UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

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

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

OFFICIAL COMMITTEE OF

EQUITY SECURITY HOLDERS,

Plaintiff,

-against-

WASHINGTON MUTUAL, INC.,

Defendant.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

April 6, 2010

1:59 PM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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P R O C E E D I N G S

THE CLERK: All rise. Please be seated.

THE COURT: Good afternoon.

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

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

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

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

THE COURT: They will be.

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

MR. ROSEN: Good afternoon, Your Honor. Brian Rosen, Weil, Gotshal & Manges. Mr. Jang is correct; we jumped down a good ways on the agenda, and specifically, Your Honor, I believe we go to page 8, as far as I'm concerned, is the first uncontested matter with certification of no objection. And items 12, 13 and 14 were submitted with a CNO. I believe, Your Honor, also, item 14, you may have already entered an order yesterday approving that compromise and settlement.

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: I didn't get it.

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

THE COURT: You may.

MR. BOWDEN: Thank you, Your Honor.

THE COURT: Good morning.

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

THE COURT: All right. Thank you.

MS. LIU: Thank you.

MR. BOWDEN: Permission to approach, Your Honor?

THE COURT: (No audible response.)

(Pause)

THE COURT: All right, let me see --

(Pause)

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

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

THE COURT: So they do reflect --

MR. JOHNSON: Yes.

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

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

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

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

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

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

THE COURT: I had it here.

(Pause)

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

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

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

THE COURT: Oh, "any" --

MR. BOWDEN: Yes.

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

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

THE COURT: Okay.

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

THE COURT: All right, thank you.

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

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

But before I turn the podium over to my partner Mr. Frongillo, I would like to reiterate a comment that we have made throughout these proceedings, Your Honor, and as of today has really gone unfulfilled by the parties on the other side of the podium; specifically, Your Honor, the compliance with Bankruptcy Rule 2019. Last time we were here, the Court spoke to Mr. Anker and asked him very nicely to file an amended 2019 statement, and Mr. Anker did so; it was an amended verified statement, but it was -- if I had to go back to a movie, President -- All the President's Men; it was a nondenial denial. He didn't say anything in there, Your Honor. He didn't way to say anything in there. He said he wasn't going to say anything in there, and he said I'm not going to say anything, because nobody else is saying anything. So -- and he specifically looked to two other law firms involved in the case who have not made an appearance in quite some time, or ever, and said that's the reason he's not going to comply with 2019, and by the way, the Court's ruling is on appeal, so he sees no reason to comply with 2019.

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

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

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

THE COURT: Do you have a copy of it?

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

THE COURT: Yes.

(Pause)

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

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

(Pause)

THE COURT: Well --

MR. ANKER: Pardon me, Your Honor?

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

MR. ANKER: The largest holder in our group, Your Honor, purchased pre-petition its entire position, as I understand it, at par, except to the extent that there may have been any discount to par pre-petition, and I don't believe there was any. I believe the bonds sold pre-petition at one hundred cents on the dollar.

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

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

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

THE COURT: All right, sorry to interrupt.

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

I did get a letter from Mr. Rosen prior to our filing of this amended 2019 statement on February 19 of this year, some seven weeks ago. I told Mr. Rosen we would be filing an amended 2019 statement that I believed complied with the Rules. We filed this 2019 statement, I represent to you, on the date it is shown. We served the debtor with a copy, and I represent to you as an officer of this court I have not heard one peep out of Mr. Rosen or any of his colleagues up until when he stood up right now. I would ask that in the future I not get sandbagged that way.

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

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

THE COURT: Okay.

MR. ANKER: Your Honor, I will make one final point. I understand Your Honor's ruling. I will say that the scope of 2019 and what it does require and doesn't require is the subject not only of hot debate within the bar but within the bench. As Your Honor is no doubt aware, a judge in this district came to a different view than you did, and so too did -- I apologize, the judge presiding in the Philadelphia Newspapers case.

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

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

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

THE COURT: Both sides. I understand.

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

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

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

MR. ANKER: -- meaningful --

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

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

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

THE COURT: Thank you.

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

MR. ROSEN: April 21st.

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

MR. ANKER: Thank you, Your Honor.

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

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

THE COURT: Okay.

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

THE COURT: You may.

(Pause)

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

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

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

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

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

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

The notes were issued from 2006 to the end of the second quarter 2007; there's an eighteen-month period of time. The bank was current on payments of all notes up until the time of the receivership. There was no default. At the receivership, the payments ceased on the notes. And as the Court's well aware, the assets of the bank were sold to JPMorgan, which did not assume the liability of the notes. The next day, September 26, this proceeding was filed by the debtors.

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

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

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

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

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

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

The bondholders here admit that the harm occurred when the bank failed. That's no different harm that was suffered from any other creditor in the case, and only the FDIC can bring the claims. And what I'm going to specifically address is only four of the claims, and the big one is the misrepresentation claim. And I think Mr. Rosen correctly pointed out that the deficiency in the 2019 filing has bearing on that, because to the extent that any of these bondholders acquired these bonds after the receivership, they can hardly come before this Court to claim that they were fraudulently induced due to public statements before the receivership that were false, to acquire the bonds, claiming that they were false statements about the health of the bank. So that point is very much germane and relevant to why at least an admitted group of these bondholders have no standing to bring any type of misrepresentation claim.

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

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

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

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

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

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

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

Now, what they've tried to do is they've tried to, if I could, throw a curveball here by adding misrepresentation gloss to the proof of claims. They're trying to take this out of being a standard classic derivative claim, which it is, by claiming that they were fraudulently induced by a number of public statements that were made pre-receivership, only four of which they allege were made during the period of time in which the bonds were issued. The rest were made, the other eight, after the bonds were issued. They claim that they relied on public statements about the, generally speaking, the health of the bank, and that this caused them to acquire the bonds and therefore they somehow have direct or individualized harm, which means they've got direct claims. That's not what this case is about. It's not about misrepresentation; it's about their allegations of purported mismanagement and looting.

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

The reason why the misrepresentation gloss fails is because of a controlling opinion in the Third Circuit, and that's the Sunrise opinion, which I discussed earlier. And we've provided the Court with a chart, which is tab 6, on the Sunrise opinion, and we did a chart because the facts are so remarkably close to the facts of this case. And since this is controlling law, it is on point factually; it really forecloses these claims as being claims for misrepresentation and tells you what they really are, which are claims, derivative claims, based on purported mismanagement and looting.

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

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

And I also would like to point out a brief passage in that opinion, which is before the Court at tab 7, that really tells the whole story on page 883, where the Third Circuit says, "The essence of the complaint is that the defendants misrepresented the financial condition of Old Sunrise by failing to disclose that they had mismanaged Old Sunrise, rendering the institution insolvent, and that they had employed deceptive operating practices, which prevented federal and state regulators from acting in a timely manner to forestall the insolvency of Old Sunrise. Defendants' mismanagement and wrongdoing brought about the insolvency of Old Sunrise and may have contributed to the insolvency of New Sunrise, thus injuring the depositors indirectly. The asserted injury emanated from mismanagement, not fraud. Furthermore, in this case, the depositors' loss cannot be separated from the injuries suffered by the institutions and all other depositors, and damages recoverable are assets of the institutions." That's this case.

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

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

The FDIC, by statute, under this section of FIRREA, absolutely has the right to step into the shoes of the insured depository institution and bring a claim on behalf of that institution, and they have the authority to do it here. So that attempt to distinguish the case falls far short of the mark.

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

They also cite Howard v. Haddad, an opinion out of the Fourth Circuit. Easily distinguishable. That case involved a single shareholder who alleged that direct misrepresentations were made to him, and him only, by a director of the insolvent bank. He relied on those misrepresentations in connection with his purchase of a share -- or of shares of the company, and the Court said, well, they aren't of similarly situated damaged creditors, it is a direct claim. That's not the case here, certainly.

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

So timing was important and cause was important. And the Court pointed out that the plaintiffs in the Sunrise case -- their injury didn't occur when they bought the CDs, just like the bondholders. There was no default. These bonds were being paid in full up until the time of receivership. They couldn't have brought a cause of action; they didn't have one at that point. It'd be like a bank trying to foreclose on a mortgage when the person who borrowed the money had made all their monthly payments. They didn't have the claim at that point in time.

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

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

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

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

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

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

And, effectively, what the Court has to do here is what it did in the OODC case. State law governs whether or not piercing the corporate veil is a derivative or direct claim. Washington law has no cases on point. There is a majority position on this as to whether a subsidiary can bring a piercing-the-corporate-veil claim against the parent. And as the Court noted in the OODC opinion issued in 2005, the clear-cut majority position is that it can. What they have done is, without explanation as to why, is to urge this Court to apply a minority position. They want you to look to the state of Arkansas and apply Arkansas law instead of looking to the majority position, which includes Delaware. And the Court shouldn't do that. There's no reason that the Court should deviate from the majority position, particularly given the fact that their claim states that they defrauded the bank and all creditors. It's an outright admission; it forecloses them on standing. They have no jurisdiction to raise that point.

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

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

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

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

The last point that I have to make about standing's got to do with what I consider to be a total red herring, this business about duplicative claims that's been argued in the briefs. It is true that the bondholders and the FDIC have overlapping claims, and we point that out largely for two reasons: One, it's clear that the FDIC believes that it has standing to bring those claims, but, secondly, to the extent that the FDIC has brought those claims, the bondholders can't claim that the FDIC is unjustifiably refusing to bring derivative claims that would confer standing to them.

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

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

Which leads to the last point on the duplicative claim. There's an argument that's being made is, because we have not sought dismissal for standing on the fraudulent transfer claim, that somehow this miraculously means that they've got standing on all their other claims. I don't quite understand what their argument is, but the fact of the matter is this: The Washington Uniform Fraudulent Transfer Act provides and confers specific claims to creditors, and they've brought a claim and have standing to bring a claim under that statute. So we have not argued lack of standing for that claim. We do -- we will argue -- Mr. Kirpalani's going to argue that those claims are insufficient under 12(b)(6).

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

So the Court is empowered by law to do it. And the Fifth Circuit in the Clowd (ph.) case, in the Southern District of New York in the Flake (ph.) case, they did it and applied 12(b)(6) to proofs of claims and upheld -- in one case they upheld -- in both cases, dismissal was upheld. Why should the Court do it here if it's a discretionary matter? Well, the fact of the matter is eighteen months have passed since this proceeding began. Ample opportunity has been given for them to spell out their claim.

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

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

THE COURT: Okay.

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

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

I think there's also a couple of other reasons why the Court should exercise its discretion and apply 12(b)(6) here. Bearing in mind that what they're trying to do is they're trying to get around the clear-cut language of the offering circular in which they knew that these were obligations of the bank and the bank only, and that WMI wasn't guaranteeing them and WMI was not responsible for them. They're trying to pull an end run around the offering circular in coming into this court, and they're trying to do it with creative pleading, using misrepresentation gloss on mismanagement and looting claims, and arguing indirect liability under theories of piercing the corporate veil, which is a -- as the Court knows, requires rigorous pleading standards and requirements.

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

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

THE COURT: Excuse me --

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

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

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

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

THE COURT: Yes.

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

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

MR. FRONGILLO: That's okay.

(Pause)

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

MR. FRONGILLO: Yes.

MR. ANKER: I apologize.

-- copies. May I approach, Your Honor?

THE COURT: You may.

(Pause)

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

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

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

Your Honor, let me start with a basic principle. Claims of creditors belong to creditors; the U.S. Supreme Court decided that issue dispositively in the Kaplan case. I was quite surprised to read the debtors' and, more frankly, the committee's response which suggested that Kaplan has been overruled. I will say to this Court it's been cited with approval probably over 1,000 times since 1972, including by Judge Easterbrook last week. It stands for the basic proposition that claims of creditors belong to creditors, and with the exception in bankruptcy of 544 claims -- and I acknowledge that there's a 544 exception in bankruptcy for certain types of avoidance claims -- may not be brought at all by the trustee. That proposition, I submit, is absolutely settled law in this circuit, indeed in the Supreme Court. Indeed, in Kaplan, the U.S. Supreme Court said we're interpreting the old Bankruptcy Act -- there was a case in '72 before the Bankruptcy Code of '78 -- Congress may want to consider overruling us. And indeed, Your Honor, the legislative history of the '78 Code shows that a bill was proposed -- I believe, in the House; it may have been the Senate -- that would have explicitly overruled Kaplan. That bill was rejected by Congress. The legislative history on that point is discussed in the Ozark Restaurant Equipment case in the Eighth Circuit, which we've cited, 816 F.2d 1222, and by the Ninth Circuit in Williams v. California First Bank, 859 F.2d 664.

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

It's the relevant provision and it says that the FDIC, as conservator or receiver, and by operation of law, shall succeed to all rights, titles, powers and privileges of the insured depository institution -- so that would be Washington Mutual Bank -- and of any stockholder, member, accountholder, depositor -- I raised my voice on that word because I'm going to come back to it -- officer or director of such institution with respect to the institution and the assets of the institution.

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

That's the first proposition: Direct claims belong to us. The second proposition, I would say to Your Honor, is that, with respect to derivative claims, the law is less black-and-white than Mr. Frongillo would have you believe. In the Gheewalla case, and I -- Your Honor, I'm going to butcher the name, I apologize. It's the Delaware Supreme Court case dealing with zone of insolvency. That case is often cited, indeed it's cited in the WMI papers, for the proposition that even though when a company becomes insolvent creditors of the -- even though a fiduciary duty then arises for directors in favor of the creditors, the creditors may not bring a direct claim. But what the Delaware Supreme Court said, by my count when I read the opinion yesterday, six separate times in the opinion is that creditors may bring a derivative claim. And indeed, of course, in this circuit, in both the Lande (ph.) and the Sunrise case, the Sunrise case which counsel is championing, the courts -- the Third Circuit said even shareholders of an insolvent bank may bring derivative claims. So the law isn't as clear. That's proposi -- there are lots of circumstances where derivative claims are brought; they're brought all the time.

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

(Pause)

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

(Pause)

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

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

Let me give an example. And there is an acknowledgment here that we have standing to bring all the fraudulent conveyance claims. Your Honor may ask why is that. I mean, if WMB was in bankruptcy, the argument would be that the debtor-in-possession or trustee succeeds to the claims under 544, and not only does it have standing but we are divested, if you will, of standing. The jurisdictional grant, or the standing grant, is exclusive.

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

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

And given the concession, I don't need to spend a lot of time -- concession that we have standing, I don't need to spend a lot of time on that. I raise it because it shows why the FDIC thinks we need to work through these issues and figure out factually what the questions are and what the evidence and what the arguments are. And indeed, as to some of these claims, Mr. Frongillo is very quick to say that the alter ego/veil-piercing claims are derivative. As to those claims, they have not been asserted by the FDIC. The FDIC -- and the misrepresentation claims as well. The FDIC does not assert that they are their claims. They've not brought those claims. And indeed they've said repeatedly that as to any direct claims we have, they do not stand in our shoes.

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

Well, I think one of the questions Your Honor has to wrestle with is am I going to spend the time today to predict how the Washington courts will come out on an issue as to which other courts have split, when, when -- and this is not true as to the alter ego claim; I will acknowledge the FDIC hasn't brought it -- as to many of these claims there are overlaps with the FDIC. And whether we are held to lack standing or not, the FDIC will have standing. And the U.S. Supreme Court has, and we've cited the cases in our brief, on more than one occasion, on at least two occasions, explicitly said the right course of action when a party -- when at least one part clearly has standing, and another party's standing is called into question but who's on the same side of the V, is simply not to reach the issue, because as long as one party has standing, the Court's jurisdiction is properly invoked and therefore the Court need go no further. That's U.S. Supreme Court jurisprudence.

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

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

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

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

I have spent a lot of my time over the last two years in litigation coming out of the Adelphia bankruptcy and the Revco bankruptcy, including litigation that both Weil Gotshal and the Quinn Emmanuel firm are involved (sic); some litigation brought by bankruptcy trustees, by liquidating trusts created post-confirmation, but also securities class actions. In those cases, there was no default until the petition date. There was no default in Enron; there was no default in Adelphia; there was no default in Global Crossing, in Revco, in every fraud case; and yet securities class actions go on in every single one of those cases.

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

Let's focus on injury, Your Honor. When you talk about who has the claim, you got to ask the question who was injured. What are we talking about? We're talking about a claim that WMB issued bonds and received money for those bonds in excess of what the bonds were worth, because there was a failure to disclose and misleading disclosure of various critical factors. Was WMB injured by that? It benefited: It issued securities worth X and it got in response triple-X or quadruple-X or five times X. The notion -- and, Your Honor, in a securities fraud claim, the claim under Section 10(b) has to be brought by a purchaser. Section 10(b)'s private right of action is a right of action for a purchaser or a seller. But we're talking here about purchasers of bonds. WMB didn't buy its own bonds. We bought our clients its bonds.

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

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

THE COURT: Okay.

MR. ANKER: And let me just read what the claim is: "The bank issued the senior notes starting in the first quarter of 2006 and continuing through the first half of 2007. During this time period and continuing thereafter, WMI made material, false and misleading statements or omitted material facts necessary in order to make the statements made not misleading regarding the bank, its operations and its financial condition. WMI and its officers and employees repeatedly misrepresented that the bank was doing well and that its credit and loan underwriting policies and operations were conservative and minimized risk to investors, including holders of the senior notes. As WMI knew at the time, those statements were false and misleading. WMI knowingly failed to disclose the true facts in connection with their purchase of the senior notes. The bank bondholders and the market," that's a reference to the fraud and the market theory, "for the senior notes, relied on the misrepresentations and material omissions. As a result, the debtor is liable to the bank bondholders for all resulting damages." That's a misrepresentation claim.

And, so the Court is clear, the claim is not limited to misrepresentations about financial condition. I'll tell you what the greatest misrepresentation here was. The greatest misrepresentation here -- and let me turn you, if I can, to slide number 2. Your Honor, this comes out of an offering of WMI notes. I will acknowledge it comes out an offering of WMI, not WMB, notes, but what was in the market and what was said to everyone. And that is -- you're going to hear all day from the three people who are going to be arguing against me, WMI and WMB were separate companies, your claim is only against WMB. You heard the reference to the offering statement from my bonds saying you can look to WMB, this is an issuance of WMB, and that's true. What was represented was that WMB had every asset and that the creditors of WMI would not see a penny, not a red cent, until the bankholder -- bank bondholders were paid in full. That's what was said to the market. And I believe that's true, but this entire bankruptcy has been about turning that whole principle upside-down.

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

The bank bonds had a lower coupon than the WMI bonds. Why? Because it was told to the market that the bank bonds are where all the assets are. The WMI bonds were, in effect, equity. They were equity -- preferred equity to the common, but they were equity, not to receive a penny until the creditors of the bank were paid in full. This is a misrep plan.

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

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

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

What caused the injury? The injury is the difference between what the securities were worth had the truth been told, and what they were represented to be worth. Had they told the truth -- WMI told the truth, the bonds on our level -- I mean, Your Honor, our bonds are trading today at forty-five cents on the dollar. Had they said "Excuse me, WMI's going to have all the assets, not WMB, and by the way we don't have all these supposedly conservative underwriting standards," our bonds would not have been worth par and they would not have traded at par.

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

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

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

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

Let me turn to the veil-piercing claim, or alter ego claim. Your Honor, I would make two arguments here. The -- I think three arguments here, I apologize. The first is -- I would refer Your Honor to the Ozark case in the Eighth Circuit, and I would refer Your Honor -- and I think it is the Williams case in the Ninth Circuit, both of which are cited in our brief. Those are federal -- I grant you, they are not Third Circuit -- they are federal appellate court decisions, one of which the Ninth Circuit includes Washington State. Both of those cases hold explicitly that debtors and trustees do not have standing to bring alter ego or veil-piercing claims to pierce their own veil. I think I have the Williams case here, Your Honor. And if I do I'll just read you the relevant quote. This is 589 F.2d 664 at page -- it's the last paragraph of the opinion, Your Honor. I'm having trouble figuring out what the jump cite is.

THE COURT: All right.

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

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

THE COURT: OODCF.

MR. ANKER: Okay. My apologies, Your Honor. I do read it to say that Your Honor thinks this is a question of state law. There is no decision in Washington State. I do think, and I'm not going to repeat the brief, I understand counsel wants to disparage Arkansas. It's not my favorite state in the union; it is what was at issue in the Eighth Circuit. I had a case that kept me there for a lot of time, Your Honor. But it's case law and it's law on alter -- the substance of alter ego and corporate disregard claims is virtually identical to that of Washington. And, therefore, it's relevant, and it's relevant because it's what the Eighth Circuit was interpreting in Ozark.

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

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

I have said in my pleading and I will say it again as a representation to this Court, to the extent that our claims are derivative, I acknowledge that any recovery must got into the receivership estate and does not go to my holders themselves. I also acknowledge that there can't be duplicative recoveries. So the extent the claim is derivative is a claim brought on behalf of the estate. Now, I will say something Your Honor for interest of full disclosure. At the moment if you look at the receivership estate and there's a bunch of disputed claims, but there's both senior bonds and junior bonds. The senior bonds are about 6.1 billion plus accrued interest. The last time the FDIC published a report the total other claims were ten million dollars. So we would be 99.99 percent of that estate. But I acknowledge that if the claim that if the claim is derivative it has to go into the receivership estate for the benefit of all creditors.

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

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

THE COURT: That's true.

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

THE COURT: Right.

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

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

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

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

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

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

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

THE COURT: But WMB can bring derivative actions.

MR. ANKER: Umm.

THE COURT: The corporation.

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

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

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

THE COURT: Okay.

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

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

Substantive consolidation. Ninety-nine -- I'll talk about the merits of substantive consolidation later. Let me just refer to standing. 99.9 percent of substantive consolidation motions in my experience are brought by creditors, that's who brings them. Now, there's been an acknowledgement and admission that we are -- we have standing to bring fraudulent conveyance claims. So we are a creditor. It may be a disputed claim, but we are a creditor of WMI. Who is to bring a substantive consolidation motion other than a creditor? I guess a debtor could. But the notion that a creditor does not have standing to seek some form of substantive consolidation is silly, I mean, to use a colloquialism. Who else is going to seek it.

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

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

Breach of fiduciary duty, the final claim that I believe counsel mentioned. A couple of points here. What -- I would refer Your Honor to the Gheewalla case. The Gheewalla case specifically says creditors have standing, albeit the claim may be derivative. And they can bring the claim on behalf of the estate. And, again, I refer you to the FDIC's own statement that the line between direct and derivative claims is very difficult in this case and can't be resolved until issues are finally determined. And I'll say again pushing things off to allow there to be a factual record is not going to harm anyone. If they don't want to reserve for us at confirmation we can have an estimation hearing. I do not believe that whatever Your Honor does -- if Your Honor denies their motion to dismiss I do not contend that that precludes them bringing a 502(c) estimation hearing where we can have some sort of proceeding on that question.

The fact is these claims need to get resolved. And when I hear the debtor, and I know you don't want me to get into right now the 12(b)(6) issue. But when I hear the debtor say this case has been going for eighteen months, I want to -- I want to scream. I've been asking for discovery, I've been asking to bring this litigation on. I've been asking to get going not for eighteen months, but for a long, long time. And you know how many documents I've had produced to me by WMI? Zero; 0.0. Every time it's all premature, it's all premature. It's all premature. We're eighteen months into this case because they don't want to litigate these issues. You can draw your own conclusion why they don't want to litigate these issues. But I -- as certain as the day as they don't want to litigate these issues. So I would submit to Your Honor these claims are going to have to get resolved, whether in my hands or the FDIC's hands. And to the extent the FDIC has brought the claims. I would submit to you that Clinton and other cases say you don't need to decide the standing question. Let's get going and get the claims resolved. Let's find out whether I'm full of it, and all of these claims have no merit. Or whether what I'm saying is right. Let's get it resolved so that whoever the legitimate creditors are of this estate can get paid.

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

I want to say one other thing as a prefatory comment. I think Mr. Rosen and Mr. Frongillo conceded this, but I want to make it clear. The agreement that the parties worked out is that this is a hearing on purely the legal issues. Their original motion is filled with affidavits. When we get to the merits I'm going to -- it's going to be one of the themes you're going to hear out of my mouth a lot. They're trying to put their own facts into -- before you. Those affidavits and all the factual assertions in the debtor's responsive papers have to be disregarded for purposes of today's hearing. This is a hearing on my complaint. And do you have to accept -- do you have to accept conclusions by me where there aren't well-pled facts? No. But you can't let them put in contradictory facts and have that be decided. I've got a right to take discovery on what the facts are. I have a right before summary judgment to depose people and to learn what the truth is and put in my own evidence. So this really should be a hearing purely on legal issues and only if the Court is clear that either the claim fails as a matter of law, or there is no standing should the Court grant relief.

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

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

THE COURT: No.

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

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

I'm going to start with an unusual request. Which is WMB noteholders actually have a pretty large dog in this hunt; several billion dollars worth. We have very strong views on the issues. We've already heard counsel express very strong views on both sides quite well. Because of that it's not our desire to repeat or reiterate the WMB bondholder group's argument, because saying them twice does not make them more effective than saying them once.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Until today.

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

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

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

Our focus from the beginning, because we do have a lot of money at stake and we're not merely lazy in not participating in this Court, has been on the FDIC, both as the receiver of the WMB estate, but also with our conflicting role as FDIC corporate. And that's what makes them a little bit different.

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

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

Counsel has rightly pointed out the irony that a thrift holding company whose only material asset was stock of the bank at the moment is debating with Your Honor whether common shareholders should get a recovery, after senior debt, after subordinated after -- junior subordinated after, preferred shareholders, they need common shareholders to get a recovery we're asking whether senior and some subordinated bondholders of the bank to get even half their money back.

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

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

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

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

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

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

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

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

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

But then you said sit down because the FDIC said hey, we're the receiver not you guys. You said they kind of are. They're not saying that today. They're saying yes, our claims may overlap, but whether they do, in fact, is a factual determination which can only be developed after discovery. It says it in their pleadings. I encouraged them to stand up to stay if they don't have that position anymore, but they're not sitting here. And it's their claims that we're supposedly pursuing. So it's not as much their concern, it should be the FDIC's concern.

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

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

The settlement as proposed had a number of elements, including several billion dollars of tax refunds to WMI which is completely mystifying. And most of the rest to JPMorgan, is a TARP recipient, which was equally mystifying. Which we have pointed out to them and to the Senate.

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

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

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

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

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

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

In the bank receivership we hope there are just 6.1 billion of senior claims, 7.6 billion of subordinated bonds. But there's lots of other asserted claims; like thirty-nine billion. The FDIC won't tell us what they are. We filed a freedom of information act, they said sorry, privately, won't tell you, but there are other people asserting claims like they do in Chapter 11s, it could take some time to resolve those claims. Class action claims, misrepresentation, directors and officers, whatever it is, could take months, could take years. In the context of the WMI case, WMI's pleadings said it would take years to resolve litigation like the one that these folks have run.

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

So I'm not going to sit here and say our proof of claim doesn't say what it did. It said it. It said it right in footnote 1, right in every class. These claims are to recover on behalf of the estate, other than representation, we'll get to. I respectfully request that it's premature, today, to disallow our claims.

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

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

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

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

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

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

We were formally part of the group that is represented by Mr. Flaschen, and as to the nonmisrepresentation claims, the seven institutions I represent continue to be represented by Mr. Flaschen. However, with respect solely to the misrep claims, which we consider, sort of, the federal securities law and the related claims, I will be counsel, as will Mr. Schwartz and his firm. So we've carved out a small piece just for the misrep claim. My clients felt they wanted a securities lawyer to basically pursue securities claims. To the extent that this claim became a contested matter, it would effectively involve litigation of the federal securities laws, and as someone who does that for a living, I am here to represent them in that regard. So that's sort of how we differ from everybody else. And as I say, we're entirely par purchasers; we're entirely purchasers during what would be considered a relevant period for securities fraud. I mean, I'm not saying that some of the other clients Mr. Flaschen represents might not meet that, but certainly the seven do meet those criteria.

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

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

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

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

Well, there's been a lot of talk, and I think we'll get to it more when we talk about, I think, the crux of this matter. And just to tell you where I'm going, I think the crux of this case, on the direct road we're standing, is where is the line between Sunrise and Hayes, and how do you reconcile those two decisions. And I think that the first thing you have to understand and is something that Mr. Anker quite clearly pointed out is that we purchased securities. We did not purchase a deposit. Well, what is a security?

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

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

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

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

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

MR. JARVIS: Fall into sort of four general categories. They were sort of -- they were failing to describe, adequately, what -- they say WaMu. When they mean WaMu, they mean WaMu Bank because WaMu Inc. didn't really do very much. WaMu risk management policies. The false statements dealt with the appraisal process that WaMu Bank used in connection with its issuance of loans. They dealt with the abandonment of underwriting standards at WaMu Bank, and they dealt with misrepresentations of WaMu Bank's financial results. And of most significant interest there, what they dealt with was, they said they had a certain amount of assets. Well these, or many of these were, of course, loans that they had made. They didn't take proper reserves against those assets. They made a whole bunch of false statements in that area.

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

So what did they buy? They bought a bond at a hundred that was probably worth fifty. When were they injured? Were they injured when WMB went bankrupt? No, they were injured when they bought a bond that was worth far less than they paid for it. And they -- why is it worth less? Because it was a risky, risky enterprise that was not disclosed. When you buy a bond, it has a certain interest rate. If the extent of the bond or the company appears less risky, you may actually pay a little premium. In other words, let's say it's paying eight percent and you think it's less risky, you might pay only six percent. And how do you do that? You pay a little bit above a hundred. To the extent you think that the company in which you are investing through debt securities is more risky, then you pay less than a hundred. You pay ninety-seven or you pay ninety-five or you pay fifty. And my clients bought at a hundred when they should have bought at fifty. And the injury occurred because they bought into a business that was considerably riskier than it was represented to be because of the false and misleading statements of the defendants, WMI -- or, the debtor, I guess. I'm not -- so used to, you know, securities law, but the debtor in this case.

And the fact of the matter is those false statements have absolutely nothing to do with whether a bank was mismanaged, was looted, anything else. The bank, quite frankly, for my purposes, could have been the most efficiently and effectively run financial institution in America. To the extent that they, nonetheless, made false statements about the way it was run and the financial health of the business, even if run as well as possible, there is, in fact, a securities fraud case, having nothing whatsoever to do with the mismanagement or anything else about the management of the bank. In fact, in the securities context, we always see people claiming, well, we're not crooks. We're just stupid. We mismanaged the business; we didn't lie to you about it. And in fact, that rarely works because the key to these cases is that you made a knowing -- at least for 10(b) -- a knowing misrepresentation. And we claim that they do. And I might add, and it's been often referred to, the Court in Western District of Washington dealing with these exact same misrepresentations, albeit in the context of WMI, but about the operations of the banks. Bank was, for all intents and purposes. The Court there held that, in fact, if they had pled to the standards of 9(b) and the heightened pleading standards of PSLRA, that these false statements were made with scienter and were false. The exact same ones that if Your Honor says, if this were a contested proceeding, file a complaint, I'll file a complaint, I'll put the same false statements in, and we can go from there.

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

Well, what damages are we seeking? Another point that debtors' counsel made was, well, gee, these guys want their interest, all their principle. I don't know where we got that from. That's not what we're asking for. We're asking for the difference between what we paid for the bonds and what we should have paid for the bonds. And how will we do that? Ultimately, we will provide an expert who will be a financial economist or a finance professor at some business school who will tell you about the very extensive models he has run at great and glorious expense to all of us, or at least to me, and he will tell you why these bonds that were purchased at a hundred should have been purchased at X, fifty, seventy, whatever the number is, and that the damage -- the difference between those two numbers are the damages we will seek. And they will be damages; they will not be all that we were entitled to from WaMu Bank, but what we were entitled to because we were lied to by WaMu Inc. I think when you get there, what is this -- this sort of, I think, brings up, I think what, to me, is the whole crux of the matter.

They have argued that this case is governed by Sunrise. It's just like Sunrise. And I look at Sunrise and I say, I don't see hardly any similarities between this case and Sunrise. What does Sunrise involve? It involved people who deposited money, either through a certificate of deposit or a demand account, in a bank. Well, when you buy a CD, last time I checked, you don't look at the bank and say, gee, that bank isn't doing so well. I think I'll pay sixty bucks for that hundred dollar CD. You give them a hundred bucks, they give you a CD, they promise to give you the hundred bucks plus interest back in a year. That is a fundamentally different thing than a security where I can look at it and say based on the risk, it might be risk increased because of something in the media, maybe Moody's downgraded their bonds, maybe Standard & Poor's downgraded their bonds. I'm only going to pay seventy because I think it's much riskier; I need that extra interest in order to make my investment.

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

Well, what is Hayes? Where's the difference in Hayes? Hayes involved securities. Now, everybody wants to say, oh, that was an equity security, not a debt security. As a securities lawyer, Your Honor, I've got to tell you the differences are in -- they're minor. I mean, they actually come to debt, you do damages a little bit differently, maybe, because the prices will have moved differently. As far as the theories on asserts, there simply is no difference. A security is a security. And we know from what counsel had to say, more than 270 days out, this is a security for the purposes of federal securities laws.

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

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

THE COURT: I have no questions. Thank you.

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

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

And why is this case Hayes, as opposed to Sunrise? You've heard it, but the Court summed it up in Hayes, which came after Sunrise, of course, and they said that in Sunrise, only mismanagement was alleged. In Hayes, plaintiffs allege more than mismanagement. Plaintiffs allege that defendants made affirmative representations inconsistent with the state of corporate affairs they knew to exist. There was more than just that. There was a securities law claim which is an individual claim, solely to purchasers that can be brought only by those individuals. In the arguments by the debtor earlier, Your Honor, I thought it was curious that there was an argument made that this is a derivative claim but the claim cannot consist of those bondholders who bought after the receiver was appointed. Well, if it's derivative, it belongs to everybody. That's the flaw in the difference between the securities law claim and the other types of claims that were dealt with.

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

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

They say this analysis is entirely consistent with the proposition that an individual stockholder may sue officers and directors based on an injury, distinct from the injury to the corporation and the indirect injury to stockholders generally. This is the type of the injury alleged in this case presently before us. Plaintiff's claim is based on specific misrepresentations that affected prospective purchasers similarly situated to plaintiff, differently than existing stockholders. Plaintiff here seeks to recover the difference between the alleged inflated price he paid for his stock and the price he would have paid if defendants had made accurate statements regarding such subjects as the adequacy of Bell's loan reserves and the strength of Bell's assets. Those are the exact -- the adequacy of the loan reserves and the strength of the assets are the exact type of misrepresentations that were made here.

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

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

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

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

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

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

MR. JARVIS: If I may briefly, on a different issue? At the outset it was raised the question that certain people on our side had not filed Form 2019 disclosures. I just wanted to tell Your Honor that: A) since we entered this case with the filing of our opposition to their objection, no one ever asked us to file a 2019 or suggest that we should. Notwithstanding that, we are absolutely prepared to do so. All of my people bought at par during the period, and we're happy to do it. When Your Honor issues an order saying everybody do it, we will promptly comply with that. I just wanted to tell that to Your Honor.

THE COURT: All right. Thank you.

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

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

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

THE COURT: Understood.

MR. CLARK: With regard to the settlement, Your Honor, if you'll forgive me for looking at my BlackBerry here at the podium, I have to do it, because I have a document that I don't have handy that I would like to read, because it was the FDIC's public statement on March 26th. It didn't put out a press release, but it was available for inquiries. And I think it basically speaks for itself. And I'd like to read a paragraph from that statement for the record.

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

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

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

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

THE COURT: Well, tell me what they are.

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

The fight about the trust preferred securities, I just don't think there's any debate that the FDIC receiver is the party to assert that claim. And there's a whole list of claims in our proof of claim that relate to that kind of disputed asset. And there are some other claims for breach of fiduciary duty, etcetera, that we have asserted in our proof of claim, which we think are clearly bank claims that the FDIC receiver has, and not any other party asserting them derivatively.

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

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

The point we were trying to make in our filing, which I just -- I think it's a point -- a factual point, is that there is a line between the claims that are clearly bank claims and those that are perhaps capable of being asserted. But that line is the line, it's the standard common law line between direct and derivative claims. And Mr. Frongillo, I'm sure is about to get up on that, so I won't spend a lot more time on that.

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

THE COURT: Okay. Thank you.

MR. CLARK: Thank you, Your Honor.

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

The claims at issue today are not against our client. We've reserved our rights. But with respect to the standing issue, which is important to JPMorgan Chase, I just wanted to note that we've heard a lot today about the misrepresentation claim, and we heard a little bit about the fraudulent transfer claim. With respect to the other claims that are pending, especially with respect to the claims that have been brought by the FDIC receiver in this action, it seems clear that everybody seems to be conceding that these are derivative claims.

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

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

In addition, there are claims pending in a case that's been discussed in this court, the ANICO litigation pending in D.C., the District Court in the District of Columbia, in which certain bondholders have asserted claims against JPMorgan Chase and the FDIC receiver. Both of those parties, JPMorgan Chase and the FDIC receiver, in that action, has taken the position that derivative claims can only be pursued by the FDIC.

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

THE COURT: Thank you.

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

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

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

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

THE COURT: I think the debtor can reply.

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

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

THE COURT: Well, don't they say that in paragraph 13, the misrepresentation and material omission portion of their proof of claim?

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

THE COURT: Well --

MR. FRONGILLO: -- the difference.

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

MR. FRONGILLO: Well, they do say that.

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

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

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

MR. FRONGILLO: Well, I think that what they have done here basically, they've now written two or three more lines as to what they're looking for for relief, and what the value of their claim is. Because prior to this, the value of their claim, they haven't even cited a federal securities statute. They haven't even cited a state securities statute. They just do a vague pleading allegation. And when they do come to claim and damages, they spell out what it is that they're looking for.

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

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

THE COURT: Well --

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

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

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

THE COURT: But a bond clearly is.

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

THE COURT: Well, but they

MR. FRONGILLO: It doesn't have --

THE COURT: It may receive dividends.

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

THE COURT: And they may be based on highly inflated financial statements --

MR. FRONGILLO: Possibly.

THE COURT: -- as well.

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

THE COURT: Um-hum.

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

THE COURT: Are CDs insured by the FDIC?

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

THE COURT: But bonds are not.

MR. FRONGILLO: That's true.

THE COURT: Okay.

MR. FRONGILLO: That's true. These were uninsured and that was made clear in the offering circular that I read to you at the outset in Exhibit number 1. So, the issue here is some people -- the people in the Sunrise case who bought the securities, relied on statements which are virtually identical to the ones that these bondholders are saying here. To say that that case -- that we must be reading a different case is ignoring the language of the Third Circuit. It couldn't be clearer.

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

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

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

THE COURT: Um-hum.

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

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

THE COURT: Um-hum.

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

THE COURT: Yeah.

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

THE COURT: Well --

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

THE COURT: Well, I --

MR. FRONGILLO: I only raised that --

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

MR. FRONGILLO: Okay.

THE COURT: -- and here's why. Because I think that I don't like them when they're filed in adversary cases. But I certainly think given the reams of paper and the argument today, I don't think parties can -- I don't think it's helpful to suggest that -- that proofs of claim are so deficient that they should be dismissed for failure to state claim, if you will. And even if I did grant it, I'd allow them to amend their proofs of claim.

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

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

THE COURT: You can have one minute.

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

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

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

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

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

THE COURT: Yes.

MR. JARVIS: Okay. Two quick points. One, counsel kept conflating the idea that the only security is really an equity security. We have to keep in mind that debt security is an equity; they're exactly the same, no difference. Second, he kept saying that the only time anyone ever gets hurt in a bond is when someone defaults and I would have to suggest that's not so. I was counsel in class in the Tyco Securities litigation. I can tell Your Honor -- I'll represent as an officer of the Court, that in fact, in that case, we submitted billions of dollars in damages on defaulted bond, a settlement of more than three billion on debt equity securities existed and bondholders received, literally, hundreds of millions of dollars in a settlement on non-defaulted bonds.

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

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

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

With respect to the corporate veil alter ego, in OODC I made it clear that state law applies. Washington State has no law on this issue as to whether it's a direct or a derivative claim. There's a split of authority. I don't know what Washington courts may decide. And therefore, I think at this stage of the proceeding, I will not decide that issue. There may be applicable state law by the time this issue really needs to be decided.

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

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

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

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

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

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

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

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

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

THE COURT: Oh. I --

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

THE COURT: Concede it --

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

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

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

THE COURT: An actual fraud.

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

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

MR. ROSEN: I would love to see that.

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

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

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

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

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

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

THE COURT: Okay.

MR. KIRPALANI: Susheel Kirpalani on behalf of -- of Quinn Emanuel on behalf of the debtors. First, I know it serves Mr. Anker's clients well to gloss over a lot of things but he handed out this demonstrative which, perhaps purposely, he's not wanting anybody to see or maybe Your Honor to see, there are three separate silos of fraudulent transfer claims. It's critical to understand them in reverse order.

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

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

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

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

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

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

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

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

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

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

THE COURT: Please.

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

THE COURT: Um-hum.

MR. KIRPALANI: -- is what the Supreme Court called an Iqbal, the formulaic recitation of a statute. It's quote "the transfers are avoidable because a, they were made with actual intent to hinder, delay or defraud a creditor of the bank including without limitation the bank bondholder." Washington statute Section 19.40.

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

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

MR. KIRPALANI: Sure.

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

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

THE COURT: Um-hum.

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

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

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

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

THE COURT: But --

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

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

MR. KIRPALANI: Well, Your Honor --

THE COURT: So --

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

THE COURT: Um-hum.

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

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

THE COURT: All right.

MR. KIRPALANI: Thank you, Your Honor.

THE COURT: Thank you.

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

THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

The issue that I want to stress with Your Honor is this tax reimbursement claim which shows up for the very first time is a brief that Mr. Anker filed. I honestly feel that it is disingenuous for him to stand up here and say I think that might have to do with a deposit. Come on, Your Honor. Six months the summary judgment motion has been briefed. He actively participated. He knows exactly what he's talking about. He never filed a motion under Pioneer. And if Your Honor is going to say to me, Mr. Kirpalani, I appreciate what you're saying, I think there's a lot of factual issues, actual fraud, I don't need to see Mr. Anker's podium speech put down on a piece of paper, my judicial common sense says this is good enough, I'll sit down on those points.

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

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

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

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

THE COURT: Yes.

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

MR. ANKER: I apologize. The 21st.

THE COURT: The 21st. Okay.

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

THE COURT: Yes.

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

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

MR. SPEAKER: Yes, ma'am.

THE COURT: All right. Thank you.

(Proceedings concluded at 5:11 PM)

I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
Application for Order Authorizing the Employment and Retention of Peter J. Solomon Company, as Financial Advisor and Consulting Expert to the Official Committee of Equity Security Holders Nunc Pro Tunc to February 12, 2010, granted	26	4

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

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

Clara Rubin

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