

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

In the Matter of

THE W.N. CONNELL and MARJORIE
T. CONNELL LIVING TRUST, dated
May 18, 1972.

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Case No. 73837

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Court Judge
District Court Case No. P-09-066425-T

APPELLANT'S APPENDIX

VOLUME 2: AAPP 126 through AAPP 250

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1 Mr. Waid, and yet she removed them out of his ability to have
2 control over those funds.

3 On April 2, she removed another \$146,000 from the
4 Wells Fargo account in St. George, and then in a couple weeks
5 later she goes to Town & Country Bank and tries to get
6 \$100,000 in cash. All of those actions, with the exception of
7 the February thing, happened after she was told she was no
8 longer trustee, and in clear violation of her duty to protect
9 the 65 percent share.

10 These are clearly actions that were taken knowingly,
11 after she had been in court, after she'd been told to -- what
12 to do, and she did them in violation of her removal of
13 trustee. And in further violation, she was ordered to
14 transfer 500,000 from Fidelity to an FDIC insured, but made a
15 transfer from the trust account in Wells Fargo instead. She
16 attempted to draw funds after she's been removed.

17 And so here we have that she's had a duty since 2013
18 to protect the trust, and yet she hasn't. She's had a duty to
19 account, and yet she hasn't. And if she -- with her legal
20 defenses, all her legal defenses, I mean, they boil down to
21 the devil made me do it, or I'm not responsible, or somebody
22 else is responsible.

23 They boil down to that somehow that she didn't know
24 what she was doing or something, but they have nothing to do
25 that absolve her of the duty to act responsibly. So both in

1 her role as a trustee and as a role of a fired trustee, and as
2 a -- she has taken steps to violate things that violate the no
3 contest clause.

4 Now moving to the next issue. Now this, we only get
5 to this issue if -- if the Court rules that she violated the
6 no contest clause. And I think that we have the facts will
7 show, after today's testimony and after today's arguments, the
8 facts will show that she did. Then we really don't have to
9 get to offsetting and impounding, so I'm not going to spend a
10 whole lot of time here.

11 But the bottom line is that permitting payments to
12 Ms. Ahern, whether to pay for attorney's fees or whether to
13 pay for her own lifestyle or whatever, if you really think
14 about it, all of the money, you can impound her share, but she
15 gets this income that really belongs, until it's been
16 restored, it belongs to the other side. It belongs to Jacqui
17 and Kathryn, and they're entitled to this money. And to force
18 them to subsidize her legal defense or to subsidize her
19 lifestyle is taking money from them.

20 And if you do the actuarial computations, the
21 chances of her collecting enough income under the current
22 income stream to restore what the trust has been resolved, if
23 we just take her normal income stream and apply it to all the
24 trust, she's not going to live long enough to restore it, to
25 get it back.

1 And so again, we're not going to spend a lot of
2 detail on the tax liability. But until the tax liability has
3 been ascertained, we can't have Mr. Waid making distributions
4 until that's been clearly -- we've got that all cleared up,
5 and that we can't be putting Mr. Waid, and I'm not his
6 attorney, but Mr. Waid needs protection as trustee against
7 personal liability.

8 And having practiced law in this area for over 30
9 years, I know that the IRS is not very kind when a fiduciary
10 spends money that could have been used and has a priority for
11 use to pay tax, and they use it to make a distribution to a
12 beneficiary. The IRS looks unkindly at that and says, I'm
13 sorry, we're not holding you harmless from that and we're
14 going to hold you personally liable. And that's something
15 that we need to protect Mr. Waid from.

16 And so the legal issue is, is it appropriate to
17 mandate and apply a mandatory income distribution against the
18 beneficiary's share, and the answer is yes. And the
19 restatement is -- I'm going to quote the restatement, because
20 we really don't have any Nevada law right on point.

21 But if a trustee who is also one of the
22 beneficiaries commits a breach of trust, the other
23 beneficiaries are entitled to charge upon his beneficial
24 interest to secure their claims against him for the breach of
25 trust unless the settlor manifested a different intention.

1 And there's nothing in the trust document that indicates that.

2 The Comment F on that goes on to say that this is
3 even applicable even if it's subject to the spendthrift trust
4 rule. And so you can't invoke the spendthrift trust rule when
5 you're basically converting trust assets. There's an offset.
6 Because what it really boils down to, Your Honor, is that the
7 spendthrift trust rule protects the beneficiary from what
8 their share is.

9 But until we've calculated that share, it's not
10 subject to protection, and we need to offset what she owes
11 back to the trust before we know what her share is, if she has
12 a share left at all. Again, if she's lost her share in the no
13 contest clause, all of this is irrelevant.

14 And if one of several beneficiaries misappropriates
15 or wrongfully deals, they are personally liable to the amount
16 of the loss and subject to a charge therefore. And again,
17 even if it's, even if it's subject to the restatement. And I
18 just want to emphasize there's no exculpatory clause in this
19 trust. There's nothing that relieves the trustee from
20 liability.

21 And we basically have court cases around the country
22 for literally centuries -- well, not -- at least a century,
23 where it's very black letter law that if one of the
24 beneficiaries takes part in a breach, then the other
25 beneficiaries get to be made whole first. And so they get a

1 share for it.

2 The thing that I really think is very important to
3 understand is that some of the things that are in the briefs
4 and in the pleadings relate to what my settlor's intent
5 might be. Well, we've got a black letter law and we've been
6 in -- and we do have Nevada caselaw in this, extrinsic
7 evidence to express the settlor's intent in a trust or a will
8 or in a contract is inadmissible unless the trust instrument
9 is ambiguous. This trust instrument is not ambiguous.

10 There isn't -- and so you can't say, well, my father
11 wouldn't want to disinherit me, or I -- it wasn't the
12 settlor's intent to have me lose my share, it wasn't the
13 settlor's intent not to have an offset, it wasn't the
14 settlor's intent not to invoke damages. Unless it's in the
15 document itself, it's just not admissible evidence, and it's
16 not there.

17 So the issues relating to damages are going to end
18 up in another evidentiary hearing about how much tax should
19 have been paid, how much should have been distributed that
20 wasn't, how much interest is due. But and so we'll deal --
21 defer that. But what we can say is that what is on the record
22 is that as of 2013, that there were amounts due of \$616,000
23 through June, through December of 2013.

24 In 2014, there was \$2.19 million that should have
25 been paid to the 65 percent share, and through January/April

1 of 2015 there was another \$611,000. Those are minimum amounts
2 and those are just amounts. And the argument we want to make
3 on damages is that the trustee stands in the same equivalent
4 position of a personal representative.

5 And under NRS 143.120, there is a provision for
6 treble damages. And in NRS 153.031, we can show by clear that
7 the trustee was negligent, or and what we've shown here is
8 that it wasn't just negligence. She went out and actually
9 took money that she was ordered to leave and protect for the
10 trust. She violated.

11 This was intentional, intentional violation of the
12 trust provisions. She withheld distributions she wasn't
13 supposed to have withheld, and because of that attorney's fees
14 are not to be charged against the trust. She's personally
15 liable for those fees. And then in NRS Chapter 42, it
16 provides for punitive damages.

17 So here in summation is that she has blatantly done
18 a myriad of things that are in direct conflict with the terms
19 of the trust, in direct conflict of the orders of this Court,
20 and clearly are intended to frustrate the administration of
21 the estate. I don't see how the Court can rule that our
22 evidence will be inadequate to show that, or that as a matter
23 of law that conduct doesn't violate the clause.

24 And we can show that there should be no money coming
25 out to Ms. Ahern or anyone else for her benefit until the

1 restitution has been made in full, and she should end up not
2 only being liable to reimburse it, but for treble damages as
3 well.

4 THE COURT: I have a question based on having read
5 both briefs and, I think, the same letter being provided by
6 both parties. And that's a letter from Mr. Powell in which he
7 said to Mr. Waid, you know, stop doing all this work that
8 we're having to pay you to do, because this is just reducing
9 the pool of money that's available to my clients, and we're --
10 my clients are paying for you to do the trustee's work and we
11 don't want to do this anymore.

12 So I guess my question is, is it your clients'
13 position that -- and Mr. Waid was never appointed the trustee
14 over the entire amount because there's any question about your
15 clients' ability to manage their own funds. That was never
16 the issue. The issue was we felt he needed to have the
17 authority of representing the entire trust in order to do this
18 reconstruction, for lack of a better term.

19 So how would we do that if -- because I didn't
20 understand if your -- it was also your request that Mr. Waid
21 not no longer act as your clients' trustee, or --

22 MR. RUSHFORTH: No. We're not asking that.

23 THE COURT: -- what that was about.

24 MR. RUSHFORTH: We're just saying that some of the
25 actions that we were taking through his attorney and others

1 were basically, you know, a waste of attorney's fees and a
2 waste of expenses, because it was -- it was pushing down areas
3 that we were getting nothing on. And basically what we were
4 trying to do is say let us do the fighting, let us do the
5 arguing, and don't spend a lot of resources of the trust
6 depleting the trust to take care of things that we need to
7 fight for.

8 And so it was kind of -- we were really more
9 concerned about a duplication of efforts and not having him --
10 his job is clearly not to be advocate for anybody and any
11 particular person, and we just didn't want him to get into
12 that position where he was trying to push, push, push and it
13 looked like he was advocating for one client or another.

14 But we want him to do the discovery. We want him to
15 find out what the numbers are, and we want him to crunch the
16 numbers. We want him to work with competent tax advisors to
17 get the real numbers on that. We just don't need him to
18 duplicate our efforts to preserve our clients' share.

19 THE COURT: Okay. I didn't read it that way, but --

20 MR. POWELL: I would just like to clarify too --

21 THE COURT: Yeah, Mr. Powell.

22 MR. POWELL: -- that that was also submitted as
23 well, Your Honor, after a point in time. There's been a
24 pending order that you've had since April, April of 2015 that
25 Ms. Ahern is to sit to be deposed by Mr. Waid. That hasn't

1 happened. That letter was sent after once again, a scheduled
2 deposition for Ms. Ahern, of which there had been a few, did
3 not occur again.

4 The point of that letter, in supplementing what
5 Mr. Rushforth just said, was as well as saying is how much
6 more effort and expenses are going to be expended to try to go
7 after and find answers when you have a party that knows the
8 answers but yet doesn't want to cooperate and doesn't want to
9 sit for a deposition to answer said questions.

10 So that was the theme of that letter, is every
11 dollar that you're expending in this chase to locate assets
12 for someone who doesn't want to cooperate and doesn't want to
13 explain themselves is money that comes out of my clients'
14 pockets if again, there is not full restitution.

15 It's our position that, and I will attempt to elicit
16 this on the record, Your Honor, it's our position that the
17 vast, vast majority of this administration that Mr. Waid has
18 done has been dealing with the issues that are present today
19 which we've just discussed. And so therefore our position on
20 that is those aren't -- as those aren't general
21 administration, administrative efforts, they're recovery
22 efforts, all that time, all those resources expended to try to
23 figure out where did the money go is money that is damage,
24 further damage to our clients, which should be --

25 THE COURT: And that's what Mr. Rushforth was

1 saying --

2 MR. POWELL: Correct.

3 THE COURT: -- that damages would have to be
4 determined at a later date because --

5 MR. POWELL: Correct.

6 THE COURT: I just want to make sure we're all on
7 the same page here --

8 MR. POWELL: We are.

9 THE COURT: -- that Mr. Waid needs to continue doing
10 the work that he's doing because, as I said, it was -- we --
11 it was never anyone's intention to imply that the 65 percent
12 should not be managed by Ms. Montoya and -- I forgot both
13 names. They are perfectly capable of managing their own
14 money. That wasn't the problem.

15 That wasn't why Mr. Waid was appointed to be their
16 trustee never. I mean, the hope was we could reconstruct it,
17 know where we were and turn it back over. So I just want to
18 make sure that that letter was not stop doing what you're
19 doing, we want to have you removed. I mean --

20 MR. POWELL: No.

21 THE COURT: I had a hard time understanding. Okay.

22 MR. POWELL: No, Your Honor, that was not the point
23 at all. The point was --

24 THE COURT: The point is what you're --

25 MR. POWELL: The point was --

1 THE COURT: -- doing is damaging our clients and we
2 want -- we're putting you on notice that we're going to seek
3 recovery of this as damages to the extent it would be added to
4 what Ms. Ahern owes to our clients, because we shouldn't be
5 having to bear the burden of recovering our own money.

6 MR. POWELL: Correct, Your Honor. Correct, Your
7 Honor.

8 THE COURT: Okay. Just wanted to clarify what that
9 letter was about.

10 MR. POWELL: And the issue you have to, I think, to
11 probably understand this in context, as the diagram shows and
12 it still is to this day, the money comes into Trust 1. So to
13 your point about Jacquelyn and Kathryn managing their 65
14 percent of the MTC, the problem is that the money doesn't come
15 directly to the MTC. It goes through a funnel of which it's
16 pooled. And then Mr. Waid is having to pay tax out of that
17 into the -- as a general fund.

18 And so 65 percent of every dollar since your order
19 has not come down to the MTC Trust. So that's been the point,
20 is it'd be one thing if it was out of the 35 percent and only
21 the Trust No. 2. But the administrative expenses and the
22 taxes that have been paid are coming out from everything. So
23 65 percent of every dollar is a dollar that my clients are not
24 receiving.

25 THE COURT: Right. So it's --

1 MR. POWELL: That was the point of that letter.

2 THE COURT: -- something that your clients can
3 complain about at a later date if they're entitled to further
4 damages. It's one of the elements of damages they would have.

5 MR. POWELL: Yes, precisely. Precisely.

6 THE COURT: All right. Just wanted to make that
7 clear.

8 Mr. Lenhard --

9 MR. LENHARD: I want to be sure everybody's done
10 over there first.

11 THE COURT: -- opening comments. Yeah.

12 MR. LENHARD: Does Mr. Kiefer have anything to add?

13 MR. KIEFER: I'm good, Your Honor. Thank you.

14 THE COURT: Thank you. So Mr. Lenhard.

15 MR. LENHARD: Ms. Peterson, maybe you?

16 MS. PETERSON: Go ahead.

17 MR. LENHARD: I'm going to go -- I'm sorry, what?

18 THE MARSHAL: Does she have trouble hearing?

19 MR. LENHARD: She can't hear a thing.

20 THE COURT: Do we want to use it? I mean, I don't
21 know if it will help her. But we do have --

22 MR. LENHARD: Which is by the way, why we wanted the
23 IME, which is one of the reasons Mr. Waid has been delayed on
24 the deposition. He wants it before the deposition makes
25 sense.

1 THE COURT: Right.

2 MR. LENHARD: Which I'm going to address here in
3 just a second.

4 Does that help?

5 MS. AHERN: I don't hear anything.

6 THE COURT: Yeah. I mean, they don't work for
7 everybody. They magnify sound somewhat, but they don't
8 work -- they don't always work depending on what people need.

9 MR. POWELL: Your Honor, if she sits on the bench
10 next to you, does that improve the sound? Because I know
11 when --

12 THE COURT: No.

13 MR. POWELL: -- I've done testimony -- no. It
14 doesn't matter where you are in the room.

15 THE COURT: No.

16 MR. LENHARD: Actually, it's not a bad idea. Do you
17 want to try it?

18 MR. POWELL: Yeah. If she wants to sit anywhere,
19 she's free to sit anywhere so she can hear.

20 MR. LENHARD: Do you mind her sitting up there to
21 see if that works?

22 THE COURT: See if she's sitting in front of you if
23 she can hear?

24 MR. LENHARD: Yeah. Sometimes --

25 MR. POWELL: Yeah, or even on the jury box maybe.

1 MR. LENHARD: Sometimes she lip reads.

2 THE COURT: Okay.

3 MR. POWELL: Maybe reading the lips from the jury
4 box maybe.

5 MR. KIEFER: Well, she just stood up when we said
6 that out loud.

7 THE COURT: Yeah. Mm-hmm.

8 MR. LENHARD: Does that help?

9 MS. AHERN: [No audible response.]

10 MR. LENHARD: Okay. Sit back there.
11 Can I proceed?

12 THE COURT: Absolutely.

13 MR. LENHARD: Thank you, Your Honor.

14 OPENING STATEMENT

15 MR. LENHARD: I don't share the salutary or
16 laudatory opinion of the letter of November 20, 2015. I want
17 to remind the Court what the first heading is to Mr. Waid, by
18 the way, who's the court appointed interim trustee who's
19 performing the functions demanded of him of the Court,
20 including retrieval of trust assets, trying to ascertain the
21 status of the trust. And I will be asking Mr. Waid at some
22 point, whenever he gets to testify and when our turn comes, as
23 to what he was doing on November 20, 2015 to benefit the trust
24 in his opinion.

25 But on November 20, 2015, counsel for the two

1 daughters write a letter with the first heading, Request to
2 Immediately Cease and Desist in Further Investigative Efforts.
3 The letter goes on to say, "With all of this said, my clients
4 insist that you no longer spend time and resources on this
5 matter and that you wave the white towel and concede that you
6 can no longer move forward."

7 Page 5, "I nevertheless must discuss certain duties
8 and obligations I feel you are required to act on without
9 delay." He then lists the duties. "For this reason, please
10 allow this to serve as an immediate demand for the current
11 monies held by you regardless of previous allocation to be
12 distributed to the MTC Trust."

13 Now, we've heard a lot this morning already about
14 Clause 10 of the trust agreement, how you are not to interfere
15 with the administration of the trust. So let me ask the Court
16 a very simple question. What do you call the letter of
17 November 20, 2015, except an effort to interfere with the
18 efforts of the interim trustee?

19 And as the Court's aware, their efforts to interfere
20 with the actions of the interim trustee do not end. They also
21 have attempted to interfere with the orders of this Court,
22 which is Exhibit F, and I'll address that later in my remarks.
23 I don't think I have to remind the Court this morning, but
24 what the status of the law is in this state, by that matter
25 all 50 states, the law affords a forfeiture. That's well

1 settled. I don't think that can be reasonably disputed.

2 They are today seeking a total forfeiture of the
3 beneficial interest in a significant trust held by my client.
4 They are contending a no contest clause, which I believe is
5 Clause 10 of the trust, results in the forfeiture. I'm saying
6 the language of that clause must be strictly construed. And
7 I'm not seeking to put in evidence outside or give extrinsic
8 evidence of the trustor's intent. I am relying on the
9 language of the no contest clause itself.

10 Two questions got to really arise out of the issues
11 before the Court today. What are the terms first of the no
12 contest clause, and secondly, what is the effect of the
13 influence of others on the behavior of my client and how does
14 that intertwine with the language of the no contest clause.
15 The terms of the clause you know and you've probably got them
16 memorized by now. They make my head ache.

17 Where in that clause does it state that if a
18 beneficiary, whether acting as a trustee or not, misspends,
19 misallocates, spends poorly, behaves poorly, spends too much,
20 as a result it's a violation of the no contest clause? Find
21 that language if you will. I suggest if it had been intended
22 by the trustor, that language would be in the document.

23 They claim in their briefing that the actions of
24 Ms. Ahern amounts to an attack on the trust. We all know what
25 an attack means. It's an intent to injure or destroy. What

1 does the attack mean, the word "attack" mean in the context of
2 this trust document? It's vague. Nobody knows. You'll have
3 to interpret it. I'm suggesting again, if the trustor
4 intended the harsh remedies that are being sought here today,
5 he would have stated it in that document.

6 There is no intent evidenced in this case on the
7 behalf of Ms. Ahern to harm the trust. And when Mr. Waid
8 comes into power, what happens? Within two weeks he's
9 recovered \$1.6 million, most of it directly or indirectly
10 through her. What else happens? According to Mr. Waid, not
11 taking this as true, she admits that she owes the trust an
12 additional \$800,000.

13 An individual trying to harm or destroy or attack
14 the trust wouldn't make that admission, wouldn't assist
15 Mr. Waid in recovering those funds. I will concede, as I
16 must, that the affidavit filed by Ms. Ahern and the original
17 accounting filed by Ms. Ahern were not correct. That's
18 probably a charitable description of it.

19 But I will also state that Ms. Ahern helped Mr. Waid
20 to recover a significant portion of the funds that it was
21 thought should be in the trust at that point in time. And
22 I'll go through the math with Mr. Waid when he testifies.

23 THE COURT: I don't want to interrupt you,
24 Mr. Lenhard, but just to clarify now, this — the million six
25 and the 800,000 — or the million six, that's in addition to

1 whatever has come into the trust in the -- any revenues coming
2 into the trust separately?

3 MR. LENHARD: That's recovered within two weeks of
4 his appointment.

5 THE COURT: All right.

6 MR. LENHARD: Since then the income coming in is a
7 different issue. We're going to be discussing that also.

8 THE COURT: I hadn't thought about there was income
9 coming in. Okay.

10 MR. LENHARD: Oh, yes. And Mr. Waid can account for
11 what he's recovered, or excuse me, what income has been paid
12 in so far.

13 THE COURT: Thank you.

14 MR. LENHARD: I would suggest to you the appropriate
15 remedy as far as Ms. Ahern's mispending and misallocation of
16 funds has already occurred. She's been removed as trustee.
17 And she's been advised, and I've not ever stood up here and
18 suggested anything to the contrary, that if it's determined
19 that she only has a 35 percent interest in this trust, that
20 she will in fact have to have her interest surcharged.

21 And in this regard, because we realize the Supreme
22 Court even in the case of an elder person moves somewhat
23 slowly, we realize that we have tax issues today and there's
24 issues that Mr. Waid has to deal with. Ms. Ahern has agreed
25 to tender, subject whatever the Supreme Court does, the

1 \$700,000, so Mr. Waid can deal with the tax issues in his
2 capacity as trustee.

3 So it comes to the second part of this. We know the
4 language in the trust document does not meet exactly what the
5 movants are trying to shoehorn into the document. So what's
6 the effect of undue influence here? And I think we can all
7 agree as a general rule parties don't come in and testify I
8 was under undue influence, I was influenced by others. It
9 generally has to be established by circumstantial or indirect
10 evidence.

11 It's unusual that we have a case here where most of
12 the evidence of undue influence is provided by the movants
13 themselves. The source of evidence is somewhat interesting in
14 that -- and I'm going to start with a document that we've
15 already discussed in argument this morning. I call it the set
16 the record straight document, which is the supplement to the
17 motion to remove Ms. Ahern as a beneficiary of the trust.

18 And just let me give you a few examples of what is
19 alleged in that document. And I intend on putting Ms. Montoya
20 on the stand and have her verify this document is truthful,
21 because I'm assuming counsel spoke to her, to their clients,
22 and would not file a document without their clients'
23 acquiescence. So assuming the document is in fact truthful, I
24 believe it's very good evidence as far as the issue of undue
25 influence on Ms. Ahern for the events that led up to where we

1 are today. Because the time period's interesting.

2 The set the record straight document refers to
3 behavior that was strange occurring as early as 2009. In
4 2012, according to this set the record straight document, the
5 sisters learned that Eleanor's books had been taken over by a
6 lady named Suzanne Nounna. They also learned that she was
7 controlling her financial decisions.

8 As a result of what they learned and incidents that
9 they observed at the home, they referred Ms. Ahern to Elder
10 Protection Services. A report was filed, and it is true in
11 the report ultimately the agent decided there was no causation
12 and didn't go any further, but that was also based on the
13 representations of Ms. Ahern, the party who's the subject of
14 the undue influence. And I'm not offering that document for
15 that issue.

16 I'm offering the document for something else; the
17 detailed statements of what was occurring between Ms. Nounna
18 and Ms. Ahern, including withdrawals from the bank, statements
19 that Ms. Montoya has not walked away from in her deposition,
20 nor do I believe she'll walk away from here today or tomorrow,
21 whenever.

22 According to the set the record straight document,
23 there were conversations with a woman who was familiar
24 somewhat with Eleanor's living arrangements. She supposedly
25 was caught whispering in the stables with the security guard.

1 Apparently, according to the set the record straight document,
2 Ms. Ahern thought the daughters were attempting to kill her.
3 The document concludes that the individuals controlling Ms.
4 Ahern's life were in fact leeches.

5 The support for the set the record straight document
6 in large part is based on the testimony of Ms. Montoya in her
7 deposition. I'm not going to cite this extensively because
8 again, I'll ask her the same questions when the time comes for
9 her to be examined.

10 But in the deposition she refers to the fact that
11 Eleanor ceded control of her life and finances to Ms. Nounna.
12 She manipulated her mother to the point she no longer trusted
13 her daughters. She forced her mother to make a choice;
14 Suzanne Nounna or her daughters. She learned through the
15 security man or the computer man, a little bit confused, that
16 my client was living off Social Security so she would not
17 spend the oil income, and she also learned that Suzanne
18 Nounna, a realtor, was apparently purchasing homes for my
19 client.

20 Suzanne Nounna became a director of a foundation
21 created by my client and was running her checking account.
22 And the most interesting of all is reference to a withdrawal
23 from Wells Fargo Bank in the sum of 80,000 or 50,000, it's a
24 little bit unclear, where Ms. Nounna initially appears and
25 attempts to withdraw the money. She's denied.

1 She comes back with Eleanor Ahern in a wheelchair,
2 is able to obtain and withdraw the money. That's reported on
3 the EPS document as well as in the deposition. Finally,
4 Ms. Montoya, in certainly a fit of candor, acknowledges that
5 my client has been manipulated by others in the past.

6 So under these facts, I ask the Court to consider
7 the entire totality of what we're dealing with. We have a
8 trust document that sets out the circumstances in which a no
9 contest clause can be invoked. We have facts here where we
10 have an elderly woman, 80 years old, at the time in question
11 76, 77 years old, clearly manipulated by others. She misspent
12 and misallocated funds as the trustee, resulting in removal as
13 a trustee.

14 None of this conduct is discussed as a basis for the
15 implication of the no contest clause, and none of this conduct
16 or type of conduct is discussed in the trust document itself.
17 What they're asking you to do under the facts and
18 circumstances of this case is rewrite Clause 10. I'd suggest
19 that's not the role of the Court.

20 I ask the Court to ask yourself did the trustor
21 intend for the trustee/beneficiary, again, an elderly widow
22 under the influence of others, be removed under these
23 circumstances, and if he had, would not that be specifically
24 spelled out in the trust document.

25 Finally, as I pointed out, we referred to our

1 Exhibit E, the cease and desist letter, which we consider to
2 be an outright interference or attempted interference with the
3 duties of Mr. Waid, but also Exhibit F. If you recall, in
4 November you ordered that Ms. Ahern get minimal living
5 expenses pending the resolution of these matters, and you also
6 ordered attorney's fees.

7 I'm not going to argue about the attorney's fees
8 today. I'm here on a pro bono basis right now. I'll deal
9 with my attorney fee issues later. I'm not walking away from
10 them, but I'll deal with them later. But they're fighting my
11 client even receiving a relatively paltry sum to live on right
12 now, as well as the ability to defend herself.

13 As we've established and you will hear from Mr.
14 Waid, she's getting food from the food bank. She gets food
15 from Meals on Wheels for seniors. She lives on Social
16 Security. She's had no access to these funds whatsoever. You
17 granted a relatively small amount to allow her to live on.
18 What's the result of your order? Because you finally signed
19 the order in January. Or I shouldn't say finally.

20 You signed the order in January. And what did that
21 lead to? Not satisfied to threaten Mr. Waid with his
22 fiduciary duties, remind him he needed to cease and desist
23 immediately his court ordered trust duties. No. On
24 January 29, they threaten Mr. Waid with personal liability.

25 This is a letter addressed to Mr. Waid. Page 2, "I

1 fear you may believe that you will be absolved of any future
2 liability that may accompany such distributions." This is
3 referring to your order. "Although a trustee may generally
4 insulate himself from liability by seeking a court order
5 directing his actions, I must warn you that no such
6 protections are available under an inappropriate and an
7 unlawful order," your order.

8 The conclusion. "My clients wish to avoid further
9 litigation on this matter. Nevertheless, they have authorized
10 our office to file suit against you in your capacity as
11 trustee should you breach your fiduciary duty of loyal to them
12 making distributions to Ms. Ahern," pursuant to your order by
13 the way. "Although I do not envy your present predicament,
14 our office cannot allow your current circumstances to affect
15 how we assert and defend the beneficiaries' legal rights."

16 So they threaten Mr. Waid with personal liability.
17 And of course what we'll establish with Mr. Waid today, the
18 order's just simply not been obeyed. What I'm getting at is
19 the appropriate remedy has already been -- has already been
20 enforced in this case, and that is the removal of her as
21 trustee and your order that she will be surcharged eventually
22 for whatever she cost the trust.

23 If the summary judgment order is affirmed, clearly
24 she'll be surcharged for whatever she cost the trust. That is
25 the penalty that's appropriate and nothing more. I would

1 suggest it's not appropriate for you to rewrite the terms of
2 the trust agreement. I'd suggest -- I would ask you to look
3 closely at the letters written by counsel in their attempt to
4 interfere with Mr. Waid's duties. Thank you.

5 THE COURT: All right. So I'm assuming, Mr. Moody,
6 you take no position? Your client takes no position, you
7 don't wish to be heard?

8 MR. MOODY: No, thank you. As far as opening
9 statements, absolutely not.

10 THE COURT: Thank you. So Mr. Rushforth or
11 whoever's going to call the first witness.

12 MR. LENHARD: They're the movants, right?

13 THE COURT: Yes. Yeah. They can call the first
14 witness.

15 MR. POWELL: I'd like to call Mr. Waid, the first
16 witness.

17 THE COURT: Thank you, Mr. Powell.

18 MR. POWELL: Your Honor, I'm going to need a few
19 minutes just to sprawl out my exhibits, if that's okay with
20 the Court.

21 THE COURT: Okay.

22 MR. POWELL: What time are you planning to take the
23 first recess today?

24 THE COURT: Well, for lunch. If we're going to be
25 here through lunch, we can take a break for lunch.

1 MR. POWELL: At approximately what time are you
2 looking at that?

3 MR. LENHARD: You need five minutes?

4 MR. POWELL: Yeah, approximately, just to get my
5 exhibits --

6 THE COURT: We'll take a brief recess now. We'll
7 just take a five minute recess and then we'll be ready.

8 THE MARSHAL: The court will be in recess for five
9 minutes.

10 (Court recessed at 11:18 a.m. until 11:29 a.m.)

11 THE COURT: Do you want to wait until your client
12 returns, Mr. Lenhard?

13 MR. LENHARD: We'll go ahead and go forward.

14 THE COURT: Okay. If you're ready, Mr. Powell, then
15 we're ready.

16 FREDRICK WAID, WITNESS, SWORN

17 THE CLERK: State your name and spell it for the
18 record.

19 THE WITNESS: Fredrick Waid, F-r-e-d-r-i-c-k. Waid,
20 W-a-i-d.

21 THE COURT: And for the record, we do have Ms. Ahern
22 back, but we don't have Mr. -- oh, Mr. Rushforth, there you
23 are. I didn't see Mr. Rushforth. You were behind Mr. Powell
24 there. Okay. So everybody's back. We're all ready to go.
25 Okay. Thanks.

1 DIRECT EXAMINATION

2 BY MR. POWELL:

3 Q Mr. Waid, could you give me a brief background of
4 your professional history, what occupations have you held,
5 titles, positions throughout the years?

6 A Certainly. I have a law degree from Baylor
7 University. I have served as both an officer and a director
8 and a corporate secretary for three different financial
9 institutions. And I have been an attorney. I have served as
10 a court appointed receiver, as a trustee, as an executor for
11 the better part of the last -- since 1997.

12 Q How many -- ballparking, how many times have you
13 been named or stipulated to being a trustee of a trust,
14 serving in that capacity?

15 A At least 75 or more.

16 Q When did you take over as trustee of the W.N. and
17 Marjorie T. Connell Trust?

18 A It was the first couple of days of April, when I
19 received the court order and confirmation, I began discussing
20 matters with the parties.

21 Q In 2015, correct?

22 A That's correct.

23 Q When you initially became the trustee in April of
24 2015, what actions did you take immediately to become familiar
25 with what you would be doing as trustee?

1 A Specifically I recall I followed the request, if you
2 will, of counsel then for Ms. Ahern at Marquis and Aurbach,
3 and that was to contact Mr. Johnston [phonetic], who was
4 counsel for the trust in Texas. That was the very first thing
5 I did.

6 Q And what was the purpose of contacting Mr. Johnston?

7 A Ms. Ahern's local counsel suggested that it would be
8 in the best interest of the trust and for transitional
9 purposes that I speak with him regarding the pending matters
10 that were facing the trust then.

11 Q And could you elaborate on what those pending
12 matters were affecting the trust at that time frame?

13 A There were some transactional matters regarding the
14 royalty payments, specifically with Apache Oil Company and
15 Pioneer, which is another oil company.

16 Q Going back, I guess, what -- what are the assets of
17 the trust that you're in control of as trustee?

18 A The Connell Trust is, I'll refer to it here rather
19 than spelling the whole name. The Connell Trust consists of
20 surface and subsurface rights to a ranch located in Texas. In
21 addition to the mineral rights and surface rights on that
22 ranch located in West Texas, there are royalty rights
23 associated on other properties.

24 It's important to note, and I -- it might be helpful
25 if there were a graphic of this, the Connell Trust receives 25

1 percent of a larger royalty arrangement, if you will, for
2 mineral rights associated with, if you go back on the family
3 tree, in the Connell family there is the Connell-Cowden Trust
4 which holds 50 percent, and there is the Miller family which
5 holds another 25 percent, and there's the William and Marjorie
6 Connell Trust of which I am the trustee which holds 25
7 percent. I am the trustee of simply that 25 percent.

8 But it's important to note that there are other
9 parties to that. There's not an independence per se, because
10 those royalty rights, the contracts and the duties and
11 obligations associated are part of the global royalty interest
12 that's held.

13 Q So if I understand your prior testimony, Mr.
14 Johnston was involved with communications on behalf of the
15 Connell Trust with various oil companies at the time that you
16 took over?

17 A That's correct.

18 Q Was Mr. Johnston in the process of negotiating oil
19 leases at the time that you took over?

20 A Most of that was concluded.

21 Q When you spoke with -- I'm assuming. Did you have
22 direct oral contact with Mr. Johnston at any time?

23 A I spoke with him by telephone multiple times over a
24 course of two days, and then there were both email and letter
25 correspondence as well.

1 Q In the context of the conversations you had with
2 Mr. Johnston, did he explain moving forward what he was doing
3 on behalf of the trust in terms of negotiation?

4 A He did not.

5 Q Did you attempt to get an understanding of what role
6 you as trustee would be doing in terms of making decisions
7 that Mr. Johnston would act on, on behalf of the trust?

8 A I think it would be more accurate to say I attempted
9 to engage him as counsel, as requested by Marquis and Aurbach.

10 Q What was the result of your attempts to engage
11 Mr. Johnston?

12 A He declined.

13 Q Did he specify a reason as to why he was declining
14 to accept your representation?

15 MR. LENHARD: Sounds like hearsay to me. I object.

16 THE COURT: Sustained.

17 THE WITNESS: He indicated in a letter --

18 THE COURT: That's okay.

19 MR. LENHARD: Whoa, hold it.

20 THE WITNESS: Oh, I'm sorry.

21 THE COURT: That's fine. Thank you.

22 MR. KIEFER: Your Honor, I think that we've kind of
23 discussed that Mr. Waid is coming here as a neutral party. I
24 understand there might be hearsay issues, but if we're willing
25 to stipulate and let the man speak to what he actually knows.

1 Also, got the trust and the trust was represented by an
2 attorney, and he's appointed as a trustee, so he's supposed to
3 talk to another trustee making representations on behalf of
4 the trust, which is a party to this action.

5 THE COURT: Not -- he wasn't another trustee. He
6 was an attorney.

7 MR. KIEFER: Sorry. An attorney for the trust.

8 THE COURT: For the former trustee.

9 MR. KIEFER: Making representations on behalf of the
10 trustee who is a party to this action.

11 MR. LENHARD: You know, let's do it this way. I
12 mean, obviously we all know what hearsay is. We don't need an
13 educational primer on it. If he wants to ask hearsay
14 questions what Mr. Johnston said, that's fine, but then I
15 should have the same rights later with other witnesses,
16 correct?

17 THE COURT: To the extent that there's a similar
18 basis for saying that this -- what this hearsay possible
19 exception might be, technically is this hearsay? Yeah, it
20 absolutely is hearsay.

21 Also, I think we have some attorney-client privilege
22 issues because this attorney was the attorney for Ms. Connell.
23 That is very clearly who he was acting for. So I don't know
24 that she's waived any confidentiality. So to the extent that
25 Mr. Johnston is just communicating directly with Mr. Waid

1 about questions Mr. Waid was putting to him, I guess I can see
2 letting that go forward, so.

3 MR. KIEFER: And I think he actually testified that
4 he didn't communicate with him.

5 THE COURT: Right. He said basically I won't
6 communicate with you, right?

7 MR. KIEFER: Counsel's attempting to do apples and
8 oranges here. If he wants to ask hearsay questions --

9 THE COURT: Okay. Thank you. You know, are we
10 going to have -- are all three of you going to be --

11 MR. LENHARD: I was going to say, are we tag teaming
12 here? What's going on here?

13 THE COURT: Yes. Okay. Thanks. All right. So
14 have a seat. And I'll allow this. And to the extent that we
15 are talking here about a response of counsel for -- then
16 counsel for Ms. Connell in the role as trustee, previous role
17 as trustee to the replacement trustee, what did he
18 communicate, if anything; it sounds like nothing, okay, we'll
19 go forward.

20 Okay. Mr. Powell, so I'll allow that.

21 Mr. Waid, you can go ahead and answer. I'll allow
22 you to answer, Mr. Waid.

23 THE WITNESS: I apologize. Where did we leave off,
24 which question?

25 THE COURT: Okay. So, Mr. Powell, do a restatement.

1 BY MR. POWELL:

2 Q I believe the question is as to what -- you had
3 mentioned that Mr. Johnston had denied your request for
4 representation, and I believe my question was along the lines
5 of was there an indication given as to why he was declining to
6 represent you as trustee of the Connell Trust.

7 A I'd like to answer that question by putting it in
8 the proper context. In the course of my appointments where I
9 come into a case and there is existing counsel or accountant
10 relationships, my first order is not to clean house, but to
11 find out from those individuals.

12 In this particular instance, I asked Mr. Johnston if
13 he would send an engagement agreement to me so that privileges
14 discussing these Apache and Pioneer contracts and pending
15 matters of the trust could be kept here between Mr. Johnston
16 and myself, because Ms. Ahern had been removed as trustee. So
17 I was trying to preserve and protect that relationship.

18 He ultimately determined that he did not want to
19 communicate the affairs or actions that he was taking on
20 behalf of the trust on behalf of Ms. Eleanor, Ms. Ahern in her
21 capacity as trustee or on behalf of the beneficiaries. He
22 simply said I needed to find other counsel, which I did.

23 Q After Mr. Johnston declined to accept representation
24 of you as trustee, did you make a request to receive his file?

25 A I did.

1 Q What was the response to your request?

2 A After a series of correspondence and me meeting with
3 his counsel in Texas, they provided some limited
4 documentation.

5 Q Was your understanding that Mr. Johnston represented
6 Ms. Ahern as trustee of the trust, or as an individual
7 beneficiary of the trust?

8 MR. LENHARD: I'd object. We need some foundation
9 there before he can give an opinion.

10 THE COURT: I --

11 MR. POWELL: This goes back to it's discussion with
12 what he had with Mr. Johnston.

13 THE COURT: Yeah. So I guess maybe we should
14 clarify. My understanding that what Mr. Waid was trying to do
15 was to preserve the attorney-client relationship for
16 Mr. Johnston on the assumption that he represented the trust.
17 It sounds like that's what Mr. Waid, the original -- when he
18 originally reached out to Mr. Johnston, he reached out to him
19 in his role as trust --

20 MR. POWELL: That's what I'm just trying to clarify.

21 THE COURT: -- as the new trustee assuming that this
22 gentleman had represented the trust.

23 And so I guess it's the objection that I think
24 Mr. Lenhard is making is that when Mr. Johnston said, no, find
25 new counsel, you know, we need to know why so we can get to

1 the next question then. But so again, here we're getting into
2 more of this hearsay. But --

3 MR. POWELL: That's why I'm trying to tiptoe around
4 this.

5 THE COURT: -- you know, what was Mr. Johnston's --
6 the basis for Mr. Johnston saying no, if he made that to
7 Mr. Waid.

8 MR. POWELL: Correct.

9 THE COURT: He may not have.

10 MR. POWELL: Correct. That's all I'm trying to
11 elicit, and then I'm trying to tiptoe that line.

12 THE COURT: All right. So yeah, Mr. Waid.

13 THE WITNESS: He did not provide a basis other than
14 he had a conflict of interest and that I should speak with his
15 counsel. I spoke with his counsel. I met with his counsel.
16 Mr. Moody has spoke with his counsel, and I'm still awaiting
17 documentation. So I can't answer specifically who was
18 representing who, because I don't believe in the discovery I
19 received a copy of the engagement agreement. But if I may, I
20 will say --

21 MR. LENHARD: Well, I'm going to object to him
22 volunteering anything, Judge. It's not responsive to a
23 question any longer.

24 THE COURT: Okay. All right. Thanks. Next
25 question, Mr. Powell.

1 MR. POWELL: Okay. Cut me off again if I'm going
2 over that line that we just drew.

3 BY MR. POWELL:

4 Q What documentation from Mr. Johnston are you seeking
5 that you haven't received?

6 A Primarily financial records relating to transactions
7 that occurred in his trust account.

8 Q Have you discovered in the course of your
9 investigation that the Connell Trust and Ms. Ahern as trustee
10 made payments from the trust for Mr. Johnston's services?

11 A That is my understanding, yes.

12 Q Did you reach out to any other -- strike that
13 question.

14 Did you learn in the scope of your investigation
15 that there were any other attorneys that were working on
16 behalf of the trust other than Mr. Johnston?

17 A Yes.

18 Q Who were those individuals or firms?

19 A I think one firm was Anthony & Middlebrook. There
20 is an attorney CPA in Fort Worth, Ryan Scharar. I believe --

21 MR. LENHARD: S-h-a-r? I'm sorry.

22 THE WITNESS: S-c-h-a-r-r.

23 MR. LENHARD: Thank you.

24 THE WITNESS: He's a former partner at Anthony &
25 Middlebrook, but now has his own firm. There were also two

1 other attorneys in West Texas. I apologize. Their name
2 escapes me at the moment. One I believe is Mr. Crawford, who
3 was associated with Mr. Johnston.

4 BY MR. POWELL:

5 Q To the best of your understanding, what services did
6 Anthony & Middlebrook perform for Ms. Ahern as trustee of the
7 trust, the Connell Trust?

8 A I am not certain. I've requested that information.

9 Q Any reason as to why you haven't received that
10 information?

11 A It's the sub --

12 Q Explanation, I should say. Any explanation?

13 A Again, if I can put it in context. I had the
14 declaration of Ms. Ahern in her accounting. I attempted to
15 contact, or I did contact Anthony & Middlebrook after I was
16 appointed as trustee. They initially agreed to cooperate and
17 provide information. They subsequently withdrew that, and I
18 have had to commence an action in Texas to enforce the orders
19 of this Court in obtaining the information.

20 As of, I believe, two weeks ago, Anthony Middlebrook
21 agreed to provide the information and comply with this Court's
22 order. I simply have not received it yet.

23 Q So it's a fair statement that as of right now you
24 don't understand the scope of the services that that firm
25 would have provided for the trust?

1 A No.

2 MR. MOODY: Sorry. Fred, will you just clarify
3 whether your answer no was it's a fair question, or you have
4 not received that information to make that decision?

5 THE WITNESS: I'll answer the latter. No, I have
6 not received the information.

7 BY MR. POWELL:

8 Q Your testimony indicated an accounting from
9 Ms. Ahern. Did you review the accounting that Ms. Ahern had
10 submitted when you became trustee?

11 A I reviewed the record in the case, yes.

12 Q Did the statements made in the accounting of
13 Ms. Ahern filed with the court, did that give you direction as
14 to who to speak to about what?

15 A Yeah. Yes.

16 Q Within that accounting, is -- to the best of your
17 recollection, is there -- was there an individual by the name
18 of Fred Smith that was referenced?

19 A Yes.

20 Q Who is Mr. Smith?

21 A To be candid, I'm not exactly sure. I believe he is
22 more properly known, if that's the best way to describe him,
23 as Fred Brown. I have spoken with a Fred Brown. I've
24 attempted to serve a Fred Brown. But I'm not sure on Fred
25 Smith.

1 Q As to Mr. Brown, is it your findings after your
2 investigation that Mr. Brown had been paid monies from the
3 trust by Ms. Ahern?

4 A That's correct.

5 Q Do you have any understanding at this time of what
6 services Mr. Brown performed for the trust?

7 A There's an invoice attached in, I believe,
8 Ms. Ahern's pleading, or a description of services he
9 provided. And then just last week this -- and I'll assume Mr.
10 Brown and Mr. Smith are the same individual, he filed a
11 pleading in the appeal portion of this case with an itemized
12 invoice for services.

13 Q Going back to Mr. Johnston for a second, what is
14 your best -- strike that.

15 As to Mr. Johnston, is Mr. Johnston's firm Johnston
16 & Associates?

17 A Yes.

18 Q To the current extent of your investigation,
19 approximately how much was paid from the trust to Johnston &
20 Associates that you've discovered?

21 A Approximately 150,000, but that comes with a large
22 asterisk.

23 Q What would that asterisk be?

24 A I simply haven't been able to verify all the
25 information. I've seen one side of the ledger and not the

1 other.

2 MR. LENHARD: I guess I should object as to
3 foundation. I'd like to know what ledger he's talking about.

4 THE COURT: If you could clarify.

5 BY MR. POWELL:

6 Q Feel free. What ledger were you referencing,
7 Mr. Waid?

8 A I apologize for using that term. The record in the
9 case, Ms. Ahern's filing, her accounting, plus some of the
10 financial records from Wells Fargo.

11 THE COURT: Thank you.

12 BY MR. POWELL:

13 Q In Ms. Ahern's accounting that we are discussing and
14 given your testimony that you reviewed the record, did you
15 investigate the claim that Mr. Johnston's firm was holding
16 money for the trust in his trust account?

17 A Yes.

18 Q What did your investigation reveal as to that, those
19 funds?

20 A That investigation is still ongoing.

21 Q At this point in your investigation, is there any
22 belief that Mr. Johnston's firm still has funds belonging to
23 the trust in his trust account?

24 A I believe we made a pretty specific demand that any
25 funds held in his trust account needed to be returned, and he

1 did in fact return approximately 70 plus thousand. However, I
2 have not reviewed his trust account records, which I have
3 requested, to verify that that's actually correct.

4 Q And when those approximately \$70,000 in funds were
5 returned, was there any explanation as to why Mr. Johnston's
6 firm was holding 70-some odd thousand dollars in funds on
7 behalf of the trust?

8 A No.

9 Q From Ms. Ahern's accounting regarding payments that
10 went to Anthony & Middlebrook, has your investigation revealed
11 as to the scope of services they performed?

12 A Only as outlined by Ms. Ahern in her declaration.

13 Q And based on Ms. Ahern's declaration, what was your
14 interpretation of what services they performed for her?

15 A I'd rather not try and quote it from memory, but
16 exactly as her declaration states, there was tax consultation,
17 there was tax savings, charitable work.

18 Q Since you've become the trustee, can you proffer any
19 explanation or understanding as to what charitable work would
20 have anything to do with the Connell Trust and the monies held
21 within the Connell Trust?

22 MR. LENHARD: I'm going to object to foundation
23 until we can establish how he would know what charitable work
24 we're talking about.

25 THE COURT: Overruled.

1 THE WITNESS: If you're asking if I was concerned
2 about the statement, I was. Because it's one of the reasons I
3 requested the information from Anthony & Middlebrook, simply
4 because it doesn't comport with, in my opinion, the terms of
5 the trust.

6 BY MR. POWELL:

7 Q You mentioned the name Ryan Scharar.

8 A Yes.

9 Q Have you spoken telephonically with Mr. Scharar?

10 A No.

11 Q Have you exchanged correspondence with Mr. Scharar?

12 A I believe my counsel, Mr. Moody, has, and also our
13 counsel in Texas.

14 Q Is it your understanding that Mr. Scharar was the
15 primary attorney for Anthony & Middlebrook involved with the
16 Connell Trust?

17 A That's my understanding, yes.

18 Q But as of today, there's no understanding as to what
19 exactly Mr. Scharar did on behalf of the trust?

20 A No.

21 Q What information would our -- strike that.

22 Have you subpoenaed the Anthony & Middlebrook file
23 relating to the Connell Trust?

24 A Yes.

25 Q And I don't want to mischaracterize your previous

1 testimony. You have yet to have a production as to that
2 subpoena?

3 A Yes.

4 Q Has there been any status given to you as to when
5 you might expect that file, production, I should say?

6 A I believe the last correspondence indicated it would
7 be produced shortly, I think, was the word they used.

8 Q Mr. Waid, do you have a list of the exhibits in
9 front of you?

10 A I'm sorry. I don't have anything.

11 MR. POWELL: May I approach?

12 THE COURT: You may.

13 THE WITNESS: Thank you.

14 MR. POWELL: Your Honor, it's noon. I don't know
15 what -- what time were you planning to break for lunch?

16 THE COURT: Well, if you want to get to a good
17 breaking point, I don't know if they're --

18 MR. POWELL: Okay.

19 THE COURT: We've been proceeding for a while.
20 Until you --

21 MR. POWELL: Okay. You just let me know.

22 THE COURT: -- get to a nice opportunity to break.

23 MR. POWELL: Sounds good. Okay.

24 THE COURT: Okay.

25 MR. POWELL: I'd like to offer into evidence

1 Exhibit E of the movants.

2 MR. LENHARD: Actually, why don't you just do them
3 all at once, as I agreed.

4 MR. POWELL: Okay. If we can do them all, offer
5 them all into evidence.

6 THE COURT: All right.

7 THE CLERK: Can I ask, are these to be marked with
8 plaintiff, respondent, petitioner, defendant or what?

9 THE COURT: These are petitioner's, petitioner's
10 exhibits.

11 THE CLERK: Petitioner's.

12 THE COURT: And, you know, for the record, as I
13 mentioned, since both sides used letters, it makes it a little
14 bit difficult for us to differentiate. So Ms. Clerk, how
15 would you prefer that we do that? Would you like us to —

16 THE CLERK: Well, one will be petitioner's, and then
17 the other will be something else.

18 THE COURT: Respondent. Okay.

19 MR. LENHARD: Well, that, or a lot of the exhibits
20 overlapped, and to the extent they overlap I'll use theirs.
21 To the extent they don't, we can convert ours to numbers.
22 It's just we're kind of backwards here. Normally I thought
23 the numbers were the plaintiff's.

24 THE COURT: Exactly.

25 MR. KIEFER: Sorry, Your Honor. We apologize for

1 that.

2 MR. LENHARD: No, it happens. I'm not being --

3 THE COURT: So then as long as we're understanding,
4 so, Mr. Powell, you're moving then for Petitioner's A
5 through --

6 MR. POWELL: Yeah. It's really A through H. I is
7 just simply our exhibit list and the Bates numbers, so.

8 MR. LENHARD: Okay. Yeah.

9 MR. POWELL: Yeah, it's only A through H.

10 MR. LENHARD: And I don't have any objection on the
11 agreeing to their admission.

12 THE COURT: All right. So exhibits will be
13 admitted. Now, though I do think we need to clarify, Mr.
14 Moody, I think that this one also has that -- the interim
15 trustee report. I believe G was filed under seal. That's Mr.
16 Waid's interim trustee's report?

17 MR. LENHARD: That's my understanding also.

18 MR. MOODY: It is, Your Honor.

19 THE COURT: So that remains under seal. So that
20 would have to be noted by the clerk as having been -- that's
21 an exhibit under seal. I mean, this is like I said, our
22 concern about -- nobody's trying to hide anything from the
23 IRS, but the concern that we have here is we don't want to
24 state any positions under oath, you know, on the record that
25 we're then all bound by at some future date.

1 So Mr. Waid's report was noted as interim, so his
2 final conclusions, and it was under seal. Just so I don't
3 have to -- anything else I need to say for the record?

4 MR. LENHARD: So it remains --

5 THE COURT: It remains under seal.

6 MR. LENHARD: Okay.

7 THE COURT: Yes, for that reason.

8 MR. KIEFER: And we need to correct our trial brief
9 to pull that back as well, and I'm sorry for that.

10 THE COURT: So it will be noted that, you know, we
11 can notify the clerk's office that that exhibit and the trial
12 brief also needs to be noted as it is a document that should
13 remain under seal.

14 MR. KIEFER: Thank you, Your Honor. And I
15 apologize.

16 (Exhibit A through F admitted.)

17 (Exhibit G admitted under seal.)

18 (Exhibit H admitted.)

19 MR. LENHARD: How do we handle this? We filed our
20 trial brief, I think, entirely under seal --

21 THE COURT: You did.

22 MR. LENHARD: -- not knowing what to do.

23 Do you want to unseal our trial brief with the
24 exception of that exhibit?

25 THE COURT: Well, maybe if you guys could talk

1 during a break. Part of it was of course the issues for Mr.
2 Waid. But the rest of it is just I don't know how much of
3 this you want made public with respect to the personal
4 financial information of the parties. I mean, certainly of
5 your clients, I mean.

6 MR. POWELL: We were never -- just to refresh the
7 Court's memory, we were never the ones that asked for any sort
8 of a seal, as Ms. Wakayama made that point. Our point of view
9 is this is all open public record, so we have no desire on our
10 part for a seal.

11 THE COURT: Because I know oftentimes the parties
12 want for example, specifically the trust documents themselves
13 are usually under seal because, I mean, you don't want third
14 parties knowing about the family business if you don't have
15 to.

16 I don't know. Mr. Moody, do you take a position on
17 that?

18 MR. MOODY: I think Mr. Waid clearly has a position
19 on this, if the Court would hear him on that.

20 THE COURT: Yeah. I just think that --

21 THE WITNESS: My concern is now I'm entering a phase
22 where there are implications, as this Court has so noted. I
23 would prefer, as it relates to anything financial, that it
24 remain under seal. The argument, legal arguments of the
25 parties are theirs to make.

1 THE COURT: Right.

2 THE WITNESS: But as it relates to anything from
3 this point going forward, I would appreciate everything being
4 protected.

5 THE COURT: Yeah. That's my concern, and I don't
6 know about the trust. Mr. Powell, do you recall, did we
7 ever -- has the trust ever been admitted into evidence before?

8 MR. POWELL: Yes. Oh, yeah, absolutely.

9 THE COURT: So it's not something we never
10 protected.

11 MR. POWELL: It was admitted, Your Honor, in '09,
12 when the court first took jurisdiction over the trust.

13 THE COURT: Okay. Because oftentimes we get them
14 and they are under seal because the parties don't want their
15 family business being made public. The whole idea of trusts
16 is that you avoid all this. But in this particular case, I
17 guess that's not a concern.

18 So the one that will remain under seal at least as
19 of today would be the interim report. And then the
20 questioning can just be going forward, if you have concerns
21 about financial information being disclosed, Mr. Waid can
22 certainly let us know.

23 But, you know, there's -- as I said, nobody's trying
24 to hide anything. And I appreciate Mr. Powell's point that,
25 you know, the policy is that it's public, it's public record,

1 a recorded record. But there are certainly reasons in this
2 particular case where I think that we all want to be somewhat
3 careful as to what we make part of any kind of a permanent
4 record that's available to the public.

5 So with that noted, then we'll just proceed. We've
6 admitted Exhibits A through H, with the understanding that G,
7 the interim trustee's report previously filed under seal, is
8 to remain under seal. Okay. Thanks.

9 BY MR. POWELL:

10 Q Mr. Waid, if you would turn to Bates number on
11 Exhibit E, if you would turn to Bates JMM0039, please, which
12 is affidavit of Fredrick P. Waid, trustee.

13 A Yes.

14 Q What was the genesis of you preparing this
15 affidavit?

16 A This affidavit was filed at the Court's request.

17 Q And what was the scope of the request?

18 A As it relates to this affidavit, I was seeking
19 compliance with the Court's order regarding approximately
20 \$500,000 in funds that were reportedly on deposit with
21 Fidelity Capital.

22 Q How did you discover there were \$500,000 of funds on
23 deposit with Fidelity Capital?

24 A I read the accounting which was provided to me by
25 Marquis and Aurbach.

1 Q What did your affidavit, once received by the Court,
2 what did that -- what did it lead to after you were requested
3 to submit it by the Court? Any action taken by the Court?

4 A My recollection of the procedural history was that
5 there were objections filed and ultimately the matter was
6 heard by Judge Gonzalez and sent back to this Court.

7 Q So if I understand your testimony, it was in regard
8 to the return to the trust of \$500,000 on deposit with
9 Fidelity National -- Fidelity Capital? Excuse me.

10 A I'd prefer to say it was the enforcement of the
11 Court's existing order.

12 Q Fair enough. As you sit here today, have you
13 received said \$500,000 back to the trust?

14 A No.

15 Q In the course of your investigation, have you sought
16 to determine why Fidelity Capital had \$500,000 of the trust
17 funds in the first place?

18 A Yes.

19 Q What conclusion have you drawn as to why there was
20 \$500,000 on deposit with Fidelity Capital?

21 A Not reached a conclusion yet.

22 Q What is Fidelity Capital?

23 A I believe it's an entity formed under the laws of
24 the State of Nevada. It is not -- I guess I can say what it
25 is not. It is not a financial institution.

1 Q Have you sought to elicit documentation from
2 Fidelity Capital as to why they have \$500,000 on deposit?

3 A Together with counsel for Ms. Ahern and my counsel
4 and I believe your office, I think a number of individuals
5 have sought to determine any documentation or any information
6 as relating to this Fidelity Capital.

7 Q Is there any evidence that you've encountered that
8 would lead you to believe that Ms. Ahern has involvement with
9 Fidelity Capital?

10 A Yes.

11 Q What would that be?

12 A My office subpoenaed the secretary of state records
13 relating to Fidelity Capital.

14 Q What did those reveal?

15 A In response to your question about Mrs. Ahern's
16 involvement or association with that, it was determined that a
17 credit card --

18 MR. LENHARD: Just for the record, I probably should
19 object on the basis of best evidence. The best evidence is
20 the document he's testifying about, not Mr. Waid's
21 recollection of the document.

22 THE COURT: Okay.

23 MR. POWELL: I have that evidence, Your Honor. If I
24 can refresh Mr. Waid's memory with it?

25 THE COURT: Sure.

1 MR. LENHARD: If he's going to -- doesn't he have to
2 mark it if he's going to refresh his memory?

3 MR. POWELL: I can mark it.

4 MR. LENHARD: Yeah.

5 MR. POWELL: It's a production of documents, if it
6 warrants --

7 THE COURT: Okay.

8 MR. LENHARD: Can I see it, please?

9 MR. POWELL: Sure.

10 MR. LENHARD: Thank you.

11 MR. POWELL: I want to put that in, I guess, as I.

12 THE COURT: All right. Well, there's already an I
13 in the book, so do you want to make it J?

14 THE CLERK: I is the exhibit list.

15 THE COURT: I is the exhibit list, so. Okay. So
16 it'll be I.

17 MR. LENHARD: Can I just have a second to look at
18 it?

19 THE COURT: Sure.

20 (Exhibit I admitted.)

21 MR. POWELL: Do you want to break for lunch maybe at
22 this point? Is that --

23 MR. KIEFER: Let's break, yes.

24 MR. POWELL: Does that work for everybody?

25 THE COURT: Want to come back at 1:30?

1 MR. POWELL: Whatever.

2 THE COURT: We'll take our lunch recess. We'll
3 return at 1:30. If you could take a look at that over the --

4 MR. LENHARD: I'm sure I'm not going to object. I
5 just wanted to see what it was.

6 THE COURT: Yeah. And I think was there one other
7 issue, I think, that we had discussed possibly taking a look
8 at over the lunch break to see if we were in agreement on? I
9 thought there was one other thing.

10 (No audible response.)

11 THE COURT: Okay. We'll be in recess until 1:30.

12 (Court recessed at 12:12 p.m. until 1:33 p.m.)

13 MR. POWELL: Your Honor, I'd just like to take a
14 minute just to lay a little foundation before going forward as
15 to that line of questioning before we ended. So I'm
16 going to --

17 THE COURT: Okay.

18 MR. POWELL: Bring back again foundational stuff as
19 to what Mr. Waid's done here, and then I'll return back to the
20 Fidelity Capital issue.

21 DIRECT EXAMINATION (continued)

22 BY MR. POWELL:

23 Q Mr. Waid, after taking over as trustee, did you
24 conduct a review of the financial status of the trust?

25 A Yes.

1 Q What actions did you take in that regard?

2 A I reviewed the information provided me by Ms.
3 Ahern's counsel, Marquis and Aurbach. I took the order, once
4 I received it, and delivered that to Wells Fargo. I also
5 delivered copies of that to other financial institutions and
6 sought records and account balances, as I would in the
7 ordinary course.

8 Q You just mentioned Wells Fargo. What is your
9 understanding or what was your understanding as to the
10 information that Wells Fargo would have regarding the trust?

11 A Initially I was hopeful, as I do in other cases
12 presenting a court order, usually I'm given pretty easy access
13 to the financial records. In this case it was determined by
14 me early on that there were voluminous transactions and that a
15 subpoena would be the most appropriate way to proceed.

16 So I had my office issue a subpoena to Wells Fargo,
17 and then I began corresponding and directly communicating with
18 the Phoenix office, who handles production requests. We are
19 now on our fifth, possibly sixth production.

20 Q That leads to my next question. What would you --
21 how would you characterize what the current status of your
22 investigation is at this point?

23 A I think as the record reflects, it's still
24 incomplete. I'm still waiting for some documents from Wells
25 Fargo. And I think the most critical aspect is I do need to

1 sit down, once the accounting is finished and proper P&L
2 statements for each year are prepared, I intend on discussing
3 those with Ms. Ahern to better understand both the income and
4 where it was deposited and the expenditures made while she was
5 trustee.

6 Q So it's a fair characterization obviously then, your
7 investigation is still ongoing and there's no firm timetable
8 on when that may be complete?

9 A I am hopeful in the 30, 60 days, now that I'm
10 getting some cooperation in Texas and hopefully this will be
11 some of the last bank production, that I can resolve it rather
12 quickly.

13 Q I'd like to go back to the Fidelity Capital issue.
14 MR. POWELL: I'd like to submit as evidence, I
15 believe this would be Exhibit J.

16 THE CLERK: I.

17 MR. POWELL: I. Okay. The pleading, which is
18 Trustee Fredrick P. Waid's third supplemental production of
19 documents. And if I could approach Mr. Waid and give him a
20 copy?

21 THE COURT: Yes. Thank you.

22 MR. POWELL: Provide one to the Court as well.

23 THE COURT: Thank you.

24 MR. KIEFER: Mr. Powell, do you have a copy that I
25 can give to Mr. Moody?

1 MR. POWELL: Yes, I do.

2 BY MR. POWELL:

3 Q Mr. Waid, do you have in front of you the document,
4 Trustee Fredrick P. Waid's Third Supplemental Production of
5 Documents?

6 A Yes.

7 Q If you would please turn to -- it's not marked as
8 a -- by a page number, but it is Bates numbered. It's
9 Number 14 of this production.

10 A Yes.

11 Q You're on that page?

12 A Yes.

13 Q There's a statement made in here that says, on the
14 page it's written in, "Restatement fee, \$2300." Do you see
15 that?

16 A Yes.

17 Q Below that it says, "Expedite fee, \$500." Do you
18 see that?

19 A Yes.

20 Q Total amount of \$2860. Do you see that?

21 A Yes.

22 Q Underneath there is an option marked "Credit card,"
23 which is marked with an X. Do you see that?

24 A Yes.

25 Q Flipping to the next page, which is 15, do you see

1 the reference to entity name, Fidelity Capital, Inc?

2 A Yes.

3 Q Below that there's cardholder information?

4 A Yes.

5 Q It states, Eleanor Ahern.

6 A Yes.

7 Q Do you see that?

8 Based on the previous document, 14, and this
9 document marked 15, is it your belief that Ms. Ahern is the
10 one that paid to have Fidelity Capital reinstated?

11 A I believe her credit card was used to reinstate it,
12 to pay the fee associated with that.

13 Q Does that lead you to conclude as part of your
14 investigation that Ms. Ahern has some relationship with
15 Fidelity Capital?

16 A I think it's a reasonable conclusion.

17 Q To clarify for the record, as of right now this
18 moment, the trust has not received back the \$500,000 which was
19 stated to -- had been deposited with Fidelity Capital; is that
20 a correct assessment?

21 A That's correct.

22 Q What efforts can be undertaken to determine the
23 whereabouts of that \$500,000?

24 A I intend to ask Ms. Ahern that when we're able to
25 speak.

1 MR. POWELL: I'm going to offer another exhibit in
2 one second, if I can find it.

3 In your investigation, did you -- strike that.

4 I'm going to offer into evidence --

5 MR. LENHARD: This is Exhibit J?

6 MR. POWELL: This would be, yeah, J.

7 MR. LENHARD: Isn't that in?

8 MS. PETERSON: No.

9 MR. POWELL: No.

10 MR. LENHARD: It's not in there? Okay. Do you have
11 one for me too?

12 MR. POWELL: Yeah. It's already in what you have.

13 MR. LENHARD: Okay. That's what I thought, it's in
14 our package already.

15 MR. POWELL: What I just gave you.

16 MR. LENHARD: All right. I'm sorry. I'm sorry.

17 MS. PETERSON: What is it?

18 MR. LENHARD: It's the notice of compliance. Thank
19 you.

20 MR. POWELL: If I could give Mr. Waid the next
21 exhibit?

22 THE COURT: Yes.

23 THE CLERK: I need a copy.

24 MR. POWELL: You need a copy too.

25 THE CLERK: I can use that copy.

1 MR. POWELL: Okay. Can you mark it, and then I
2 can --

3 THE CLERK: Yes.

4 MR. POWELL: -- take it back for a second?

5 THE CLERK: No, I can -- he uses this one.

6 (Exhibit J marked for identification.)

7 MR. POWELL: Okay. That's fine. Give me that one.

8 THE WITNESS: Thank you.

9 BY MR. POWELL:

10 Q Mr. Waid, do you have before you the notice of
11 compliance regarding \$500,000 deposits?

12 A I do, yes.

13 Q Have you seen this document before?

14 A I have, yes.

15 Q Based on this document, what efforts did you make to
16 locate the \$500,000 that I believe are claimed to have been
17 with Fidelity Capital, Inc., into an FDIC insured money market
18 account held at U.S. Bank?

19 A I brought to the bank at U.S. Bank a copy of the
20 court order appointing me as trustee, presented it to the bank
21 with a request for the transactional history, including all
22 documentation relating to this 500,000.

23 Q And what -- what information did you receive from
24 U.S. Bank to verify or not as to them having said funds?

25 A I received copies of the deposited items, including

1 a check from Wells Fargo, not from Fidelity Capital.

2 Q Did you communicate that to anybody, that you had
3 discovered that?

4 A I did, yes.

5 Q Who did you convey that to?

6 A I contacted the office of Marquis and Aurbach and
7 spoke, I believe, with two of the counsels on a conference
8 call, and questioned whether they had any additional
9 information regarding this transaction.

10 Q What was their response?

11 MR. LENHARD: Well, I think you can certainly look
12 at the filed documents. I'm going to object to the hearsay
13 from Marquis and Aurbach at this point in time.

14 THE COURT: Okay.

15 MR. POWELL: That's fine. It leads me to another
16 exhibit.

17 MR. LENHARD: Which one is it, Mr. Powell?

18 MR. POWELL: It is his notice of withdrawal.

19 MR. LENHARD: Okay.

20 MR. POWELL: Notice of compliance regarding the
21 500,000 deposit.

22 MR. LENHARD: And that's going to be K?

23 MR. POWELL: Yes.

24 (Exhibit K admitted.)

25

1 BY MR. POWELL:

2 Q Mr. Waid, do you have in front of you a document
3 entitled Notice of Withdrawal of Notice of Compliance
4 Regarding \$500,000 Deposit?

5 A Yes.

6 Q If I could -- if you would direct your attention to
7 page 1, there's a sentence reading, "It was brought to MAC's
8 attention for the first time today, April 14, 2015, by
9 Mr. Waid, court appointed trustee for the trust, \$500,000
10 deposit funds were not from Fidelity Capital." On to page 2,
11 "Accordingly, MAC has withdrawn the notice of compliance."

12 A Yes.

13 Q And your -- to the best of your knowledge, Marquis
14 and Aurbach withdrew their notice of compliance based on a
15 conversation with you?

16 A And I believe I produced the documents to them so
17 that they could review them themselves.

18 Q Showing that the \$500,000 was not from the source
19 that was claimed?

20 A That's correct.

21 (Attorneys confer.)

22 MR. POWELL: If I can approach, Your Honor.

23 THE COURT: Yes.

24 MR. POWELL: I've got an exhibit. This will be
25 Exhibit L.

1 (Exhibit L admitted.)

2 BY MR. POWELL:

3 Q Mr. Waid, do you have before you the order
4 compelling Eleanor Ahern to turn over trust records to acting
5 successor trustee?

6 A I do, yes.

7 Q What necessitated receiving this order from the
8 Court?

9 A I think as we discussed earlier in my testimony, my
10 attempts to obtain information from Mr. Johnston's firm were
11 not successful, and so I sought assistance from the Court in
12 obtaining information as it related to the trust.

13 Q Did the production of the order to Mr. Johnston or
14 any other parties result in any productions that assisted you
15 with your investigation?

16 A Very limited, and most of the documents were
17 documents that I was able to obtain either from Apache or
18 Pioneer.

19 MR. POWELL: This will be Exhibit M.

20 (Exhibit M admitted.)

21 BY MR. POWELL:

22 Q Mr. Waid, do you have in front of you the order
23 confirming acting successor trustee?

24 A Yes.

25 Q What was the genesis of obtaining that order from

1 the Court?

2 A There was significant confusion with some of the oil
3 and gas companies and the banks regarding who was the acting
4 trustee, and a position taken by Mr. Johnston and his firm in
5 Texas as to title and vesting matters.

6 I sought confirmation from the Court because the
7 original order was part of a larger order, and a concise -- I
8 have found in my practice a concise order of this nature
9 simply allows me to provide the information, attain status as
10 a successor trustee without disclosing or providing any
11 information as to the history or the reasons why, because
12 candidly, they're not -- it's not the business of the bank or
13 anyone else what happened.

14 Q I'd like to direct your attention to Exhibit G,
15 which is titled Interim Trustee Report, dated July 2, 2015.
16 The Bates numbers on those are 5972.

17 A That is not what I have in my book.

18 Q What do you have?

19 A Under G, it's "Interim Trustee Filed Under Seal
20 Pursuant to Court Order," dated February 11, 2015.

21 Q I'm sorry. You're correct. That's what I meant.

22 A And my Bates number is 060.

23 Q Correct. That's the document I'm referring to.

24 A Okay.

25 Q Could you explain to me, during the course of your

1 investigation, what led you to the production of your Interim
2 Trustee Report?

3 A I think the simplest way to describe it is the
4 parties were engaged in litigation regarding legal issues, the
5 appeals and the other beneficiary disputes, and the Court was,
6 in my opinion, in need and, if I remember correctly, was
7 requesting any information that could be of assistance as to
8 the concerns and the allegations that had been raised in some
9 of the prior hearings.

10 Q Do you recall what -- strike that.

11 In preparing your report, did you look at the
12 accounting that Marquis Aurbach and Coffing had filed on
13 behalf of Ms. Ahern, it was filed approximately March 13,
14 2015?

15 A Yes.

16 Q Did you find discrepancies in the accounting after
17 conducting further investigation?

18 A I found concerns and discrepancies, but I needed
19 more information is probably a better way to describe that.

20 Q Did you find statements within the accounting that
21 you felt were false statements based on what you had
22 investigated?

23 A Yes. Based on records I had obtained from financial
24 institutions, the productions to date, up until the filing of
25 the report, and information in her accounting that there

1 were -- there were certainly issues.

2 Q I'd like to direct your attention to page, what is
3 marked page 3 of your report, Bates No. 0062.

4 A Yes.

5 Q Under the heading of Funds on Deposit on Date of
6 Removal --

7 A Yes.

8 Q -- there is a statement.

9 Your statement is on page 8, beginning at line 23 of
10 the Ahern brief, "The following declaration was made by
11 Ms. Ahern's counsel: Quote, The total amount in the accounts
12 is \$1,997,573.16, end quote and hyphen, all of the funds
13 remain intact and are presently being held in trust."

14 Did your investigation reveal to you was that a
15 correct statement, a factual statement?

16 A That was not a correct statement.

17 Q What was wrong with said statement?

18 A I think as the record reflects, those funds were not
19 on deposit.

20 Q When you first accessed the account, what did you
21 discover was on deposit?

22 A If you turn to page 4 of that, it reads \$9,941.55,
23 as reflected in my report.

24 Q Upon making that discovery, what actions did you
25 take?

1 A I believe I called Marquis and Aurbach and spoke
2 again with two, perhaps three of their counsels were on the
3 phone at that point, and I inquired what do they know about
4 the funds, where are they.

5 Q Were you given any answers that led you to look
6 elsewhere?

7 A Only a --

8 MR. LENHARD: Hang on. I'll object to the extent
9 he's quoting Marquis and Aurbach as hearsay.

10 THE COURT: Overruled.

11 THE WITNESS: I received a commitment that they
12 would investigate and get back to me.

13 BY MR. POWELL:

14 Q Did they get back to you?

15 A They did.

16 Q What did they reveal to you when they got back to
17 you?

18 A Well, I think as the record reflects and as has been
19 disclosed earlier, they did assist in the return of certain
20 funds, approximately 1.6 million over the course of the next
21 few weeks.

22 Q Did you at any point make a demand for the return of
23 those funds?

24 A I most certainly did.

25 Q I'd like to direct your attention to page 4,

1 Bates 06 -- 0063, under the heading Initial Return of Certain
2 Trust Funds.

3 A Yes.

4 Q You state, "On April 8, 2015, Ms. Ahern deposited
5 into the trust account a cashier's check in the amount of
6 \$409,228.50. The cashier's check represented funds withdrawn
7 on March 20, 2015 from the trust account by Ms. Ahern after
8 the hearing earlier in the day in which she was removed as
9 trustee. The funds were withdrawn from a Wells Fargo branch
10 in Orange County, California just before the bank closed for
11 business that evening.

12 "The funds withdrawn were used to purchase a
13 cashier's check payable to the trust. No explanation has been
14 provided or basis determined for withdrawal of the funds from
15 the trust account, the intent of Ms. Ahern, where the check
16 was held from March 20, 2015 until April 8, 2015."

17 Does that remain an accurate statement as of today?

18 A Yes, it is.

19 Q What led you to -- what in your investigation gave
20 you the information to make that statement?

21 A I believe the \$409,000 withdrawal was brought to my
22 attention by Wells Fargo Bank in my initial delivery of the
23 court order to them. The banker that I was interacting with
24 simply brought it to my attention. And then I explained to
25 Marquis and Aurbach -- and when I say their firm, I just don't

1 remember which of the three lawyers handling the case I spoke
2 to, usually it was two, sometimes three of them on the
3 phone -- that these funds in particular were issued in a form
4 of a cashier's check, I'd like the cashier's check back. And
5 then it was subsequently deposited.

6 Q So it -- your understanding would be who had
7 possession of the funds?

8 A I don't know. There was a corresponding deposit
9 made. I believe Marquis and Aurbach called me and said check
10 the account, there was a deposit made returning that very
11 cashier's check.

12 Q Do you have any knowledge as to who made the
13 deposit?

14 A I do not.

15 Q Will that be something that you feel like you can
16 still uncover in your investigation?

17 A I believe it's part of the final production request.
18 I have an image of the cashier's check. I don't have the
19 supporting tickets that accompanied it.

20 Q On page 5, Bates 0064, you state, "On March 23,
21 2015, three days after her removal as trustee, Ms. Ahern
22 withdrew \$500,000 from the trust account at Wells Fargo Bank
23 (St. George, Utah branch)."

24 MR. LENHARD: Where are you, Mr. Powell? I'm sorry.
25 What line?

1 MR. POWELL: I -- yeah, let me help you. I am
2 starting on line 10.

3 MR. LENHARD: Thank you.

4 MR. POWELL: On line 10, Mr. Waid, is where I'm
5 making the statement from, your statement.

6 THE WITNESS: Yes.

7 BY MR. POWELL:

8 Q I'll start, "On March 23, 2015, three days after her
9 removal as trustee, Ms. Ahern withdrew \$500,000 from a trust
10 account at Wells Fargo Bank (St. George, Utah branch),
11 purchased a cashier's check payable to the trust and deposited
12 the same with U.S. Bank."

13 Does that remain an accurate statement as of today
14 based on your investigation subsequently?

15 A Yes.

16 Q Do you have any knowledge as to why \$500,000 was
17 removed?

18 A If I can clarify my previous answer in answering
19 that question.

20 Q Sure.

21 A If that makes sense.

22 Q Sure.

23 A Ms. Ahern was the designated signatory party on the
24 account. I have not been able to determine definitively that
25 it was Ms. Ahern who actually withdrew the funds. The

1 transactional history indicates the funds were withdrawn, but
2 to be precise, I am not certain of that fact.

3 And the fact remains that the 500,000 that was
4 deposited into U.S. Bank came from Wells Fargo. But who
5 actually delivered the checks, I don't know. I intend to ask
6 Ms. Ahern that question at the appropriate time.

7 Q Have you attempted to ask Ms. Ahern these questions
8 since you've become trustee?

9 A I had a very brief conversation with her after
10 obtaining permission from the court to do so, and determined
11 that it was in the best interest that I not proceed and ask
12 any additional questions until she was represented by counsel.
13 So to answer your question, I began a discussion of those
14 issues, but we did not complete that conversation.

15 Q So as of today there is still no understanding as to
16 why that money was ever taken out of that account in the first
17 place?

18 A My understanding, it was an attempt to comply with
19 the Court's order, because the certificates were filed by
20 Marquis and Aurbach.

21 Q But in terms of why they were withdrawn in the first
22 place, there's no understanding of why that was done by Ms. --
23 by whomever three days after Ms. Ahern was removed as trustee?

24 A That's correct.

25 Q Continuing on, on page 5, 0064, line 16, you state:

1 "On April 16, 2015, Ms. Ahern delivered a \$700,000
2 cashier's check to her then counsel at MAC. The check was in
3 the form of a Wells Fargo cashier's check payable to the trust
4 dated February 18, 2015. The check was obtained by Ms. Ahern
5 at the St. George, Utah branch of the bank. No explanation
6 has been provided or basis determined for the withdrawal of
7 funds from the trust account, the intent of Ms. Ahern, nor the
8 check was held for approximately two months."

9 Does that remain an accurate statement?

10 A That is correct. Yes.

11 Q I'd like to, if you would turn to page 6 for me,
12 Bates No. 0065. Beginning on line 12, under the heading
13 Additional Recoveries of Trust Funds, "Since Ms. Ahern's
14 removal as trustee, the trust has located additional trust
15 funds in banks located in Texas and Utah."

16 Could you give me an explanation of those accounts?

17 A As indicated in the report, I discovered funds at
18 Town & Country Bank and then also a bank in Texas, and was
19 able to obtain the funds that were in the trust's name in both
20 of those accounts.

21 Q Approximately how much money was in those accounts?

22 A Approximately \$146,517.38. And then I believe the
23 Texas bank was somewhere in the range of \$72,088.75. And that
24 is First Capital Bank of Texas located in Midland.

25 Q Continuing on, on page 6, line 20. "On April 14,

1 2015, the day the court issued its order to show cause against
2 Ms. Ahern regarding the \$500,000 Fidelity Capital, Inc.
3 matter, Ms. Ahern contacted the bank and attempted to arrange
4 an all cash withdrawal of \$100,000 from the trust account."

5 Is that an accurate statement as of today?

6 A Per my investigation, I believe that to be an
7 accurate statement.

8 Q What did you discover in your investigation that led
9 you to this discovery?

10 A I reviewed documents both from Town & Country Bank
11 and spoke with the bank's compliance officer and, I believe,
12 another officer who is risk management, and I believe I also
13 spoke with the chief financial officer of the bank. I don't
14 recall their names immediately, but I did speak with three
15 individuals.

16 (Attorneys confer.)

17 (Exhibit N admitted.)

18 BY MR. POWELL:

19 Q Mr. Waid, these transactions, these withdrawals that
20 we just had talked about on, I believe, three indications, as
21 mentioned in your report, at any time while making those
22 withdrawals did Ms. Ahern, in your view, have the
23 authorization to withdraw those funds?

24 A No.

25 Q And why is that?

1 A Simply going by the dates of the court orders of her
2 removal and my appointment and the subsequent order of the
3 court that I was the acting trustee, I was the only one with
4 authority to act.

5 Q Mr. Waid, what you have before you as Exhibit N is
6 the motion to compel Eleanor Ahern's authorization to allow
7 trustee to obtain information from attorneys and other
8 professionals on an order shortening time. Do you have that
9 document in front of you?

10 A I do.

11 Q If you would turn to page 5, please. Line 3.
12 "Waid's investigation has revealed that Ahern did not comply
13 with this Court's order. Between December 2013 and her
14 removal as trustee, Ahern did not hold 65 percent of oil and
15 gas royalties in trust. Instead, she treated the trust and
16 its income as her own. She lived lavishly, used trust money
17 to hire professionals between California and Texas, and
18 completely failed," I believe that's supposed to be failed,
19 "to pay some -- and completely failed to pay taxes some years
20 and under-reported trust income other years."

21 Notwithstanding the discussion we've already had
22 about the tax issues, could you please elaborate on what led
23 you to making this statement, what was revealed to you in your
24 investigation that led you to make these conclusions?

25 A Sure. In the course of some of the records reviewed

1 that were produced by Wells Fargo, which was at least in my
2 estimation or investigation was the primary both depositing ---
3 depository account for royalties and then also the checking
4 account for trust expenditures, there were significant what I
5 would deem personal expenditures or expenditures which until I
6 visit with Ms. Ahern I cannot reasonably conclude had benefit
7 to the trust.

8 Q So your statement that Ms. Ahern treated the trust
9 and its income as her own is a conclusion that you believe
10 based on the records that you've obtained in your
11 investigation?

12 A That is correct.

13 Q Could you elaborate as to getting examples of what
14 instances you discovered about using trust income as her own,
15 for her own expenses; like what kind of examples can you
16 provide that you discovered?

17 A I think the record reflects in subsequent pleadings
18 filed that, I think by my office and I believe your office as
19 well, is that there were instances where a marriage and family
20 therapist was paid, there were private jet charter services,
21 there were hotel charges, things of that sort.

22 Q Could you give me examples, for instance, of
23 ballparking amounts as to these expenditures?

24 A I apologize. Without the exact record before me,
25 but I believe there were well over 100,000 in private jet

1 charter services. There were into the tens of thousands in
2 the counselor. There were significant hotel expenses, food
3 expenses. And the reason I find these out of the ordinary is
4 historically this is a pass-through trust. These are not
5 expenses that were historically borne by the trust as I have
6 come to learn.

7 The largest — if I can continue to clarify for the
8 record, the largest was an approximately \$300,000 payment, and
9 then I believe some additional. There was a \$90,000 payment
10 to real estate services, and I believe real estate services is
11 a Nevada based entity. I find no link to the ranch in Texas
12 or the oil and gas revenues. And again, my investigation is
13 not complete. I still have to question Ms. Ahern about these.

14 Q Understood. As to your statement about using trust
15 money to hire professionals between California and Texas,
16 approximately what have you concluded at least as to this
17 point dollar-wise that was used from the trust for these
18 attorneys?

19 A Well into six figures. Certainly over \$100,000, if
20 not more.

21 Q And based on your investigation, have these -- were
22 these transactions authorized by Ms. Ahern?

23 A Without receiving copies of the various
24 professionals' engagement agreements and their accounting
25 ledgers as to funds received and verifying whether they came

1 from the trust account or her personal account, that
2 investigation is still pending.

3 Q Have any of the records that you have obtained, have
4 they shown the responsible billing party being Ms. Ahern?

5 A Yes.

6 Q Individually or as trustee?

7 A That's a complicated question, because there are
8 transactions that I can trace where funds are moved from the
9 trust account to Ms. Ahern's account, and then to the
10 professional's account effectively in the same day. But
11 again, I reserve the right -- I need to discuss those with Ms.
12 Ahern first before I reach an absolute conclusion.

13 Q And the only person with access to the trust account
14 was Ms. Ahern?

15 A One of the documents I reviewed were the signature
16 cards on file, and Ms. Ahern was the only signatory on the
17 account.

18 Q At this point in time in your investigation, do you
19 have evidence that you have discovered that Ms. Ahern's prior
20 counsel in Nevada in this proceeding was paid through trust
21 funds?

22 A Yes.

23 Q What law firms have you determined were paid from
24 trust funds?

25 A I believe Mr. Mugan's firm, Jeffrey Burr. I believe

1 Marquis and Aurbach, and perhaps Mr. Mann.

2 Q Do you have an idea as to the amount of attorney's
3 fees paid to all three of those firms that you just mentioned?

4 A Again, without the benefit of their documents
5 confirming how much they received, I'd estimate in the range
6 of 700,000 to a million dollars.

7 Q I'd like to go back one second to your efforts to
8 obtain records in regards to the trust. Do you feel that you
9 have been blocked by being able to obtain those records?

10 A Counsel, I don't feel I've been blocked. I've had
11 to instigate legal proceedings in my effort to obtain them.
12 That's not really a feeling. It's -- I think the record
13 speaks for itself.

14 Q Has the need to obtain court orders been because of
15 the lack of cooperation that you have received in collecting
16 those files from the various firms?

17 A Counsel, I can't -- I can't speak to what may be
18 happening behind the scenes, what communications Ms. Ahern may
19 have with the various professionals in Texas and up until just
20 late last week even here in Nevada with cooperating, because
21 they haven't disclosed that to me. But those professionals
22 have remained very vigilant in their effort to not comply and
23 have filed protective orders, have gone to great lengths to
24 not disclose the information.

25 It has only been in the last literally two weeks

1 that it appears there's a changing event. We feel it was the
2 last court order that Judge Sturman signed that has helped.
3 But it's not uniform. Some have cooperated, some are
4 beginning to cooperate.

5 And when I say that, have not received all the
6 documents yet. They've simply indicated through their counsel
7 we're going to provide this. I think I've received one out of
8 three commitments and I've received an affirmation that
9 litigation will continue in the case of Mr. Johnston.

10 Q In the case of Mr. Johnston and any of these other
11 attorneys, have they invoked an attorney-client privilege
12 exception as to your ability to review their files?

13 A My understanding is they've invoked multiple
14 privileges.

15 Q Is as to Mr. Johnston there's, if I understand
16 correctly, there's an attorney representing you in Texas
17 trying to have Mr. Johnston comply with turning over his files
18 relating to the trust?

19 A To be accurate, the engagement agreement is on
20 behalf of the trust, and then me individually in my capacity
21 as trustee. Counsel has made an appearance in both courts, in
22 Dallas and in Midland, for that purpose, yes.

23 Q In any of your prior experiences as a trustee, have
24 you run into a scenario comparable to this, where you've been
25 prevented or there have been blocks put up to try to prevent

1 you from obtaining information regarding prior administration
2 before you became trustee?

3 MR. LENHARD: Objection to relevance.

4 THE COURT: Yeah. I think we're really only
5 concerned here about Ms. Ahern. So what's the relevance of
6 other experience?

7 MR. POWELL: That's fine, Your Honor.

8 THE COURT: Okay.

9 BY MR. POWELL:

10 Q I'd like to direct your attention, if you would, in
11 the exhibit list to Exhibit H. That would be Bates, I
12 believe, 0074 through 79. That is a letter to you, Mr. Waid,
13 from me, Joseph Powell, dated November 20, 2015. Do you have
14 that letter in front of you, Mr. Waid?

15 A I do.

16 Q Do you recall previously having read this letter?

17 A I do.

18 Q I'd like to direct your attention to page 4 of that
19 letter, which is marked with Bates 0077, and also on to 0078.
20 There's a heading, Calculations of Damages by Jacqui and
21 Kathy. Do you see where that heading is, Mr. Waid?

22 A Yes.

23 Q Within this page and flowing on to the next page
24 there's been a calculation, which I believe there is a
25 disclaimer saying that these are believed amounts owing from

1 the time period of June of 2013 through April of 2015. And in
2 summary, after a breakdown, the number is concluded to be
3 owing to Jacqueline and Kathryn, as of their 65 percent share
4 of the trust for this time frame, to be 3.4, 20,000 and
5 change.

6 As of your investigation right now, do you have any
7 belief that this is not a close approximation of being an
8 accurate figure as to what they should have received as
9 their 65 percent?

10 MR. LENHARD: I'll object to that opinion testimony
11 without a subsequent or updated trustee's report that we can
12 use for cross-examination purposes. It's not fair or
13 appropriate for him to be opining as to numbers contained in a
14 letter from counsel.

15 THE COURT: Yeah.

16 MR. MOODY: Judge, I'd join in that objection.

17 THE COURT: Yeah. So are you asking him to confirm
18 your calculation, or are you asking if he's made any of his
19 own calculations?

20 MR. POWELL: I'm going -- I'm seeking to get an
21 understanding, based on his investigations, as to what he at
22 this moment in time has concluded as to an approximate value
23 that the 65 percent share has had since it was cut off in June
24 of 2013 through April of '15.

25 MR. LENHARD: Then I'm going to renew my objection,

1 because --

2 THE COURT: Well, it's a little different. It's a
3 little different, Mr. Lenhard.

4 MR. LENHARD: It may be. But I'm certainly entitled
5 to a report from the trustee, if he's going to give you a
6 number on damages, so I can cross-examine him on those
7 damages. For him to pull a number out of the air based on
8 this letter is highly inappropriate and unfair.

9 THE COURT: See, that's different. That's why I
10 said I thought it was different. I -- and Mr. Waid's answer
11 to this question may very well be I'm not prepared to comment,
12 because I think that's been his whole point all along is he is
13 uncomfortable -- he is not yet prepared. He is not yet
14 prepared to issue a report.

15 So if he doesn't have sufficient information from
16 which to issue a report at this point in time, he can
17 certainly tell that to Mr. Powell. But I think Mr. Powell's
18 question's a little different this second -- the way it was
19 restated.

20 MR. LENHARD: Well, let's ask -- I don't want a
21 number floating around here that's not verified or I have a
22 chance to cross-examine it.

23 THE COURT: Correct.

24 MR. LENHARD: Why don't we ask the first question,
25 can he render a number, is he comfortable rendering a number,

1 and let me object.

2 THE COURT: Well, that's kind of what I thought
3 that -- to me the question was restated, and I thought it was
4 less objectionable.

5 MR. LENHARD: Well, that's a yes or no.

6 THE COURT: So yeah, I think that the way you
7 restated it is probably the appropriate way. I don't know.
8 Mr. Moody may feel similarly, because I know he joined that
9 objection. My understanding has been to this point that
10 Mr. Waid is not comfortable that he really can go any further
11 than his initial interim report, there's not enough
12 information.

13 MR. MOODY: Your Honor, I think if Mr. Powell tries
14 to lay some foundation, Mr. Waid will make it clear what he
15 has and has not done and what he can and cannot say with
16 regard to what --

17 THE COURT: Okay. Mr. Lenhard's got a valid
18 objection, which is, you know, if we're going to put a number
19 in the record, they need to be able to -- and this is where
20 your objection was, that can they really cross-examine.
21 They're entitled to object to that. And so that's why, you
22 know, I think we have to go a step at a time, Mr. Powell.

23 MR. POWELL: That's fine.

24 THE COURT: Because -- and I'm sure you understand
25 too --

1 MR. MOODY: Yeah.

2 THE COURT: -- why we need to be very careful about
3 putting any specific number in the record.

4 MR. POWELL: I understand.

5 THE COURT: So we'll see if we can take this a step
6 at a time and we'll get there.

7 MR. POWELL: Okay. Let me try to break it down into
8 smaller questions.

9 THE COURT: Okay.

10 BY MR. POWELL:

11 Q Based on your investigation, Mr. Waid, and the
12 understanding again that it's to this point in time, have you
13 conclusively determined that Ms. Ahern has inappropriately
14 taken funds from the trust that did not belong to her 35
15 percent share?

16 A That is accurate.

17 Q Do you, based on what you have discovered in your
18 investigation, do you have a general idea, from the time that
19 the monies were stopped in June of 2013 through your time
20 becoming trustee in April of 2015, what amount of monies are
21 owed to Jacqueline and Kathryn as part of the 65 percent
22 share?

23 MR. LENHARD: And it's the same objection I have to
24 renew again. I have no way of determining from that question
25 how Mr. Waid reaches that number, what he relies upon, how he

1 makes his calculations. I would need a summary. I would need
2 a spreadsheet. I'd need a report in order to properly examine
3 him. I object to him answering that question.

4 THE COURT: See, my concern is that we're jumping
5 several steps ahead to damages, because I thought, from
6 understanding what Mr. Rushforth said earlier, that we're
7 going to -- that's a different issue for another date.

8 Today's question, I thought, was how far can Mr.
9 Waid -- has Mr. Waid gotten in being able to rebuild the trust
10 book so that he can tell us what would have, should have been
11 accounted for by Mrs. Ahern. Not what the damages might be to
12 your client, but can he tell us what he believes, although
13 he's --

14 MR. POWELL: That's exactly the question I'm trying
15 to get at.

16 THE COURT: -- not ready to do an accounting -- he's
17 not ready to do an accounting.

18 MR. POWELL: So you're hitting it dead on the head
19 and that's what I'm trying to make that.

20 THE COURT: Right.

21 MR. POWELL: So that's really the question.

22 THE COURT: I think Mr. --

23 MR. RUSHFORTH: And to be clear, is we're not after
24 a specific number here.

25 MR. POWELL: No.

1 MR. RUSHFORTH: We're just showing that there are
2 general damages.

3 MR. POWELL: Parameters of what the damages -- not
4 necessarily damages, but --

5 THE COURT: Different issues. We're confining to
6 the extent that, Mr. Lenhard, you state your objection and
7 I'll rule on it.

8 MR. LENHARD: Well, I'm not -- what is the -- I got
9 lost here in the conversation. What is the question being
10 posed to Mr. Waid now, so I'm certain I've got my objection on
11 the record. Okay. The right objection. What is he -- is he
12 being asked to give a damage number, or is he being asked to
13 say eventually I'll be able to calculate damages? Can you
14 help me out?

15 THE COURT: Thank you. Okay. Yeah. I think why
16 don't we have the question restated. Mr. Moody.

17 MR. MOODY: I think that's a fair question. And I
18 go back to my foundational argument, which is if Mr. Powell
19 attempts to lay some foundation, Mr. Waid will be in a
20 position to tell the Court what he can and cannot opine to
21 based on what he has found, based on what he still needs to
22 discover both by way of professionals in Las Vegas and Texas
23 and questions for Ms. Ahern.

24 MR. LENHARD: Yeah. What I'm saying, in response to
25 Mr. Moody --

1 THE COURT: A little different, yeah. You've got
2 different objections. I understand that.

3 MR. LENHARD: What he can or cannot opine to, I'm
4 fine with him saying that. What I'm saying though, that
5 that's where it should stop. He should do another report so
6 we all know what he's going to say and I have the chance to
7 take a look at it.

8 THE COURT: Right. So Mr. Powell, I do think that
9 we have gotten a little ahead of ourselves.

10 MR. POWELL: Okay.

11 THE COURT: Because I think what we first need to
12 understand, and we're getting there, is that based on what
13 he's done so far, what has he done toward -- where does he
14 feel he is with respect to his accounting, what additional
15 information does he need, those kinds of things. Because I
16 think you're kind of getting to the ultimate question I don't
17 think we're ready for.

18 MR. POWELL: Okay.

19 THE COURT: I don't.

20 MR. POWELL: I understand. Let me --

21 THE COURT: We certainly don't want to put words in
22 Mr. Waid's mouth.

23 MR. POWELL: Yeah. Let me see if I can kind of
24 rephrase this, or at least explore it with Mr. Waid.

25

1 BY MR. POWELL:

2 Q What do you still need, what are you still waiting
3 for that is going to allow you to pinpoint the amount of
4 damages owed to the trust?

5 A Perhaps I can help all the parties in this way. In
6 the record, in my interim report filed, I believe in July, on
7 page 10 of that record I cite the Court's order of April 20,
8 wherein the Court found a figure of \$2,163,758.88. And I
9 don't disagree with the Court's initial finding and don't have
10 an objection to it.

11 I just reserve the right, once the accounting is
12 completed, to verify that number which represents the 65
13 percent interest not distributed to the MTC Trust during the
14 periods of a partial period of 2013 and the entire calendar
15 year for 2014. One of the challenges in this accounting
16 challenge that we all face here is that in December there are
17 certain royalties which are paid by the oil and gas companies,
18 but they're not deposited until the following year.

19 There's a significant reconciliation as to what
20 happened in the first quarter of 2015 which is not yet
21 complete. I have part of the information, but I can't
22 reconcile it and I won't complete that and I'm not prepared to
23 reach an absolute conclusion until I visit with Ms. Ahern and
24 understand why and how and the bases for some of the
25 transactions.

1 But in order to help all parties, because I don't
2 think the Court has withdrawn or this order has not been
3 appealed, is that 2.163 million is a reasonable estimate as to
4 unpaid, undistributed funds due in the MTC Trust.

5 Q Okay. Thank you. In terms of the amounts paid to
6 the Connell Trust by the oil companies during this time
7 period, the time period being June 2013 through April, or to
8 April, I should say, 2015, do you feel that you have what you
9 need from those oil companies to determine what the 65 percent
10 interest gross would have been -- do you have sufficient
11 information based on what the oil companies have stated they
12 paid to determine what the 65 percent interest would have been
13 from that time period?

14 MR. LENHARD: I object to foundation. I need some
15 time, or a time period.

16 THE COURT: I think you said it was the --

17 MR. LENHARD: If I missed it, I'm sorry.

18 MR. POWELL: Going from June 2013 through to
19 April '15. But the time period where the distributions were
20 cut off through the time that Mr. Waid became trustee is the
21 time frame I'm looking at.

22 THE COURT: About 22 months.

23 MR. POWELL: Yes.

24 MR. LENHARD: Thank you.

25 THE WITNESS: I'm going to again refer to the

1 Court's order of 2.1 million, and the reason being is there
2 are still issues with certain severance and other payments
3 that oil and gas companies reporting on the 1099 and what was
4 actually paid are actually in dispute. There's a discrepancy.
5 And together with the accountant that I'm now utilizing, we're
6 working through those issues.

7 So no, I'm not prepared to render a range other than
8 what the Court has already found at this time. I believe it
9 to be close, but I'm going to reserve any final opinion until
10 the numbers are completed.

11 BY MR. POWELL:

12 Q In your prior testimony you had indicated that there
13 are, not intending to misquote you, but that the land we are
14 talking about is effectively divvied up a 50 percent interest,
15 a 25 percent interest, and then the Connell Trust interest of
16 25 percent; is that a correct statement?

17 A That's not accurate. The land is not divided that
18 way. The royalty interests are divided that way, subsurface
19 mineral interests. The surface rights are owned 100 percent
20 by the trust, by the William and Marjorie Connell Trust. It
21 does not share surface rights with the other 50 percent and
22 Miller's 25 percent trust. They have their own individual
23 landholdings.

24 Q Thank you for the clarification. Do the amounts
25 received by the other 25 percent revenue, I guess, can we say

1 revenue sharing interests, do those generally speaking come
2 very close to the amounts that are received by the Connell
3 Trust from these oil, gas, mineral companies?

4 A With respect to royalty interest, yes.

5 Q So as part of your investigation, have you made
6 determinations to corroborate what the 25 percent interest
7 revenue holders have received in comparison to what has been
8 reported as to what the Connell Trust was receiving?

9 A I apologize. I followed your question until you
10 said to report it. Who is reporting?

11 Q Let me backtrack real quickly. Who owns -- start
12 this way. Who owns the 25 percent interest of the revenues,
13 the other income revenues; 50 percent, 25, 25, who is the
14 other 25 percent holder?

15 A The Miller family.

16 Q Have you contacted the Miller family --

17 A I have.

18 Q -- or their attorneys and determined what they
19 received for this time, same time period? Do you attempt to
20 corroborate what the Connell Trust should have been receiving
21 at that time?

22 A Yes.

23 Q Is there any way that you can recall if these
24 numbers referenced in this letter, again, approximations -- as
25 you'll see on page Bates 007, there's a reference to the

1 Millers. Do you see that?

2 A I'm sorry. I moved exhibits. Which page are you
3 on?

4 Q This would be page 4 of Exhibit H, the letter from
5 me to you dated November 20, 2015.

6 A Yes.

7 Q If you'll look at the bottom under that heading,
8 Calculation of Damages by Jacqui and Kathy, you'll see a
9 reference in there to the Millers.

10 A Yes.

11 Q Have you spoken to the Millers or their attorneys
12 about the funds that they received from June '13 through the
13 end of 2013, through December?

14 A Yes.

15 MR. POWELL: Your Honor, can we take a short recess?

16 THE COURT: Sure.

17 MR. POWELL: Okay. Just maybe five minutes.

18 THE COURT: Yes. We need to switch recorders
19 anyway. Ms. Esparza's going to be gone the rest of the
20 afternoon, so we'll get another recorder in here and take
21 about a five, ten minute recess.

22 (Court recessed at 2:45 p.m. until 2:53 p.m.)

23 DIRECT EXAMINATION (continued)

24 BY MR. POWELL:

25 Q I'm just going to wrap up my questioning to you,

1 Mr. Waid. I just have two more questions for you. As it
2 stands now, you've concluded that Ms. Ahern owes the trust
3 monies; is that a correct statement?

4 A That's a correct statement, yes.

5 Q To summarize your testimony, and correct me if I'm
6 misstating, you've also stated that the monies that Ms. Ahern
7 owes the trust could include both inappropriate trust expenses
8 and also wrongful distributions to herself; is that a correct
9 statement of your testimony?

10 A I don't think I've exactly testified about
11 distributions made to her. But there still will be a
12 reconciliation and a report to the court which will simply
13 indicate here is what should have occurred, 65/35 split, and
14 here's where the monies went.

15 And then I will, with respect to the expenses, and
16 this is the part where I'm not prepared to either render an
17 opinion or provide a conclusion as to how I will allocate
18 those expenses, but I have to review them. I have to review
19 them with Ms. Ahern first to determine what those would be,
20 whether they're appropriate or not.

21 Q And just my final question. How long have you made
22 attempts to do these reconciliations by speaking to Ms. Ahern?

23 A I spoke with Ms. Ahern the second week of April. I
24 met with her --

25 Q 2015?

1 A I'm sorry. Yes. 2015. I met with her and her
2 counsel, Ms. Peterson and Mr. Lenhard, in their offices
3 sometime in the summer of 2015, actually perhaps twice. And
4 then I next met with Ms. Ahern just last week with Mr.
5 Lenhard. So in terms of speaking to her, as you asked, it's
6 been since I've been in the case.

7 MR. POWELL: No further questions. Thank you for
8 your testimony, Mr. Waid.

9 CROSS-EXAMINATION

10 BY MR. LENHARD:

11 Q Good afternoon, Mr. Waid.

12 A Good afternoon.

13 Q Let's just go back over a few things before I get
14 into what I really wanted to cover today. Let's go back on
15 this deposition issue first. It's true, isn't it, that you
16 did in fact meet with Ms. Peterson and I and Ms. Ahern right
17 when we got into the case; fair statement?

18 A That's correct.

19 MR. MOODY: Judge, I'm just going to enter my first
20 objection. He starts off with a leading question.

21 MR. LENHARD: Of course I do.

22 MR. MOODY: I don't mind doing that if it's going to
23 save us some time, but I do want to reserve my objection if
24 the --

25 THE COURT: Okay. Sure.

1 MR. MOODY: -- if he's treating him adverse and --

2 MR. LENHARD: I'm not treating him as an adverse
3 witness. I don't consider myself to be adverse to Mr. Waid.
4 But I will remind the Court of NRS 50.115, Mode and order of
5 interrogation and presentation of evidence. Cross-examination
6 is limited to the subject matter of the direct exam of the
7 witness, unless the judge exercises discretion and permits
8 more than direct examination. Leading questions are
9 permitted.

10 THE COURT: Yeah.

11 MR. LENHARD: And whether he's adverse to me or not,
12 I didn't call him.

13 THE COURT: Right. Yeah. I think leading questions
14 are permitted. So I would agree with Mr. Moody that we
15 [unintelligible] an adversary process, but leading questions
16 are permitted and I don't consider that an adverse question.

17 BY MR. LENHARD:

18 Q Mr. Waid, I'm not trying to be offensive or anything
19 else. I'm just trying to get to the heart of the matter
20 between you and I; fair enough?

21 A Understood.

22 Q All right. Now, I also arranged a meeting, did I
23 not, with you and Ms. Ahern where she lives?

24 A That is correct.

25 Q Will you tell the Court about that meeting?

1 A I believe it was last Friday.

2 Q Sounds right.

3 A You and I went to the home in which Ms. Ahern rents.
4 She gave us a tour. Through a series of written questions and
5 questions from you, we had a discussion regarding her health,
6 limited finances, expenses. I think that about sums it up.

7 Q At any time during that meeting did I interfere with
8 your questions?

9 A No.

10 Q It's true, is it not, that I told a few times
11 Ms. Ahern to answer your questions?

12 A You in fact did.

13 Q Now, also we can both agree, can't we, that we want
14 to have Ms. Ahern deposed?

15 A You have communicated that to me and I have
16 certainly communicated that to you, so.

17 Q Right. And you and I tried to arrange an IME?

18 A We actually did.

19 Q And I had Ms. Peterson present Ms. Ahern at the IME;
20 do you understand that?

21 A Yes.

22 Q And you and I are waiting for a report from the IME
23 physician?

24 A That's correct.

25 Q And to date we have not been blessed with one; is

1 that fair?

2 A I paid for it and we're waiting for the report.

3 Q When you say you paid for it, the trust paid for it?

4 A Correct. I coordinated the payment.

5 Q Right. And pending the results of that IME we're
6 planning on the deposition going forward; is that a fair
7 statement?

8 A I'm planning on it, yes.

9 Q Now, there's been a reference to blockage or some
10 type of blocking of your efforts to obtain information. Do
11 you recall that -- those questions from Mr. Powell?

12 A Yes.

13 Q Can you sit here today and state that Ms. Peterson
14 or myself have in any way, shape or form attempted to block
15 you from obtaining any information?

16 A I wouldn't characterize you or Ms. Peterson
17 blocking. I think it's accurate to simply reflect on the
18 record in the case where she's not complied with the court
19 orders, that you or Ms. Peterson wrote on the last court order
20 disapproved --

21 Q Right.

22 A -- instead of signing it, because she simply would
23 not provide the signature.

24 Q Has Ms. Peterson and I ever objected to any motion
25 you have filed seeking an authorization? Have we filed an

1 objection?

2 A Not to my knowledge, here or in Texas.

3 Q Correct. Thank you. On the issue of Fidelity
4 Capital, you made a reference to the fact that you had
5 attempted to locate it, I have attempted to locate it, and I
6 think Mr. Powell attempted to locate it; is that a fair
7 statement?

8 A I think everyone's done their part to figure out who
9 they are and who the parties are involved.

10 Q It's true, is it not, that none of us have -- or
11 excuse me. You and I haven't been able to find an office,
12 have we?

13 A That is correct.

14 Q We haven't found a bank account?

15 A That is correct.

16 Q And we haven't found a fellow named Frederick Parrel
17 [phonetic] either, have we?

18 MR. KIEFER: Objection, Your Honor. He's saying we
19 as if Mr. Waid knows what he has done. I'm not sure he does.

20 MR. LENHARD: Well, we're tag-teaming again here,
21 Your Honor.

22 THE COURT: Okay.

23 MR. LENHARD: Can we designate an objector?

24 MR. KIEFER: Your Honor, you're allowed to have more
25 than one counsel. I'm a little astonished that from a firm

1 his size he's worried about being outmanned by a four-man
2 shop.

3 MR. LENHARD: Well, wait a minute.

4 MR. KIEFER: I'm just objecting.

5 MR. LENHARD: This isn't a barroom brawl. One
6 lawyer objects, one questions.

7 THE COURT: Yes. Okay. Correct. Well, for the
8 purpose here, if we can have one person objecting.

9 MR. POWELL: It would be Mr. Kiefer.

10 THE COURT: Mr. Kiefer, you're going to be -- if
11 there are any objections, Mr. Kiefer will make them.

12 MR. LENHARD: Thank you.

13 THE COURT: Thank you.

14 MR. LENHARD: And by the way, let me rephrase the
15 question, now that we got through that silliness.

16 BY MR. LENHARD:

17 Q I didn't mean we. Have you located the bank
18 account?

19 A I have not.

20 Q Have you located Mr. Parrel?

21 A I have not.

22 Q Have you located Mr. Parrel's office, if it exists?

23 A I have not.

24 Q And that's probably a poor question. Have you
25 located the office of Fidelity Capital?

1 A I have not.

2 Q So would I be safe in stating you haven't found
3 \$500,000 there either, have you, sir?

4 A No, I have not.

5 Q The accounting that you refer to, the Marquis and
6 Aurbach accounting, did it designate that all the funds would
7 be in one account? Do you recall?

8 A I believe in both her declaration and in the
9 pleading filed under signature of Marquis and Aurbach, it
10 references 500,000 in Fidelity and the balance of the funds in
11 Wells Fargo.

12 Q Now, you're familiar with the FDIC regulations, are
13 you not?

14 A Yes, I am.

15 Q And how far or how much money does an FDIC insurance
16 institution insure in one account?

17 A Depending on the type of account, whether it's held
18 in a private bank or whether it's in the standard traditional,
19 or whether you purchase additional insurance, it generally is
20 in the 200 to \$250,000 range.

21 Q All right. Now, my understanding of the -- hang on
22 a second. Bear with me. You spoke to Ms. Ahern within a few
23 days of being appointed the interim trustee; am I correct,
24 sir?

25 A I believe it was a week and a half or two weeks

1 almost.

2 Q I'm sure you're correct. Where did you speak with
3 Ms. Ahern?

4 A I was on the telephone. I'm not sure where she was.

5 Q Fair enough. Someone picked up the phone and said
6 it was Eleanor Ahern?

7 A She actually phoned me.

8 Q All right. The person phoning you said it was
9 Eleanor Ahern; fair enough?

10 A Correct.

11 Q Okay. And in that conversation you discussed the
12 status of the trust?

13 A Yes.

14 Q And she volunteered to you that there was a
15 deficiency?

16 A She volunteered to me that she owed monies.

17 Q All right. She volunteered that to you, correct,
18 sir?

19 A Correct.

20 Q And the some money was \$800,000, or something like
21 that give or take?

22 A That's the figure she used.

23 Q I think I'll use your interim trustee report, but
24 I'll use the one in the book in front of you that's
25 Mr. Powell's book, or the movant's book, and I think it's

1 Exhibit G. If you would turn to page 3. And I'm not going to
2 refer to the Bates stamps. It's easier for me to do page 3 of
3 that. It says under the heading, Funds on Deposit on Date of
4 Removal. Do you see that?

5 A Yes.

6 Q And you refer into some detail as to what was in the
7 Marquis and Aurbach account; am I correct, sir?

8 A Yes.

9 Q And the number that appears there is \$1,997,573.16,
10 which were the funds that were on deposit according to Marquis
11 and Aurbach ---

12 A Correct.

13 Q -- as of the date of their accounting; is that
14 correct, sir?

15 A Yes.

16 Q And if I go up to the line 3 on page 3, that would
17 have been dated March 13, 2015; is that correct, sir?

18 A That's correct.

19 Q So as of March 13 -- bear with me a second. As of
20 March 13, 2015, MAC is representing \$1.9 million and change is
21 on deposit?

22 A I believe Ms. Ahern does as well.

23 Q Okay. That's absolutely correct. MAC and Mrs.
24 Ahern represented that. Now, keep that date together. Okay.
25 Now, it's my understanding that initially on April 8, Ms.

1 Ahern deposited \$409,220.50 into the trust account, a
2 cashier's check. I'm looking at page 4 of the document.

3 A That's correct.

4 Q Line 24. Is that correct?

5 A Yes.

6 Q So that money's recovered as of April 8; am I right?

7 A That's correct.

8 Q Go to the next page. On April 13, 2015, the trust
9 recovered 500,000 from the account at U.S. Bank. Now,
10 admittedly, that's not from Fidelity Capital. You and I can
11 both agree to that, correct?

12 A Correct.

13 Q But it was from U.S. Bank, correct?

14 A That is correct.

15 Q So now as of April 13, the trust has \$909,000 and
16 change, correct?

17 A Yes.

18 Q Then on April 16, Ms. Ahern delivers \$700,000, a
19 \$700,000 cashier's check. That's line 16, sir. I'm sorry.
20 On April 16, Ms. Ahern delivers a \$700,000 cashier's check to
21 her then counsel at MAC. Do you see that?

22 A Yes.

23 Q And that was of course turned over to you right
24 away?

25 A I picked it up, yes.

1 Q So by April 16, or about one month since the date of
2 the filing of the MAC accounting, you had recovered 909 --
3 \$1,609,000, correct?

4 A That's correct.

5 Q So you're about, as of that date, about \$300,000
6 short of the amount that appeared initially in the MAC
7 account; am I right?

8 A That's correct.

9 Q Then if I can go on, it looks like the trust
10 received -- page 6, line 25. The trust receives a check for
11 \$146,584.83 on June 10; is that correct?

12 A Yes.

13 Q So that's two months later; am I right, May June?

14 A Right.

15 Q Turn the page, you also get, it looks like, a check
16 for \$72,000 from Johnston & Associates. And I can't tell
17 exactly when you got that. That's on page 7. Do you recall?

18 A Yes.

19 Q Do you recall when it was, Mr. Waid? I'm sorry.

20 A It was sometime in June.

21 Q So by sometime in June you recovered another
22 approximately \$200,000, the 142 and the 70; am I correct?

23 A Correct.

24 Q You add that to the 1 million 609, we're about one
25 million eight. Does that sound about right, rough round off

1 numbers?

2 A With an asterisk.

3 Q I appreciate it. So you're now about \$100,000 short
4 from the Marquis and Aurbach accounting, admittedly from
5 different sources; am I right or wrong?

6 A You're right numerically.

7 Q That's what I'm talking about right now,
8 numerically. Am I right numerically?

9 A You are correct.

10 Q You had in your hand \$1.8 million and change in the
11 account that you were controlling for the trust?

12 A That is correct.

13 Q Now, if I can work through some of the math here,
14 Mr. Waid, and I had asked you earlier at a break with your
15 counsel's approval if you had your cellphone with you with the
16 calculator.

17 A Yes.

18 Q Let's start, if we can, with trust income
19 calculations and reporting discrepancies on page 8 of your
20 report. Now, it's my understanding we've been dealing with
21 mid 2013 —

22 MR. KIEFER: Your Honor, if I may object. Why are
23 we back on the numbers issue when they didn't want to address
24 the numbers issue? I'm confused.

25 MR. LENHARD: I'm addressing his report.

1 MR. KIEFER: His report as it relates, but he's
2 trying to back out of certain numbers. He's again going to
3 the damages here, is he not?

4 MR. LENHARD: No, I'm not.

5 MR. KIEFER: Is that not what he's pursuing?

6 THE COURT: No. This is --

7 MR. LENHARD: I'm going to the damages -- may I
8 respond?

9 THE COURT: This is for me, I mean, if you're
10 talking about this report, this was all what -- this is what
11 Mr. Waid reported on. Mr. Waid never got into damages at all.

12 MR. LENHARD: What I am doing is establishing the
13 numbers in Mr. Waid's interim report, nothing more.

14 THE COURT: Right.

15 MR. LENHARD: I'm not asking him to opine on future
16 damages or anything else.

17 THE COURT: Right.

18 MR. LENHARD: I'm just trying to verify the numbers
19 so I can then discuss the number that's being -- I hate to use
20 this word, tendered. Okay?

21 THE COURT: Okay.

22 BY MR. LENHARD:

23 Q Again, Mr. Waid, so you and I are clear, I'm not
24 asking for any opinions as to future damages, tax liabilities
25 or anything else. I'm just working off this interim report,

1 okay?

2 A Yes.

3 Q All right. Now if we can go to the bottom of page
4 8. It's my understanding, based on the Court's order, we're
5 working from mid 2013 through March of 2015; am I correct?

6 A Yes.

7 Q Now, is there any way for you to break down, based
8 on your report, if you can't, tell me, how much of the 2013
9 number, which is \$1,255,892, how much of that would be
10 represented by six months?

11 A I cannot.

12 Q Then we're just going to use the entire number for
13 now. All right. I want you to add up 2013 and 2014 on your
14 calculator. I think it comes out to about \$3.8 million; is
15 that right?

16 A You're adding '13, '14 and '15?

17 Q Yes, sir. Actually, you added '15 for me. You
18 anticipated my next question and that's just fine. What's
19 that total?

20 A \$4,414,410.66.

21 Q Now, if you subtract the amount that the trust has
22 collected so far as of the date of this report, that you had
23 collected on behalf of the trust, and that's how much? One
24 million nine -- excuse me. I've got it somewhere and I lost
25 it. Bear with me. It looks like \$1,827,902.08 has been

1 collected so far as of the date of this report. Does that
2 sound right?

3 A Approximately.

4 Q Subtract that from that number, if you would.

5 A Would you tell me that number again, one eight?

6 Q Two seven nine oh two. Actually, before you do
7 that, I'm sorry. Take the \$4.2 million first, if you would.

8 A I'm at 4.4.

9 Q I'm sorry. 4.4.

10 A Okay.

11 Q You can tell I can't balance a checkbook. Will you
12 divide that by 65 percent?

13 A That's 2.869 million.

14 Q Now subtract from that 1,827,902.08.

15 A One eight.

16 Q Two seven?

17 A Two seven.

18 Q Nine oh two point oh eight.

19 A Yes.

20 Q And that number is?

21 A 1,041,464.850.

22 Q And that of course is using a 2013 number that
23 includes the whole year; is that correct, sir?

24 A That's correct.

25 Q Now go to page 10, if you would, in your report.

1 About line 19. Do you see Court's April 22, '15 order,
2 2,163,758.88?

3 A Yes.

4 Q That was your starting number?

5 A Yes.

6 Q 65 percent share of first quarter 2015 trust income
7 was 328,275.25; is that correct, sir?

8 A Yes.

9 Q Is that 328 number 65 percent of the 573,424 number
10 we previously discussed?

11 A Approximate. That first quarter is still subject to
12 verification.

13 Q Fair enough. You then added the two together on
14 page 10, and you come to 2,492,034.13, right?

15 A Yes.

16 Q Leaving -- you subtracted the total recovered, the
17 one million eight and change; am I correct?

18 A Yes.

19 Q Leaving 664,132, the estimated shortfall as of the
20 date of this report?

21 A Yes.

22 Q All right. Now, Mr. Waid, do you have our binder up
23 there?

24 A I do not. It was not provided to me.

25 Q That's because I'm trying to trick you.

1 MR. LENHARD: Do we have an extra binder for him? I
2 thought we left three with the court.

3 THE CLERK: I didn't have a binder of yours.

4 THE COURT: Yeah. That's that, and the --

5 MR. LENHARD: I've got another set of exhibits.
6 I'll do it this way.

7 THE COURT: I can email the law clerk and see if
8 she's got the third set. Because she mentioned there were
9 three, but I don't know --

10 MR. LENHARD: I'm going to dig it out, Judge.

11 (Pause in proceeding.)

12 MR. LENHARD: Mr. Powell, that's Exhibit G in our
13 binder to you.

14 MR. POWELL: Okay.

15 MR. LENHARD: And does the Court have a copy of this
16 in your binder?

17 THE COURT: I have it. I have.

18 MR. LENHARD: Okay. I guess we need to mark it as a
19 different letter or number now due to the confusion of the
20 marking. So how would you prefer to do it; Exhibit 1?

21 THE CLERK: We can leave it A/B, and if we put
22 respondent, if that will not bother you.

23 MR. LENHARD: Whatever works for you.

24 THE COURT: Here's the third set. So we can give
25 that to --

1 MR. LENHARD: Mr. Waid.

2 THE COURT: — to Mr. Waid. Mr. Waid, there you go.

3 THE WITNESS: Thank you.

4 MR. LENHARD: Okay. So how am I referring to this
5 exhibit, as our original exhibit --

6 THE COURT: That's respondent's.

7 MR. LENHARD: Respondent's G?

8 THE COURT: Just the way you've got it marked, yes.

9 MR. LENHARD: All right. Thank you.

10 BY MR. LENHARD:

11 Q Mr. Waid, do you have respondent's -- I managed to
12 mess that up. Do you have Respondent's G in front of you?

13 A I'm turning to it now.

14 Q All right. Do you recall -- well, first of all,
15 briefly, if you would, take a second to review to yourself the
16 contents of Exhibit G.

17 A I am familiar with them, yes.

18 Q Do you recall receiving this correspondence on or
19 about November 17, 2015?

20 A Yes.

21 Q It is true, is it not, that due to the verse of that
22 correspondence we offered to, and I don't like the word
23 "tender" right now, but we offered to give you access to
24 \$400,000 in the money being held on behalf of Mrs. Ahern for
25 you to do with as you deemed appropriate?

1 A That is what you communicated.

2 Q Did you take us up on that proposal?

3 A No, I did not.

4 Q Why not?

5 A As we discussed, there's significant issues in the
6 semantics why you are hesitant to use the word tender, why
7 we're hesitant to use any allocations or anything of
8 significant potential tax or legal consequence or implication
9 at this juncture until I've completed my evaluation,
10 investigation, deposition of Ms. Ahern and provided a final
11 report to the Court.

12 Q Now, the number we, and I'm going to put it in
13 quotes, tendered was about two-thirds of the number you just
14 testified to that based on your interim report was presently
15 due and owing, in your opinion?

16 MR. KIEFER: Objection. Misstates testimony.

17 MR. POWELL: Same objection.

18 MR. LENHARD: Well, let's go back to page 10.

19 THE COURT: Yeah. I understand what everybody's
20 objection is.

21 MR. KIEFER: It's the presently issue I have. As of
22 the date of the report, is that what you're saying?

23 THE COURT: So it was the report in --

24 MR. LENHARD: Yeah, as of the date of the interim
25 report.

1 THE COURT: -- July. The report was --

2 MR. KIEFER: Then say that. You said presently.

3 THE COURT: As of the date of the report. So as of
4 the date of the report, the --

5 MR. LENHARD: If I said presently, I misspoke and I
6 apologize.

7 THE COURT: -- in November -- okay.

8 THE WITNESS: If I can clarify.

9 THE COURT: We're trying to keep our timeline
10 straight, yeah.

11 THE WITNESS: If I can clarify, my interim report
12 does not assess liability against any individual. I was
13 simply reporting numbers that should have been on deposit.
14 And so when you raised the issue of offering or suggesting
15 this allocation, to me it was just simply premature.

16 BY MR. LENHARD:

17 Q Let's do it this way. Look at page 10, line 21.

18 A This is back in -- Plaintiff's G.

19 Q That's fine.

20 A Page 10.

21 Q Page 10. I'm sorry. Are you with me?

22 A I'm there.

23 Q Okay. Look at line 21; 664,132.05. Do you see
24 that?

25 A Yes.

1 Q And next to it, it says, "Estimate shortfall due by
2 Ms. Ahern."

3 A That's correct.

4 Q And well, this is dated, this report's dated July
5 2015, correct?

6 A Correct.

7 Q A couple months later we're -- Mrs. Ahern is, quote,
8 through her counsel offering new access to 400,000, the money
9 held on her behalf.

10 A Yes.

11 Q Now, just so we have our dates right, three days
12 later you received a letter from Mr. Powell, didn't you?

13 A Yes.

14 Q Three days after we made that, quote, tender, you
15 received a letter saying cease and desist all efforts to
16 continue on with your labors for the trust?

17 A Yes.

18 Q Will you tell the Court, if you can recall,
19 specifically what you were doing for this trust on or about
20 November 20, 2015, when you received that cease and desist
21 letter?

22 A I would like to characterize my efforts in that
23 exact day and on the general time frame in that -- during that
24 part of November as trying to reach an accord and broker a
25 settlement between the various parties.

1 Q I recall that effort. It didn't work out, did it?

2 A No, sir.

3 Q Now, leaving that to the side, what were you doing
4 as far as trying to marshal trust assets? Tell the Court what
5 you were doing in November 2015.

6 A I was continuing my efforts to obtain records from
7 Wells Fargo and any other individual, professional firm or the
8 like who may have information. Because in your comment,
9 Mr. Lenhard, about marshaling assets, I was trying to
10 determine where those assets may be so that they could be
11 marshaled.

12 Q Right. You're still trying to find money for the
13 trust?

14 A Correct.

15 Q That's part of your job, isn't it?

16 A It is.

17 Q Mr. Waid, the interim report really appears to stop
18 as far as trust income as of, it looks like, March 2015; is
19 that right, or am I wrong?

20 A That's correct.

21 Q Can you tell the Court how much trust income has
22 been collected since March 2015?

23 A In excess of a million dollars.

24 Q Has any of that been distributed to Eleanor Ahern?

25 A No, it has not.

1 Q How much trust income so far has been distributed to
2 the other beneficiaries?

3 A In excess of a million dollars.

4 Q To date, you have been retaining funds on behalf of
5 Ms. Ahern; is that correct? And that may be a poor term, but
6 segregating an account and her name in it whatever from the
7 trust?

8 A Subject to the Court's direction and instruction I
9 have held those funds, yes.

10 Q How much is on deposit today in that account?

11 A Approximately 665, \$670,000.

12 Q Do you recall being here in court in November 2015,
13 when the issue was discussed and argued somewhat let's say
14 strenuously about the award of interim attorney's fees and
15 living expenses for Ms. Ahern?

16 A I was here.

17 Q Do you recall the Court making an order from the
18 bench that was objected to by movant's counsel?

19 A Yes.

20 Q Do you recall receiving a signed order from the
21 Court in January 2016 to that effect?

22 A Yes.

23 Q Do you recall per the Court's instruction meeting
24 with Ms. Peterson and myself to determine how a tender could
25 properly be -- and again, there's that word again, but how a

1 tender could be properly effectuated?

2 A Yes.

3 Q The meeting was with, I think, your accountant, your
4 counsel, myself, Ms. Peterson?

5 A That is correct.

6 Q Do you recall being asked by us for a form or
7 whatever you wanted our client to sign so we could satisfy
8 your concerns and effectuate this offer?

9 A That is correct.

10 Q Did we ever receive a document from you?

11 A No, you have not.

12 Q Did you receive a letter from movant's counsel in
13 January 2016?

14 A Yes. Maybe more than one.

15 Q I'm going to refer to -- I'm calling it --

16 MR. LENHARD: Ms. Clerk, do you recall the exhibit
17 letter -- it's already been offered by Mr. Powell, I believe,
18 so no sense me offering it again.

19 THE CLERK: What do you --

20 MR. LENHARD: It's the January 29, 2016 letter from
21 the Rushforth firm to Mr. Waid.

22 MS. PETERSON: Kirk, it's our Exhibit F.

23 MR. LENHARD: It's our Exhibit F.

24 THE CLERK: Oh, so your F --

25 MR. LENHARD: I'll just mark it as our Exhibit F.

1 We'll mark it.

2 THE COURT: I don't think that letter is in
3 Mr. Powell's exhibits.

4 MR. LENHARD: Then I'm in error. It wouldn't be the
5 first time nor the last.

6 BY MR. LENHARD:

7 Q Do you have that in front of you, Mr. Waid?

8 A I do.

9 Q Did you in fact receive that letter?

10 A I did.

11 Q And you of course saw the language in that letter on
12 the top of page 2:

13 Given the existence of a court order requiring the
14 distributions, I fear that you may believe that you will be
15 absolved of any future liability that may accompany such
16 distributions. Although a trustee may generally insulate
17 himself from liability by seeking a court order directing his
18 actions, I must warn you that no such protections are
19 available under an inappropriate and unlawful order.

20 Do you recall reading that language?

21 A I do.

22 Q Do you also recall reading the language on the last
23 page of this exhibit?

24 MR. KIEFER: Your Honor, I'm going to object on
25 relevance. I don't see how any of this has any bearing on

1 Ms. Ahern's own personal conduct related to the no contest
2 clause.

3 MR. LENHARD: It goes to their interference of
4 Mrs. Ahern's ability to conduct a defense.

5 MR. KIEFER: Which is --

6 MR. LENHARD: Their active -- let me finish, please,
7 Counsel. It's my turn.

8 THE COURT RECORDER: I can't have both of you
9 talking at the same time.

10 THE COURT: Thanks.

11 MR. LENHARD: Who do you want to hear from next?

12 THE COURT: Mr. Lenhard, if you want to respond,
13 we'll let counsel go on, if that'll work.

14 MR. LENHARD: Thank you. It goes to their
15 interference both with Mr. Waid's activities as the trustee in
16 November of 2015, we were attempting to tender, and their
17 interference on a later date with a valid court order, and
18 their interference with our ability to tender at this point in
19 time.

20 They have interfered with his duties as the trustee,
21 and we intend on amending our pleas at the close of these
22 proceedings to allege that they in fact [inaudible] they have
23 in fact interfered and violated Clause 10 of the trust
24 agreement.

25 THE COURT: Okay. Thank you.

1 MR. LENHARD: So I think it's relevant for that
2 reason.

3 MR. KIEFER: And Your Honor, that's tantamount to an
4 admission that she shouldn't have the money in the first
5 place. Because he's saying you're not letting us return it,
6 essentially saying we took it, which is what the real issue
7 is, did she inappropriately take money from the trust thus
8 violating the no contest clause, but you wouldn't let us give
9 it back.

10 THE COURT: Okay. That's not what the no contest
11 clause says, with all due respect, so.

12 MR. KIEFER: What I'll say is did you attack the
13 administration or distribution of estate assets, and we would
14 say that her actions do demonstrate that, regardless of any
15 later attempt to return the money.

16 THE COURT: Understood.

17 MR. KIEFER: So if that's the case, it's still
18 irrelevant.

19 THE COURT: All right. Overruled.

20 MR. LENHARD: I absolutely disagree.

21 THE COURT: I overruled.

22 MR. LENHARD: Thank you.

23 BY MR. LENHARD:

24 Q Can you look now? Do you recall where I was,
25 Mr. Waid?

1 A I believe you said the last page.

2 Q Right. "My clients wish to avoid further litigation
3 in this matter, nevertheless they have authorized our office
4 to file suit against you." Do you see that?

5 A Yes.

6 Q Okay. And that's dated January 29?

7 A Yes.

8 Q Did you receive the letter on or about January 29?

9 A I believe so.

10 Q To date, have you obeyed the Court's order that was
11 issued in early January 2016?

12 A That order has been appealed and I am awaiting
13 further instructions from the Court.

14 Q So the answer to my question is no --

15 A No.

16 Q -- correct?

17 THE COURT: It wasn't stayed.

18 MR. LENHARD: It hasn't been stayed. The Court
19 hasn't done anything with it yet.

20 MR. KIEFER: There's an emergency motion that will
21 be ruled on in the next two days, Your Honor, from the
22 [inaudible].

23 MR. LENHARD: As of standing here at 3:30 on
24 February 22, 2016, it has not been stayed.

25 MR. KIEFER: And I don't recall anyone saying it had

1 been.

2 THE COURT: All right. Thanks.

3 MR. LENHARD: The Court's indulgence just for one
4 second.

5 THE COURT: Sure.

6 (Attorneys confer.)

7 MR. LENHARD: Thank you, Mr. Waid.

8 THE COURT: All right. Thanks. Anything further?
9 Mr. Moody.

10 MR. LENHARD: As much as I like Mr. Moody, I'm not
11 sure what standing he has to indulge in questioning here
12 today.

13 THE COURT: Yes. That was going to be a question as
14 to what Mr. Moody may have, yeah.

15 MR. MOODY: Just a few clarifications for questions
16 that were asked by Mr. —

17 MR. LENHARD: Has the Court overruled my —

18 Excuse me, Todd. I'm sorry.

19 Has the Court overruled my objection to Mr. Moody
20 questioning?

21 THE COURT: No, because I need to know — I think
22 Mr. Moody was trying to explain what it was he wanted to ask
23 questions about. Because, you know, we do have a — Mr.
24 Waid's here as a witness. He is a neutral party.

25 Typically counsel for witnesses don't ask questions,

1 but, you know, this is a little -- it's a little bit different
2 from a typical litigation situation. Mr. Waid's not a typical
3 disinterested third party witness in like a typical litigation
4 where you wouldn't allow counsel to ask questions.

5 So what was it you were --

6 MR. LENHARD: Just so I'm clear, because I'm not
7 sure what we're doing here exactly. Can I -- I'm lodging my
8 objection so it's clear on the record --

9 THE COURT: Yes.

10 MR. LENHARD: -- that I'm objecting to this.

11 THE COURT: And so we're going to let Mr. Moody
12 respond because, as I said, it's a little bit different
13 situation than a typical witness in litigation who their
14 attorney wouldn't be allowed to ask any questions because
15 they're not parties. Mr. Waid's not a party, but he's the
16 trustee of the trust. So he's in a different standing than a
17 typical witness in a litigation.

18 So Mr. Moody, do you want to respond on the basis
19 for what, you know, why you have some questions?

20 MR. MOODY: Yeah. I think that's correct, Your
21 Honor. I think he's more like a party than a non-party in
22 this case, and maybe after I ask my questions, if counsel has
23 an objection, it can be entertained then. I think what I will
24 ask of Mr. Waid will clarify some issues for the Court that
25 have been asked already.

1 THE COURT: Right. Yeah, as I said, typically a
2 witness would not -- if [unintelligible] witness had counsel
3 present, they aren't allowed to ask questions because they're
4 not parties. Mr. Waid technically is the trustee of the trust
5 that is the entity under which this litigation is proceeding.
6 We have petitioners and respondents who are dealing with their
7 rights, but the trust itself is represented in the form of
8 Mr. Waid.

9 So I think it's a little different, but certainly,
10 you know, I think Mr. Lenhard can certainly reserve his right
11 to object to any -- or counsel and any -- all counsel have the
12 right to object to any question in particular. So okay. I'll
13 overrule the objection and we'll take it a question at a time.

14 MR. MOODY: Okay. Thank you.

15 CROSS-EXAMINATION

16 BY MR. MOODY:

17 Q Mr. Waid, Mr. Powell asked you on direct examination
18 about his letter to you and specifically about the Miller
19 Trust's 25 percent for subsurface rights, correct?

20 A That's correct.

21 Q And that was a 25 percent percentage of royalties?

22 A That's correct.

23 Q And he asked you to compare that to the William N.
24 Connell and Marjorie T. Connell 25 percent, and was trying to
25 get a correlation between those numbers to see if you could go

1 back and say based on what was reported to Miller what has
2 been distributed to the trust we're here about today; is that
3 correct?

4 A Yes.

5 Q Can you just explain to the Court why you cannot
6 take the Miller percentage and calculate it with respect to
7 the Connell Trust?

8 A I can. During the time Ms. Ahern was trustee and
9 the litigation between the MTC Trust and its beneficiaries and
10 Ms. Ahern, there were circumstances which caused some of the
11 oil and gas companies to suspend revenue payments, and so that
12 which was paid to the Millers and that which was received by
13 the trust would not necessarily correlate.

14 That is yet an additional reconciliation I'm still
15 waiting to complete. And I think I'm close on that, but I
16 just want it to be clear that I can't use that exactly. They
17 should correlate, yes, because they both equal 25 percent, but
18 at this stage I'm going to reserve and just need to hold on a
19 final opinion on that matter.

20 Q Okay. Very good. And the last question I have for
21 you is if the -- if MTC's motion for an emergency stay pending
22 with the Supreme Court is denied, do you intend to comply with
23 this Court's order and advance funds as has been directed by
24 this Court?

25 A As I have in every case, even the contentious ones,

1 I will obey court orders.

2 Q Thank you.

3 THE COURT: Okay. Any redirect?

4 MR. POWELL: Yeah. Can we just have a moment --

5 THE COURT: Sure.

6 MR. POWELL: -- Your Honor, just to discuss?

7 (Attorneys confer.)

8 REDIRECT EXAMINATION

9 BY MR. RUSHFORTH:

10 Q Mr. Waid, let me turn you to --

11 THE COURT: It's Mr. Rushforth.

12 MR. LENHARD: Your Honor, just so I can make a
13 record, obviously I'm going to object to a new questioner at
14 this stage. Just can I note my objection to this?

15 THE COURT: All right. Thank you.

16 Mr. Rushforth, so noted. We'll allow it.

17 MR. RUSHFORTH: I will admit that I am not an expert
18 at trial procedure and I apologize if I've done anything
19 wrong, but we came here as a team.

20 THE COURT: Okay.

21 BY MR. RUSHFORTH:

22 Q Mr. Waid, I would refer you to Movant's Exhibit C,
23 which is titled The Order Regarding the Accounting Breach of
24 Fiduciary Duty Claims and Award of Attorney's Fees. It has a
25 file stamp of 4/20. Are you familiar with this order?