that's in bold below that?

17 A It says, "Unscheduled withdrawal."

18 Q Okay. Please turn to the next exhibit, Exhibit E. And
19 can you please explain what this document is?

20 A This is a similar brochure for the loan consultant's
21 capital accumulation. Yeah, the brochure.

22 Q And was this provided to participants in that plan upon
23 enrollment?

24 A Yes, the same procedure was followed.

25 Q Can you please turn to Page 10 of this brochure?

1 A Um-hum.

2 Q And can you please look about halfway down the page and
3 tell me what you see there in bold on the left-hand side?

4 A Unscheduled withdrawal.

5 Q And to the right of that, can you explain generally what's
6 stated there?

7 A This is very much like the last paragraph where it's
8 describing a 10 percent penalty, they have the option to elect
9 entire account balance.

10 Q So, again, it's a summary of the provision that's
11 otherwise in the plan?

12 A Yes.

13 Q Could you please turn to Exhibit F, F as in Frank, the
14 next exhibit.

15 A Um-hum.

16 Q Have you seen this document before?

17 A Yes, I have.

18 Q Can you please describe what this is?

19 A This is a cover letter to Mr. Olson that would generally
20 accompany the enrollment materials when he became eligible for
21 the plan, where I'm requesting that he look at the materials
22 and enroll if he wishes to by sending back forms.

23 Q So, who sent this letter?

24 A I did.

25 Q And just for clarification, you'll see the letter is

1 signed by Laura M. Palmbar (phonetic).

2 A Yes.

3 Q Is that a previous name of yours?

4 A That was a previous name of mine.

5 Q And what is the letter dated?

6 A It's dated February 20th, 1998.

7 Q And was anything mailed with this letter? Any documents?

8 A Yes. An enrollment package would be the enrollment
9 brochure and the forms that he would need to fill out and
10 return.

11 Q And would the brochure have been the same brochure that we
12 just walked through? I believe it was Exhibit D --

13 A Yes.

14 Q -- that we looked at.

15 A Yes.

16 Q And please turn to the next exhibit, Exhibit G, as in
17 George. Have you seen this document before?

18 A Yes.

19 Q And can you please describe what this is?

20 A This is an audit form, an internal audit form that I would
21 prepare for my supervisor at the time to make sure that my
22 cover letter and all materials were included before it was
23 mailed out.

24 Q So, again, this was signed by you under your previous
25 name, is that correct?

1 A Yes.

2 Q And who is this audit form with respect to?

3 A This was with respect to Mr. Olson's correspondence and
4 package.

5 Q His package related to?

6 A Enrollment. I'm sorry. His enrollment package.

7 Q Thank you.

8 A And the cover letter that I included.

9 Q And please turn to Exhibit H, the next exhibit in the
10 binder. Have you seen this document before?

11 A Yes, I have.

12 Q And can you please describe what this is?

13 A This is a letter from Mr. Olson to me, and he's enclosing
14 his executed forms, as we requested. And he is evidencing his
15 election to participate. He also is saying that he faxed a
16 copy to our contact H.F. Ahmanson. And ensuring that he has
17 received confirmation from H.F. Ahmanson that he's eligible for
18 the enhancement yield because he has more than five years of
19 participation from his years of service as Coast Federal Bank.
20 He's assuming that I received confirmation from Home Savings,
21 and would apply that to his participation in the plan.

22 Q And what is the date of this letter?

23 A It's February 28th, 1998.

24 Q Can you please read aloud the first sentence?

25 A "Dear Ms. Palmbar, pursuant to your letter of February

1 20th, 1998, enclosed please find the original executed forms
2 evidencing my election to participate in the plan."

3 Q Thank you. Please turn to the next exhibit, Exhibit I.

4 And have you seen this document before?

5 A Yes, I have.

6 Q And can you please describe what this is?

7 A This is an enrollment form for Dotty Jenson where she is
8 electing to enroll for 1995, for the next four years, to defer
9 bonus.

10 Q And she was deferring a bonus into which plan pursuant to
11 this form?

12 A She's deferring bonus into the elective deferred
13 compensation plan.

14 Q And what was the date that she signed this?

15 A She signed it November 29th, 1994.

16 Q And at the top of the form, inside the box, could you
17 please read aloud the second sentence that begins "By signing?"

18 A "By signing this participation agreement, I elect to
19 participate in the plan and acknowledge receipt of materials
20 containing a summary of the plan and consequences of plan
21 participation."

22 Q Thank you. Please turn to the next exhibit, Exhibit J.
23 Can you please describe generally what this document is?

24 A This is a similar form, Kary Newman, in which Kary Newman
25 is electing to participate for the 1993 commission deferral

1 unit in the loan consultant elective deferred compensation
2 plan.

3 Q And what is the date of this agreement?

4 A December 1st, 1992.

5 Q In the second paragraph of this document inside the box,
6 can you please read the sentence that begins with the words "By
7 signing?"

8 A "By signing this participation agreement, I elect to
9 participate in the plan and acknowledge receipt of materials
10 containing a summary of the plan and consequences of plan
11 participation."

12 Q Thank you. Ms. Malafronte, you may recall a moment ago
13 Ms. Bakker asked you a series of questions that related to
14 unscheduled withdrawal payments made, I believe it was between
15 the period of 1997 to 2007.

16 A Yes.

17 Q Do you recall that?

18 A Yes.

19 Q Would there have been any reason for there to have been a
20 -- for there to be a difference in the unscheduled withdrawal
21 requests made after 2004?

22 A I'm sorry. I'm not sure I understand the question.

23 Q If a participant asked for an unscheduled withdrawal
24 distribution after 2004, is there any reason that that might
25 have entailed a different analysis?

1 A Yes. After -- when 409(A) -- Section 409(A) came into
2 being, plans -- all companies were considering whether their
3 plans would fall under or would be subjected to 409(A). So,
4 operations would change -- could change based on the
5 corporation's direction.

6 (Pause)

7 MS. DiBLASI: Your Honor, may I approach?

8 THE COURT: You may.

9 MS. DiBLASI: I have handed the witness a document
10 marked Debtors' Exhibit 30.

11 BY MS. DiBLASI:

12 Q Ms. Malafronte, can you tell me what this document is?

13 A This is a benefits statement generated by our system.

14 Q For which participant?

15 A For Dotty Jenson.

16 Q And this document shows the -- a benefits statement as of
17 what date?

18 A As of September 25th, 2008.

19 Q And can you please read aloud what Ms. Jenson's balance
20 was as of that date?

21 A It was \$219,613.40.

22 Q And which plan does this relate to?

23 A It relates to the capital accumulation plan.

24 Q Thank you.

25 MS. DiBLASI: Your Honor, if you'd bear with me a

1 moment, I'm going to collect all of these to hand up at once
2 because there are quite a few, and I don't want to have to keep
3 wasting the Court's time walking back and forth.

4 MS. BAKKER: Your Honor, this line of questioning is
5 beyond the scope of cross examination.

6 MS. DiBLASI: Your Honor, these are business records
7 that are from Mullin Consulting's business files and they
8 relate to these participants' interest in the plans that we've
9 been discussing.

10 THE COURT: Okay. But was it part of her affidavit
11 identifying these?

12 MS. DiBLASI: No, it was not.

13 THE COURT: Well, she could call her independently,
14 though, couldn't she? I mean --

15 MS. BAKKER: Well --

16 THE COURT: What's the prejudice?

17 MS. BAKKER: WMI agreed that it would not put on any
18 additional direct testimony beyond what's stated in the
19 declarations.

20 MS. DiBLASI: Your Honor, we're willing to just move
21 on.

22 THE COURT: Okay.

23 MS. DiBLASI: Your Honor, we have nothing further for
24 Ms. Malafronte.

25 THE COURT: All right. Any further cross?

1 MS. BAKKER: Yes, Your Honor. Thank you.

2 RECROSS EXAMINATION

3 BY MS. BAKKER:

4 Q Ms. Malafronte, you testified just a few moments ago that
5 it was your job and the job of members on your staff to answer
6 telephone calls of participants in the Ahmanson plans from
7 time-to-time.

8 A Yes.

9 Q And when participants called from time-to-time, they
10 called with questions with respect to various design features
11 of the Ahmanson plans, isn't that right?

12 A It's possible.

13 Q Yes or no, isn't that right, with questions?

14 A Yes.

15 Q On how their plan was operated?

16 A Yes.

17 Q And these participants who called you are the same
18 participants who were provided with all of this plan
19 information that you just referred to in your testimony with
20 Ms. DiBlasi.

21 A Yes.

22 Q So, even though they had voluminous amounts of plan
23 participant -- plan information, they still had questions. And
24 it was your job to answer those questions, wasn't it not -- was
25 it not, or members of your staff?

1 A We would direct them to the information.

2 Q Ms. Malafronte, didn't you testify just a few moments ago
3 that in your role as senior director, and with your
4 responsibility for the Ahmanson plans, that it was your job,
5 and the job of the members of your staff to answer participant
6 questions regarding the features of their plan?

7 A Yes.

8 Q Thank you. Now, Ms. Malafronte, isn't it true that in the
9 fall of 2007, Kevin McDonough called you and you spoke to him
10 regarding the Ahmanson plans?

11 A I don't recall the conversation or that time. It's -- I
12 couldn't say for sure.

13 Q You have no recollection of speaking with Kevin McDonough?

14 A I can recall his name. I don't know -- over the years, I
15 think I have answered a question for Kevin McDonough.

16 Q So, it's possible you spoke with Kevin McDonough in the
17 fall of 2007, isn't it?

18 MS. DiBLASI: Your Honor, asked and answered.

19 THE COURT: Overruled. I'll allow cross on this.

20 A It's possible I spoke to all of the participants.

21 Q And isn't it true that when the participants called, they
22 were calling because they were anxious about getting
23 distributions from the Ahmanson plans?

24 MS. DiBLASI: Your Honor, Ms. Malafronte just
25 testified she doesn't necessarily remember speaking to these

1 participants.

2 THE COURT: Overruled. She can ask.

3 THE WITNESS: I'm sorry, could you repeat that?

4 MS. BAKKER: Sure.

5 BY MS. BAKKER:

6 Q Isn't it true that when participants called at this time
7 in the fall of 2007, they were calling because they were
8 anxious about getting distributions of their interest in the
9 Ahmanson plans?

10 A I wouldn't agree with that. Participants called for a
11 number of reasons. There's a possibility that some
12 participants asked that question. But I wouldn't say that was
13 the overwhelming question.

14 Q But that was a concern at the time?

15 MS. DiBLASI: Your Honor, Ms. --

16 THE COURT: Sustained. Sustained.

17 MS. DiBLASI: Thank you.

18 MS. BAKKER: Thank you. I have no more questions.

19 THE COURT: Any redirect?

20 MS. DiBLASI: No, Your Honor.

21 THE COURT: All right. Thank you. You may step
22 down. You can leave all the documents up there.

23 Only cross on Ms. Dewar?

24 MS. BAKKER: Your Honor, I would like to ask that
25 Robbyn Dewar take the stand.

1 THE COURT: All right.

2 ROBBYN DEWAR, DEBTORS' WITNESS, SWORN

3 CLERK: Please state your name, and spell your last
4 name.

5 THE WITNESS: Robbyn Westber (phonetic) Dewar, D-E-W-
6 A-R.

7 CROSS EXAMINATION

8 BY MS. BAKKER:

9 Q Good morning, Ms. Dewar. My name is Jeanne Bakker, and I
10 represent the participants, in particular Jeff Olson, Kary
11 Newman, Kevin McDonough, Dotty Jenson, and Donald Cook.

12 A Okay.

13 Q Ms. Dewar, are you being paid by Washington Mutual, Inc.
14 to testify in these proceedings?

15 A I am not.

16 Q Are you being paid by any other person or entity to
17 testify here?

18 A I am not.

19 Q You were employed by Washington Mutual Bank in the Human
20 Resources Department from January, 2004 until September, 2008,
21 isn't that right?

22 A That's correct.

23 Q Where were you employed before January, 2004?

24 A For a time period, I was not working, and September of
25 that year -- through September, I worked for Hubbard

1 Broadcasting, a broadcasting company in Minnesota, and I still
2 work remotely.

3 Q When you worked for Washington Mutual Bank, your title was
4 Manager of Nonqualified Deferred Compensation Plans, isn't that
5 right?

6 A Technically it was Manager of Deferred Compensation Plan
7 Operations, but, yes.

8 Q Would you please describe your duties and responsibilities
9 as -- in that role, please?

10 A I managed the 44 nonqualified plans, four plans were WMI
11 plans, and the other were acquired plans. And basically what
12 that meant is I handled employee issues, made sure that
13 employee deferrals in the Washington Mutual plans were handled
14 correctly, you know, dealt with employee questions regarding
15 the plans, did open enrollment for the Washington Mutual plans.

16 Q So, it's fair to say then that you were knowledgeable
17 about the terms and operation of the H.F. Ahmanson nonqualified
18 deferred compensation plans in that role, isn't it?

19 A Again, I managed 40 acquired plans, so there were a lot of
20 them. I was generally knowledgeable, and I did have the plan
21 documents, yes.

22 Q For brevity going forward, I'm going to refer to the H.F.
23 Ahmanson nonqualified deferred compensations as the Ahmanson
24 plans going forward.

25 A Okay.

1 Q Ms. Dewar, there should be a binder in front of you that
2 contains declarations WMI thoughtfully put together. I'd like
3 to refer you to -- let's see -- to Tab 2 in that binder.

4 A Okay.

5 Q Paragraph 6.

6 A Yes.

7 Q Would you please read aloud for the Court the portion of
8 Paragraph 6 that begins on the sixth line down with the words
9 "Each HFA deferred compensation plan?"

10 A "Each HFA deferred compensation plan contained a provision
11 similar to Section 5.9(B) in the capital cumulation plan of
12 H.F. Ahmanson and Company which provided that after a change in
13 control occurred, a participant could elect to receive a lump
14 sum distribution of such participant's deferred compensation at
15 any time subject to a five percent penalty, or haircut, on
16 unscheduled withdrawal."

17 Q Thank you. So, just to be clear, your declaration refers
18 to the five percent penalty applicable after a change of
19 control, isn't that right?

20 A Yes.

21 Q Now, you just testified that you're familiar with the
22 terms of the Ahmanson plans in your role as manager.

23 A I am.

24 Q Isn't it true that Section 5.9(B) of the Ahmanson plans
25 also provides for an immediate distribution at any time before

1 a change of control, subject to a 10 percent penalty?

2 A The change in control did happen, however, so it's not
3 relevant.

4 Q No, my question was isn't it true that Section 5.9(B) of
5 the Ahmanson plans also provides for an immediate distribution
6 at any time before a change of control subject to a 10 percent
7 penalty?

8 A I would have to see the plan document.

9 Q There should be a document in front of you, Ms. Dewar,
10 marked D-1, that's the capital accumulation plan of H.F.
11 Ahmanson and Company.

12 A Okay.

13 Q If you would please refer to Page 22 of that document.

14 A Okay.

15 Q Take a look at that for a moment, if you would.

16 (Pause)

17 A Okay.

18 Q So, I'll repeat my question. Isn't it true that Section
19 5.9(B) of the Ahmanson plans provided for an unscheduled
20 withdrawal at any time before a change of control, subject to a
21 10 percent penalty?

22 A That's correct.

23 Q Thank you.

24 A The document states that.

25 Q Ms. Dewar, isn't it also true that Ms. Malafronte told you

1 -- specifically told you in an e-mail that the Ahmanson plans
2 provided for immediately unscheduled withdrawal subject a 10
3 percent penalty before a change of control?

4 A I'm not sure she used the word "immediate," but she did
5 say that there was an unscheduled withdrawal provision, yes.

6 Q So, in November of 2007, you were aware of that provision,
7 were you not?

8 A I was.

9 Q And you began working for Washington Mutual Bank in 2004?

10 A Correct.

11 Q Isn't it true that Mullins had served as the record keeper
12 for the Ahmanson plans since 1997?

13 A I believe that's what she said.

14 Q So, you would agree then that Mullin's experience in
15 administering the plans predates your employment with
16 Washington Mutual Bank?

17 A True.

18 Q You would agree also that Mullin's experience in operating
19 the plan extends to a larger period than your employment with
20 Washington Mutual Bank?

21 A Correct.

22 Q You would agree then that Mullin's experience in operating
23 the plan was based on their longevity, was greater than your
24 personal experience in operating the plan?

25 A True, but --

1 Q Thank you. Now, isn't it true that Ms. Malafronte, who
2 was the senior manager over at Mullins, specifically told you
3 in an e-mail in November of 2007 that the Ahmanson plans had
4 always been operated to provide for the 10 percent penalty
5 before change of control or the five percent penalty after a
6 change of control?

7 A She stated what the plan said, yes. She did not -- they
8 did not interpret the plan, however.

9 Q Ms. Dewar, there should be a document in front of you that
10 has been previously marked as Participant's Exhibit 7.

11 A Yes.

12 Q I'd like to refer you to Page 2.

13 A Okay.

14 Q At the bottom of Page 2 is an e-mail from Ms. Malafronte
15 to you dated November 27, 2007 in which Ms. Malafronte -- would
16 you please read the first line of that text --

17 A "The plan doc" --

18 Q -- at the bottom of Page 2?

19 A Yes. "The plan doc specifies 10 percent prior to" -- I
20 think that was supposed to be change, but it says "chang in
21 control, and five percent post change in control. The plan has
22 always operated this way."

23 Q And yet in 2007, you chose to ignore the information that
24 the plan's longtime record keeper had given you about the
25 operation of the plan, didn't you?

1 A I talked to counsel, and they didn't agree with the
2 provision of the plan, and it was up to Washington Mutual, Inc.
3 to interpret the plan.

4 Q Ms. Malafronte, wasn't it your personal view --

5 A Dewar. Sorry.

6 Q Wasn't it your personal view that the five percent penalty
7 was insignificant?

8 A It was not my personal view. I had talked with legal
9 counsel, and they did not agree with the way the plan was
10 written, and specifically about the haircut provision.

11 Q Ms. Dewar, I'd like to refer you to Participant's Exhibit
12 Number 7, same page we were just looking at, but the next e-
13 mail in the e-mail string. Do you see where I'm referring?

14 A "Since I?"

15 Q It's an e-mail from you to Ms. Malafronte dated November
16 27, just a couple hours later.

17 A Um-hum.

18 Q Would you please read the first paragraph of that?

19 MR. ROSEN: Your Honor, if I could at this time, I
20 apologize for standing up, I just would like to caution about
21 possible issues associated with the attorney/client privilege
22 and ask the --

23 THE COURT: All right. She's just being asked to
24 read something.

25 MR. ROSEN: I would ask not to speak about what was

1 actually said from counsel, though.

2 A It says, "Since I don't think that five percent is
3 significant, I think our counsel will agree. That puts the
4 entire plan at risk with a constructive receipt issue. I'll
5 talk to them, but I don't think we'll be allowing this option
6 even though the plan is grandfathered."

7 Q Isn't it true, Ms. Dewar, that you sent this e-mail to Ms.
8 Malafronte before you spoke to counsel?

9 A No.

10 Q That's contrary to what your e-mail says here, that you
11 will talk to counsel after you sent the -- after you instructed
12 Ms. Malafronte to disregard how the plan had been operated.

13 A We had been reviewing the plans by that point, and had
14 looked at that issue, and our -- and counsel had given me an --
15 we had talked about the fact that they didn't think it was
16 significant, nor did they think it was a valid provision in the
17 plan.

18 So, I hadn't talked about them specifically about --
19 about -- if five percent was significant -- well, about what it
20 could be. We talked about in general, was it a valid
21 provision; they didn't think it was. And that's -- I'm not a
22 lawyer, I don't pretend to be.

23 Q Ms. Dewar, I'd like to direct you to Paragraph 4 of your
24 declaration, which is Tab 2 in the binder. Do you have it in
25 front of you?

1 A Yes.

2 Q Would you please read for the Court the last sentence of
3 Paragraph 4, beginning with the word "accordingly" in the
4 fourth line from the bottom?

5 A "Accordingly, I am generally knowledgeable about the H.F.
6 Ahmanson and Company deferred compensation and retirement plans
7 that WMI inherited when it purchased HFA and which are
8 referenced in the motion, as well as certain tax related issue
9 in connection therewith."

10 Q So, even though you're not a lawyer, you are familiar with
11 certain tax related issues, isn't that right?

12 A (No verbal response)

13 Q That's what you said in your declaration.

14 A Yeah -- yes.

15 Q Thank you. And that would include the concept of
16 constructive receipt as it relates to nonqualified deferred
17 compensation plans, isn't that right?

18 A Often I would reference -- I would talk to our internal
19 counsel if I had questions.

20 Q But you were familiar with certain tax related concepts,
21 such as constructive receipt, weren't you?

22 A Yes, but --

23 Q Your job was manager of nonqualified deferred
24 compensations --

25 A Correct.

1 Q -- plan, right -- plans, right?

2 A Correct.

3 Q You would agree then that the general principle of
4 constructive receipt is that income becomes taxable to an
5 employee when it is made available to the employee, isn't that
6 right?

7 A That's my understanding.

8 Q So, for example, if an employee receives an ordinary
9 paycheck in December of 2009, and is free to cash that paycheck
10 at any time, but doesn't actually cash that paycheck until
11 January of 2010 when he actually receives the cash, the
12 employee is still deemed to have -- to receive the cash in
13 December, 2009 even though he doesn't cash the check until
14 2010, isn't that right?

15 MS. DiBLASI: Your Honor, you know, I would object to
16 relevance, and her qualifications to testify about --

17 THE COURT: Sustained. This isn't really relevant.

18 BY MS. BAKKER:

19 Q As manager of nonqualified deferred compensation plans,
20 isn't it your understanding that in order for employees to
21 avoid being taxed, there has to be a restriction on their
22 access to the money?

23 A Yes.

24 Q And if they had access to the money, it's your
25 understanding that they would be deemed in constructive receipt

1 of the money?

2 A I believe that's correct.

3 Q And that restriction has to be in place in order to avoid
4 constructive receipt, isn't that right?

5 A I believe so.

6 Q And if that restriction no longer exists, then they're in
7 constructive receipt.

8 A Yes.

9 Q And that restriction must exist at all times or they're in
10 constructive receipt.

11 A They have to have a substantial risk of forfeiture, I
12 believe, in order -- and not have full access to their money in
13 order to not have constructive receipt.

14 Q And that substantial risk of forfeiture or restriction
15 must exist at all times in order to avoid constructive receipt,
16 isn't that right?

17 A That's my understanding.

18 Q Thank you. To your knowledge, Ms. Dewar, did the Internal
19 Revenue Service ever challenge the unscheduled withdrawal
20 provisions by asserting that the five or 10 percent penalties
21 were insignificant with the result that the participants were
22 in constructive receipt of their benefits?

23 A I'm not sure we ever used that provision actually.

24 Q But the provision is in the plan document, is it not?

25 A It is in the plan document.

1 Q To your knowledge, did the Internal Revenue Service ever
2 challenge the term in the plan document, Section 5.9(B), the
3 unscheduled withdrawal provision, by asserting that the
4 penalties were legally insignificant so that the participants
5 were deemed in constructive receipt of their benefits?

6 A During my tenure, I was not aware of our plan being
7 audited. And that's when that would happen is my
8 understanding.

9 Q So, the answer to the question is, yes, to your knowledge,
10 the Internal Revenue Service never challenged that provision?

11 A Correct.

12 Q Ms. Dewar, in Paragraph 9 of your declaration, if you
13 would take a quick look at that, please?

14 A Okay.

15 Q In Paragraph 9 of your declaration, you state that the
16 Human Resources Department undertook a review of all of
17 Washington Mutual Bank's and WMI's many nonqualified deferred
18 compensation plans in connection with 409(A), isn't that right?

19 A That's correct.

20 Q Now, generally speaking as part of this review, is it fair
21 to say that what you have to determine was whether or not
22 409(A) applied to a particular plan or not?

23 A No, it applied to every plan. It could have been -- it
24 could have applied to every plan. It was whether there was
25 enough significant provisions in the plan that you wanted to

1 preserve that grandfathering versus having it subject to
2 409(A).

3 Q Perhaps you didn't quite understand my question, Ms.
4 Dewar. My question was as part of that review, didn't you --
5 didn't WMI need to determine whether or not a plan was
6 grandfathered or not grandfathered?

7 A Yes.

8 Q And generally speaking, if a plan was not grandfathered,
9 there was no question that that plan had to be amended to
10 comply with 409(A), isn't that right?

11 A Correct.

12 Q And if a plan was not grandfathered, and had to be amended
13 to comply with 409(A), that meant that the participants going
14 forward would be subject to 409(A)'s new restrictions on the
15 timing of distributions, isn't that right?

16 A Correct.

17 Q Isn't it also true that if a plan was subject to 409(A),
18 there was a one-time opportunity under the transition rules to
19 amend the plans for 409(A) accelerated elections.

20 A A company could offer that, they didn't have to. It was
21 an option for a company.

22 Q It was an option to make that available, isn't that right?

23 A Correct.

24 Q And if you chose to amend the plan for 409(A) accelerated
25 elections, participants could then elect to take their money

1 out immediately before the new -- well, subject to the six-
2 month delay, but before the new 409(A) restrictions on the six-
3 month -- on the timing of elections kicked in.

4 A That's correct.

5 Q Thank you. Now, you also state in Paragraph 9 that the
6 nonqualified deferred compensation plans like WMI sponsored,
7 this 40 some odd plans, were prioritized for purposes of the
8 409(A) review, isn't that right?

9 A Correct.

10 Q How did the company go about prioritizing the plans?

11 A We looked at the complexity of the plan, because you
12 basically had to go page-by-page and look to see if any
13 provision would be -- if we wanted to preserve that provision
14 under the grandfather rule, what participants would lose out on
15 had we subjected them to 409(A), how many participants were
16 involved. There was a lot of factors involved in prioritizing
17 the plans.

18 Q Which company plans receive the highest priority?

19 A Actually -- originally we -- I believe we targeted plans
20 that had terminated participants in pay status. So, there were
21 some Ahmanson plans, and others that I believe were the first
22 to be subject to 409(A) and given the acceleration option.

23 Q Isn't it true that the WMI deferred compensation plan
24 received top priority in this review?

25 A No, that's not true.

1 Q Isn't it true that the WMI deferred compensation plan was
2 not grandfathered?

3 A That is correct.

4 Q So, the WMI deferred compensation plan had to be amended
5 for 409(A)?

6 A It had to be amended because it had contributions going
7 forward after 2004. So, it was subject regardless.

8 Q Which plans receive the lowest priority?

9 A Plans that were highly complex and people that --
10 basically participants who had the most to lose by making them
11 subject to 409(A). Again, there were 44 plans, I can't tell
12 you what the hierarchy was there.

13 Q You just testified that the WMI plan had to be amended for
14 409(A) because it was an active plan continuing contributions.

15 A Correct.

16 Q And, in fact, WMI did amend the plan to comply with
17 409(A).

18 A They did.

19 Q And by doing so, WMI made the participants in the WMI plan
20 subject to the timing election restrictions of 409(A) and all
21 of 409(A)'s other restrictions going forward, isn't that right?

22 A Yeah, you couldn't pick and choose. If you were subject
23 to 409(A), you were subject to 409(A).

24 Q But the effect of being subject to 409(A) is that
25 participant in a plan -- a 409(A) plan after the effective date

1 of 409(A) became subject to those onerous restrictions of
2 409(A) in terms of when you can put your money in, when you can
3 take your money out, and when you have to make your elections,
4 et cetera.

5 A Correct.

6 Q Isn't it also true, as you just testified, that there was
7 one-time opportunity to take -- for -- for a company to amend
8 the plan as part of the transition rules to allow for 409(A)
9 accelerated elections before the new restrictions kicked in?

10 A A company had an option, yes.

11 Q And isn't it true that WMI elected to amend the WMI plan
12 to provide that one-time opportunity for accelerated elections
13 under the WMI plan?

14 A Correct.

15 Q Ms. Dewar, isn't it true that before the WMI plan was
16 amended to provide for the 409(A) accelerated elections that
17 Kary Killinger had the largest account balance in that plan?

18 A I couldn't tell you, I don't know.

19 Q You were the manager of those plans, were you not?

20 A I did, but I didn't memorize people's balances.

21 Q He had a large account balance, didn't he?

22 A I have no idea.

23 MS. DiBLASI: Objection, Your Honor; asked and
24 answered.

25 THE COURT: Well, it's been answered, yes.

1 BY MS. BAKKER:

2 Q Ms. Dewar, isn't it true that the WMI plan was not funded
3 by a rabbi trust?

4 A That is correct.

5 THE COURT: Could you ask that question again?

6 MS. BAKKER: Certainly, Your Honor.

7 BY MS. BAKKER:

8 Q Isn't it true that the WMI plan was not funded by a rabbi
9 trust?

10 A That's correct.

11 Q So, as a result, any benefits paid out of the WMI plan had
12 to be funded with assets from the plan sponsor, isn't that
13 right?

14 A Correct.

15 Q Isn't it true that in late 2007 or early 2008, Mr.
16 Killinger exercised his newly created right under the amended
17 WMI plan for an accelerated 401 -- 409(A) election and took a
18 distribution of roughly \$40 million?

19 MS. DiBLASI: Objection, Your Honor. She already
20 testified she doesn't know about Mr. Killinger's balance.

21 THE COURT: Sustained.

22 BY MS. BAKKER:

23 Q Isn't it true that any participant who elected to take a
24 distribution under the 409(A) accelerated election option had
25 to have their benefit paid out of company money?

1 A Yes.

2 Q The -- WMI amended the WMI plan in roughly November of
3 2007, isn't that right?

4 A Amended the plan?

5 Q Amended the WMI plan to provide for the 409(A) accelerated
6 elections in roughly November of 2007, isn't that right?

7 A It was amended at the time that it was required. I
8 believe it was the end of 2008 actually the amended actually
9 was filed.

10 Q Isn't it true that the 409(A) accelerated elections were
11 made available to the WMI plan participants in roughly November
12 of 2007?

13 A Yes, we made the election available in November of 2007,
14 and paid them the following July.

15 Q And that is because under the transition rule, there was a
16 six-month waiting period for payment under that accelerated
17 election option?

18 A At least six months was my understanding.

19 Q So, any participant, including Mr. Killinger, who elected
20 to take his money out of the plan in November of 2007 would
21 have had to wait six months to actually get his money?

22 A Correct.

23 Q So, any participant, including Mr. Killinger who elected
24 that option, would have been paid their money from company
25 assets in roughly mid-2008?

1 A July, I believe.

2 Q Thank you. Ms. Dewar, WMI finally got around to amending
3 the Ahmanson plans to comply with 409(A) sometime in 2008,
4 isn't that right?

5 A I believe the deadline was December 31st, 2008.

6 Q Prior to WMI's amendment to the Ahmanson plans to comply
7 with 409(A), isn't the fact that the Ahmanson plans documents,
8 as they existed before that amendment, were the governing plan
9 documents?

10 A Correct.

11 Q And so isn't it a fact that Section 5.9(A)(B) of the
12 Ahmanson plans was a provision in the governing plan documents
13 of the Ahmanson plans until those plans were amended in 2008?

14 A You could have a -- you could have a provision that was
15 not --

16 Q The question is wasn't that provision a part of the plan?

17 A It was.

18 Q Thank you. Now, Ms. Dewar, did there come a time in the
19 fall of 2007 when you began receiving telephone calls from
20 participants in the Ahmanson plans?

21 A We received phone calls from all participants. So, I
22 can't say specifically that I talked to those folks.

23 Q Isn't it true that in October of 2007, Jeff Olson called
24 you?

25 A That was a long time ago, I can't say.

1 Q You have no recollection of speaking with Mr. Olson?

2 MS. DiBLASI: Asked and answered, Your Honor.

3 THE COURT: Overruled.

4 A I have talked to Mr. Olson on occasion. I can't say when
5 I talked to him or what I talked to him about because, again, I
6 had over 1,200 participants that I talked to.

7 Q Ms. Dewar, isn't it true that if a participant called you
8 and wanted to know about getting an immediate distribution from
9 the Ahmanson plans, it was not your practice to direct them to
10 the unscheduled withdrawal provision as a basis for getting
11 their withdrawal?

12 A If they asked me for the plan document, I would provide
13 it?

14 Q My question was -- that was not my question. My question
15 was isn't it true that if a participant called you -- an
16 Ahmanson plans participant called you to request a distribution
17 of their benefit under the Ahmanson plans, it was not your
18 practice to direct them to the unscheduled withdrawal provision
19 in the plan as a basis for the withdrawal?

20 MS. DiBLASI: Your Honor, I would ask that counsel
21 please limit her question to a particular time period.

22 THE COURT: Well, are we talking about the fall of
23 '07?

24 MS. BAKKER: Yes, we are. Thank you.

25 A I don't know how to answer that. I mean I didn't

1 purposely not tell them about something. People had -- had
2 access to the documents. If they asked me specifically could I
3 have an unscheduled withdrawal, I probably would have said this
4 is what the plan document says, however, based on advice of
5 counsel, it's -- we don't think it's a valid provision in the
6 plan.

7 Q Ms. Dewar, isn't it true that you received phone calls
8 from Ahmanson plans participants in the fall of 2007 who were
9 anxious to receive a distribution and called you looking for
10 any way they could get their money out of the plan?

11 MS. DiBLASI: Your Honor, she already testified that
12 she doesn't know who she spoke to or when she spoke to them.

13 THE COURT: Sustained.

14 BY MS. BAKKER:

15 Q When participants called you, did you offer to send them
16 plan documents?

17 A If they asked, absolutely.

18 Q Did you ask them to make sure that they had the plan
19 documents?

20 A No.

21 Q Ms. Dewar, you had testified earlier that the role of the
22 H.R. Department was to -- to provide services to participants
23 in answering their questions in open enrollment and the
24 provision of the company's benefits to employees.

25 A Correct.

1 Q Isn't it true that the Human Resources Department was the
2 place that participants went to for information regarding their
3 benefits?

4 A Depending on what benefits you're talking about. If
5 you're talking about deferred comp and they were -- if Ahmanson
6 was the third party administrator, often times they went to
7 Ahmanson because they had been with Ahmanson for years. If
8 you're talking about employee benefits, people would come to us
9 or they'd go to Mullin.

10 Q Ms. Dewar, isn't it true that the H.R. Department of which
11 you were an employee functioned as the source of information
12 for Washington Mutual Bank and WMI employees to go to when they
13 needed information about any employee benefit plan that was
14 sponsored by the bank?

15 A We were one of several sources, yes.

16 Q What other sources?

17 A Mullin Consulting.

18 Q And if Mullin Consulting didn't answer their questions,
19 who would they direct their participants to?

20 A They would come back to us.

21 Q They would direct it to the Human Resources Department?

22 A Yes.

23 Q Of which you were a member?

24 A Correct.

25 Q And your job in the Human Resources Department was as

1 manager of the nonqualified deferred compensation plans?

2 A Correct.

3 Q And if a participant needed an answer to a question
4 regarding a nonqualified deferred compensation plan, that
5 question would come to you as manager?

6 A Yeah.

7 Q So, if a participant called, they would have spoken to
8 you?

9 A Or someone on my team, yes.

10 Q There's no other place in the bank they could go to for
11 information other than Mullin?

12 A We did have a call center. But ultimately, the -- you
13 know, if it was a -- if it was a difficult question or a
14 complicated question, they would come to my team.

15 Q Thank you.

16 MS. BAKKER: I have no further questions.

17 THE COURT: Okay.

18 REDIRECT EXAMINATION

19 BY MS. DiBLASI:

20 Q Hi, Ms. Dewar.

21 A Hi.

22 Q Just to be clear, you testified that you're not a lawyer,
23 is that correct?

24 A Correct.

25 Q And can you describe generally when decisions were being

1 made in your department at the bank about deferred compensation
2 plans, who was involve with that decision making process?

3 A Internal legal counsel, often times we would consult with
4 external legal counsel, myself, sometimes a teammate.

5 Q Another teammate from the H.R. Department?

6 A Yes.

7 Q And as Ms. Malafronte testified, Mullins was the record
8 keeper for the plans, is that correct?

9 A Correct.

10 Q Did Mullins operate the plans?

11 A No, they were the administrator. So, they were the record
12 keeper, they handled statements and answered employee
13 questions, things like that.

14 Q So, if there were ever any questions about the
15 interpretation or the application deferred comp plan,
16 specifically the HFA deferred comp plan, who was it who made
17 that decision?

18 A With advice of legal counsel, it would have been me.

19 Q There have been discussions today about both a 409(A)
20 accelerated distribution election and also this unscheduled
21 withdrawal provision in the HFA deferred compensation plans.
22 Can you just describe very generally what is a 409(A)
23 accelerated election distribution?

24 A Basically when 409(A) came into being, because previously
25 nonqualified plans, there weren't a lot of rules around them,

1 and 409(A) was pretty stringent. And so what they did as part
2 of the provisions of that was to say a company has the option
3 of offering an accelerated payment option with a delay. But if
4 you were -- if your plan was subject to 409(A) or you wanted it
5 to be subject to 409(A), you had the option of allowing --
6 because it was so strict on a go-forward basis, you had the
7 option of allowing participants to take an acceleration option
8 in which they would be paid in a future time period.

9 Q And was the employer required to allow that election?

10 A No.

11 Q After 409(A) was enacted, did Washington Mutual engage in
12 a review of its nonqualified deferred compensation and
13 retirement plans to determine whether to permit these
14 elections?

15 A Yes.

16 Q What did this review process entail?

17 A It entailed both for the Washington Mutual -- the Inc.
18 plans, as well as the acquired plans, is that what you're
19 asking?

20 Q Well, I'm asking what was the process?

21 A The process was to look at the plan documents to see what
22 provisions would have been affected by 409(A) and basically see
23 if the acceleration option by -- well, by subjecting the plan
24 to 409(A), if it would basically be harming participants who
25 decided to stay in the plans.

1 Q So, to be clear, what would happen if a plan that was
2 otherwise grandfathered and not subject to 409(A) was then --
3 if -- with respect to such a plan, Washington Mutual decided to
4 permit this election, what would then be the ramifications of
5 that?

6 A If it was subjected to 409(A)?

7 Q If it's -- if it's an otherwise grandfathered plan and WMI
8 decides to permit an accelerated payment election, what would
9 then happen?

10 A It would be -- the entire plan and participants would be
11 subject to 409(A) and all the restrictions that that brings.

12 Q So, the plan would have lost its grandfathered status?

13 A Correct.

14 Q Previously you testified that when you conducted this
15 review process -- when your team conducted this review process,
16 you prioritized plans among many factors, including their
17 complexity. Can you describe this, what did you mean by
18 complexity?

19 A Well, we basically had a checklist and, of course, every
20 time the law was clarified, we'd have to sort of start again.
21 So, 409(A) came into being in October of 2004, and basically --
22 at least once a year, there was a clarification, and it helped
23 us to better understand what 409(A) meant and, therefore, we
24 would start the process again. But essentially what we would
25 do is, based on the clarification, we would look and say, okay,

1 these kinds of provisions will be negated by 409(A), and it's -
2 - you know, with the help of a lawyer, we would try and point
3 different things out, and then we would look at each plan
4 individually, sit down with counsel and decide, you know, how
5 much participants would lose out on those grandfathered
6 provisions if we made it subject to 409(A).

7 Q And if the company decided to permit an accelerated
8 payment election, and thus subject the plan to 409(A), would
9 that only affect those participants who were taking -- who
10 decided to make the election and take the distribution?

11 A No, it would -- it would subject the entire plan. And
12 that's why it was so -- you wanted to preserve provisions that
13 were favorable to participants if you could, if you thought
14 maybe a lot of people would stay. You didn't want to subject
15 all of them to 409(A) and there, again, were more restrictions
16 around the plan, all the provisions in the plan.

17 Q So, is it fair to say that WMI, when it was conducting
18 this review process, had all plan participants in mind and the
19 implications that could result from whatever decision WMI made?

20 A Absolutely.

21 Q Why -- you testified previously that there were some other
22 plans that were reviewed ahead of the HFA deferred compensation
23 plan, correct?

24 A Yes.

25 Q Why did it take longer to review the HFA plans?

1 A They were very complex. And, again, it was an important
2 -- it was an important decision to make, and we wanted to be
3 thorough with our legal review.

4 MS. DiBLASI: Your Honor, may I approach?

5 THE COURT: You may.

6 MS. DiBLASI: I've handed the witness and the Court a
7 copy of an e-mail that's marked Plan Participant's Exhibit 3,
8 this was previously entered into evidence at the prior hearing.
9 And this is an e-mail from Ms. Jenson to Ms. Dewar. Well, it's
10 to the GMWMUDCP.

11 BY MS. DiBLASI:

12 Q Ms. Dewar, can you please explain what that e-mail address
13 means?

14 A It's a general mailbox. So, because I had other team
15 members, everyone on my team had access to that. So, when
16 participants had questions, they could send it to the mailbox
17 versus sending it directly to a person.

18 Q So, did you have access to this mailbox?

19 A Yes, I did.

20 Q Okay. Can you please read the second sentence of the
21 first full paragraph that's in the top portion of the e-mail
22 beginning, "The decision of whether?"

23 A "The decision of whether or not the acceleration will be
24 offered to the home savings plan is still under review."

25 Q Please continue through the end of that paragraph.

1 A "This decision cannot be taken lightly, especially
2 considering that if we make this option available, the plan
3 will become subject to 409(A) and accordingly lose the
4 grandfathered provisions that potentially offer greater
5 flexibility to the participants in the plan."

6 Q Previously, Ms. Dewar, there has been testimony by the
7 participants that they believe that the WMI deferred
8 compensation plan was reviewed prior to the H.F. Ahmanson
9 because Mr. Killinger had an interest in it. And if you
10 recall, opposing counsel asked you some questions about Mr.
11 Killinger's interest in the WMI plan.

12 Did Mr. Killinger have any involvement in the
13 decisions of the H.R. group regarding how to prioritize review
14 of Washington Mutual, Inc.'s deferred compensation plan?

15 A Not in any way, no.

16 Q Was the WMI deferred compensation plan reviewed because
17 Mr. Killinger had an interest in it?

18 A No.

19 Q Did anyone ever tell you not to review the HFA deferred
20 compensation plans?

21 A No.

22 Q Specifically, did anyone ever tell you that WMI had no
23 interest in amending the HFA plans to provide for an
24 accelerated distribution election because Mr. Killinger did not
25 have an interest in them?

1 A No.

2 Q And did WMI ever actually engage in a review of the HFA
3 deferred compensation plans to determine whether to provide a
4 409(A) accelerated distribution election?

5 A Yes.

6 Q I believe that the document marked Plan Participant's
7 Exhibit Number 7 should be in front of you.

8 A Yes.

9 Q On Page 2 of that document, about halfway down the page in
10 the e-mail that's from to Ms. Malafronte, can you please read
11 aloud the first sentence of that paragraph beginning, "We do
12 plan?"

13 A "We do plan to review all the legacy nonqualified plans by
14 mid-2008 to determine if we should be offering the acceleration
15 option which makes the plan subject to 409(A) rules. If you
16 have any additional questions" --

17 Q And did you participate in that review that you're
18 referring to here?

19 A Absolutely.

20 Q And were the H.F. Ahmanson plans actually ever amended?

21 A I believe they were amended in the end of 2008, which is
22 the time that the amendment had to happen and that was
23 specifically because we had offered the terminated employees in
24 those plans the option of receiving their funds and accelerated
25 -- based on the accelerated --

1 Q And are you aware of the contents of the amendment?

2 A Yes, I reviewed it.

3 Q Do you recall what the amendment provided?

4 A It just made the plan compliant with 409(A), I don't
5 remember specifics.

6 Q Okay. So, now let's turn to the other distribution
7 concept that has been discussed today, which is the unscheduled
8 withdrawal provision in the H.F. Ahmanson plans.

9 A Right.

10 Q At any point in time, did Washington Mutual engage in a
11 review of whether it could make distributions pursuant to this
12 unscheduled withdrawal provision in the H.F. Ahmanson plans?

13 A We did review it with legal counsel.

14 Q And was there a particular event that triggered this
15 review?

16 A I think as just a general course of business, we looked at
17 plan documents periodically.

18 Q Did WMI consider the H.F. Ahmanson plans grandfathered
19 from 409(A)?

20 A Yes.

21 Q And when WMI engaged in this review, did it have
22 communications with in-house counsel? Don't tell me -- if
23 there were, don't tell me the content of those communications,
24 but did those communications take place?

25 A Yes.

1 Q And similarly, did Washington Mutual speak with outside
2 counsel? Again, please don't disclose the content of any
3 communications, but did those communications take place?

4 A Yes.

5 Q Taking into account all analyses available, did WMI
6 eventually make a decision regarding the enforceability of the
7 unscheduled withdrawal provisions in the HFA plans?

8 A Yes.

9 Q And what was that decision?

10 A The advice was that they didn't think it was a valid
11 provision in the plan.

12 Q So, the decision was to not permit unscheduled withdrawal
13 distributions?

14 A Correct.

15 Q Without disclosing the advice of counsel, why -- why did
16 WMI decide to not permit distributions under that provision?

17 A The risk was too great. You -- potentially -- if the IRS
18 didn't agree with what you had done, there was a constructive
19 receipt issue, which would mean taxation for the entire
20 population within that plan.

21 Q And did this concern about constructive receipt exist
22 notwithstanding the fact that WMI had determined that these
23 plans were grandfathered from 409(A)?

24 A Yes.

25 Q Previously Ms. Bakker asked you to look at the plan terms

1 and confirm that the unscheduled withdrawal provision provided
2 for a 10 percent penalty prior to there being a change of
3 control. Do you recall, and if not, please refer to the plan
4 document, what was the penalty after a change in control?

5 A I believe it's five percent.

6 Q Can you just please look at the plan document and just
7 confirm that?

8 A Yes, it is five percent.

9 Q And was there a change in control?

10 A There was.

11 Q In what year?

12 A (No verbal response)

13 Q If you don't recall --

14 A Long before my time.

15 Q So, you testified that WMI was concerned about
16 constructive receipt issues. If there was a constructive
17 receipt issue, who would have been affected by that
18 determination?

19 A All the plan participants.

20 Q So, not just those people who had elected to receive a
21 unscheduled withdrawal distribution?

22 A Exactly.

23 Q Would the -- do you know whether the IRS would have reason
24 to audit or challenge a plan provision if, in fact, no
25 distributions had been made pursuant to that provision?

1 MS. BAKKER: Objection; calls for speculation.

2 THE COURT: Sustained.

3 BY MS. DiBLASI:

4 Q You were previously asked about whether the IRS has
5 audited these plans. Whether or not it was audited, did WMI
6 still determine that it was required to abide by the law and
7 not to permit unscheduled withdrawal distributions?

8 A Absolutely, yes.

9 Q So, is that why WMI reviewed the plans and withheld from
10 making such distributions?

11 A Yes.

12 Q Is it still possible for the IRS to audit these plans?

13 A I believe so.

14 Q We previously discussed about -- discussed the amount of
15 the penalty. And Ms. Bakker asked you a series of questions
16 about the existence of a penalty and how that relates to
17 whether or not a participant in a deferred compensation plan is
18 considered in constructive receipt of the funds. Was the mere
19 existence of a penalty sufficient?

20 A I don't believe so. I believe it had to be significant.

21 Q Taking a step back to our discussion about WMI's review of
22 the plans and specifically the unscheduled withdrawal
23 provision, did the enactment of Section 409(A) have any
24 influence on the decisions that were made pursuant to this
25 review process?

1 A I think it strengthened our position. But I'm not -- I
2 think we had the conversation before 409(A) was enacted.

3 Q And can you explain a little bit more your statement that
4 it strengthened your position?

5 A I believe after 409(A), the haircut provision was no
6 longer allowed.

7 Q And you just stated a minute ago that you had
8 conversations about this provision, even prior to the enactment
9 of 409(A)?

10 A I believe so, yes.

11 Q So, WMI had concerns about its legality even prior to that
12 statute coming into existence?

13 A Yes.

14 Q Did WMI make a payment to any participant under this
15 unscheduled withdrawal provision in the HFA plans after the
16 enactment of Section 409(A)?

17 A No.

18 Q As you probably are aware, the participants here today
19 have requested that the Court impose a constructive trust on
20 the rabbi trust assets so that they can have a direct ownership
21 interest in those assets and be paid directly from them. If
22 the Court agrees with the participants and imposes a
23 constructive trust, do you believe that it's possible that this
24 could trigger a constructive receipt issue?

25 A Yes.

1 MS. BAKKER: Objection, Your Honor; calls for
2 speculation. And she's already testified that she is not a
3 lawyer and couldn't --

4 THE COURT: Well -- sustained.

5 BY MS. DiBLASI:

6 Q If there is a constructive receipt issue with respect to a
7 deferred compensation plan, does that affect all participants
8 in the plan?

9 A Yes, it does.

10 Q Whether or not they've actually received a distribution?

11 A Correct.

12 Q And what are the ramifications of that? What happens?

13 A I believe taxation is back to when the deferral happened,
14 as well as penalties additionally on that money.

15 Q So, all participants are taxed for what portion of
16 compensation that was deferred?

17 A (No verbal response)

18 Q Let me rephrase the question.

19 A All right.

20 Q What portion of their -- in that circumstance, what
21 portion of participant's deferred compensation would be taxed?

22 A Their entire balance.

23 MS. DiBLASI: I have nothing further.

24 THE COURT: Any recross?

25 MS. BAKKER: Yes, Your Honor.

1 RECCROSS EXAMINATION

2 BY MS. BAKKER:

3 Q Ms. Dewar, I'd like to direct your attention to the
4 document that's been previously marked as Participant's
5 Exhibit 7.

6 A Okay.

7 Q That is -- I apologize. I'd like you -- to direct you to
8 Participant's Exhibit 3.

9 A Oh, okay.

10 Q Earlier you read into the record the last sentence of that
11 e-mail from the GMWAMUDCP, which was you writing, correct?

12 A Actually it was Carla Morrison who --

13 Q Oh, Carla Morrison, right.

14 A Yes.

15 Q But she's a member of your team?

16 A She is.

17 Q To Dotty Jenson. And the last sentence says -- if you
18 would read it again, beginning with "This decision."

19 A "This decision cannot be taken lightly, especially
20 considering that if we make this option available, the plan
21 will become subject to 409(A) and accordingly lose the
22 grandfathered provisions that potentially offer greater
23 flexibility to the participants in the plan."

24 Q So, it is the case, is it not, that the provisions of the
25 Ahmanson plans, as they existed before the plan was amended for

1 409(A) remained the governing plan provisions for those plans,
2 is it not?

3 A The plan was subject to interpretation.

4 Q The plan documents, as they existed before the plan -- the
5 Ahmanson plans were amended for a 409(A) continue to be the
6 governing plan documents, were they not?

7 A Correct.

8 Q And those governing plan documents included the
9 unscheduled withdrawal provision, did they not?

10 A It included it, but our legal counsel didn't believe it
11 was a valid provision.

12 Q Why is that?

13 A Again, it's the risk -- you have to look at the risk of
14 the entire population. And there's potential that it would be
15 -- you know, if the IRS didn't agree with that provision, there
16 was potential for constructive receipt, and full taxation to
17 all participants in the plan.

18 Q Ms. Dewar, you should have in front of you the documents
19 that we're using as a sample plan document, Capital
20 Accumulation Plan of H.F. Ahmanson and Company.

21 A Okay.

22 Q I'd like to refer you to Page 1 of that document, the
23 preamble.

24 A Okay.

25 Q The first paragraph of that document, would you please

1 read the last sentence of that document? The first -- the last
2 sentence of that paragraph?

3 THE COURT: Of the first paragraph?

4 MS. BAKKER: Yes, please.

5 THE WITNESS: Isn't it all one -- oh.

6 A "The plan will be effective as of January 1st" --

7 Q Continue.

8 A -- "1995 and will apply to all deferred elections made
9 after September 30th, 1994."

10 Q And this is the same plan document that contains, at Page
11 22, the unscheduled withdrawal provision at Section 5.9B?

12 A That's correct.

13 Q Okay. So, isn't it the case then based on your counsel's
14 advice that if Section 5.9B was invalid somehow, that that
15 would have been the case since 1994?

16 A No. The decision at the time -- I'm not sure if there was
17 ever unscheduled withdrawals previous to that.

18 Q That was not my question.

19 A Okay.

20 Q The -- Section 5.9B is in the plan document that's
21 effective as of January 1, 1995, is it not?

22 A That's what it says.

23 Q So, is it not the case that your counsel's advice that
24 Section 5.9B is invalid would have been with respect to a
25 provision in the plan that's existed and been effective since

1 January 1, 1995?

2 MS. DiBLASI: Objection, Your Honor. Ms. Dewar has
3 no basis to know the reasoning behind her counsel's advice. It
4 may have been --

5 THE COURT: Overruled.

6 MS. DiBLASI: -- influenced by circumstances.

7 THE COURT: Overruled. She had conversations with
8 them, so I'll allow the question. And please don't prompt.
9 Go ahead and answer.

10 MR. LANDIS: Your Honor, I hesitate to jump and
11 object. Let me -- for the record, Adam Landis from Landis Rath
12 & Cobb on behalf JPMorgan Chase.

13 Your Honor, we share a privilege, we believe, with
14 the debtors with respect to conversations that may have been
15 had with counsel. And there's a concern that --

16 THE COURT: Why do you share a privilege with them?

17 MR. LANDIS: Well, in connection with the P&A, Your
18 Honor. We may have either shared or acceded to certain aspects
19 of the privilege.

20 And because of that, we -- I rise to state a concern
21 that this line of questioning appearing to be asking into
22 advice of counsel. Your Honor, that's privileged, and we don't
23 believe that should be made part of this record.

24 THE COURT: Well, maybe you should have spoken up
25 earlier because she's been talking about --

1 MR. LANDIS: Well, Your Honor --

2 THE COURT: -- what counsel said all along.

3 MR. LANDIS: She talked about the fact that she did
4 have conversations with counsel, and --

5 THE COURT: And they felt it was invalid.

6 MR. LANDIS: And Mr. Rosen --

7 THE COURT: She said they felt it was invalid. Now
8 we're asking why.

9 MR. LANDIS: Well, Your Honor, perhaps I should have
10 jumped up earlier in that regard. But that doesn't, I think
11 don't think, waive the ability to raise the fact that the
12 privilege is being -- it may be, in fact, being invaded here.

13 THE COURT: In my opinion, she cannot rely on advice
14 of counsel to say that this was invalid without telling us why.
15 I really think she's opened the door.

16 MR. LANDIS: In terms of the reliance on advice of
17 counsel, the fact of relying on advice of counsel, I think, is
18 different from speaking as to what that counsel's advice was.

19 THE COURT: Well, she's told us what that counsel's
20 advice was. I think she's already opened the door.

21 MR. LANDIS: And, Your Honor, I don't believe
22 necessarily by saying that that she has necessarily enabled the
23 questions to then be asked as to any aspect of counsel's
24 advice.

25 THE COURT: Well, I'm not sure of that. But all

1 she's asked is why did counsel say it was invalid.

2 MR. LANDIS: Okay.

3 THE COURT: And I think that question can be
4 answered.

5 MR. LANDIS: I suppose if she knows it or recalls.
6 But, thank you, Your Honor.

7 THE COURT: I'd caution counsel not to suggest
8 answers.

9 MR. LANDIS: No, Your Honor --

10 THE COURT: Or make argument --

11 MR. LANDIS: Thank you, Your Honor.

12 THE COURT: -- in objections. You can answer the
13 question.

14 THE WITNESS: I don't remember what the question was.
15 Can you say it again?

16 BY MS. BAKKER:

17 Q Ms. Dewar, I was -- if you'll look at Page 1 of the H.F.
18 Ahmanson -- the capital accumulation plan of H.F. Ahmanson and
19 Company -- actually if you look at the third line down from the
20 top -- at the top of that page, it says that the plan is
21 effective as of January 1, 1995, does it not?

22 A Yes, it does.

23 Q And this is the very same plan that contains Section 5.9B
24 on Page 22 --

25 A Correct.

1 Q -- that is the unscheduled withdrawal provision which you
2 say your counsel asserted was invalid, is that correct?

3 A Correct.

4 Q So, my question is if that were the case, then that would
5 mean that the provision was invalid as of the time that it
6 first existed, which would be 1995, isn't that your prior
7 testimony?

8 A No. I -- I don't know if it would. I don't know if it's
9 a point in time -- if you make that decision in a point in time
10 it's going forward. I don't know.

11 Q Didn't you just testify that if there were a determination
12 by the Internal Revenue Service that contributions to a
13 deferred compensation plan that had provisions with an
14 insignificantly low restriction, which is what your counsel
15 advised you --

16 A Right.

17 Q -- Section 5.9B amounts to, then those distributions would
18 be taxable going back to the time they first were put into the
19 plan.

20 A Correct.

21 Q Those contributions.

22 A That's correct.

23 Q Did that ever happen?

24 A Not to my knowledge. Again, I don't know that the
25 unscheduled withdrawal ever happened, if there was one.

1 Q Didn't your counsel advise you that Section 5.9B amounts
2 to an invalid restriction on a participant's access to his
3 cash?

4 A Can you say that again?

5 Q Didn't your counsel advise you that Section 5.9B amounts
6 to -- that -- is not a significant -- does not create a
7 substantial risk of forfeiture -- or is not a significant
8 restriction on a participant's access to its cash which creates
9 the constructive receipt problem?

10 MS. DiBLASI: Your Honor, I would ask that counsel
11 please limit her question to a particular time period.

12 THE COURT: Can you?

13 MS. BAKKER: Your Honor, she previously testified
14 that she can't remember when her counsel gave her this advice.

15 THE COURT: So, whenever counsel gave you the advice,
16 was this the advice?

17 THE WITNESS: The advice was they didn't think it was
18 valid because they didn't think it was a substantial penalty.

19 BY MS. BAKKER:

20 Q Did WMI seek to correct this problem by amending the plan
21 at any time?

22 A No.

23 Q So, WMI chose to leave the participants hanging out there
24 in case the IRS chose to assert this issue, which would have
25 resulted, as you've already testified, in all of the

1 participants being deemed in constructive receipt for all of
2 their contributions going back to 1995?

3 A Can you ask the question again?

4 Q Did WMI -- you just testified that after WMI received this
5 advice from counsel, that Section 5.9B amounted to an
6 insignificant restriction which created this constructive trust
7 issue. That WMI did not seek to correct that problem by
8 modifying Section 5.9B in some way, did you not just testify to
9 that?

10 A Yes, and they -- they did not amend the plan, that's
11 correct.

12 Q So, by that decision, essentially WMI was essentially
13 leaving its participants in these plans unguarded from that
14 result should the IRS decide to assert the view that your
15 counsel told you that 5.9B is invalid?

16 A My understanding is if you didn't allow it, that it was --
17 that -- because we weren't honoring the provision, it was
18 essentially a no longer valid provision of the plan.

19 Q Is or is not the provision still part of the plan?

20 A It is. Well, actually it was amended -- I believe the
21 amendment actually made the correction in 2008.

22 Q In 2008. In 2007, when the participants were calling,
23 seeking distributions of their plans, was 5.9B a part of the
24 plan?

25 A Yes, it was.

1 Q So, 5.9B in November of 2007 was still part of the
2 governing plan document --

3 A That's --

4 Q -- was it not?

5 A Yes.

6 Q Ms. Dewar, have you -- are you familiar with a statute
7 called the Employee Retirement Income Security Act, or ERISA?

8 A Yes, I am.

9 Q As a administrator and manager of employee benefit plans,
10 are you aware that ERISA obligates plan administrators to
11 operate their plans in compliance with the terms of plan
12 documents?

13 A Yes.

14 Q So, is it -- isn't it true then, Ms. Dewar, that in this
15 decision not to give effect to Section 5.9B based on this
16 advice of counsel, you are acting in abrogation of your
17 obligation to administer the plans in accordance with the plan
18 documents?

19 MR. ROSEN: Your Honor, objection; calls for legal
20 conclusion.

21 THE COURT: Sustained.

22 BY MS. BAKKER:

23 Q Ms. Dewar, when you accepted the advice of counsel not to
24 give effect to the unscheduled withdrawal provision in the
25 governing plan document, is it not true that that was a

1 decision not to operate the plan in accordance with its written
2 terms?

3 MR. ROSEN: Same objection, Your Honor.

4 THE COURT: Well, overruled. You can answer.

5 THE WITNESS: Can you ask the question again?

6 MS. BAKKER: Certainly.

7 BY MS. BAKKER:

8 Q Is it not the fact that when you decided to follow this
9 advice from counsel that Section 5.9B was somehow invalid at
10 some point in time, that that decision was contrary to and an
11 abrogation of your obligation as a plan administrator of this
12 plan to operate the plan in accordance with the written terms
13 of that plan?

14 A No, I don't think it is true.

15 Q Didn't you just testify that you're aware that ERISA
16 requires that you operate plans in accordance with their terms?

17 A But there's a time period in which you can amend your
18 plan. And, again, not knowing when we had those discussions, I
19 can't say if were -- was in that time frame or not.

20 Q Ms. Dewar, didn't you testify that the Ahmanson plans are
21 grandfathered under 409(A)?

22 A Yes.

23 Q So, isn't it the fact that if a plan is grandfathered
24 under 409(A), there was no time period involved for deciding
25 whether or not they would be amended to comply with 409(A)?

1 A There was a time period in deciding.

2 Q If the plan is grandfathered, 409(A) does not apply to it,
3 isn't that right?

4 A That's correct. But that didn't mean that we weren't
5 amending the plan for other reasons.

6 Q You could have been amending it --

7 A Um-hum.

8 Q -- because you chose to, but you weren't subject to a
9 deadline, isn't that right?

10 A I think there is a deadline when you -- when you make
11 changes to a plan, you have so many -- so long to actually
12 amend the plan, even though you're -- you're acting in good
13 faith.

14 Q Ms. Dewar, in November of 2007, was Section 5.9B part of
15 the governing plan document?

16 A Yes.

17 Q And in November of 2007, when the participants were
18 calling seeking distributions of their benefits, was Section
19 5.9B a part of the governing plan document?

20 A Yes.

21 Q And in November of 2007 when the participants were calling
22 you, asking for distributions,, did you operate the plan and
23 process their request in accordance with the terms of the
24 governing plan document?

25 A No, because there was a legal decision --

1 Q Thank you.

2 A -- that it was not valid.

3 Q Thank you.

4 MS. BAKKER: No more questions.

5 THE COURT: Redirect?

6 FURTHER REDIRECT EXAMINATION

7 BY MS. DiBLASI:

8 Q Ms. Dewar, did WMI believe it had the authority to
9 interpret and apply the plan terms?

10 A Yes.

11 Q And I believe in front of you is a copy of the HFA capital
12 accumulation plan marked Debtors' Exhibit 1.

13 A Yes.

14 Q Can you please turn to Page 6 of that document?

15 A Yes.

16 Q And there is a provision on that Page 6 marked Section
17 2.2, Duties of Committee, do you see where that is?

18 A I do.

19 Q Could you please read aloud the first sentence of that
20 paragraph?

21 A "The Committee shall be charged with the administration of
22 this plan, and shall decide all questions arising in the
23 administration, interpretation, and application of the plan,
24 including all questions of distributions except as such may be
25 expressly reserved hereunder to the Board."

1 Q Ms. Dewar, did the enactment of Section 409(A) in 2004
2 heighten concerns about constructive receipt issues?

3 A Yes.

4 Q And in 2007 when the participants allegedly were calling
5 and asking for payment of their balances from their HFA plans,
6 notwithstanding the fact that this unscheduled withdrawal
7 provision existed, WMI was not enforcing it, is that correct?

8 A That's correct.

9 Q And in doing so, was WMI exercising its authority to
10 interpret and apply the plans?

11 A Yes.

12 Q We previously discussed that WMI amended the WMI deferred
13 compensation plan to provide for an option for participants to
14 elect 409(A) accelerated distributions, do you recall that?

15 A Yes.

16 Q Do you recall whether any of the participants who are here
17 today made an election to take a distribution from those plans?

18 A I believe some of them, yes, did.

19 Q Do you recall specifically who made those elections?

20 A I recall that Jeff Olson did make the election under the
21 WMI acceleration.

22 Q And do you recall how much he elected to receive?

23 A I think the majority of his money.

24 Q And was there any of the other participants, Ms. Jenson,
25 Mr. McDonough, or Ms. Newman, who similarly elected

1 distributions?

2 A I know Ms. Newman did not. I believe Mr. McDonough took
3 his entire balance.

4 Q Are you aware that with respect to any remaining balance
5 in their WMI deferred compensation plans that JPMorgan later
6 paid these balances to these participants?

7 MS. BAKKER: Objection, Your Honor; beyond the scope.

8 THE COURT: We are. Sustained.

9 MS. DiBLASI: I have nothing further.

10 THE COURT: Anything?

11 FURTHER RECROSS EXAMINATION

12 BY MS. BAKKER:

13 Q Ms. Dewar, I would like to, again, direct your attention
14 to Page 6 of the capital accumulation plan of H.F. Ahmanson and
15 Company.

16 A Okay.

17 Q Section 2.2, Duties of Committee.

18 A Yes.

19 Q Would you continue reading for the Court the second full
20 paragraph of Section 2.2 aloud?

21 A Starting with "The Committee shall?"

22 Q Yes, please.

23 A "The Committee shall, from time-to-time, direct the
24 treasurer of the company concerning the payments to be made
25 hereunder to the participant pursuant to this plan, and shall

1 have other such powers respecting administration to the plan as
2 may be conferred upon it hereunder or may be delegated to it
3 from time-to-time by the Board."

4 Q I apologize. I actually meant for you to read the next
5 part. Page 7, Section 2.3, Paragraph B at the bottom of
6 Page 7.

7 A Oh. Section 503?

8 Q Yes.

9 A Okay. "Section 503 of Title 1 of ERISA requires that
10 there be an established with respect to the plan claims
11 procedures which are in accordance with regulations that may be
12 promulgated under said section by the Secretary of Labor."

13 Q Continue, please.

14 A "The Committee shall establish and maintain procedures
15 pertaining to claims by participants and their beneficiaries
16 for the benefits of the plan, which shall be in compliance with
17 the requirements of said Section 503."

18 Q As an administrator of employee benefit plans, Ms. Dewar,
19 isn't it the case that employee benefit plans administrators
20 must have in place claims procedures that enable participants
21 to assert their rights to claims under plans?

22 A We did, yes.

23 Q When -- in the fall of 2007 when the participants were
24 calling you and members of your staff to get distributions of
25 their benefits under the Ahmanson plans, did you or anyone in

1 your staff tell them that the denial was based on counsel's
2 view that Section 5.9B was invalid?

3 MS. DiBLASI: Objection, Your Honor; beyond the
4 scope.

5 THE COURT: Overruled.

6 THE WITNESS: Can you ask the question again?

7 BY MS. BAKKER:

8 Q When the participants were calling in the fall of 2007
9 seeking a distribution of their benefits under the Ahmanson
10 plans, did you, or any member of your staff, tell them or
11 indicate in any way that the basis for the refusal to process a
12 distribution at that time was because counsel had advised that
13 Section 5.9B was somehow invalid?

14 A I don't know.

15 Q Did you mention the unscheduled withdrawal provision at
16 all?

17 A I'm not sure.

18 Q Did you give them any reason to believe that that was the
19 basis for the denial of their claim?

20 A If people called, they were calling about if it was
21 subject to 409(A), and if they could get the acceleration
22 option. I don't remember people asking about an unscheduled
23 withdrawal, but --

24 Q Did you tell them that that was the basis for refusing to
25 process an immediate distribution?

1 MS. DiBLASI: Asked and answered.

2 THE COURT: Overruled.

3 BY MS. BAKKER:

4 Q Who are the members of the committee?

5 A The plan administration committee?

6 Q Yes.

7 A I -- actually I never was able to talk to them directly.
8 Everything was, you know, letters I would write would be to the
9 pack. So, I --

10 Q Does the committee exist?

11 A Yes, it does, absolutely.

12 Q And who appoints the committee?

13 A I don't know.

14 Q How long are they appointed for.

15 A I don't know.

16 Q Did they ever establish the claims procedures that the
17 plan documents requires that they establish?

18 A I believe so, yes.

19 Q And do those claim procedures require, as ERISA indicates
20 that they do, that denials of benefits be stated in writing,
21 and identify that provision of the plan document that is the
22 basis for the denial?

23 A I believe so.

24 Q Did you or any member of your staff ever send out a letter
25 to the participants who are trying to get distributions of

1 their benefits in the fall of 2007 indicating the basis for the
2 denial?

3 A My understanding was we needed a written request, and I
4 never received that.

5 Q Is there anything in this document that identifies that a
6 written request is required?

7 A I don't know.

8 Q When the participants called asking for information on how
9 to get their benefits, did you tell them that they needed to
10 send in a written request?

11 A I probably directed them back to the plan document. And
12 if they didn't have it, would provide it to them.

13 Q It's true that you didn't tell them that they needed to
14 send in a written request.

15 A I --

16 Q You just said no?

17 A I couldn't --

18 Q Isn't that right?

19 MR. ROSEN: Your Honor, would she please allow the
20 witness to answer the question instead of badgering her?

21 THE COURT: All right. Please allow her to answer.

22 MS. BAKKER: Yes, Your Honor.

23 THE COURT: Did you tell them they had to submit a
24 written request?

25 THE WITNESS: I probably said you -- please -- you

1 know, if you have questions, please read the plan document.

2 So, I don't know that I directly said you need to send in
3 something written.

4 BY MS. BAKKER:

5 Q You said you probably said that, but you're not sure?

6 A I'm not sure, you're right.

7 Q Isn't it true that you didn't direct them to the plans'
8 claims procedures?

9 A (No verbal response)

10 Q Isn't it true -- to rephrase my question. Isn't it true
11 that you didn't direct them to the plans' claims procedures as
12 a way of getting additional decision making on their -- by a
13 fiduciary on their claim for an immediate distribution under
14 the plans?

15 A I can't say.

16 Q Isn't it true that you did nothing further to try to help
17 them?

18 MR. ROSEN: Your Honor, I apologize for standing up.
19 With the witness has answered so many times that she doesn't
20 recall the substance of the conversation. Counsel continues to
21 say "didn't you not say this." The answer is "I don't recall
22 what I said."

23 THE COURT: Well, then let her say it. Please don't
24 tell her what to answer.

25 MR. ROSEN: Your Honor, I'm not. She's answered --

1 THE COURT: All right.

2 MR. ROSEN: -- several times.

3 THE COURT: Overruled. Did you do anything else to
4 try and help these employees?

5 THE WITNESS: I -- I directed them to the plan
6 document, which had all the information that they needed.
7 These seemed to be casual -- people were asking questions, but
8 they -- they weren't saying, you know, -- I'm sorry.

9 BY MS. BAKKER:

10 Q Ms. Dewar, it was your responsibility to administer these
11 plans, was it not?

12 A Correct.

13 Q And it was your responsibility to administer the plans in
14 accordance with the plan documents?

15 THE COURT: Now we're repeating.

16 MS. BAKKER: Okay. Thank you.

17 (Pause)

18 BY MS. BAKKER:

19 Q Ms. Dewar, I'd like you to turn to Page 33 of the document
20 that's been previously marked as D-1, which is the Capital
21 Accumulation Plan of H.F. Ahmanson and Company.

22 A I'm sorry. What page?

23 Q Page 33.

24 A Okay.

25 Q Would you please read aloud for the Court Section 9.2 on

1 Page 33 of that document?

2 THE COURT: I don't think we have to read the whole
3 thing, I can read it.

4 MS. BAKKER: Okay.

5 THE COURT: Do you have a follow-up question?

6 MS. BAKKER: Just the first sentence, how about that?

7 THE COURT: I can read the sentence. Do you have a
8 question on it?

9 MS. BAKKER: Partial -- I'm sorry, what? I'm sorry
10 what? I didn't hear you.

11 THE WITNESS: I didn't hear you?

12 THE COURT: I can read it. Do you want to ask her a
13 question on that?

14 MS. BAKKER: Sure. Thank you, Your Honor.

15 BY MS. BAKKER:

16 Q Ms. Dewar, you previously testified that WMI received
17 advice from counsel that Section 5.9B was invalid. And based
18 on that advice, you made the decision not to operate the plan
19 in compliance -- in accordance with Section 5.9B.

20 A Correct.

21 Q Did -- are you aware -- based on that advice --

22 (Pause)

23 Q Did the Board or WMI take any efforts to terminate the
24 plan because there had been advice that a portion of the plan
25 was invalid?

1 A It didn't invalidate the entire plan, and that would have
2 caused full taxation to all the participants. And there was a
3 reason the plan was put in place in the first place was to
4 allow them to defer taxation into the future years.

5 Q But there was no effort to fix Section 5.9B, right?

6 A (No verbal response)

7 MS. BAKKER: All right. I have no further questions.

8 THE COURT: Thank you.

9 MS. BAKKER: Thank you, Your Honor.

10 THE COURT: Any redirect?

11 FURTHER REDIRECT EXAMINATION

12 BY MS. DiBLASI:

13 Q Ms. Dewar, did you believe that you were acting in good
14 faith when you interpreted the terms of the HFA deferred
15 compensation plans?

16 A Yes.

17 MS. DiBLASI: Nothing further.

18 THE COURT: All right. Thank you. Thank you. You
19 may step down.

20 All right. Are we done then? Are we done?

21 MS. BAKKER: Yes, Your Honor. Thank you.

22 MS. DiBLASI: May we have a moment, Your Honor?

23 THE COURT: Yes.

24 (Pause)

25 MS. DiBLASI: Your Honor, at this time, the debtors

1 would like to present their closing argument.

2 THE COURT: Can we skip that?

3 MS. DiBLASI: If that's what you'd prefer.

4 THE COURT: I do. I do. Haven't the parties briefed
5 this? I had asked for additional briefing, and I --

6 MS. DiBLASI: Yes, Your --

7 THE COURT: -- got the motion to reopen the record.

8 MS. DiBLASI: Yes, Your Honor. The parties each
9 submitted initial moving briefs. The debtors submitted a reply
10 brief. The plan participants reserved their right to submit a
11 reply brief and requested in the order the ability to do so
12 after the hearing.

13 THE COURT: All right. Well, I'll just wait for the
14 briefing to be completed then.

15 MS. DiBLASI: And the debtors had reserved their
16 right for further reply brief, as well, in the event that the
17 participants were exercising their right, just to confirm.

18 THE COURT: All right. How long before the
19 participants' brief is due then?

20 MS. BAKKER: I believe two weeks, February 12th.

21 THE COURT: All right. And you'll have the same
22 after that?

23 MS. DiBLASI: Yes.

24 THE COURT: Okay. All right. I'll ask the parties,
25 if they haven't already, to order the transcript --

1 MS. DiBLASI: Okay.

2 THE COURT: -- of the different hearings, okay?

3 MS. DiBLASI: Thank you, Your Honor.

4 MS. BAKKER: Thank you, Your Honor.

5 THE COURT: All right. I'll look for that, and then
6 I'll render my decision.

7 MR. STRATTON: Your Honor, just one minute. David
8 Stratton, if I may? I'm sorry. David Stratton for the
9 Committee.

10 The Committee may want to submit something very brief
11 at the end of -- along with the debtors' papers on these
12 issues. We have some views on them. We won't burden the
13 record with the extended discussion. I just wanted to let the
14 Court know that.

15 THE COURT: That's fine.

16 MR. STRATTON: Thank you.

17 THE COURT: All right. Then we'll stand adjourned.
18 Thank you.

19 (Whereupon, at 12:52 P.M., the hearing was adjourned.)

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
23 above-entitled matter.

24 /s/ Karen Hartmann AAERT CET**D0475 Date: February 1, 2010

25 TRANSCRIPTS PLUS, INC.

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