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SANMATEO COUNTY

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By COLLEEN KELLY
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NATIONAL CENTER
ON POVERTY LAW

16 Attorneys for Plaintiffs and the Class

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

REVERSE MORTGAGE CASES

The SAN MATEO COUNTY PUBLIC GUARDIAN
as special administrator of the estate of BERTA A.
GRAY, GEORGE GOODRICH, an individual, and
BARBARA DeVRIES as conservator of estate of
TERESITA O. ZALBIDEA v. TRANSAMERICA
CORPORATION, *et al.*

WALKER, as personal representative *etc.* v.
TRANSAMERICA CORPORATION, *et al.*

HEAD, as executor and court-appointed special
administrator of the estate of CRANDELL v.
TRANSAMERICA CORPORATION, *et al.*

JUDICIAL COUNCIL
COORDINATION PROC. No. 406 1

SAN MATEO CO. SUPERIOR
Case No. 405495

SAN MATEO CO. SUPERIOR
Case No. 406465

SAN FRANCISCO CO. SUPERIOR
Case No. 997850

CLASS ACTION

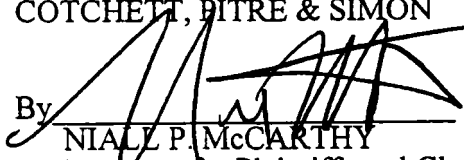
**NOTICE OF ENTRY OF
ORDER DENYING
DEFENDANTS' PETITIONS TO
COMPEL ARBITRATION**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

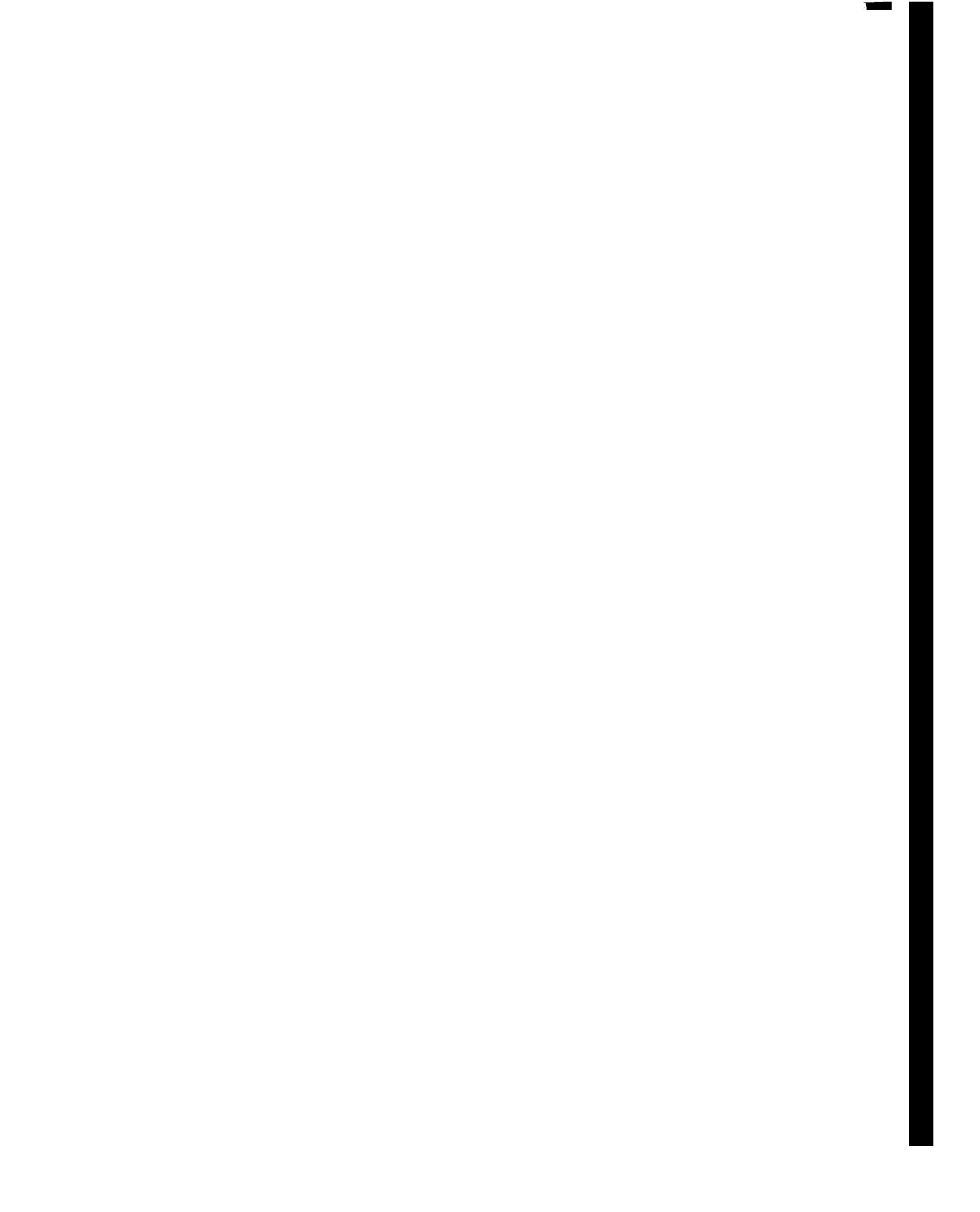
Attached hereto as Exhibit "A" is a copy of the Order Denying Defendants' Petitions to
Compel Arbitration, entered and filed by the Court on January 18, 2000.

DATED: February 2, 2000

COTCHETT, PITRE & SIMON

By 
NIALL P. MCCARTHY
Attorneys for Plaintiffs and Class

NOTICE OF ENTRY OF ORDER DENYING DEFS' PETITIONS TO COMPEL ARBITRATION



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FILED
SAN MATEO COUNTY

JAN 18 2000

Clerk of the Superior Court
By *[Signature]*
DEPUTY CLERK

[Counsel Listed on Signature Page]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Coordination Proceeding Special Title
(Rule 1550(b))

REVERSE MORTGAGE CASES

This Document Relates to:
ALL CASES

JUDICIAL COUNCIL COORDINATION
PROCEEDING No. 406 1

CLASS ACTION

**ORDER DENYING DEFENDANTS'
PETITIONS TO COMPEL
ARBITRATION**

The Hon. Carol L. Mittlesteadt
Coordination Trial Judge

1 On December 23, 1999, this matter came to be heard upon defendant Transamerica
2 Homefirst, Inc.'s Verified Petitions to Compel Arbitration and Motion to Dismiss or Stay
3 Proceedings, filed in each of the three following Coordinated Actions:

- 4 1. San Mateo County Public Guardian, as Conservator of Person and Estate of
5 Berta A. Gray, et al. v. Transamerica Corporation, et al., San Mateo Superior Court, Case
6 No. 405495 ("Gray");
- 7 2. Morris Head, as Executor of the Estate of Olathas "Tom" Crandell v.
8 Transamerica Corporation, et al., San Francisco Superior Court, Case No. 997850 ("Head"); and
- 9 3. Jerome B. Walker, as Personal Representative, etc. v. Transamerica
10 Comoration, et al., San Mateo Superior Court, Case No. 406465 ("Walker").

11 Upon consideration of all pleadings, motions, petitions, and accompanying papers
12 filed in connection therewith, and after the hearing on December 23, 1999, attended by counsel
13 for all parties, IT IS HEREBY ORDERED AND ADJUDGED as follows:

- 14 1. The arbitration clauses contained within the Deeds of Trust and the Loan
15 Agreement and Note drafted by defendant Transamerica HomeFirst, Inc., and at
16 issue in all three of the Coordinated Actions, are unconscionable and therefore
17 unenforceable under California state law and applicable federal law;
- 18 2. Accordingly, the Petitions to Compel Arbitration and Motion to Dismiss or Stay
19 Proceedings, filed in each of the three following Coordinated Actions by defendant
20 Transamerica HomeFirst are each hereby DENIED.
- 21 3. Further, the Verified Petitions to Compel Arbitration and Motion to Dismiss or
22 Stay Proceedings, filed by defendant Transamerica Corporation in each of the three
23 Coordinated Actions are each hereby DENIED;
- 24 4. Further, the Motion by Defendant Metropolitan Life Insurance Company to
25 Compel Arbitration to the Extent Arbitration Is Ordered as to the Claims Against
26 Homefirst filed by defendant Metropolitan Life Insurance Company in the Gray
27 and Walker cases are each hereby DENIED;


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5. By virtue of the foregoing, any issues concerning classwide arbitration, the arbitrability of Plaintiffs' statutory claims, and/or MetLife's standing to compel arbitration, are hereby deemed moot.

Attached hereto as Exhibit "A" is a true and correct copy of the transcript of the proceedings held on December 23, 1999 in these Coordinated Actions setting forth the Court's reasoning for its ruling.

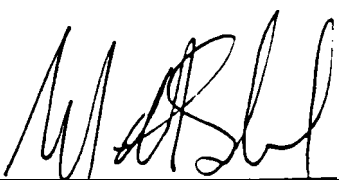
IT IS SO ORDERED.

Dated: 1/18/00


The Honorable Carol L. Mittlesteadt
Coordination Trial Judge

APPROVED AS TO FORM:

Dated: 1.7.00

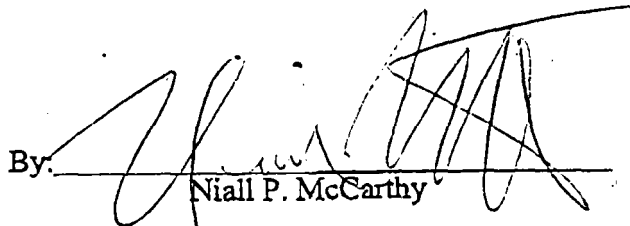
By: 
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Dated: 1/4/00

By: 
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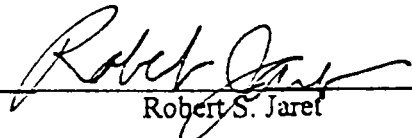
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Dated: January 6, 2000

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HomeFirst*

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By: _____

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18 E: January 5, 2000

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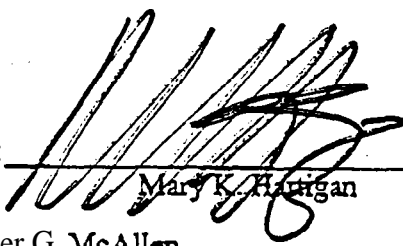
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Dated: 1/5/00

By: 
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STAM

EXHIBIT "A"

IN THE SUPERIOR/MUNICIPAL COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

COORDINATION PROCEEDING)
) JUDICIAL COUNCIL
) COORDINATION PROCEEDINGS
REVERSE MORTGAGE CASES) NO. 4 0 6 1
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REPORTER'S TRANSCRIPT

BEFORE: HON. CAROL L. MITTLESTEADT, JUDGE
THURSDAY, DECEMBER 23, 1999

A P P E A R A N C E S:

FOR PLAINTIFFS:

MR. NAILL MC CARTHY
MR. MICHAEL SOBOL
MS. ELIZABETH CABRASER

FOR GRAY PLAINTIFFS:

MR. JOSEPH COTCHETT

FOR WALKER PLAINTIFFS:

MS. ANNE-MARIE WAGGONER

FOR PUBLIC GUARDIAN:

MR. STEVE DYLINEA

FOR TRANSAMERICA CORPORATION:

MS. NICOLE DILLINGHAM

FOR METROPOLITAN LIFE:

MR. PETER MC ALLEN

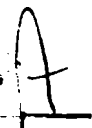
FOR TRANSAMERICA HOME:

MR. DIRK SCHENKKAN

MR. ED MULLEN

REPORTED BY:

SANDRA L. BETTENCOURT
C.S.R. #3847

EXHIBIT 

P R O C E E D I N G S

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so. SAN FRANCISCO, CALIFORNIA
THURSDAY, DECEMBER 23, 1999

THE COURT: GOOD MORNING, EVERYONE,

THE CLERK: THIS IS THE COORDINATION
PROCEEDINGS SAN MATEO COUNTY PUBLIC GUARDIAN VERSUS TRANS
AMERICA CORPORATION, AND VARIOUS CASES.

THE COURT: AND IF COUNSEL WOULD PLEASE
STATE THEIR APPEARANCES FOR THE RECORD.

MR. SCHENKKAN: DIRK SHENKKAN AND ED MULLEN
FOR THE DEFENDANT TRANS AMERICA, HOMEFIRST. AND WE HAVE
AGREED TO REFER TO IT AS HOMEFIRST IN THESE PROCEEDINGS TO
AVOID CONFUSION WITH TRANSAMERICA CORPORATION.

THE COURT: I HAVE AGREED TO THAT,
COUNSEL, TO CALLING IT HOMEFIRST. AND GOOD MORNING TO
YOU.

MS. DILLINGHAM: NICOLE DILLINGHAM FOR TRANS
AMERICA CORPORATION.

THE COURT: GOOD MORNING, MS.
DILLINGHAM.

M R . MC ALLEN: PETER MC ALLEN FOR
DEFENDANT METROPOLITAN INSURANCE COMPANY.

THE COURT: GOOD MORNING, MR. MC ALLEN.

1 MR. SOBOL: MICHAEL SOBOL FOR
2 PLAINTIFFS, MORRIS HEAD AND CLASS-

3 THE COURT: GOOD MORNING, MR. SOBOL.

4 MR. MC CARTHY: NAILL MC CARTHY ON BEHALF
5 OF PLAINTIFFS SAN MATEO PUBLIC GUARDIAN AND CLASS.

6 THE COURT: GOOD MORNING, MR.
7 MC CARTHY.

8 MS. CABRASER: ELIZABETH CABRASER, WITH
9 MR. SOBOL APPEARING ALSO FOR HEAD PLAINTIFFS.

10 THE COURT: GOOD MORNING, MS. CABRASER.

11 MR. COTCHETT: HAPPY HOLIDAYS, JOE
12 COTCHETT WITH MR. MC CARTHY THIS MORNING.

13 THE COURT: GOOD MORNING, MR. COTCHETT,
14 HAPPY HOLIDAYS TO YOU AND TO ALL OF YOU.

15 MS. WAGGONER: ANNE-MARIE WAGGONER
16 APPEARING FOR WALKER PLAINTIFFS AND THE CLASS.

17 THE COURT: GOOD MORNING, MS. WAGGONER.

18 MR. DYLINA: LAST, HOPEFULLY NOT LEAST,
19 GOOD MORNING, STEVE DYLINA, DEPUTY COUNTY COUNSEL.

20 THE COURT: GOOD MORNING, MR. DYLINA.

21 LET'S TAKE, WE HAVE BASICALLY TWO MATTERS BEFORE US
22 THIS MORNING, ESSENTIALLY TWO BASIC MATTERS; THE FIRST IS
23 THAT THE PLAINTIFF WALKER HAS FILED A MOTION TO STRIKE
24 REFERENCES TO CERTAIN UNPUBLISHED DECISIONS, NAMELY, TWO
2 5 FEDERAL UNPUBLISHED DECISIONS THAT WERE CITED IN, I
26 BELIEVE THE HOMEFIRST PAPERS, ORIGINALLY.

1 LET ME DO IT THIS WAY, FIRST OF ALL I WILL INDICATE
2 TO YOU I HAVE READ HUNDREDS OF PAGES OF PAPER ON THESE
3 MATTERS. AND AFTER A WHILE I FELT AS IF THE ARGUMENTS
4 WERE BECOMING REPETITIVE. NEVERTHELESS, I KEPT READING
5 EACH PAGE BECAUSE I WAS FEARFUL I WOULD MISS SOMETHING
6 NEW. AND THERE WERE SOME NEW POINTS MADE IN SOME OF THE
7 VARIOUS BRIEFS. I DO, THEREFORE, FEEL AS IF I HAVE A VERY
8 GOOD UNDERSTANDING OF THE MATTERS BEFORE THE COURT THIS
9 MORNING.

10 AND I THINK THAT PERHAPS RATHER THAN HAVING ANYONE
11 REITERATE WHAT YOU HAVE ALREADY PUT IN WRITTEN FORM AND
12 THAT I HAVE CAREFULLY CONSIDERED, WHAT I WOULD LIKE TO DO
13 IS GIVE YOU MY TENTATIVE RULING ON EACH OF THESE MATTERS,
14 GIVE YOU THE BENEFIT OF MY RATIONALE AS TO WHY THOSE ARE
15 MY TENTATIVE RULINGS AND THEN ALLOW ANYONE WHO WOULD LIKE
16 TO BE HEARD, TO TRY TO CONVINC ME TO CHANGE MY MIND.

17 AND I WILL INDICATE TO YOU THAT EVEN THOUGH I
18 CONSIDER MATTERS VERY CAREFULLY, I HAVE BEEN KNOWN TO
19 CHANGE MY MIND, SO IT IS NOT A FUTILE EFFORT ON YOUR PART.

20 AND THE FIRST MATTER THAT I WOULD LIKE TO LOOK AT
21 IS THE MOTION TO STRIKE REFERENCES TO THE UNPUBLISHED
22 DECISIONS.. MY TENTATIVE RULING IS TO DENY THAT MOTION.

23 THE CITATION OF THE UNPUBLISHED FEDERAL DECISION IS
24 NOT PROHIBITED BY CRC 977 NOR THE NINTH CIRCUIT RULE 36-3
25 IF I LOOK AT THE EXPLICIT LANGUAGE OF THOSE RULES, THOSE
26 APPLY TO UNPUBLISHED APPELLATE DECISIONS.

1 AND ALSO, SOMEONE CITED TO ME, AND I HAVE TO ADMIT
 2 IN READING ALL OF THE VARIOUS BRIEFS I AM NOT GOING TO BE
 3 ABLE TO IDENTIFY WHO MADE THE PARTICULAR ARGUMENT, THE
 4 CASE OF HILLMAN VERSUS BRITTON A 1980 DECISION, WHICH DOES
 5 MAKE IT VERY CLEAR THAT UNPUBLISHED FEDERAL AUTHORITY IS
 6 NOT PROSCRIBED IN BRIEFING IN STATE TRIAL COURT. HOWEVER,
 7 EVEN THOUGH I DON'T FIND THAT THOSE CITATIONS ARE
 8 PROSCRIBED, THOSE UNPUBLISHED DECISIONS ARE NOT BINDING ON
 9 THIS COURT AND THIS COURT WILL NOT FIND THEM TO BE
 10 BINDING.

11 I THINK THERE IS A DISTINCTION TO BE DRAWN BETWEEN
 12 NUMBER ONE WHETHER UNPUBLISHED FEDERAL DECISIONS MAY BE
 13 CITED AND CONSIDERED AND NUMBER TWO, WHETHER THOSE
 14 DECISIONS SERVE AS BINDING PRECEDENT UPON THIS COURT.

15 I, AS I HAVE INDICATED, DO FIND THAT THE
 16 UNPUBLISHED DECISION IS NOT BINDING ON THIS COURT. AND
 17 SOMEONE CITED TO ME A VERY RECENT CASE BOLKIAH VERSUS
 18 SUPERIOR COURT, A 1999 DECISION, WHICH I THINK EXPRESSED
 19 MY OWN THOUGHTS ON THAT EVEN BEFORE I READ THAT DECISION;
 20 NAMELY, THAT AT BEST, THE UNPUBLISHED DECISION IN THE
 21 MEYERS CASE AND MC CARTHY CASE, REPRESENT ONE COURT'S VIEW
 22 FROM THE PROSPECTIVE OF A DIFFERENT SET OF FACTS.

23 AND I HAVE READ BOTH OF THOSE DECISIONS FOR
 24 WHATEVER VALUE THEY HAVE IN HELPING ME REACH A LOGICAL
 25 DECISION ON THE MATTERS, BUT I AM NOT BOUND BY THEM AND DO
 26 NOT DEEM MYSELF TO BE BOUND BY THEM.

1 WOULD ANYONE LIKE TO BE HEARD ON THAT PARTICULAR
2 MOTION BEFORE WE GO ON TO THE PETITIONER'S MOTION TO
3 COMPEL ARBITRATION?

4 MR. MC CARTHY: ON BEHALF OF THE
5 PLAINTIFFS, WE WOULD SUBMIT.

6 NAILL MC CARTHY ON BEHALF OF GRAY PLAINTIFF, WE
7 WOULD SUBMIT ON THAT ISSUE'.

8 THE COURT: IT WOULD HELP SANDY, AS YOU
9 CAN TELL WE HAVE A LOT OF ATTORNEYS HERE, IT IS -DIFFICULT
10 FOR ME ALTHOUGH I AM BEGINNING TO PUT FACES WITH NAMES,
11 BUT IT IS DIFFICULT FOR SANDY WHO HAS LESS CONTACT WITH
12 YOU THAN I HAVE.

13 ANYONE ELSE?

14 MS. WAGGONER: ANNE-MARIE WAGGONER FOR THE
15 WALKER PLAINTIFFS, WE WOULD ALSO SUBMIT.

16 THE COURT: LET ME SHORT CUT THIS.
17 ANYONE WHO DOESN'T WANT TO SUBMIT, LET'S PUT IT THAT WAY?
18 THEN THAT MOTION IS DENIED.'

19 LET'S MOVE ON TO THE REAL MEAT OF THE MATTER BEFORE
20 THE COURT AND THAT IS, THE MATTER OF WHETHER OR NOT, ANY
21 OF THESE CASES SHOULD BE ORDERED TO BINDING ARBITRATION
22 BEFORE THE AMERICAN ARBITRATION ASSOCIATION IN ACCORDANCE
23 WITH THE RESPECTIVE ARBITRATION PROVISIONS.

24 MY TENTATIVE RULING ON THAT IS TO DENY THE
25 PETITIONS AND ALSO METROPOLITAN LIFE'S MOTION TO COMPEL
26 ARBITRATION. AND LET ME EXPLAIN TO YOU WHY AND THIS

1 EXPLANATION WILL TAKE JUST A LITTLE BIT LONGER THAN THE
2 PREVIOUS EXPLANATION. THIS IS A MORE COMPLICATED MATTER.

3 I WANT TO START BY INDICATING THAT I RECOGNIZE FULLY
4 THE STRONG PUBLIC POLICY IN FAVOR OF ENFORCING ARBITRATION
5 AGREEMENTS. AND THAT STRONG PUBLIC POLICY EXISTS UNDER
6 BOTH FEDERAL LAW AND STATE LAW, UNDER CALIFORNIA LAW. THE
7 FEDERAL PROVISION THAT ALL OF YOU HAVE CITED IS SECTION 2
8 OF THE FEDERAL ARBITRATION ACT AND THAT IS A FEDERAL
9 STATUTORY MANDATE.

10 HERE IN CALIFORNIA WE HAVE A SIMILAR STATUTE,
11 NAMELY CCP SECTION 1281. AND WE ALSO HAVE A SIMILAR
12 POLICY INITIALLY EXPRESSED VERY CLEARLY IN THE MONCHARSH
13 CASE BACK IN 1992. SO WE ALSO HAVE VERY STRONG PUBLIC
14 POLICY FAVORING ARBITRATION AND THE ENFORCEMENT OF
15 CONTRACTUAL ARBITRATION AGREEMENTS.

16 HOWEVER, UNDER BOTH FEDERAL LAW AND UNDER STATE
17 LAW, THE CONTRACT DEFENSE OF UNCONSCIONABILITY MAY BE
18 APPLIED TO INVALIDATE AN ARBITRATION AGREEMENT. AND THE
19 CASE THAT I THINK MANY OF YOU HAVE CITED FOR THAT
20 PROPOSITION IS DOCTOR'S ASSOCIATES, WHICH IS A 1996 U.S.
21 SUPREME COURT DECISION.

22 THEN I HAD TO DETERMINE, AND THERE WERE ARGUMENTS
23 ON BOTH SIDES AS TO, WHETHER I LOOK AT THE FEDERAL
24 DOCTRINE OF UNCONSCIONABILITY OR THE DOCTRINE OF
25 UNCONSCIONABILITY AS EXPRESSED IN CALIFORNIA STATE LAW.
26 AND IN MAKING THAT DECISION, I LOOKED AT THE CONTRACTS

1 THEMSELVES.

2 AND ON THIS PARTICULAR POINT THERE WASN'T MUCH
3 VARIANCE IN THE LANGUAGE AMONGST ALL OF THE VARIOUS
4 PLAINTIFFS IN **BOTH** THE PROMISSORY NOTE AND THE DEED OF
5 TRUST. AS TO EACH PARTY PLAINTIFF IN THIS CASE, **IT**
6 STARTED OFF WITH THE GENERAL PROVISIONS SAYING THAT THE
7 DOCUMENTS WERE "GOVERNED BY CALIFORNIA AND APPLICABLE
8 FEDERAL LAW."

9 THE DEED OF TRUST SAYS, AFTER SAYING THAT,
10 "INCLUDING THE FEDERAL ARBITRATION ACT AS IT APPLIES TO
11 SECTION 20" (WHICH WAS THE ARBITRATION PROVISION). THE
12 PROMISSORY NOTE SAYS, "AND IN PARTICULAR SECTION 20 (AGAIN
13 THE ARBITRATION PROVISION) WILL BE GOVERNED BY FEDERAL
14 LAW, INCLUDING THE FEDERAL ARBITRATION ACT."

15 IN LOOKING AT THE DIFFERENT PROVISIONS IN THE
16 PROMISSORY NOTE AND THE DEED OF TRUST, IT BECAME CLEAR TO
17 **ME** THAT BOTH PROVISIONS CLEARLY ALLOW THAT THE FEDERAL
18 ARBITRATION ACT GOVERNS, BUT IT IS NOT SO CLEAR AS TO
19 WHETHER FEDERAL LAW GENERALLY GOVERNS THE ARBITRATION
20 **CLAUSES** OR WHETHER **ONLY** THE FAA GOVERNS THE ARBITRATION
21 PROVISIONS. AND I RESOLVED THAT AMBIGUITY AGAINST THE
22 DRAFTER OF THE DOCUMENTS, NAMELY, HOMEFIRST.

23 IN SUM, I HAVE CONCLUDED THAT THE FEDERAL
24 ARBITRATION ACT TOGETHER WITH CALIFORNIA GENERAL CONTRACT
25 PRINCIPLES GOVERN THE ARBITRATION PROVISIONS THAT ARE THE
26 **SUBJECT** OF EACH OF THE CASES FILED HEREIN.

1 NOW THE STIRLEN CASE WAS CITED TO ME FOR THE.
 2 PROPOSITION, I AGREE IT STANDS FOR THE PRINCIPLE, THAT THE
 3 FAA DOES NOT PRECLUDE A FINDING THAT AN ARBITRATION CLAUSE
 4 IS UNCONSCIONABLE UNDER CALIFORNIA LAW. AND I HAVE
 5 DETERMINED IN VERY CAREFULLY WEIGHING ALL OF THE ARGUMENTS
 6 THAT WERE MADE, THAT THE SUBJECT ARBITRATION CLAUSES ARE
 7 UNCONSCIONABLE UNDER CALIFORNIA LAW.

8 BEFORE I TELL YOU THE REASONS WHY I CAME TO THAT
 9 CONCLUSION, LET ME EMPHASIZE THAT THE COURT IS FOCUSING
 10 ONLY ON THE UNCONSCIONABILITY OF THE ARBITRATION
 11 PROVISIONS, RATHER THAN ANY UNCONSCIONABILITY OF THE
 12 ENTIRE LOAN DOCUMENTS. THAT ISSUE IS NOT BEFORE THE COURT
 13 THIS MORNING. AND THAT IS AN ISSUE THAT I SUBMIT WILL
 14 PROBABLY HAVE TO BE DETERMINED AT A SUBSEQUENT TIME.

15 I THINK I AM REQUIRED TODAY TO FOCUS ONLY ON
 16 WHETHER THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE
 17 UNDER THE AUTHORITY OF PRIMA PAINT CORPORATION, WHICH IS
 18 AGAIN A UNITED STATES SUPREME COURT DECISION. IN
 19 CALIFORNIA, UNDER CALIFORNIA LAW ON UNCONSCIONABILITY, AS
 20 ALL OF YOU HAVE CITED, WE HAVE TWO DIFFERENT STANDARDS
 21 REALLY, WE HAVE THE GRAHAM VERSUS SCISSOR-TAIL OR WE HAVE
 22 THE A & M PRODUCE COMPANY CASE.

23 AND THE ANALYSIS LEGALLY IS SLIGHTLY DIFFERENT
 24 UNDER BOTH OF THOSE. UNDER THE SCISSOR-TAIL ANALYSIS-AS
 25 YOU ALL KNOW, THE FIRST PRONG IS WHETHER OR NOT THE
 26 AGREEMENT TO ARBITRATE IS A CONTRACT OF ADHESION.' AND THE

1 SECOND PRONG IS WHETHER OR NOT THE ARBITRATION PROVISIONS¹⁰
2 FALL OUTSIDE THE REASONABLE EXPECTATIONS OF THE PARTIES
3 AND ARE UNDULY OPPRESSIVE.

4 IF WE INSTEAD LOOK AT A & M PRODUCE ANALYSIS, WE
5 HAVE THE PROCEDURAL ELEMENT AND THE SUBSTANTIVE ELEMENT,
6 AND BOTH OF THEM MUST BE MET. IN ORDER TO FIND THE
7 AGREEMENT UNCONSCIONABLE, THE PROCEDURAL ELEMENT HAS AS
8 ITS FIRST PRONG OPPRESSION AND AS ITS SECOND PRONG,
9 SURPRISE. AND THE SUBSTANTIVE ELEMENT REALLY FOCUSES ON
10 WHETHER OR NOT THE AGREEMENT IS OVERLY HARSH, OPPRESSIVE.
11 OR HAS ONE-SIDED RESULTS.

12 NOW, APPLYING THOSE ANALYSES TO THIS PARTICULAR
13 **CASE**, LET ME TELL YOU WHAT I FOCUSED ON IN REACHING THE
14 CONCLUSION THAT THE CLAUSES HERE ARE UNCONSCIONABLE.
15 CLEARLY WE HAVE UNEQUAL BARGAINING POWER. THERE HAVE BEEN
16 SUBMITTED A LOT OF DECLARATIONS TALKING ABOUT THE
17 SOPHISTICATION OF THE VARIOUS BORROWERS IN THIS CASE.

18 I REALLY DON'T THINK THAT THE SOPHISTICATION OF THE
19 BORROWERS IS REALLY CONTROLLING ON THIS ISSUE. I THINK
20 THAT THE GRAHAM CASE IS A GOOD EXAMPLE OF THAT. PERHAPS
21 IT WOULD BE DIFFICULT FOR US TO FIND A PLAINTIFF MORE
22 SOPHISTICATED THAN BILL GRAHAM, AND WE DO HAVE HERE,
23 ELDERLY PERSONS NORMALLY ON FIXED INCOME, WHO ARE
24 REQUIRING MORE INCOME FOR VARIOUS REASONS THAT ARE THE
25 BORROWERS IN ALL OF THESE PARTICULAR CASES.

26 UNLIKE THE TWO FEDERAL DECISIONS **THAT HOMEFIRST**

1 RELIED UPON, THE UNPUBLISHED FEDERAL DECISIONS OF MEYERS¹¹
2 AND MC CARTHY, SO HEAVILY, YOU WILL NOTE IN BOTH OF THOSE
3 DECISIONS THAT THE U.S. DISTRICT JUDGES FOUND THOSE
4 PROVISIONS TO BE CLEAR AND UNAMBIGUOUS. I CAN'T FIND THAT
5 HERE.

6 I HAVE STUDIED THE PROVISIONS VERY CAREFULLY, AND I
7 WILL NOTE FIRST OF ALL THAT ARGUMENTS HAVE BEEN MADE ABOUT
8 THE "YOU" AND "LENDER." AND THE CONFUSION ABOUT CALLING
9 THE LENDER "YOU" RATHER THAN THE BORROWER BEING "YOU."

10 SINCE THESE ARE DOCUMENTS DRAFTED BY HOMEFIRST, I
11 GIVE SOME WEIGHT TO THAT ARGUMENT ALTHOUGH IN ALL HONESTY
12 I AM MORE IMPRESSED BY THE LANGUAGE OF THE ARBITRATION
13 PROVISIONS THEMSELVES AND MY OWN INABILITY TO REALLY
14 TOTALLY UNDERSTAND WHAT IT IS THAT HOMEFIRST HAS TO
15 ARBITRATE, AND WHAT IT IS THAT HOMEFIRST DOESN'T HAVE TO
16 ARBITRATE.

17 AND I RECOGNIZE THAT THE PROVISIONS ARE SLIGHTLY
18 DIFFERENT FROM ONE PLAINTIFF TO ANOTHER, BUT IF WE LOOK AT
19 THE GRAY DOCUMENTS JUST AS AN EXAMPLE, AND MANY OF THE
20 PROVISIONS WERE VERY SIMILAR TO THE GRAY, IN THE
21 ARBITRATION CLAUSE OF THE DEED OF TRUST. IN PARAGRAPH 20,
22 WE HAVE A PROVISION FOR BINDING ARBITRATION OF ANY CLAIM
23 ARISING OUT OF OR RELATING TO THE LOAN DOCUMENTS. AND
24 WHEN IT'S SAYS EXCEPT FORECLOSURE, UNDER TRIPLE A
25 COMMERCIAL RULES IN SAN FRANCISCO OR L.A. COUNTIES. THEN
26 IT GOES ON TO SAY WHICH MAY NOT DELAY OR ADVERSELY AFFECT

1 THE ABILITY OF HOMEFIRST TO EXERCISE ITS REMEDIES UNDER ¹²
2 THE LOAN DOCUMENTS.

3 THAT CLAUSE APPEARS IN EACH AND EVERY ONE OF THE
4 BORROWER'S ARBITRATION PROVISIONS AND THAT CLAUSE SEEMS TO
5 ME TO BE A BLANKET STATEMENT THAT HOMEFIRST CAN EXERCISE
6 ANY REMEDIES IT HAS UNDER THE LOAN DOCUMENTS AND THAT
7 ARBITRATION CANNOT AFFECT THAT.

8 THEN WE HAVE IN THE GRAY DEED OF TRUST PARAGRAPH
9 20, A SPECIFIC EXCLUSION OF HOMEFIRST'S REMEDIES OF
10 FORECLOSURE, SET OFF, AN INJUNCTION, IT SAYS, "FOR THE
11 APPOINTMENT OF A RECEIVER." QUITE FRANKLY, I DON'T KNOW
12 WHAT AN INJUNCTION FOR THE APPOINTMENT OF A RECEIVER IS.
13 I HAVE TO WONDER IF IT WAS SUPPOSED TO BE INJUNCTION OR
14 APPOINTMENT OF RECEIVER." AND THEN IT GOES ON ABOUT
15 CONSOLIDATION OR COMBINATION.

16 THAT'S THE DEED OF TRUST IN GRAY. THEN WE HAVE THE
17 PROMISSORY NOTE IN GRAY. IN PARAGRAPH 20 THERE IS AN
18 ARBITRATION PROVISION AND THAT PROVIDES FOR BINDING
19 ARBITRATION IN ACCORDANCE WITH THE DEED OF TRUST
20 PROVISIONS, AND IT GOES ON AND HAS THAT SAME CLAUSE THAT
21 TROUBLES ME AGAIN, WHICH MAY NOT DELAY OR ADVERSELY AFFECT
22 THE ABILITY OF HOMEFIRST TO EXERCISE ITS REMEDIES IN THE
23 LOAN DOCUMENTS.

24 WELL, WE HAVE THREE DIFFERENT STATEMENTS OF WHAT'S
25 BEING EXCLUDED AND I FIND THAT LESS THAN CLEAR AND
26 UNAMBIGUOUS AS TO WHAT IS BEING EXCLUDED. AND QUITE

1 FRANKLY, THIS ONE CLAUSE THAT I KEEP FOCUSING ON WHICH
2 APPEARS IN EACH AND EVERY ONE OF THE LOAN DOCUMENTS FOR
3 EACH AND EVERY BORROWER, I HAVE READ IT OVER AND OVER AND
4 OVER AGAIN, AND I THINK THAT AT LEAST ARGUABLY THAT WOULD
5 ENTITLE HOMEFIRST TO GO TO ARBITRATION ON ALL OF ITS
6 CLAIMS THAT IT HAS, I MEAN, EXCUSE ME, TO GO TO COURT ON
7 ALL OF ITS CLAIMS THAT IT HAS.

8 WHEREAS, ALL OF THESE ARBITRATION PROVISIONS VERY
9 CLEARLY INDICATE THAT THE BORROWERS HAVE TO GO TO
10 ARBITRATION ON ALL OF THEIR CLAIMS. SO, JUST SO YOU ARE
11 CLEAR, THE AMBIGUITY THAT I AM MENTIONING, I DON'T KNOW
12 HOW TO RECONCILE ALL OF THESE, FIRST EXCLUDING
13 FORECLOSURE, THEN EXCLUDING SPECIFIC REMEDIES, AND THEN
14 WITH THAT BLANKET STATEMENT. SO I DON'T THINK THEY'RE
15 CLEAR AND UNAMBIGUOUS BY THE WAY I READ THEM AND I THINK
16 THE ARGUMENT CAN WELL BE MADE THAT HOMEFIRST CAN GO TO
17 COURT ON ANY OF ITS CLAIMS.

18 ANOTHER FACTOR IN APPLYING THE CALIFORNIA DOCTRINE
19 OF UNCONSCIONABILITY, WHETHER UNDER THE SCISSOR-TAIL OR
20 THE A & M PRODUCE ANALYSIS, IS THAT THESE OBVIOUSLY ARE
21 **LENGTHY FORM** CONTRACTS WHICH WERE PRESENTED TO THE
22 BORROWERS. AND WE DID HAVE THE DECLARATIONS AND I
23 UNDERSTAND THAT THERE WERE COUNTER DECLARATIONS TRYING TO
24 EXPLAIN IT, BUT WE HAD DECLARATIONS FROM SOME OF THE SALES
25 REPS THAT INDICATED THEY TOLD THE BORROWERS AT THE TIME,
'26 HERE ARE THE SAMPLE DOCUMENTS AND THEY WILL BE "IDENTICAL"

1 AT THE TIME OF CLOSING.

2 I KNOW THAT THE SALES REPRESENTATIVES CAME BACK
3 WITH SUBSEQUENT DECLARATIONS TRYING TO EXPLAIN THEY DIDN'T
4 MEAN BY THAT STATEMENT THE ARGUMENTS THAT WERE BEING MADE:
5 NEVERTHELESS I THINK WE ALL CAN AGREE THAT THEY ARE
6 LENGTHY FORM CONTRACTS. AND IN THIS CASE THE EVIDENCE
7 DOES SHOW THAT NONE OF THE PREPRINTED ARBITRATION
8 PROVISIONS EITHER AS DIRECTLY SUBJECT TO THIS LITIGATION
9 OR IN ANY OF THE REVERSE MORTGAGES SOLD BY HOMEFIRST, WAS
10 EVER MODIFIED IN ANY MANNER FOR ANY CUSTOMER.

11 AND UNDER THE DECISION OF PATTERSON, WHICH IS A
12 1993 APPELLATE DECISION IN CALIFORNIA LAW, THAT IN ITSELF
13 SUGGESTS THAT THE ARBITRATION PROVISIONS WERE
14 NONNEGOTIABLE. IF YOU LOOK AT PAGE 1664 THERE ARE
15 COMMENTS BY THE COURT TO THAT EFFECT IN THAT PARTICULAR
16 DECISION.

17 THEREFORE IT DOES SEEM TO ME THESE ARBITRATION
18 PROVISIONS ARE BLATANTLY ONE-SIDED AND THAT **HOMEFIRST**, CAN
19 AND COULD ELECT TO TAKE ANY CLAIMS IT WANTED TO COURT,
20 **WHEREAS** ALL OF THE PLAINTIFF'S CLAIMS ARE ARBITRABLE UNDER
21 THE PROVISIONS.

2 2 IN SUM, THEY APPEAR TO ME TO BE UNILATERAL
23 AGREEMENTS TO ARBITRATE. AND THEN, I THINK IT WAS MR.
24 4C **CARTHY** WHO SENT ME THE MOST RECENT DECISION OF RAMIREZ

25 --

26 MR. MC **CARTHY**: YES, YOUR HONOR.

1 THE COURT: I READ THAT DECISION TOO,
2 AND THAT DECISION SITES BOTH THE KINNEY DECISION. AND
3 ALSO THE STIRLEN DECISION THAT I REFERENCED EARLIER AND
4 INDICATES THAT AN AGREEMENT THAT REQUIRES THE WEAKER PARTY
5 TO ARBITRATE ANY CLAIMS HE OR SHE MAY HAVE, BUT PERMITS
6 THE STRONGER PARTY TO SEEK REDRESS THROUGH THE COURTS, IS
7 PRESUMPTIVELY UNCONSCIONABLE. EVEN THOUGH I HAVE FOUND
8 THAT CALIFORNIA LAW ON UNCONSCIONABILITY APPLIES HERE, I
9 DID LOOK AT THE FEDERAL STANDARD OF UNCONSCIONABILITY,
10 ALSO. I THINK THE RESULTS WOULD BE THE SAME, THAT IS THE
11 WILLIAMS STANDARD THAT SEVERAL OF YOU CITED IN YOUR
12 BRIEFS.

13 AND THEREFORE, HAVING FOUND, OR TENTATIVELY HAVING
14 FOUND, THE ARBITRATION PROVISIONS TO BE UNCONSCIONABLE,
15 QUITE FRANKLY, EVEN THOUGH IT WAS VERY INTERESTING READING
16 MATERIAL, I DON'T HAVE TO MAKE A DECISION ON THE SCOPE OF
17 THE ARBITRATION, OR WHETHER SOME REMEDIES ARE
18 INAPPROPRIATE FOR ARBITRATION OR THE ARBITRABILITY OF THE
19 PLAINTIFF'S CLAIMS AGAINST TRANS AMERICA AND METLIFE AS
20 OPPOSED TO HOMEFIRST; OR WHETHER ARBITRATION SHOULD BE ON
21 AN INDIVIDUAL OR CLASS WIDE BASIS. THOSE ISSUES ALL
22 BECOME MOOT AT THAT PARTICULAR POINT. I AM SURE SOMEBODY
23 WOULD LIKE TO ARGUE THIS.

24 WHO WOULD LIKE TO GO FIRST?

25 THE COURT: MR. SCHENKKAN?

26 MR. SCHENKKAN: FIRST LET ME SAY I AM SURE

1 I SPEAK FOR EVERYBODY HERE THAT I REALLY APPRECIATE THE
 2 WAY THE COURT HAS PRESENTED ITS REASONING NOT JUST ITS
 3 CONCLUSION, BUT THE PROCESS BY WHICH IT REACHED ITS
 4 CONCLUSION. IT IS ENORMOUSLY HELPFUL FROM A
 5 PRACTITIONER'S POINT OF VIEW, OBVIOUS TO HAVE A CLEAR IDEA
 6 OF WHAT THE COURT'S THINKING IS AT THE OUTSET FINDING OUR
 7 WAY INTO IT IN THE PROCESS.

8 THE COURT: THANK YOU.

9 MR. SCHENKKAN: WE HAVE THE LABORING OAR IN
 10 VIEW OF THE COURT'S TENTATIVE, BUT OF COURSE THE LAW HERE
 11 RETURNING TO THE FIRST PRINCIPLE FOR A MOMENT SAYS THAT IT
 12 IS THE OTHER SIDE THAT HAS THE LABORING OAR ON THESE
 13 PETITIONS.

14 THESE ARBITRATION CLAUSES ARE ENTITLED TO
 15 PRESUMPTION OF ENFORCEABILITY AS THE COURT HAS
 16 ACKNOWLEDGED. AND MORE THAN THAT, ON THE SPECIFIC ISSUE
 17 OF UNENFORCEABILITY, THE BURDEN OF PROOF LIES ON THE PARTY
 18 CHALLENGING THE ARBITRATION CLAUSES TO PROVE MORE LIKELY
 19 THAN NOT THAT THE -- OR BY CLEAR AND CONVINCING EVIDENCE,
 20 I GUESS, THAT THE ARBITRATION CLAUSES ARE UNENFORCEABLE.

21 I WOULD PUT THAT OUT THERE BECAUSE I THINK THAT HAS
 22 SOME BEARING ON THE COURT'S ANALYSIS HERE, AND IT IS, I
 23 BELIEVE, CRITICAL TO PROPER ANALYSIS OF SOME OF THE ISSUES
 24 WHICH HAVE BEEN RAISED PARTICULARLY UNDER THE
 25 UNENFORCEABILITY ARGUMENT.

26 BUT THE MAXIM UNDER CALIFORNIA LAW NOW WE ARE

1 TALKING ABOUT AS WELL AS FEDERAL LAW IS THAT THE COURT
2 MUST INDULGE EVERY INTENDMENT TO GIVE EFFECT TO THE
3 ARBITRATION CLAUSE.

4 THE COURT: WOULD YOU AGREE THOUGH THAT
5 IT HAS TO BE A CLEAR AND UNAMBIGUOUS ARBITRATION CLAUSE?
6 ISN'T THAT KIND OF THE FIRST POINT, IT HAS TO BE CLEAR AND
7 UNAMBIGUOUS BEFORE I CAN ENFORCE IT?

a MR. SCHENKCAN: NO, YOUR HONOR. I THINK
9 THE CLEARNESS AND UNAMBIGUOUSNESS OF THE CLAUSE BECOMES --
10 IT IS SIGNIFICANT TO THE ENFORCEABILITY ISSUE ONLY AS AN
11 ELEMENT OF SUBSTANTIVE UNCONSCIONABILITY UNDER EITHER THE
12 FEDERAL OR UNDER THE STATE ANALYSIS.

13 THE VERY PRINCIPLES THAT I JUST ARTICULATED
14 ACTUALLY REQUIRE THE COURT IN CONSTRUING THE ARBITRATION
15 CLAUSE TO CONSTRUE ITS AMBIGUITIES IN FAVOR OF
16 ARBITRATION. THAT AMONG OTHER THINGS IS THE ERIKSON CASE
17 CITING CHAN V DIRECTEL (PHONETIC) WHICH IS ANOTHER
18 CALIFORNIA CASE. BOTH OF THOSE CASES MAKE THAT POINT.

19 TO THE EXTENT THE COURT FOUND SOMETHING AMBIGUOUS
20 IN THE CLAUSE, ITS OBLIGATION IS TO SEE IF IT CAN CONSTRUE
21 THE CLAUSE IN A WAY THAT RESOLVES THAT AMBIGUITY IN FAVOR
22 OF ARBITRATION AND NOT USE THAT AMBIGUITY AS A BASIS FOR
23 STRIKING DOWN THE CLAUSE WHICH OF COURSE IS THE ANTITHESIS
24 OF INDULGE EVERY INTENDMENT TO GIVE FORCE TO THE
25 ARBITRATION AGREEMENT.

26 IF I MAY, I WOULD LIKE TO IF I HAVE ADDRESSED THAT

1 I S S U E ?

2 THE COURT: YES.

3 MR. SCHENKKAN: I WOULD LIKE TO GO BACK FOR
4 A MOMENT JUST SO I CAN FOLLOW THROUGH THE COURTS
5 REASONING HERE AND RESPOND. AS THE COURT ITSELF
6 SUGGESTED, I AM NOT GOING TO ADDRESS FEDERAL VERSUS STATE
7 LAW ISSUE HERE. I UNDERSTAND WE OBVIOUSLY RESERVE OUR
a POSITION ON THAT.

9 I THINK IN THE END I WOULD BE INCLINED TO AGREE
10 WITH THE COURT IN THE END YOU SHOULD COME TO THE SAME
11 RESULT UNDER EVEN THE FEDERAL OR THE STATE ANALYSIS HERE,
12 ALTHOUGH IT IS POSSIBLE GIVEN SOME DIFFERENCES IN THOSE
13 DOCTRINES THEY PRODUCE DIFFERENT RESULTS IN PARTICULAR
14 CASES. I WOULD CERTAINLY ARGUE OUGHT TO PRODUCE THE SAME
15 RESULT THE COURT REACHED.

16 THE COURT: I AGREE WITH YOU. I THINK
17 WHETHER FEDERAL OR STATE LAW APPLIES REALLY DOESN'T HAVE
18 AS MUCH SIGNIFICANCE ON THE ISSUE OF CONSCIONABILITY. IT
19 HAD MORE SIGNIFICANCE ON OTHER ISSUES WHICH I WILL NOT
20 HAVE TO REACH IF I ADOPT MY TENTATIVE AS THE COURT'S
21 ORDER.

22 MR. SCHENKKAN: I WOULD AGREE WITH THAT AS
23 WELL.

24 IN YOUR ANALYSIS, YOU STATED FIRST -- THE COURT
2 5 STATED FIRST THERE IS CLEARLY UNEQUAL BARGAINING POWER
26 HERE. I DO NOT BELIEVE THAT. AGAIN, WE ARE LIMITED BY

1 THIS RECORD AND APPROPRIATELY SO.

2 ONE THING, I GUESS I SHOULD ASK THE COURT TO DO, IS
3 GIVE US A RULING ON EVIDENTIARY OBJECTIONS BECAUSE THERE
4 HAVE BEEN A SUBSTANTIAL NUMBER OF THOSE AND THEY OBVIOUSLY
5 AFFECT WHAT THE RECORD IS THAT THE COURT'S DECISION IS
6 ULTIMATELY BASED ON WHETHER THE COURT HAS ACTUALLY RULED
7 ON THOSE OBJECTIONS, BUT WE FILED SUBSTANTIAL --

a THE COURT: I DID READ THE SUBSTANTIAL
9 NUMBER OF EVIDENTIARY OBJECTIONS. AND I NOTE, AND CORRECT
10 ME IF I AM WRONG, BUT I THINK THAT THE EVIDENTIARY
11 OBJECTIONS WENT TO DECLARATIONS, DID NOT GO TO ANY OF THE
12 DEPOSITION EVIDENCE, BUT ONLY TO VARIOUS DECLARATIONS.
13 AND QUITE FRANKLY, IF I WERE TO RULE ON EACH AND EVERY ONE
14 OF THE EVIDENTIARY OBJECTIONS, I THINK WE PROBABLY WOULD
15 BE HERE IN TO THE AFTERNOON IF WE HAD ARGUMENT ON ALL OF
16 THOSE.

17 BUT I HAVE REVIEWED THEM ALL VERY CAREFULLY AND I
18 FOUND MERIT TO SOME OF THE OBJECTIONS ON ALL SIDES AND I
19 HAVE, IN MAKING MY ANALYSIS, DISREGARDED ALL INADMISSIBLE
20 OR INCOMPETENT EVIDENCE IN RULING ON THE PETITIONS.

21 AND I WILL NOTE FOR THE RECORD THAT I DID RESEARCH
22 THE APPELLATE REVIEW STANDARD FOR THIS MATTER BEFORE THE
2 3 COURT THIS MORNING, AND DETERMINATION OF ARBITRABILITY IS
24 A LEGAL QUESTION SUBJECT TO DE NOVO REVIEW. THE REASON I
25 RESEARCHED THAT IS THAT I THINK THE ANALYSIS OF THE COURT
26 RELATIVE TO RULING ON EVIDENTIARY OBJECTIONS RELATIVE TO

1 MOTIONS FOR SUMMARY JUDGMENT IS VERY SIMILAR HERE AS
2 STATED IN THE BILJAC CASE WHICH I'D BE HAPPY TO GIVE YOU
3 THE CITE. I NEED NOT IF YOU ARE FAMILIAR WITH THAT
4 PARTICULAR DECISION'. OKAY.

5 MR. SCHENKKAN: ALL RIGHT. YOUR HONOR,
6 THANK YOU. THE FIRST STEP IN THE COURT ANALYSIS WAS WITH
7 RESPECT TO UNEQUAL BARGAINING POWER WHICH IS AN ELEMENT OF
a PROCEDURAL UNCONSCIONABILITY UNDER THE STATE STANDARD,
9 ALTHOUGH BY NO MEANS THE WHOLE THING.

10 AND I DON'T KNOW WHAT IT IS IN THIS RECORD THAT
11 REFLECTS THAT THERE WAS UNEQUAL BARGAINING POWER BETWEEN
12 THE PARTIES. THERE WAS A COMPANY THAT HAD A PRODUCT AND
13 THERE WERE INDIVIDUAL BORROWERS, ALL OF WHOM OWNED THEIR
14 OWN HOMES HAD APPARENTLY BEEN SUCCESSFUL ENOUGH IN LIFE
15 THAT THEY HAD COME TO THAT STATUS IN LIFE AND WERE
16 INTELLIGENT ENOUGH TO KNOW ABOUT REVERSE MORTGAGES AND
17 YADE INQUIRIES ABOUT REVERSE MORTGAGES.

18 IN SOME INSTANCES, FOR EXAMPLE MR. WALKER AND MR.
19 ZRANDAL HAVE RESEARCHED REVERSE MORTGAGES AND COLLECTED
20 INFORMATION ON THEM AND HAD MADE SOME INITIAL DECISIONS
21 ABOUT WHO THEY WANTED TO TALK TO PURSUE THE ISSUE FURTHER
22 BEFORE ANYONE EVER CONTACTED HOMEFIRST. IN MOST OF THESE
23 INSTANCES IF NOT ALL OF THEM, IT IS -- PEOPLE HAD ADVISORS
24 INCLUDING ATTORNEYS IN SOME INSTANCES OR TRUSTED FRIENDS
25 WITH BUSINESS EXPERIENCE, THEIR SONS IN THE CASE OF MR.
26 WALKER, THEIR ADULT SONS ACTUALLY MADE THE FIRST INQUIRIES

1 ON THEIR BEHALF TO HOMEFIRST.

2 AND IN SOME INSTANCES DEALING WITH MR. ASHLEY, ONE
3 INDEPENDENT SALES AGENT WHO SOLD A NUMBER OF THESE WERE
4 DEALING WITH INDEPENDENT SALES AGENT WHO ACTUALLY
5 REPRESENTED A NUMBER OF DIFFERENT PRODUCTS, DIFFERENT
6 COMPANIES.

7 I DON'T KNOW HOW THAT RECORD COULD SHOW GROSS
8 DISPARITY IN BARGAINING POWER. THIS WAS A STARTUP
9 COMPANY. THE PLAINTIFFS HAVE TRIED TO BLAME -- THIS IS
10 TRANS AMERICA CORPORATION, IT IS NOT -- IT IS HOMEFIRST.
11 IT IS AN INDIRECT SUBSIDIARY THAT WAS CREATED TO PROVIDE
12 THIS PARTICULAR PRODUCT, ONLY SOLD RELATIVE FEW OF THEM IN
13 THE COURSE OF ITS EXISTENCE.

14 THE EVIDENCE IS THAT WHERE A BORROWER WAS
15 PARTICULARLY CONCERNED ABOUT A PROVISION UNSUITABLE TO IT
16 AND RAISED IT, HOMEFIRST WAS WILLING TO SIT DOWN AND
17 DISCUSS IT WITH THEM AND NEGOTIATE IT AND IN SOME
18 INSTANCES MADE CHANGES.

19 NOW THERE WEREN'T A WHOLE LOT OF INSTANCES LIKE
20 THAT, BUT THAT DOESN'T REFLECT DISPARITY IN BARGAINING
21 POWER THAT PEOPLE DIDN'T -- WERE UNCOMFORTABLE WITH
22 PROVISIONS AND DIDN'T NEGOTIATE THEM SIMPLY NOTHING IN THE
23 RECORD TO SHOW PEOPLE WERE UNCOMFORTABLE WITH PROVISIONS
24 FELT THEY COULDN'T NEGOTIATE THEM.

25 NOW IN ADDITION, THE COURT CITED GRAHAM FOR THE
26 PROPOSITION OF SOPHISTICATION AND THAT IS TRUE. BUT LOOK

1 AT THE SITUATION, IN GRAHAM THERE SOPHISTICATION WAS
2 EXCLUDED AS IRRELEVANT CONSIDERATION BECAUSE THAT CONTRACT
3 WAS PRESENTED ON A TAKE IT OR LEAVE IT BASIS. MR. GRAHAM
4 HAD NO CHOICE IF HE WAS GOING TO HIRE ENTERTAINERS FOR HIS
5 PRODUCTION IT HAD TO BE USING THAT UNION CONTRACT BECAUSE
6 THAT WAS THE CONTRACT THAT ALL OF THE TALENT WAS OBLIGATED
7 TO USE. HE COULDN'T GO ANY PLACE ELSE. IT WASN'T A
a QUESTION OF BEING SOPHISTICATED IN NEGOTIATIONS,
9 SOPHISTICATED ENOUGH TO UNDERSTAND WHAT HE WAS ENTERING
10 INTO IN THAT CASE WHICH IS AN UNUSUAL ONE.

11 FOR THAT REASON, ALL OF THAT SOPHISTICATION WENT BE
12 THE BOARDS BECAUSE HE COULDN'T DO ANYTHING ABOUT THE
13 SITUATION.

14 THAT IS NOT THIS CASE. THAT IS NOT THE RECORD IN
15 THIS CASE, AT ALL.

16 THE COURT: WHAT ABOUT THE EVIDENCE
17 THOUGH THAT THE ARBITRATION PROVISIONS IN NOT ONLY THESE
18 REVERSE MORTGAGES, BUT IN ALL OTHER REVERSE MORTGAGES THAT
19 WERE EVER SOLD BY HOMEFIRST, WERE NEVER MODIFIED?

20 MR. SCHENKAN: THE COURT SEEMS TO THINK
21 THAT SUGGESTS THE PARTIES HAD NO BARGAINING POWER. I
22 WOULD SUBMIT THAT SUGGESTS THAT ARBITRATION IS SUCH A
23 FAVORED PROCESS IN THIS COUNTRY AND IN THIS STATE AS
24 RECOGNIZED BY STATE LAW ITSELF, THAT PEOPLE DON'T FEEL THE
25 NEED TO OBJECT TO AN ARBITRATION PROVISION IN A CONTRACT.

26 AND I THINK, IN FACT, THAT IF THE COURT INDULGES

1 THE OPPOSITE INTENDMENT FROM THAT AMBIGUOUS AT BEST
2 EVIDENCE, IT IS VIOLATING THE PRINCIPLE THAT IT MUST
3 INDULGE EVERY INTENDMENT TO GIVE FACT TO ARBITRATION
4 CLAUSE. THE FACT ONE IN EFFECTUATION I THINK THAT FIRST
5 PRINCIPLE IS BEING CITED HERE BY THE COURT'S TENTATIVE
6 ANALYSIS.

7 THE COURT: BUT IN GIVING EFFECT TO THE
a ARBITRATION PROVISIONS, DOESN'T THE LAW SAY I HAVE TO GIVE
9 AFFECT TO THE AGREEMENT OF THE PARTIES? THAT IS WHAT THE
10 PUBLIC POLICY RECOGNIZES. IF THE PARTIES AGREE TO
11 ARBITRATE, THEN I, THE COURT, NEED TO ENFORCE THEIR
12 AGREEMENT.

13 WHAT AGREEMENT DID THEY MAKE UNDER THE LANGUAGE?
14 THAT TROUBLES ME IN THESE ARBITRATION PROVISIONS. WHAT DO
15 YOU SUPPOSE THE BORROWERS THOUGHT WAS GOING TO BE SUBJECT
16 TO ARBITRATION BY HOMEFIRST AND NOT WITH THOSE PROVISIONS
17 THAT I HAVE CITED?

18 MR. SCHENKKAN: AND I THINK THE COURT IS --
19 THE DISTINCT ISSUE, THE FIRST ISSUE, WHAT DOES THE
20 ARBITRATION CLAUSE PROVIDE WITH RESPECT TO THE BORROWER?
21 AND I DON'T THINK THE COURT FOUND ANYTHING UNAMBIGUOUS
22 ABOUT THE ARBITRATION CLAUSE, AT LEAST WITH RESPECT TO
23 BORROWERS. THE BORROWERS BASICALLY ARE REQUIRED TO
24 ARBITRATE ALL ITS DISPUTES.

25 THE QUESTION BECOMES THERE IS A CARVE OUT OF SOME
26 SORT HERE IN THIS AGREEMENT FOR SOMETHING RELATIVE TO

1 HOMEFIRST. NOW TO ABROGATE THE ENTIRE ARBITRATION CLAUSE
2 ON THE BASIS OF AMBIGUITY IN ITS -- IN THE EXTENT TO WHICH
3 IT AFFECTS HOMEFIRST'S OBLIGATION TO ARBITRATE WOULD BE
4 APPROPRIATE IF, IN FACT, THE COURT'S CONCLUSION WAS IT IS
5 ENTIRELY A ONE-SIDED DOCUMENT.

6 THE COURT: THAT IS MY CONCLUSION.

7 MR. SCHENKKAN: I UNDERSTAND THAT. I WOULD
a JUST SUGGEST THIS IS A VERY DIFFERENT CASE THAN THE
9 STIRLEN CASE FOR EXAMPLE OR THE KINNEY CASE WHICH ARE THE
10 TWO KIND OF LEADING CASES IN THE LAW ON LACK OF MUTUALITY
11 WHERE THERE WAS NO MODICUM OF BILATERAL IN THE PHRASE OF
12 STIRLEN CASE IN EITHER INSTANCE 'AND THERE WERE ALSO
13 VARIETY OF OTHER PROBLEMS WITH THOSE PROVISIONS
14 ONE-SIDEDNESS IN THOSE PROVISIONS.

15 HERE, IN THE STIRLEN CASE NO AMBIGUITY ABOUT THE
16 CARVE OUTS FOR THE FIRST INSERTING ARBITRATION CLAUSE.
17 HERE WHAT THE COURT IS FINDING THERE IS SOME AMBIGUITY
18 ABOUT THE CARVE OUT, IF I READ IT ONE WAY, TREMENDOUSLY
19 BROAD, IS TOO ONE-SIDED TO ENFORCE, BUT AGAIN THE FIRST
20 PRINCIPLE IS, YOU INDULGE EVERY INTENDMENT TO GIVE AFFECT
21 TO ARBITRATION CLAUSE NOT TO RULE AGAINST IT.

22 AND THERE ARE CERTAINLY OTHER WAYS OF READING THIS
23 CLAUSE, READING THOSE CARVE OUTS IN MORE LIMITED FASHION
24 THAT ABSOLUTELY YOU WILL NOT ELIMINATE THE KIND OF
25 ONE-SIDEDNESS. THAT WAS THE BASIS OF THE RULINGS IN
26 STIRLEN AND KINNEY. IT SOUNDS TO ME AS IF THE COURT HAS

1 NOT DONE THAT.

2 THE COURT -- THE QUESTION THE COURT OUGHT TO BE
3 ASKING ITSELF HERE IS EVEN THOUGH THERE IS SOME ARGUABLE
4 AMBIGUITY, AND HONESTLY I WOULD DISPUTE THAT ACCEPTING FOR
5 A MOMENT THERE IS SOME AMBIGUITY YOU HAVE TO GO TO OTHER
6 PLACES IN THE CONTRACT TO CLARIFY WHAT THIS PROVISION IS.

7 IS THERE A WAY OF READING THIS CARVE OUT THAT SAYS
8 THE ARBITRATION CLAUSE? THAT'S THE QUESTION I THINK THE
9 COURT IS OBLIGATED TO ANSWER, ASK IT AND ANSWER UNDER THE
10 JURY PRINCIPLES THAT GOVERN THESE PETITIONS.

11 AND IN OUR BRIEFS, WE WENT TO CONSIDERABLE LENGTH
12 TO EXPLAIN HOW, IN FACT, THOSE CARVE OUTS ARE VERY
13 LIMITED. THEY ONLY AFFECT REMEDIES FIRST, THAT IS VERY
14 IMPORTANT DISTINCTION. THEY DON'T AFFECT CLAIMS, THEY
15 DON'T AFFECT DISPUTES TO THE EXTENT THERE IS DISPUTE
16 BETWEEN THE PARTIES AS TO WHETHER THE MONEY IS OWED AS TO
17 WHETHER THE TERMS OF THE LOAN HAVE BEEN BREACHED, ALL OF
18 THOSE CONTROVERSIES AND CLAIMS ARE SUBJECT TO ARBITRATION.

19 WHAT THE CARVE OUT IS LIMITED TO IS CERTAIN
20 REMEDIES. AND THE REMEDIES THAT REFERS TO IF YOU LOOK
21 BACK THROUGH THE REST OF THE AGREEMENT AND THIS IS
22 INTEGRATED DOCUMENT, AND JUST BECAUSE YOU DON'T FIND THE
23 ANSWER TO SOMETHING IN ONE PART OF IT DOESN'T MEAN IT
24 DOESN'T EXIST IN THE DOCUMENT.

25 LOOK AT WHAT THOSE REMEDIES ARE AND THEY ARE THE
26 VERY SPECIFIC REMEDIES THAT GOVERN A BORROWER'S RIGHTS

1 RELATIVE TO THE SECURITY INTEREST IN THE PROPERTY.
2 EFFECTIVELY WHAT WAS RECOGNIZED IN THE MC **CARTHY** CASE, WE
3 DON'T CITE THAT CASE AS A BINDING PRECEDENT ON THIS COURT,
4 BUT WE CITE IT AS ILLUSTRATION OF **APPROPRIATE** ANALYSIS OF THIS
5 VERY ISSUE AMONG OTHERS.

6 THE REMEDIES THAT ARE INVOLVED HERE ARE THE RIGHT
7 TO GO TO COURT TO GET A RECEIVER APPOINTED TO TAKE CONTROL
8 OF THE PROPERTY TO PRESERVE IT, OBVIOUSLY, YOUR CRITICAL
9 RIGHT OF THE LENDER BECAUSE ITS ONLY RECOURSE IS TO THE
10 PROPERTY IN THE EVENT OF DEFAULT. WELL ARBITRATORS DON'T
11 HAVE THE POWER TO APPOINT RECEIVERS, THAT REQUIRES AN
12 EXERCISE OF JUDICIAL POWER UNDER STATE LAW AND SO AN
13 ARBITRATOR CAN'T DO THAT.

14 AND, IN FACT, IF YOU LOOK AT THE STATE LAW OF
15 ARBITRATION 1281 AND SEQUENTIAL PROVISIONS, THOSE STATE
16 STATUTES CARVE OUT **THE** RIGHT TO GO TO COURT FOR THE
17 APPOINTMENT OF A RECEIVER TO TAKE CONTROL OF THE PROPERTY.
18 SO IF IT IS NOT INCONSISTENT UNDER STATE LAW TO DO THAT,
19 HOW CAN IT BE SO INCONSISTENT UNDER PRIVATE AGREEMENT TO
20 DO IT? THAT IT RENDERS THE AGREEMENT ONE-SIDED, TOO
21 ONE-SIDED TO ENFORCE. THAT IS THE RECEIVERSHIP **REMEDY**.

22 THE OTHER JUDICIAL REMEDY AND ALWAYS ONE OTHER THAT
23 WE ARE AWARE OF HERE, IS JUDICIAL FORECLOSURE. OF COURSE,
24 NOTHING IN CALIFORNIA EVER GOES TO JUDICIAL FORECLOSURE
25 ANYWAY, BUT AGAIN, JUDICIAL FORECLOSURE IS THE SORT OF
26 THING AN ARBITRATOR CANNOT GRANT, SIMPLY DOESN'T **HAVE** THE

1 POWER TO GRANT. AND WE CITED THE AUTHORITY FOR THAT.
2 THAT IS ANOTHER ILLUSTRATION OF HOW ALL OF THE AGREEMENTS
3 DOING THIS, MAKING IT CLEAR THAT THAT TYPE OF REMEDY IS
4 CARVED OUT, SHALL BE WITHOUT PREJUDICE TO THAT REMEDY IS
5 SIMPLY AFFIRMING WHAT THE LAW ALREADY PROVIDES.

6 THE COURT: MR. SCHENKKAN, I UNDERSTAND
7 THAT ARGUMENT. WHAT I DON'T UNDERSTAND IS, CAN YOU HELP
8 ME RECONCILE THE BLANKET CLAUSE THAT EXCLUDES HOMEFIRST
9 REMEDIES, THE BLANKET CLAUSE WHICH SAYS ARBITRATION MAY
10 NOT DELAY OR ADVERSELY AFFECT THE ABILITY OF HOMEFIRST TO
11 EXERCISE ITS REMEDIES UNDER THE LOAN DOCUMENTS?

12 MR. SCHENKKAN: RECONCILE IT WITH
13 MUTUALITY?

14 THE COURT: NO. I MEAN, IT DOESN'T
15 LIMIT THE REMEDIES THERE, IT JUST TALKS ABOUT REMEDIES IN
16 GENERAL.

17 MR. SCHENKKAN: RIGHT. BUT WHAT THAT MEANS
18 ONE HAS TO ASK ONESELF IS WHAT ARE THE REMEDIES UNDER THE
19 LOAN DOCUMENTS? IF YOU LOOK AT THE BALANCE OF THE
20 DOCUMENT, I THINK I AM GOING TO BE WORKING FROM --

21 THE COURT: THE FACT IT TALKS ABOUT
22 "ANY OF THE REMEDIES AVAILABLE." I AM LOOKING AT
23 PARAGRAPH 20. IT IS THE LAST SENTENCE.

24 MR. SCHENKKAN: I AM LOOKING.

25 THE COURT: THIS IS IN THE GRAY DEED OF
26 TRUST.

1 MR. SCHENKKAN: IF 'WE CAN JUST TAKE A
2 MOMENT SO WE ARE SURE WE ARE ALL LOOKING AT THE SAME.

3 THE COURT: SURE. PAGE EIGHT OF THE
4 DEED OF TRUST AND THE SAME CLAUSE APPEARS IN THE LAST.
5 SENTENCE OF PARAGRAPH 20 OF PROMISSORY NOTE ON PAGE **TEN.**

6 I THINK I MISSPOKE THE DEED OF TRUST IS THE **NEXT TO**
7 THE LAST SENTENCE AND THE PROMISSORY NOTE IS LAST
8 SENTENCE.

9 MR. SCHENKKAN: I DON'T HAPPEN TO HAVE IN
10 FRONT OF ME THE GRAY PETITION. I HAVE GOT THE WALKER
11 PETITION WHICH HAS ATTACHED TO IT LOAN AGREEMENT AND DEED
12 **OF** TRUST IN THAT CASE.

13 MR. MC CARTHY: I WONDER IF I CAN HAVE A
14 YOMENT?

15 THE COURT: YES.

16 IN WALKER PARAGRAPH 20 ALSO SECTION 20.

17 MR. MC CARTHY: I HAVE THE GRAY LANGUAGE IN
18 FRONT OF ME, IF I CAN HAND THAT TO MR. SCHENKKAN.

19 THE COURT: ALSO. PARAGRAPH 20 OF
20 PROMISSORY NOTE, THE LANGUAGE IS SUBSTANTIALLY THE SAME IN
21 **WALKER.**

22 MR. SCHENKKAN: ARE YOU NOW LOOKING AT THE
23 **WALKER?**

24 THE COURT: I WAS.

25 MR. SCHENKKAN: LET ME GO BACK TO WALKER
26 'HEN IF YOU TAKE THE DEED **OF** TRUST PARAGRAPH 20, **REFERS** TO

1 THE ARBITRATION DELAYING OR ADVERSELY AFFECTING ABILITY ²⁹ TC
2 EXERCISE ANY OF THE REMEDIES AVAILABLE TO YOU UNDER THE
3 SECURITY AGREEMENT OR UNDER THE LOAN AGREEMENT. SO ONE
4 THEN LOOKS UNDER THE BALANCE OF THE SECURITY AGREEMENT
5 THEN UNDER THE LOAN AGREEMENT TO SEE WHAT REMEDIES ARE
6 SPECIFIED THERE.

7 AND WHAT YOU SEE AND WE DID GO THROUGH THIS
a EXERCISE IN ONE OF OUR OPENING BRIEFS, AT LEAST I THINK
9 PERHAPS ALL OF THEM, BUT WHAT YOU SEE THERE ARE IN VARIOUS
10 PROVISIONS IN THE LOGICAL PLACE YOU WOULD EXPECT TO FIND
11 THEM IN THE AGREEMENTS, THERE ARE SOME REMEDIES SPELLED
12 BUT MOST OF THEM ARE SELF HELP REMEDIES. OF COURSE THE
13 RIGHT OF SET OFF, THE RIGHT TO GO IN AND NON JUDICIALLY
14 FORECLOSE ALL OF WHICH WOULD NOT BE AFFECTED BY
15 ARBITRATION IN ANY EVENT.

16 THE COURT: I THINK MR. SCHENKKAN YOU
17 KEEP JUMPING TO THE LAST PARAGRAPH 20 OUTSIDE OF THE BOX
18 IN THE WALKER DOCUMENT AND I AM STILL FOCUSING ON THE
19 SENTENCE THAT TALKS ABOUT ANY REMEDIES, ANY REMEDIES.

20 MR. SCHENKKAN: OKAY. DIRECT ME TO THE
21 FIGURE BEING INSIDE THE BOX AND THEN THE FURTHER LANGUAGE
22 OUTSIDE THE BOX?

23 THE COURT: RIGHT. BECAUSE LET'S LOOK
24 AT 20. IF WE START IN THE FIRST SENTENCE WE HAVE EXCLUDED
25 ONLY FORECLOSURE PROCEEDINGS INITIALLY. THEN IF WE GO
26 DOWN TO THE SENTENCE THAT I KEEP COMING BACK TO, WE HAVE

1 GOT A STATEMENT THAT SAYS THAT ARBITRATION MAY NOT WITHOUT
2 HOMEFIRST'S CONSENT DELAY OR ADVERSELY AFFECT' HOMEFIRST'S
3 ABILITY TO EXERCISE ANY OF THE REMEDIES AVAILABLE TO IT
4 UNDER THE SECURITY AGREEMENT OR UNDER THE LOAN AGREEMENT.'

5 MR. SCHENKKAN: RIGHT.

6 THE COURT: THEN THE NEXT PARAGRAPH ARE
7 THE SPECIFIC CUT OUTS THAT YOU'RE REFERRING TO.

a MR. SCHENKKAN: WELL, I THINK THERE IS
9 REDUNDANCY THERE, YOUR HONOR. I DON'T THINK REDUNDANCY IS
10 FATAL TO AN AGREEMENT ESPECIALLY WHERE THE OBLIGATION IS
11 TO READ THE AGREEMENT IN THE WAY THAT PRESERVES THE RIGHT
12 TO ARBITRATE.

13 THE COURT: I AM JUST TRYING TO FIGURE
14 OUT WHAT THE PARTIES AGREEMENT WAS.

15 MR. SCHENKKAN: YOUR HONOR, I THINK THE
16 PARTIES AGREE AND IT IS STATED THERE TO THE EXTENT IT THEN
17 TAKES READING THE BALANCE OF THE CONTRACT TO UNDERSTAND
18 WHAT EACH OF THE REMEDIES IS THAT IS SET FORTH IN THE
19 CONTRACT, THAT IS WHAT WE HAVE TO DO. AND THAT IS WHAT I
20 HAVE -- I WAS STARTING TO DO.

21 THE FACT THAT ONE PART OF THE CONTRACT REFERS BACK
22 TO ANOTHER PART OF THE CONTRACT OR INCORPORATES PROVISIONS
23 ELSEWHERE IN THE CONTRACT DOESN'T RENDER THE CONTRACT
24 AMBIGUOUS. IT MAY REQUIRE YOU TO DO SOME ADDITIONAL
25 STUDY. AND YOU MAY EVEN WANT TO HAVE A LAWYER LOOK AT IT.

26 PEOPLE WERE ADVISED OF THE SITUATIONS THAT THEY

1 SHOULD SEEK LEGAL COUNSEL OR OTHER ADVICE TO HELP THEM
2 UNDERSTAND THE FULL PANOPLY OF RIGHTS AND RESPONSIBILITIES
3 THEY WERE TAKING ON HERE.

4 THERE IS ABSOLUTELY NOTHING WRONG WITH THAT IN
5 TERMS OF WHAT IT IS THAT HOMEFIRST IS OBLIGATED TO
6 ARBITRATE HERE. IT IS OBLIGATED TO ARBITRATE ANY
7 CONTROVERSY OR CLAIM. IT IS JUST THAT IT IS STILL
a ENTITLED, EVEN IN THAT EVENT, TO- EXERCISE ITS SELF HELP
9 REMEDIES WHICH ARE NOT INCONSISTENT WITH ARBITRATION TO
10 BEGIN WITH, AND TO SEEK THE OTHER SPECIFIC REMEDIES THAT
11 IT IS ENTITLED TO UNDER THE LOAN AGREEMENTS PRIMARILY, IF
12 NOT EXCLUSIVELY, THAT IS FORECLOSURE, JUDICIAL OR NON
13 JUDICIAL FORECLOSURE AND RIGHT TO GO IN AND SEEK A
14 RECEIVER. BUT IT ALSO INCLUDES FOR EXAMPLE, THE RIGHT TO
15 INSPECT, PARAGRAPH SEVEN OF RIGHT TO INSPECT THE PROPERTY.

16 AND IF THERE IS DISPUTE OVER THAT RIGHT TO INSPECT
17 SOMEONE CONTENDS THEY DON'T HAVE THE RIGHT TO INSPECT,
18 THAT IS SUBJECT TO ARBITRATION. BUT THE REMEDY OF
19 INSPECTION ITSELF IS NOT -- IT IS NOT THE ARBITRATOR THAT
20 GETS TO GO IN AND INSPECT, IT IS THE LENDER WHO DOES.

21 I MEAN, THE POINT IS THESE ARE LEGAL DOCUMENTS
22 WHICH PROVIDE FOR VARIETY OF REMEDIES SOME OF WHICH ARE
23 EMPLOYED BY LAW, SOME OF WHICH ARE EXPRESS IN THE
24 DOCUMENTS. THE CARVE OUT IS JUST FOR THOSE REMEDIES, IT
25 IS NOT FOR THE UNDERLYING DISPUTE OF FACT OR LAW. THAT
26 WOULD HAVE TO BE RESOLVED BETWEEN THE PARTIES. IT IS

1 ACTUAL-LY THE KIND OF THING IN MC CARTHY CASE THE COURT
2 SAID WAS ENTIRELY REASONABLE TO CARVE OUT.

3 THE COURT: OKAY.

4 MR. SCHENKKAN: AGAIN, JUST COME BACK TO
5 THE EXTENT THERE IS ANY AMBIGUITY IN THAT IT DOESN'T
6 BECOME REASON TO INVALIDATE THE ARBITRATION **PROVISION**, IT
7 IS BECOMING A REASON TO READ IT NARROWLY, TO ENFORCE IT.
8 THE COURT WOULD INCLUDE IT, WOULD OTHERWISE RENDER THE
9 CLAUSE UNENFORCEABLE THEN IT IS OBLIGATED TO LOOK AND ASK
10 ITSELF, WELL IS THERE A WAY TO RENDER IT ENFORCEABLE?

11 THE COURT: MR. SCHENKKAN, IF I BUY
12 THAT ARGUMENT, ONCE I CONCLUDE THAT THIS IS AN UNILATERAL
13 AGREEMENT TO ARBITRATE, THE ONLY WAY I CAN ENFORCE IT IS
14 TO TAKE OUT THE UNILATERAL AGREEMENT. I DON'T THINK THAT
15 CASE STANDS FOR THAT PROPOSITION IF IT IS AN UNILATERAL
16 AGREEMENT, IT IS UNENFORCEABLE AS UNCONSCIONABLE.

17 MR. SCHENKKAN: WELL, I WOULD AGREE WITH
18 YOU. IF THE COURT CONCLUDED THAT IT -- THAT IT WAS
19 UNAMBIGUOUSLY UNILATERAL, THAT WOULD BE TRUE, BUT THAT'S
20 NOT THE WAY THE COURT IS REACHING ITS CONCLUSION THAT IT
21 MAY BE TOO UNILATERAL HERE TO BE ENFORCEABLE.

22 AND THIS BRINGS US TO THE OTHER POINT WHICH IS THAT
23 IF THE PROBLEM **IS** THE CARVE OUT, IN THE COURT'S OPINION,
24 AND WITHOUT THE CARVE OUT IT IS AN ENFORCEABLE AGREEMENT
25 BECAUSE IT IS ENTIRELY MUTUAL, AND THE COURT'S OBLIGATION
26 IS TO SEVER THE OFFENDING TERM FROM THE **ARBITRATION** CLAUSE

1 AND ENFORCE THE BALANCE OF IT. AND WE CITED NUMBER OF
2 CASES FOR THAT PROPOSITION.

3 THE DIVISION BETWEEN THE CASES THE COURT I THINK
4 HAS IN MIND WHERE ONE-SIDEDNESS INVALIDATED THE WHOLE
5 CLAUSE, IN THIS CASE THERE WAS NO -- THE BASIS FOR THE
6 ONE-SIDEDNESS IN THOSE CASES WAS NOT AMBIGUITY, AS TO THE
7 EXTENT OF THE CARVE OUT AND THEREFORE AMBIGUITY AS TO
a WHETHER IT WAS ONE-SIDED. THOSE PROVISIONS WERE
9 UNAMBIGUOUSLY ONE-SIDED LACKING EITHER MODICUM OF
10 BILATERAL ON THEIR FACE.

11 HERE THERE IS AT LEAST, I THINK THE COURT WOULD
12 AGREE, A LEGITIMATE QUESTION. THE PROBLEM IN THE COURT'S
13 VIEW IS **AMBIGUITY AS** TO WHAT IT REALLY PROVIDES. THERE
14 THE COURT'S OBLIGATION BECAME TO SALVAGE THE ARBITRATION
15 CLAUSE. THAT MEANS CARVING OUT -- SEVERING **OUT THE**
16 OFFENDING TERMS, THE CARVE OUT AND SAYING THOSE WOULDN'T
17 BE ENFORCED BUT THAT RENDERS THE WHOLE AGREEMENT MUTUAL
18 AND THEREFORE THERE IS NO PROBLEM OF ENFORCEABILITY.

19 THE COURT: WELL MR. SCHENKKAN, I THINK
20 WHAT I AM SAYING THOUGH, AS I READ ALL OF THE PROVISIONS,
21 ALL OF THE SENTENCES TOGETHER IN THIS PARTICULAR
22 ARBITRATION CLAUSE, I REALLY AM LEFT WITH NO CONCLUSION
2 3 BUT THAT IT APPEARS THAT HOMEFIRST AT ITS OPTION CAN SAY
24 I'HAT THE ARBITRATION IS UNDULY GOING TO DELAY OR ADVERSELY
25 AFFECT ITS REMEDIES UNDER THE LOAN DOCUMENTS AND THEREFORE
26 IT IS NOT SUBJECT TO ARBITRATION.

1 MR. SCHENKKAN: I JUST DON'T THINK THAT IS
2 A FAIR READING OF THE CLAUSE, YOUR HONOR, AND I THINK WE
3 ARE ENTITLED TO A FAIR READING OF THE CLAUSE UNDER THE
4 FIRST PRINCIPLE.

5 AS I MENTIONED, I THINK THAT IS EXTREME READING OF
6 THE CLAUSE AND NOT WARRANTED. AND IT IS A READING THAT
7 EVEN THE PETITIONERS THEMSELVES HAVEN'T ARGUED IS THE WAY
a IT SHOULD BE READ. THEY MADE OTHER ARGUMENTS ABOUT WHAT
9 THAT SAID, NEVER ARGUED THAT INTERPRETATION.

10 THE COURT: LET ME HEAR FROM THE OTHER
11 PARTIES IN A MINUTE. LET'S HAVE YOU MOVE ONTO YOUR 'NEXT
12 POINT, PLEASE.

13 MR. SCHENKKAN: WELL, THE ONLY OTHER FACTOR
14 THE COURT MENTIONED IN ITS ANALYSIS, I BELIEVE, WAS THAT
15 THIS WAS OBVIOUSLY A LENGTHY FORM CONTRACT. AND IT IS
16 VERY CLEAR THAT THAT IN AND OF ITSELF HAS NO BEARING NOT
17 DISPOSITIVE EVEN UNDER A CONTRACT OF ADHESION ANALYSIS.
18 IT IS -- THEY ARE LENGTHY DOCUMENTS; THEY ARE LEGAL
19 DOCUMENTS. THEY ARE NECESSARILY DENSE IN SOME OF THEIR
20 PROVISIONS.

21 IF THAT WERE TO INVALIDATE AGREEMENTS THAT PEOPLE
22 MADE THESE DAYS, THERE WOULD BE VERY FEW AGREEMENTS
23 CERTAINLY IN THE CONSUMER ARENA THAT COULD' HAVE BEEN
24 ENFORCED.

25 SO THE QUESTION HAS TO BE SOMETHING MORE THAN THE
26 MERE FACT THAT THEY ARE -- THEY HAVE A LOT OF **GENERIC**

1 TERMS AND THE EVIDENCE IS THAT WHERE PEOPLE CARE TO
 2 NEGOTIATE OVER ISSUES, HOMEFIRST DID NEGOTIATE, IN FACT,
 3 SOME SENTENCES CHANGED VERY MATERIAL TERMS. THE FACT THAT
 4 NO ONE EVER ASKED TO CHANGE THE ARBITRATION CLAUSE, CAN
 5 HARDLY BE HELD AGAINST THE ENFORCEABILITY OF THE
 6 ARBITRATION.

7 IF THERE WERE EVIDENCE IN THIS RECORD THAT PEOPLE
 a HAD SOUGHT TO CHANGE IT AND HOMEFIRST HAD SIMPLY REFUSED
 9 TO CONSIDER IT, THAT WOULD ENTER INTO ANALYSIS UNDER THE
 10 PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY DOCTRINE, BUT
 11 THERE IS NO EVIDENCE IN THIS RECORD OF THAT. AND, IN
 12 FACT, THE ONLY EVIDENCE THERE IS IN THIS RECORD ON THAT
 13 SUBJECT, IS THE STATEMENT BY THE PRESIDENT OF HOMEFIRST,
 14 THAT ALTHOUGH NO ONE EVER DID MAKE A REQUEST TO MODIFY THE
 15 ARBITRATION CLAUSE, HOMEFIRST WOULD HAVE CONSIDERED IT IF
 16 IT HAD BEEN SOUGHT, NOT NECESSARILY HOMEFIRST WOULD HAVE
 17 AGREED TO DO IT, THAT WOULD OBVIOUSLY DEPEND UPON THE
 18 CIRCUMSTANCES, BUT HOMEFIRST WOULD HAVE BEEN WILLING TO
 19 CONSIDER IT. THAT IS THE STATE OF THIS RECORD.

20 THE COURT: BUT THAT IS RATHER
 21 SPECULATIVE ISN'T IT, SINCE THAT DIDN'T HAPPEN? I MEAN,
 22 THE FACTS, THE EVIDENCE THAT WE HAVE IS THAT THE
 23 ARBITRATION PROVISIONS NEVER WERE MODIFIED AND NOBODY EVER
 24 REQUESTED THAT THEY BE MODIFIED. THAT IS THE EVIDENCE
 25 THAT IS BEFORE THE COURT.

26 MR. SCHENKKAN: YES.

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THE COURT: AND I DON'T THINK ANY OF US
CAN SPECULATE WHAT WOULD HAVE HAPPENED IF SOMEBODY HAD
REQUESTED.

MR. SCHENKKAN: WELL, I THINK IT IS NOT
SPECULATION THAT THE PRESIDENT OF THE COMPANY SAYS WE
WOULD HAVE CONSIDERED IT. THAT IS NOT SPECULATION. IT
WOULD BE SPECULATION FOR SOMEONE TO SUPPOSE THAT HAVING
CONSIDERED IT THEY THEN WOULD THEN AGREE TO IT. THAT
WOULD BE SPECULATIVE.

THE POINT HERE, YOUR HONOR, IS THAT THE COURT IS
INDULGING IN SPECULATION. THE COURT IS INDULGING IN
SPECULATION AGAINST THE ENFORCEABILITY OF THE ARBITRATION
CLAUSE AND THAT IS SPECULATION THAT PREMISE OF THE COURT'S
ANALYSIS IS THAT BECAUSE THE ARBITRATION CLAUSE WAS NEVER
CHANGED, IT MUST HAVE BEEN NON NEGOTIABLE.

THERE IS NO EVIDENCE IN THAT REGARD OF THAT, NONE
WHATSOEVER. AND FOR THE COURT TO GIVE ANY WEIGHT TO THAT
FACT, IN RULING AGAINST ARBITRATION IS TO GO DIRECTLY
AGAINST ITS OBLIGATION TO INDULGE EVERY INTENDMENT TO GIVE
EFFECT TO THE ARBITRATION CLAUSE. THE COURT IS DOING THE
EXACT OPPOSITE IN INCIDENTAL INTENDMENT TO FIND IT
UNENFORCEABLE.

THE COURT IS OBLIGATED UNDER THESE FIRST PRINCIPLES
IN THE FACE OF THIS RECORD TO CONCLUDE THAT THERE IS
NOTHING HERE TO SAY THE ARBITRATION CLAUSE WAS PRESENTED
ON A TAKE IT OR LEAVE IT NON NEGOTIABLE BASIS. IN FACT,

1 THE RECORD SUGGESTS HOMEFIRST MIGHT HAVE BEEN WILLING TO
2 DISCUSS MODIFYING THAT CLAUSE.

3 NOT ONLY DOES IT OFFEND THE OBLIGATION TO INDULGE
4 EVERY INTENDMENT TO GIVE AFFECT TO THE ARBITRATION CLAUSE;
5 BUT IT REALLY GOES DIRECTLY AGAINST WHAT THE LAW IS OF
6 CALIFORNIA ON ARBITRATION. THE LAW FAVORS ARBITRATION.
7 CLAUSES.

a IF THE COURT IS PRESENTED WITH TWO POSSIBLE
9 EXPLANATIONS FOR WHY THERE HAS NEVER BEEN A CHALLENGE TO
10 THAT ARBITRATION CLAUSE IN NEGOTIATIONS OVER THESE
11 CONTRACTS, ONE OF THEM THE PREMISE OF WHICH IS PEOPLE
12 DON'T LIKE IT, DIDN'T WANT IT, FELT POWERLESS TO DO
13 ANYTHING ABOUT IT, THE OTHER WHICH IS THAT PEOPLE AGREED
14 TO DISPUTES OUGHT TO BE SUBJECT TO ARBITRATION.

15 HOW CAN IT POSSIBLY FAVOR THE PREMISE THAT
16 DISFAVORS ARBITRATION WHEN THE LAW IN CALIFORNIA IS YOU
17 YUST -- THAT WE FAVOR ARBITRATION THAT IT IS A FAVORED
18 REMEDY?

19 THE COURT: I THINK THE LAW IN
20 CALIFORNIA IS THAT WHEN PEOPLE ENTER INTO AN AGREEMENT TO
21 ARBITRATE, THAT THERE IS PUBLIC POLICY IN FAVOR OF
22 ENFORCING THAT AGREEMENT. I KEEP COMING BACK TO THAT AND
23 I THINK THAT IS AN IMPORTANT ONE.

24 I AM TRYING TO DETERMINE FROM THE DOCUMENTS WHETHER
25 THE PARTIES AGREED TO ARBITRATE HERE AND WHETHER THE
26 AGREEMENT IS AN UNILATERAL AGREEMENT THAT HOMEFIRST WAS

1 NOT BOUND BY, AND I AM FOCUSING UPON THE REASONABLE
2 EXPECTATIONS OF THE PARTIES AS THEY ENTERED INTO THIS
3 DOCUMENT.

4 MR. SCHENKKAN: YOUR HONOR, IS NOW MOVING
5 FROM ONE ISSUE HERE TO ANOTHER.

6 THE COURT: I THINK THEY'RE RELATED.

7 MR. SCHENKKAN: THE ISSUE OF WHETHER-THERE
a WAS AGREEMENT, EVER AN AGREEMENT TO ARBITRATE, IS SEPARATE
9 AND APART FROM WHETHER WHATEVER AGREEMENT WAS REACHED WAS
10 SO ONE-SIDED THAT IT CAN'T BE ENFORCED. I THINK THE COURT
11 WOULD AGREE THOSE ARE TWO SLIGHTLY SEPARATE LEGAL ISSUES.
12 THERE HAS NEVER BEEN A CONTENTION IN THIS CASE THERE WAS
13 NOT AN AGREEMENT TO ARBITRATE.

14 NO ONE HAS HAD THE TEMERITY TO DISCUSS THAT THESE
15 ARE SIGNED DOCUMENTS THAT HAVE AN ARBITRATION CLAUSE IN
16 THEM. BEEN NO SUGGESTION PEOPLE DIDN'T KNOW WHAT THEY
17 WERE SIGNING, THEIR HAND WAS GUIDED OR SOMETHING LIKE
18 THAT. THERE IS AN AGREEMENT TO ARBITRATE HERE.

19 THE COURT'S CONCERN ON THE ONE HAND IS WHAT THE
20 SCOPE OF THAT AGREEMENT IS AND WHETHER IT IS TOO ONE-SIDED
21 TO BE ENFORCED. BUT **WHAT** I AM **ADDRESSING** RIGHT NOW IS AN
22 ENTIRELY DIFFERENT ISSUE WHICH IS THE ISSUE OF WHETHER
23 THERE CAN BE ANY SIGNIFICANCE GIVEN IN THE COURT ANALYSIS,
24 **NOT** THE FACT THAT THE ARBITRATION CLAUSE WAS NEVER
25 MODIFIED THAT GOES TO --

26 THE COURT: TAKE A LOOK AT THE'

1 PATTERSON CASE BECAUSE I THINK THE PATTERSON CASE IF I
2 LOOK AT PAGE 1664 DOES INDICATE THAT THE FACT THAT NONE OF
3 THE PREPRINTED ARBITRATION PROVISIONS HAS EVER BEEN
4 MODIFIED DOES SUGGEST THEY WERE NON NEGOTIABLE.

5 MR. SHENKKAN: WAS THE COURT ASKED TO
6 ADDRESS IN THAT CASE THE VERY ARGUMENT I JUST MADE WHY
7 THAT IS AN INCORRECT APPROPRIATE ANALYSIS? DID IT GRAPPLE
a WITH THE ISSUE? DID YOU TRY TO RECONCILE THAT COMMENT, IF
9 YOU WILL, TO ITS OBLIGATION UNDER THE LAW, TO INDULGE
10 EVERY INTENDMENT TO GIVE AFFECT TO ARBITRATION CLAUSE NOT
11 TO INDULGE IN ASSUMPTIONS AGAINST THE ENFORCEABILITY OF
12 THE LAWS?

13 DID IT ATTEMPT TO RECONCILE THAT COMMENT TO
14 CALIFORNIA'S STATED POLICY IN FAVOR OF ARBITRATION? HOW
15 IS IT CONSISTENT WITH THE FACT THAT THE LAW SAYS
16 ARBITRATION IS A BETTER REMEDY, IT IS SUCH A GOOD REMEDY
17 GOING TO HAVE SPECIAL RULES TO ENFORCE ARBITRATION CLAUSES
18 WITH REMEDI'ES THAT BECAUSE NOBODY EVER OBJECTED TO
19 ARBITRATION CLAUSE IT MUST SHOW THAT.IT WAS OFFERED. ON A
20 TAKE IT OR LEAVE IT BASIS.

21 THE REASON NEVER OBJECTED TO IT, I WOULD SUBMIT,
22 BECAUSE THEY DON'T HAVE ANY PROBLEM WITH ARBITRATION
23 CLAUSE PLUS THE STATE OF CALIFORNIA DOESN'T HAVE A PROBLEM
24 WITH ARBITRATION CLAUSES HAS SPECIAL RULES TO ENFORCE
25 THEM.

26 THE COURT: MR. SCHENKKAN, I DO WANT TC

1 ALLOW THE PLAINTIFFS TIME TO MAKE THEIR COMMENTS. DO YOU
2 HAVE ANY OTHER POINTS YOU'D LIKE TO ADDRESS BRIEFLY BEFORE
3 I ALLOW OTHER DEFENSE COUNSEL TO MAKE ORAL ARGUMENT.?

4 MR. SCHENKKAN: MAY I JUST HAVE A MOMENT?

5 THE COURT: YES.

6 MR. SCHENKKAN: NO, YOUR HONOR, NOT AT THIS
7 TIME.

8 THE COURT: ALL RIGHT. MS.
9 DILLINGHAM?

10 MS. DILLINGHAM: WE HAVE NOTHING TO ADD,
11 YOUR HONOR, TO THE COMMENTS MADE BY MR. SCHENKKAN. THANK
12 YOU.

13 THE COURT: MR. MC ALLEN?

14 MR. MC ALLEN: WE ALSO HAVE NOTHING TO
15 ADD.

16 THE COURT: LET'S HEAR FROM ONE OR MORE
17 OF THE PLAINTIFFS AND WHO WOULD LIKE TO GO FIRST?

18 MR. MC CARTHY: IF I MIGHT IF THAT IS ALL
19 RIGHT WITH MY COUNSEL, GOING TO BE EXTREMELY BRIEF BECAUSE
20 IT IS -- APPARENTLY, THE COURT HAS GIVEN CAREFUL
21 CONSIDERATION TO THE CASE LAW.

22 I JUST WANT TO ADDRESS ONE COMMENT THAT IS THE
23 ISSUE OF ONE-SIDEDNESS AND UNCONSCIONABILITY THAT IS
24 REALLY KEY ISSUE BEFORE THE COURT.

25 THE WAY THESE ARBITRATION CLAUSES ARE STRUCTURED,
26 HOMEFIRST HAS THE RIGHT TO ESSENTIALLY PURSUE **WHATEVER IT**

1 WANTS IN COURT WHILE THE **PLAINTIFFS** ARE REQUIRED TO GO TO
2 ARBITRATION. UNDER THE RECENTLY DECIDED CASE OF RAMIREZ,
3 THERE IS PRESUMPTION OF UNCONSCIONABILITY SO WE HAVE THAT
4 IN THE RECORD. THAT **IS** A CASE THAT WAS DECIDED **WITHIN THE**
5 LAST TWO WEEKS.

6 RAMIREZ READS AND I AM QUOTING FROM PAGE 9741, "IT
7 IS BY NOW WELL SETTLED THAT AN AGREEMENT THAT REQUIRES THE
8 WEAKER PARTY TO ARBITRATE ANY CLAIMS HE OR SHE MAY HAVE
9 BUT PERMITS THE STRONGER PARTY TO SEEK REDRESS THROUGH THE
10 COURTS, IS PRESUMPTIVELY UNCONSCIONABLE."

11 I WANT TO RAISE ONE OTHER FACTUAL ISSUE IF I COULD
12 BEFORE THE COURT. MR. SCHENKKAN JUST GAVE THE SUGGESTION
13 THAT WELL EVEN THOUGH THIS LANGUAGE ABOUT REMEDIES IS IN
14 THERE AND THAT WE HAVE THE OPTION OF PURSUING CERTAIN
15 REMEDIES THERE, THEY ARE VERY LIMITED. DON'T WANT TO
16 REITERATE THE WHOLE THING, IF I COULD DIRECT THE COURT IN
17 THE CONTRACTS TO PARAGRAPH 19 AND I AM SPECIFICALLY
18 REFERRING TO MY CLIENT'S CONTRACT.

19 THE COURT: IS THIS THE DEED OF TRUST
20 OR PROMISSORY NOTE?

21 MR. MC **CARTHY**: THIS, YOUR HONOR, IS DEED
22 OF TRUST. AND YOU WERE JUST READING FROM PARAGRAPH 20 THE
23 LANGUAGE ON ARBITRATION. I AM READING FROM THE GRAY AND I
24 JUST WANTED TO HIGHLIGHT FOR THE COURT PARAGRAPH 19 TO
25 SHOW THE EXPANSIVENESS OF THE REMEDIES.

26 WHAT IT STATES IS THAT "HOMEFIRST HAS THE ABILITY

1 TO PURSUE THE REMEDIES UNDER THIS LOAN AGREEMENT OR ANY
2 OTHER REMEDY WHICH IS AFFORDED BY LAW OR EQUITY." WHAT
3 THAT MEANS THEY CAN TAKE ANYTHING THEY WANT AND BE IN
4 COURT WHILE WE ARE RELEGATED TO ARBITRATION. AND FOR THAT
5 REASON, IT IS ONE-SIDED UNCONSCIONABLE AND WE WOULD
6 SUBMIT, YOUR HONOR.

7 THE COURT: ALL RIGHT. THANK YOU VERY
8 MUCH.

9 MR. SOBOL?

10 MR. SOBOL: YOUR HONOR, I DON'T HAVE
11 MUCH TO ADD. AND I JUST WOULD SAY THAT IN RESPONDING TO A
12 FEW OF THE POINTS MR. SCHENKKAN RAISED, OBVIOUSLY WE HAVE
13 WHATEVER BURDEN THAT WE HAVE HERE WE HAVE MET. AND I
14 AGREE THAT THE NUB OF THE ISSUE HERE IS WHETHER OR NOT
15 THIS IS ONE-SIDED.

16 IF FOR SOME REASON A BORROWER DEFAULTS UNDER ANY OF
17 THESE PROVISIONS IN THIS AGREEMENT, THEY'RE GOING TO BE
18 ABLE TO GO AND FORECLOSE. THAT IS ALL THE BANK IS
19 INTERESTED IN. HERE, IF THEY SAY THEY HAVE TO GO
20 ARBITRATE BUT THEY CAN FORECLOSE YOUR HOUSE IN THE MEAN
21 TIME, THAT IS COMPLETELY UNFAIR AND ONE SIDED.

22 THERE IS THIS NOTION THAT SOMEHOW NOBODY EVER ASKED
23 TO MODIFY THIS AGREEMENT, THESE ARBITRATION CLAUSES. THAT
24 IS REALLY NOT THE RECORD.

25 WHAT WE HAVE IS SOME STATEMENTS BY SOME UPPER LEVEL
26 OFFICERS AND EMPLOYEES OF HOMEFIRST THAT SAY, WELL, NEVER

1 BROUGHT TO MY ATTENTION. WHAT WE DON'T HAVE IS STATEMENT
2 FROM ALL OF THE VARIOUS SALES REPRESENTATIVES BOTH
3 EMPLOYEES AND INDEPENDENTS OUT THERE WHO WERE IN TOUCH
4 WITH ALL OF THE SENIOR CITIZENS WHO *TOOK* OUT THESE REVERSE
5 MORTGAGES, WHO' REPORTED BACK ON A ROUTINE BASIS.

6 WELL THESE PEOPLE HAVE COMMENTS ABOUT THE
7 ARBITRATION. THEY HAVE QUESTION ABOUT ENFORCEABILITY.
8 AND I THINK THAT IT IS LIKELY. SO WE DON'T KNOW REALLY,
9 ON THE PRESENT RECORD, WHETHER OR NOT THERE WAS A LOT OF
10 INTEREST IN CHANGING THE ARBITRATION CLAUSE AND WHETHER OR
11 NOT HAD A DEAF EAR TO ANY COMPLAINTS ABOUT IT BECAUSE
12 THEIR SALES PEOPLE JUST GLOSSED OVER IT.

13 AND WE ALSO KNOW THE REALITY OF THE SITUATION IS
14 THAT THE BANK IS GOING TO PRESENT YOU WITH A MASS OF
15 DOCUMENTS. AND BORROWERS ARE GOING TO NOT FEEL AS IF THEY
16 HAVE ANY CHOICE IN THE MATTER AND ACCEPT WHAT IT IS THAT
17 THEY'RE GIVEN, AND/OR WALK AWAY FROM IT. AND THAT IS THE
18 KIND OF LACK OF MEANINGFUL CHOICE WHICH THE RAMIREZ CASE
19 TALKS ABOUT. IT IS NOT A CHOICE TO BE ABLE TO WALK AWAY
20 FROM HOMEFIRST WITH OUR REVERSE MORTGAGTE AND GET OUT OF
21 THIS ARBITRATION CLAUSE.

22 IF THEY WANTED THIS AGREEMENT, HAD TO STICK WITH
23 THIS ARBITRATION CLAUSE. ANY KIND OF REMEDY, ANYTHING
24 THAT THE BANK WOULD REALISTICALLY BE INTERESTED IN, IS
25 GOING TO BE DONE THROUGH FORECLOSURE. AND FOR THAT
26 REASON, COMPLETELY ONE-SIDED, UNCONSCIONABLE AND WE WOULD

1 SUBMIT IT.

2 THE COURT: THANK YOU, MR. SOBOL.

3 MS WAGGONER?

4 MS. WAGGONER: I JUST HAVE ONE REALLY
5 BRIEF COMMENT, YOUR HONOR, THAT HAS TO DO WITH THE NATURE
6 OF ADHESIVE CONTRACTS. YOUR HONOR HAD MENTIONED THAT.
7 THERE WAS SOME DECLARATIONS ORIGINALLY SUBMITTED IN WHICH
a THEY STATED THAT THE PARTIES WOULD BE REQUIRED TO SIGN THE
9 DOCUMENTS IN THE FORM THEY WERE PRESENTED TO THEM OR WORDS
10 TO THAT EFFECT. THOSE DECLARATIONS AREN'T THE ONLY PLACE
11 WHERE LANGUAGE LIKE THAT APPEARS. AND I JUST WANTED TO
12 POINT THAT OUT TO THE COURT.

13 EXHIBIT A TO THE WAGGONER DECLARATION IN SUPPORT OF
14 THE WALKER OPPOSITION IS THE IMPORTANT INFORMATION FOR ALL
15 BORROWERS SHEET THAT DOCTOR WALKER RECEIVED. AND ON THE
16 FIRST PAGE OF THAT DOCUMENT, THERE IS A HEADING THAT SAYS
17 LEGAL ARGUMENTS DOCUMENT.

18 AND IT SAYS DOCUMENT YOU SIGNED DURING THE COURSE
19 OF THIS TRANSACTION WILL INCLUDE THOSE **REQUIRED** FOR **YOUR**
20 PROTECTION BY FEDERAL AGENCIES AND LISTS SOME, AS WELL AS
21 THE FOLLOWING DOCUMENTS THAT DEFINE YOUR RELATIONSHIP WIFE^f
22 TRANS AMERICA AND HOMEFIRST AND LISTS OUT THE LOAN
23 AGREEMENT AND NOTE. AND IT LISTS OUT THE DEED OF TRUST OF²
24 MORTGAGE.

25 THERE IS NO EVIDENCE, IN FACT, THAT SHOWS THAT THE
26 BORROWERS DIDN'T HAVE ANY IDEA THAT THEY EVEN **COULD**

1 REQUEST THAT THE DOCUMENTS BE MODIFIED IN ANY WAY. IN
2 FACT, THAT IS NOT WHAT THIS SAYS AND THAT IS NOT WHAT THEY
3 WERE TOLD. I WANTED TO POINT THAT OUT TO THE COURT.

4 THE COURT: THANK YOU, MISS WAGGONER. .
5 MR. DYLINE I KNOW YOU ARE CO-COUNSEL. DID YOU HAVE
6 ANYTHING TO ADD TO WHAT MR. MC CARTHY HAS SAID?

7 MR. DYLINE: NO, THANK YOU, YOUR HONOR.

a THE COURT: ALL RIGHT. IS THE MATTER
9 SUBMITTED OR DOES ANYBODY ELSE WISH TO ADD ANYTHING?

10 MR. MC CARTHY: SUBMITTED.

11 MS. WAGGONER: SUBMITTED.

12 MR. SCHENKMAN: JUST ONE OTHER THING, YOUR
13 HONOR, OBVIOUSLY YOU ARE DENYING.

14 AN ORDER DENYING PETITION TO COMPEL ARBITRATION
15 GOES IMMEDIATELY ON APPEAL AND DOES STAY THE ENTIRE ACTION
16 BELOW. WE WOULD REQUEST THE COURT GRANT AN INTERIM STAY
17 UNTIL WE CAN FILE THAT NOTICE OF APPEAL AND SO THAT THIS
18 MATTER IS PROTECTED IN ITS CURRENT STATE UNTIL THE COURT
19 OF APPEALS HAD AN OPPORTUNITY TO REVIEW THESE MATTERS.

20 THE COURT: ALL RIGHT. LIKE TO HEAR.
21 SOME RESPONSE FROM THE PLAINTIFFS.

22 MR. MC CARTHY: OBVIOUSLY, IF WE CAN BE
23 GIVEN AN OPPORTUNITY TO RESEARCH SOME OF THAT LAW, I AM
24 NOT SURE THAT IS CORRECT. THE PROBLEM IS TAKING APPEAL
25 YOU'RE TALKING ABOUT A YEAR, YEAR AND A HALF PROCESS. WE
26 COULDN'T AGREE TO A STAY OF THAT LENGTH. I'D BE HAPPY TO

1 LOOK AT MR. SCHENKKAN'S AUTHORITIES AND WORK SOMETHING OUT
2 WITH HIM VIA STIPULATION OBVIOUSLY, AFTER CONSULTING WITH
3 COUNSEL.

4 MR. SCHENKKAN: IF I MAY CLARIFY NOT ASKING
5 FOR A STAY DURING PENDENCY OF APPEAL. THAT WILL FOLLOW AS
6 ONCE THE APPEAL NOTICE IS FILED. I AM SAYING WOULD THIS
7 COURT ISSUE AN INTERIM STAY UNTIL THE TIME FOR APPEAL HAS
8 RUN, BE ONLY 30 DAYS, I BELIEVE AFTER THE COURT'S FORMAL
9 NOTICE IS ENTERED IF THE COURT STICKS WITHIN ITS INTENDED
10 DECISION? WHAT I AM CONCERNED ABOUT IS PARTIES LEAPING ON
11 DISCOVERY IN THE INTERIM.

12 IF WE ARE CORRECT, THAT WE ARE ENTITLED TO
13 ARBITRATION ISSUES OBVIOUSLY SHOULD BE NO DISCOVERY UNTIL
14 THAT QUESTION HAS BEEN FINALLY RESOLVED BY THE COURT OF
15 APPEAL. AND I DON'T WANT TO HAVE TO COME RUNNING IN HERE
16 OR ASKING THE COURT FOR A STAY AT THAT TIME. WE OUGHT TO
17 HANDLE THIS IN A REGULARIZED MANNER.

18 IF THE COURT STAYS WITH ITS INTENDED DECISION, I
19 GUARANTEE WE WILL BE NOTICING APPEAL PROMPTLY, BUT I DON'T
20 WANT TO HAVE TO COME IN HERE TO FILE INTERIM DISCOVERY
21 ORDER WHILE WAITING FOR THE COURT OF APPEAL.

22 MR. COTCHETT: HE IS ABSOLUTELY CORRECT.
23 NOBODY IS GOING TO DO ANY DISCOVERY. THE COURT IS GOING
24 TO RENDER A DECISION. HOWEVER YOU RULE, IN DUE COURSE, NO
25 ONE IS GOING TO DO ANYTHING DURING THAT PERIOD OF TIME.

26 MR. SCHENKKAN IS A VERY FINE LAWYER. IF HE

1 REPRESENTS TO THE COURT THAT THAT IS THE SITUATION THAT
2 THERE IS AN AUTOMATIC STAY, WE HAVE ABSOLUTELY NO PROBLEM
3 WITH THAT. I DON'T THINK HE'S GOING TO HAVE TO RUN BACK
4 INTO COURT TO GET ANY ORDER. COUNSEL HAS BEEN VERY
5 COOPERATIVE ON THE OTHER SIDE AND I THINK YOU JUST MOVE
6 AHEAD IN YOUR ORDINARY COURSE, RENDER AN ORDER, WE WILL
7 NOT BOTHER YOU WITH **ANY STAY**.

8 WE INTEND TO TAKE NO ACTION UNTIL YOU RULE. AT
9 THAT POINT, MR. SCHENKKAN WILL LOOK AT THE LAW AS WELL
10 FILE NOTICE OF APPEAL WHATEVER HE HAS TO DO, WE ARE NOT
11 GOING TO DISRUPT BUT WE ARE NOT RUNNING BACK TO THE OFFICE
12 TODAY. TO NOTICE DEPOSITIONS, YOUR HONOR.

13 THE COURT: OKAY.

14 MR. SCHENKKAN: IF ALL COUNSEL REPRESENTING
15 THE THREE SEPARATE ACTIONS COORDINATED HERE WILL TAKE THE
16 SAME VOW.

17 THE COURT: YOU KNOW WHAT I AM GOING TO
18 DO, MR. SCHENKKAN, AND IN ALL CANDOR I WAS THINKING OF
19 DOING THIS ANYWAY UNTIL WE COULD RESOLVE SOME OF THE OTHER
20 PENDING ISSUES, I AM GOING TO ADOPT THE TENTATIVE RULING
21 AS THE ORDER OF THE COURT.

22 AND I WANT TO EMPHASIZE THIS COURT IS CONCLUDING
23 THAT THE ARBITRATION PROVISIONS IN THESE PARTICULAR CASES
24 ARE SO ONE-SIDED IN FAVOR OF HOMEFIRST, AS TO BE
25 UNCONSCIONABLE AND THEREFORE UNENFORCEABLE. THAT IS THE
26 RULING THAT I AM MAKING. AND THEREFORE, THE PETITIONS TO

1 COMPEL ARBITRATION AS FILED BY HOMEFIRST AND ALSO BY TRANS
2 AMERICA AND MOTION TO COMPEL ARBITRATION AS FILED BY MET
3 LIFE ARE ALL DENIED BY THIS COURT.

4 I WILL, IN LIGHT OF YOUR INDICATION, AND I AM NOT
5 SURPRISED BY THAT, I FIGURED WHO EVER LOST THIS ISSUE IT
6 IS IMPORTANT ENOUGH TO ALL OF YOU IT WOULD BE TAKEN UP ON
7 WRIT OR ON APPEAL WHICHEVER IS APPROPRIATE. I THINK ONE
8 APPLIES TO DENIAL, THE OTHER APPLIES TO GRANT.

9 I AM GOING TO STAY ALL FURTHER DISCOVERY IN THIS
10 CASE UNTIL THE NEXT COURT DATE, AND THEN THAT WILL GIVE
11 THE COURT OF APPEALS TIME, IF YOU FILE YOUR NOTICE OF
12 APPEAL, TO STAY ANYTHING FURTHER BY MYSELF AS TRIAL COURT.

13 BUT WHAT I WANT TO DO IS I AM GOING TO STAY
14 DISCOVERY UNTIL THE NEXT COURT DATE AND I WANT TO MAKE A
15 DATE SOME TIME HOPEFULLY IN JANUARY NEAR THE END OF
16 JANUARY FOR TWO THINGS. WE STILL HAVE PENDING OUT THERE
17 THE MOTIONS FOR APPOINTMENT OF LEAD AND LIAISON COUNSEL
18 AND CO-LEAD AND CO-LIASON COUNSEL. I THINK WE NEED TO SET
19 TIME FOR THOSE.

20 AND ALSO I THINK IT WOULD BEHOOVE ALL OF US TO HOLD
21 JUR NEXT PRETRIAL CONFERENCE. SO WHAT I WOULD LIKE TO DO
22 IS PICK A DATE SOME TIME AT THE END OF JANUARY FOR THOSE
23 TWO PURPOSES, AND I WILL STAY ALL DISCOVERY IN THIS CASE
24 IN THE MEANTIME AND THAT WILL GIVE YOU, MR. SCHENKKAN, THE
25 ABILITY TO GET TO THE COURT OF APPEALS AND STOP
26 EVERYTHING.

1 MR. SCHENKKAN: OKAY.

2 MR. COTHETT: LAST WEEK OF JANUARY.' WHAT
3 IS CONVENIENT DATE TO YOU?

4 THE COURT': I AM GOING TO BE, BY THE
5 WAY LET YOU KNOW, BE BACK IN REDWOOD CITY EFFECTIVE
6 JANUARY FIRST ON THE SEVENTH FLOOR. YOU CAN FIND ME
7 THERE, AND I THINK COURTROOM 7D IS WHERE WE ARE MOVING TO.

8 I AM TOLD THE BEST TIME FOR ME TO SET HEARINGS IN
9 THIS CASE WOULD BE FRIDAY MORNINGS. WHY DON'T WE PICK A
10 FRIDAY MORNING.

11 MR. COTCHETT: 28TH LOTS OF TIME.

12 MR. SCHENKKAN: I HAVE A CONFLICT ON THE
13 28TH.

14 THE COURT: 21ST?

15 MR. SCHENKKAN: I BELIEVE WORKS FOR ME.

16 MR. SOBOL: FINE.

17 MS. WAGGONER: FINE, YOUR HONOR.

18 THE COURT: JANUARY 21ST, PREFER NINE
19 O'CLOCK OR TEN O'CLOCK?

20 MR. SCHENKKAN: NINE O'CLOCK IS FINE.

21 MR. MC ALLEN: I PREFER TEN O'CLOCK AS I
22 AM IN LOS ANGELES.

23 THE COURT: MAKE IT JANUARY 21ST AT TEN
24 O'CLOCK. THAT WILL BE, AS I INDICATED EARLIER BOTH FOR
25 HEARING ON MOTIONS TO APPOINT LEAD AND LIAISON COUNSEL. :
26 DON'T BELIEVE I WILL NEED ANY FURTHER BRIEFING. I WOULD

1 RATHER NOT READ FURTHER BRIEFS UNLESS ANYONE THINKS IT
2 ABSOLUTELY CRUCIAL. I DOUBT MUCH HAS CHANGED SINCE YOU
3 DID THE ORIGINAL BRIEFS. AND THEN ALSO HAVE OUR SECOND
4 PRETRIAL CONFERENCE'ON THAT DATE ALSO.

5 ANYTHING FURTHER?

6 MR. COTCHETT: THANK YOU VERY MUCH.

7 MR. DYLIBA: MAY I ASK --

8 MR. SCHENKKAN: IF I CAN CLARIFY YOUR STAY
9 RPPLIES TO ALL PROCEEDINGS IN THIS MATTER OR DISCOVERY?

10 THE COURT: STAYING ALL DISCOVERY WHICH
11 IS WHAT I AM DOING BECAUSE I AM SETTING THESE DATES. YOU
-12 MAY WELL GET A DIFFERENT ORDER FROM THE COURT OF APPEALS.
13 IN THE MEAN TIME I AM STAYING ALL DISCOVERY IN THIS CASE.

14 MR. COTCHETT: THANK YOU, YOUR HONOR.

15 MR. SCHENKKAN: MY CONCERN MIGHT BE OTHER
16 PROCEEDINGS SOMEBODY ATTEMPTING TO INITIATE BETWEEN NOW, I
17 DON'T KNOW WHAT THEY WILL BE.

18 THE COURT: LET ME INDICATE TO YOU THAT
19 ONE THING THAT MY DENIAL OF THE PETITION DOES DO, IS UNDER
20 CCP 1281.7 IT THEN FORCES THE DEFENDANTS TO FILE
21 RESPONSIVE PLEADINGS WITHIN 15 DAYS.

22 WHY DON'T WE DO THIS, I WANT TO PREVENT THAT TOO
23 BECAUSE THAT IS UNNECESSARY WORK, SO LET'S STAY THAT 15
24 DAYS FROM BEGINNING TO RUN UNTIL WE ALL GET TOGETHER AGAIN
25 ON JANUARY 21ST.

26 MR. SCHENKKAN: ' THAT WOULD BE FINE. MAYBE

1 OTHER THINGS. NONE OF US I THINK HAVE THOUGHT THROUGH
2 WHAT MIGHT HAPPEN. IN THIS EVENT I REQUEST THE STAY **BE**
3 KIND OF STAY ON WHAT ORDER WOULD FOLLOW FROM APPEAL OF
4 ISSUE THAT AFFECTS THE ENTIRE CASE WHICH IS STAY OF THE
5 ENTIRE CASE.

6 THE COURT: I TELL YOU WHAT I AM
7 WILLING TO DO, STAY ALL OF PROCEEDINGS OTHER THAN THESE
8 DATES FOR THE CONFERENCE THAT I HAVE STAYED SO I CAN KEEP
9 THE CASE MOVING FORWARD IN THE EVENT THE COURT OF APPEALS
10 DOESN'T STOP ME.

11 MS. CABRASER: ELIZABETH CABRASER FOR THE
12 **PLAINTIFF'S**. OUR ONLY CONCERN IS THAT THE COURT RETAIN
13 ITS ADMINISTRATIVE JURISDICTION AS IT HAS DONE TO DEAL
14 WITH MINISTERIAL MATTERS THAT MAY COME UP MAYBE POSSIBLE
15 MATTERS THAT DON'T AFFECT RESPONSES OF THE PLEADINGS OR
16 DISCOVERY OR THE CLASS CERTIFICATION ISSUES THAT WE MIGHT
17 **NONETHELESS** WISH TO BRING TO **YOUR HONOR'S ATTENTION ON** THE
18 JANUARY DATE.

19 AND WE WILL OBVIOUSLY CONSULT WITH COUNSEL FOR
20 DEFENDANTS BEFORE WE DO THAT TO MAKE SURE THERE IS NO
21 DISPUTE ABOUT IT AND WE ARE NOT CREATING ISSUES OUT- OF
22 THIN AIR. BUT I JUST WOULD NOT WANT TO BE FORECLOSED **FROM**
23 DISCUSSING THOSE MATTERS WITH COUNSEL AND BRINGING THEM **UP**
24 IF THEY'RE HELPFUL TO THE ADMINISTRATION OF THE
25 PROCEEDINGS.

26 THE COURT: WELL I DEEM NECESSARY

1 MATTERS TOWARDS THE EFFECTIVE ADMINISTRATION OF THE
2 PROCEEDINGS I THINK WOULD BE APPROPRIATE MATTERS FOR
3 COUNSEL TO DISCUSS WITH EACH OTHER AND APPROPRIATE MATTER
4 FOR ME TO TAKE UP WITH YOU WHEN WE COME BACK TO COURT
5 JANUARY 21ST FOR THE PRETRIAL CONFERENCE.

6 MR. SCHENKKAN: OUR ONLY INTEREST IS TO
7 PRESERVE THE STATUS QUO IN CASE SOMEONE WANTS TO SEE
8 PEOPLE FILING MOTIONS TO BE HEARD ON PRETRIAL CONFERENCE
9 THEN BE OBLIGATED TO RESPOND.

10 THE COURT: NO, ALL WE'RE GOING TO DO
11 ON THE 21ST IS THE MOTION FOR LEAD AND LIAISON COUNSEL AND
12 ANOTHER PRETRIAL CONFERENCE.

13 MR. DYLINEA: STEVE DYLINEA. MAY I ASK
14 THE COURT, THE COURT WENT THROUGH LENGTHY REASONING IN
15 TERMS OF THE RULING THAT THE COURT HAS ADOPTED THIS
16 MORNING, BECAUSE I DON'T WANT TO BURDEN THE COURT, BUT
17 DOES THE COURT WISH TO PREPARE THE ORDER DENYING THE
18 PETITION OR WOULD YOU ASK COUNSEL TO PREPARE THAT?

19 THE COURT: I WOULD ASK COUNSEL TO. I
20 THINK THE RECORD SHOWS MY REASONING. I DON'T THINK THE
21 ORDER NEEDS TO INCLUDE THAT.

22 MR. SOBOL: WE WILL PREPARE THE ORDER.

23 THE COURT: MR. SOBOL IS VOLUNTEERING
24 AND I WILL TAKE HIM UP ON HIS OFFER.

25
26 PROCEEDINGS CONCLUDED

STATE OF CALIFORNIA)

) SS

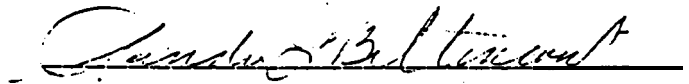
COUNTY OF SAN MATEO)

I, SANDRA L. BETTENCOURT, OFFICIAL REPORTER OF
SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE
COUNTY OF SAN MATEO, DO HEREBY CERTIFY:

THAT THE FOREGOING CONTAINS A TRUE, FULL AND
CORRECT COMPUTER-AIDED TRANSCRIPT OF THE PROCEEDINGS GIVEN
AND HAD IN THE WITHIN-ENTITLED MATTER THAT WERE REPORTED
BY ME ON THE DAY.

DATED: JANUARY 6, 2000

REDWOOD CITY, CALIFORNIA



OFFICIAL REPORTER

SERVICE LIST

Reverse Mortgage Cases (Coordination Proceeding No. 4061)

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38 Chair, Judicial Council of California *Courtesy Copy*
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