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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

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In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Case No.

Debtors.

08-12229 (MFW)

- - - - -x

BLACK HORSE CAPITAL LP, et al., Plaintiffs,

ADV. Proceeding

- against -

No. 10-51387 (MFW)

JPMORGAN CHASE BANK, N.A., et al., Defendants.

- - - - -x

BROADBILL INVESTMENT CORP., Plaintiff,

ADV. Proceeding

- against -

No. 10-50911 (MFW)

WASHINGTON MUTUAL, INC., Defendant.

- - - - -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

December 2, 2010

9:35 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

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HEARING re Motion of Debtors for Approval, Pursuant to Bankruptcy Rule 3018, of Stipulation and Agreement Among the Debtors and JPMorgan Case Bank, N.A. with Respect to the Allowance of the JPMC Claims Solely for the Purpose of Voting on the Debtors' Sixth Amended Chapter 11 Plan of Reorganization.

HEARING re Debtors' Motion for an Order Authorizing the Debtors to File Under Seal Exhibit 1, 2 and 3 to the Declaration of Charles Edward Smith in Support of Entry of an Order Confirming the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code.

HEARING re Debtors' Motion for an Order Authorizing the Debtors to File Under Seal Exhibits A & B to the Declaration of Jonathan Goulding in Support of Entry of an Order Confirming the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code.

HEARING re Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code.

HEARING re Black Horse Capital L.P. et al. v JPMorgan Case Bank, N.A., et al. (Adv. Pro. No. 10-51387).

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HEARING re Broadbill Investment Corp. v. Washington Mutual, Inc. (Adv. Pro. No. 10-50911).

HEARING re Motion in Limine to Preclude Any Use or Reference to the Examiner's Report.

HEARING re Plaintiff's Motion in Limine to Strike and Preclude Evidence of Analysis that was Withheld from Discovery on the Basis of Attorney-Client Privilege.

HEARING re Motion of the Official Committee of Equity Security Holders for Entry of an Order Granting Relief from the Confidentiality Agreement Governing Confirmation Discovery to Permit Reference to Debtors' Work Product Upon Closing of the Courtroom.

HEARING re Motion of the Official Committee of Equity Security Holders for Permission to File Supplemental Objection to Plan Confirmation.

HEARING re Emergency Motion to Strike Declaration of Charlotte Chamberlain and to Preclude Her from Testifying at the Confirmation Hearing.

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2 HEARING re Motion to Strike Declarations and Arguments Relying
3 on Examiner's Report or, in the Alternative, to Compel
4 Production of All Debtors' Work Product and Communications
5 Related to the Examiner's Report.

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7 HEARING re Motion of the Official Committee of Equity Security
8 Holders for an Order Authorizing It to (I) Unseal and Publicly
9 File, Its Motion to Strike Declarations and Arguments Relying
10 on Examiner's Report or, in the Alternative, to Compel
11 Production of All Debtors' Work Product and Communications
12 Related to the Examiner's Report and (II) Use Confidential
13 Information at the Confirmation Hearing.

14

15 HEARING re Debtors' Motion for an Order Authorizing the Debtors
16 to File Under Seal Certain Portions of the Debtors' Omnibus
17 Opposition to the TPS Consortium's Motion in Limine and the
18 Official Committee of Equity Security Holders' Motion to
19 Strike, Both Relating to the Examiner's Report.

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21 HEARING re Plaintiff's Motion in Limine to Strike the Debtors'
22 Designations of Deposition Testimony of Steve Simms.

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24 Transcribed by: Pnina Eilberg

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ALSO PRESENT TELEPHONICALLY:
JIM BOLIN, Appaloosa Management
GEORGE BRICKFIELD, The Seaport Group
PEG BRICKLEY, Dow Jones & Co.
DAN BULLOCK, In Pro Per
ELEANOR CHAN, Aurelius Capital
LAWRENCE N. CHANEN, JPMorgan Chase & Co.

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ALSO PRESENT TELEPHONICALLY: (cont.)

JASON C. KELIN, JPMorgan Chase Bank, N.A.

TIMOTHY CHEN, Puma Capital

GREN DAY, Chapdelaine Credit Partners

EPHRAIM DIAMOND, DK Partners

DAVID DUBACK, Waterstone Capital Management, L.P.

MATTHEW EHMER, Silver Point Capital

JIM F. FARNER, Morgan Stanley

STANISLAV FEDORENKO, Centerbridge Partners

BRYCE FRASER, Fortress Investment Group

JOSH GALE, Miller Tabak Roberts Securities

HAL F. GOLTZ, Anchorage Advisors

JOEL HAWKINS, Carval Investors

JAMES JACOBS, Gruss & Company, LLC

DANIEL B. KAMENSKY, Paulson & Company

SERGEY KAMENSKY, Canyon Partners, LLC

MARK KRONFELD, Owl Creek Management

MICHAEL LINN, Farallon Capital Management

JAMES MCINNIS, Deutsche Bank

ANDERS MAXWELL, The Peter J. Solomon Company

DANIEL PINE, Marathon Asset Management

ANDREW REBAK, Credit Suisse First Boston

MARC SCHWARTZ, Taconic Capital

MICHAEL C. SCOTT, Venor Capital

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ALSO PRESENT TELEPHONICALLY: (cont.)

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KEVIN STARKE, CRT Capital Group, LLC

MITCHELL E. SUSSMAN, Stone Lion Capital

BRAD SWEENEY, Barclays Capital, Inc.

WILLIAM VRATTOS, York Capital Management

CHRIS WARREN, Macquarie Bank

MICHELE WHALEN, Morgens, Waterfall, Vintiadis & Co.

ARIN J. WOLFSON, UBS Securities LLC

MICHAEL WILLINGHAM, Washington Mutual Inc.

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P R O C E E D I N G S

THE CLERK: You may be seated.

THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor. Brian Rosen, Weil Gotshal & Manges on behalf of the debtors, Washington Mutual Inc. and WMI Investment Corp.

Your Honor, we have quite a full agenda and quite a full courtroom here today and what I'd like to do, very briefly, is to set out what I think we're going to be doing and then leave it to the Court to take us in whatever path the Court desires. Specifically, Your Honor, it's our goal today to handle first an item which was a motion that we filed a certificate of no objection for, which was a stipulation approving a 3018 voting motion. The certificate of no objection was filed last evening, I don't know if the Court saw it yet. This was with respect to a stipulation and agreement among the debtors and JPMorgan Chase with respect to the allowance of the JPMC claims solely for purposes of voting on the debtors' plan.

THE COURT: I did see it this morning and I've entered the order based on the certificate.

MR. ROSEN: Thank you very much, Your Honor.

Next, Your Honor, you have set several items over for this morning, for 9:30, and obviously those were the various motions to strike in limine -- motion in limine or with respect

1 to actually emptying the courtroom for one of them. I assume,
2 Your Honor, that we will be handling those immediately and then
3 after that that will tell us what your rulings are -- based
4 upon your rulings as to how we will proceed with the balance of
5 the day. As the Court is aware we have filed declarations over
6 a week ago for the direct testimony. We've spoken with the
7 Court and other parties about those and they are the focus of
8 those motions.

9 Depending upon how the Court rules will tell us, Your
10 Honor, whether we can move forward with those declarations as
11 direct or with respect to them putting on witnesses in lieu of
12 that. We have counsel who will be handling those respective
13 motions, Your Honor, from the debtors' side and I'm sure other
14 parties who will be stepping up.

15 THE COURT: Well, first with respect to the
16 confidentiality and the sealing -- sealing the courtroom as
17 well as the record, I guess is what the suggestion is. Let me
18 hear the parties on that. I'm reluctant to seal a courtroom
19 and not have the evidence in support or in opposition to the
20 debtors confirmation of its plan not be a matter of public
21 record. So let's talk about how we can do it the best.

22 MR. ROSEN: Your Honor, from the debtors' side -- and
23 that's not our motion, that's Mr. Nelson's. From the debtors'
24 side, Mr. Elsborg will be handling that matter.

25 THE COURT: All right.

1 MR. NELSON: Good morning, Your Honor. May it please
2 the Court, Justin Nelson from Sussman Godfrey representing the
3 equity committee.

4 We have no objection to having an open courtroom.
5 We're trying to comply with protective orders and it's not just
6 the documents that we've received from the debtors on the work
7 product, we expect that to be very, very narrow and limited and
8 frankly we don't think there's a need to seal it for what we're
9 planning to use it for. But the debtors and other parties have
10 also designated as confidential a whole bunch of deposition
11 testimony and there are exhibits that are marked as
12 confidential and -- so we're at the Court's pleasure and
13 guidance on the issue.

14 THE COURT: All right.

15 MR. ELSBERG: Good morning, Your Honor. David Elsberg
16 from Quinn Emanuel for the debtors.

17 It sounds like we actually have a fair amount of
18 agreement here. We have no problem with the equity committee
19 at least proffering our privileged documents and then Your
20 Honor can determine whether they should be admitted or not or
21 be given any weight or not and whether there's any need or
22 justification to call any witnesses about those types of
23 documents or not.

24 We think Your Honor may conclude that there's no
25 reason to admit those types of documents since we're not

1 proffering anything privileged as a basis to justify the
2 settlement. So we think you may conclude that they're
3 irrelevant anyway.

4 But in the event that you do decide that you want to
5 consider any documents of that type privileged documents, we
6 just want to make sure that it's done in a way that, A, avoids
7 disruption of the rest of the trial and B, protects our
8 privilege. They waited until the trial to bring this up so we
9 haven't had a chance, over the last month or so, to work it out
10 but I think that there are a few ground rules that we may be
11 able to agree to that will avoid any disruption.

12 One that I would suggest is that to the extent any
13 documents like this come up, they should be brought in camera
14 instead of asking this number of people to leave the courtroom.
15 We can go in camera, just the equity committee, the debtors and
16 Your Honor to look at any of those documents, if they come up.

17 I would also suggest, to the extent possible, it
18 should all be done at once instead of piecemeal. It sounds as
19 if there are just a few of these documents that we may need to
20 deal with so instead of interrupting the trial a few times, we
21 might be able to go back and camera deal with them all at once.

22 Second, we just want to make sure that there's not
23 going to be any waiver. The equity committee was given some of
24 our privileged materials under a 502(d) order, again we're
25 happy if they want to try to proffer them and you can decide

1 how to use them, in camera. It would be just us, the debtors,
2 the equity committee counsel and Your Honor and there'd be an
3 understanding that there's no waiver as to any parties,
4 including of course, our adversaries in the litigation,
5 JPMorgan and the FDIC.

6 Third, we've asked for the equity committee to
7 identify for us the specific documents that they're speaking
8 about on some type of exhibit list so that we can lodge any
9 objections to these documents and also prepare our witnesses.
10 They've refused to do this. I understand if it's just for
11 impeachment they may not know about some of them but it sounds
12 like they do know about others and we would request
13 identification of those. And similarly I think they've said
14 that they may want to call witnesses to talk about some of
15 these documents and we would ask for identification of those
16 witnesses so that we might want to object or we might want to
17 prepare them or Your Honor might say there's no need to have
18 witnesses. Again, since especially we are not going to proffer
19 any privileged information as a basis to justify the
20 settlement.

21 And the last note is that I don't know if one of the
22 witnesses they would plan to call would be outside counsel,
23 since outside counsel participated in putting together some of
24 this work product and privilege. We can cross that bridge when
25 we get there but that would obviously raise some special issues

1 that we would need to address.

2 So it's unfortunate we need to address all this at
3 this last minute but those are some of the ground rules that we
4 would propose.

5 MR. NELSON: I can assure the debtors and the Court
6 that we do not plan on calling any outside counsel. First of
7 all, with respect to the order of how to do it, at least with
8 respect to the work product documents that we may introduce
9 with respect to a witness; what I would suggest is not to close
10 the courtroom, to approach the bench before using any of the
11 documents with just the debtors and the equity committee
12 approaching the bench. But then the Court may examine the
13 document, we can explain whether it should or should not be
14 used at that point and then whether we should then have it in a
15 closed courtroom or an open setting.

16 The only place, anticipated place, that this will come
17 up is in a very limited section of Mr. Goulding's cross
18 examination. With respect to any of the other witnesses, we do
19 not expect this to be an issue at all. And we do expect it to
20 be, again, -- we're talking about literally a few documents
21 that we're discussing here.

22 MR. ELSBERG: That sounds fine to us, Your Honor.

23 THE COURT: All right. Let's deal with it then when
24 we get to that cross.

25 MR. BROWN: Good morning, Your Honor. Charles Brown

1 on behalf of Daniel Hoffman. Your Honor, with respect to this
2 issue I did file a response to the equity committee's motion
3 late last night; Your Honor probably didn't have a chance to
4 review it.

5 Largely the response said that there would be an
6 objection to sealing the courtroom. Your Honor already
7 indicated a reluctance to do that so until the documents get
8 produced I really don't think that there's anything more I can
9 add to it at this point. So I just wanted to make Your Honor
10 aware that that was an issue that was pretty near to my
11 client's heart and --

12 THE COURT: All right.

13 MR. BROWN: -- you know, you might hear from me in the
14 future.

15 THE COURT: Well, let's see if we can do this without
16 too much damage.

17 Let's see what other preliminary matters we can get
18 rid of? How about the TPS consortium's motion in limine to
19 preclude use of the examiner's report?

20 MR. ELSBERG: Excuse me. Before you begin, Your
21 Honor, if I could just make a suggestion. The TPS group and
22 the equity committee have both submitted very similar motions
23 and so it might make sense to have both of them argue at once
24 and then I could respond, instead of doing the same thing
25 twice.

1 THE COURT: Fine.

2 MR. STOLL: Your Honor, James Stoll from Brown Rudnick
3 representing the Trust Preferred Security Holders.

4 If I could suggest, Your Honor, the motion in limine
5 with respect to the examiner's motion as well as the motion in
6 limine with respect to the use of privileged materials to prove
7 their case that have not been disclosed during the course of
8 the case, they intersect with one another. And I think if I
9 could actually address them both in tandem, I think that would
10 be more efficient, if it please the Court.

11 THE COURT: All right.

12 MR. STOLL: Your Honor, as you know, we were here last
13 summer discussing this very issue. We had submitted a series
14 of admissions that we sought responses for regarding the issues
15 of reliance on counsel to discharge the responsibility that the
16 parties would have or the debtors would have to prove the
17 reasonableness of the settlement. That motion was opposed.
18 Your Honor agreed with the debtors that they would not be
19 required to produce privileged material at that time but also
20 admonished the debtors that they could not rely on privileged
21 materials to prove their case when the time came at
22 confirmation.

23 And sadly Your Honor, in our view, that's exactly what
24 they've done. We've now come full circle and what the debtors
25 have done is submit a half a dozen affidavits, all of which

1 tell the Court that substantial investigation of claims have
2 been undertaken and that the relative strengths and weaknesses
3 of the claims have been evaluated and that is part of their
4 assessment as to why the settlement is a reasonable settlement.

5 At depositions that occurred over the past month every
6 single witness of the debtors, as well as the creditors
7 committee, testified that any analysis of the likelihood of
8 success on the merits of any claim was conducted solely by
9 counsel. Every witness was instructed by counsel at their
10 deposition not to answer a single question and every witness,
11 in fact, agreed and they did not answer a question on the
12 investigation surrounding the likelihood of success on the
13 merits.

14 But in their affidavits they say precisely that we
15 reviewed the claims, we assessed the merits, the relative
16 strengths and weaknesses of the merits --

17 THE COURT: Well, I don't want to interrupt you but I
18 think there's a disagreement on that factual premise.

19 MR. STOLL: Well, I'm going to get to that, Your
20 Honor, but I'm going to walk you through just a couple of
21 questions.

22 THE COURT: Well, I'm -- I don't see how I can analyze
23 that motion without going to each and every witness. So maybe
24 we should do it when we get to each witness and you can
25 identify, as you have in your motion, the specific paragraphs.

1 They can point to the areas of the deposition where they say
2 the witness did answer your question and then I can analyze it.
3 I thought the examiner's report was easier to deal with than
4 that.

5 MR. STOLL: Well, okay. So let me -- let me at least
6 move, then, to the examiner's report, Your Honor, because I
7 think the examiner's report -- the reason I bring this up, Your
8 Honor, because the examiner's report does -- attempts to do
9 through the back door what the debtors said they would not do
10 with their own witnesses, and that is provide the examiner with
11 privileged materials upon which the examiner would rely in
12 conducting his report and then try to seek to have that report
13 admitted into evidence for its conclusions and its assessment
14 of the reasonableness of the settlement.

15 As the Court will recall, the examiner's report, at
16 the time that the Court issued a work order, the examiner's --
17 the order said that the examiner could receive privileged
18 materials from any party and not disclose those privileged
19 materials and the party would not lose the privilege by
20 providing those materials to the examiner. And the examiner
21 was insulated from any discovery.

22 The examiner then issued a report and repeatedly,
23 throughout the examiner's report, he says that he relied on the
24 privileged materials. For example, at page 13 of the
25 examiner's report the examiner states, "The debtors and the

1 creditors committee provided the examiner with numerous
2 attorney work product documents outlining their analyses of
3 potential claims, defenses, damages and discovery materials
4 relating to the claims against JPMC as well as other entities
5 and individuals. The examiner reviewed and utilized this work
6 product in planning his investigation."

7 On page 187 of the report, with respect to one of the
8 particular claims, the so-called fraudulent transfer claims,
9 the examiner stated, "The examiner extensively reviewed
10 publicly available information pending litigation documents
11 produced in connection with the 2004 discovery and work product
12 provided to the examiner by the parties in interest and their
13 respective professionals."

14 On page 229 of the examiner's report, addressing
15 potential claims against JPMC the examiner wrote, based on the
16 examiner's review of the discovery materials, the debtors
17 substantial work product, briefs filed with the court and
18 independent analyses, the examiner identified potential causes
19 of action," etcetera.

20 There's no place in the examiner's report where he
21 then parses out from that state of reliance which of his
22 conclusions and which of his assessments are based on
23 privileged material and which are not.

24 Now when the examiner was originally appointed by the
25 Court nobody said to the Court we want to use the examiner as a

1 testimonial witness. That was never requested. And if his
2 report were to come in as an expert report, what is the
3 hallmark of expert reports? That the expert has to set forth
4 the bases for his conclusions and all material that he
5 receives, including all work product material, any
6 communications with counsel, that is all the subject of proper
7 discovery in order to test the expert's opinion. None of that
8 happened in this case. This examiner's report was never
9 designated, never sought to be designated as a testimonial
10 witness and I don't even believe Mr. Hochberg (ph.) is here or
11 intends to testify. So they simply want to use his report,
12 which of course is rank hearsay, as to any fact and the
13 conclusions based on privileged material only make those
14 conclusions just completely unreliable and untestable.

15 And again, Your Honor, in bringing it back to the
16 motion in limine vis-à-vis their privileged material, this is
17 precisely what they say they're not doing with their witnesses.
18 Not one of our witnesses, they say, are going to testify about
19 any privileged communication. But we know the examiner has
20 that privileged communication. We know the examiner used it to
21 formulate his investigation and we know he used it to reach
22 some of his conclusions, we don't know precisely which ones.
23 And so that examiner's report should not be permitted into
24 evidence.

25 And with respect to the witnesses, Your Honor, I'll

1 take those up one at a time as they testify.

2 THE COURT: Thank you.

3 MR. STOLL: Thank you.

4 MR. NELSON: Good morning again, Your Honor.

5 THE COURT: Good morning.

6 MR. NELSON: I'm in the somewhat uncomfortable
7 position of moving to strike the very report that we asked for
8 and we recognize that. But there is a difference between what
9 the examiner -- what the statute required the examiner to do
10 and to investigate and what can be admissible evidence for plan
11 confirmation. And the examiner did examine the claims and did
12 some factual investigation and reached some conclusion that
13 appeared to be, as we lay out on or motion, much more similar
14 to what the debtors wanted in their request for an examination
15 than we did, but the examiner did reach some conclusions.

16 It was based upon unsworn interviews. It was based
17 upon documents, attorney-client work product information that
18 was given to the examiner without our participation or
19 knowledge of what was being disclosed.

20 It appears, from the debtors' response, that they are
21 not trying to admit some of the underlying facts only the
22 conclusions that the examiner has reached. But that only makes
23 it worse because we aren't able to test the underlying factual
24 basis of what is occurring. And what we're trying to do is say
25 that can the debtors meet their burden of proof and can they do

1 it by using an expert report that's based upon the very thing
2 that they say that they're not trying to use, namely the work
3 product.

4 So they've also shifted and said that well actually
5 the examiner is a court-appointed expert under Rule 706. But
6 the case law is clear that first of all, as Mr. Stoll pointed
7 out, that was never the intention of the examiner. But second
8 of all, as the cases we cited in our reply state, that process
9 has to be open and that, again, we have not had the ability to
10 test the validity of the examiner's assertions. For example,
11 it does appear, and we cite this in our opening brief, it does
12 appear that at least one of the major witnesses on which the
13 examiner relies was a paid consultant to the debtors and that
14 was not disclosed to the examiner at the time. And that's just
15 an example of the factual basis on which is hearsay and, of
16 course, work product that then the examiner uses to reach his
17 conclusions.

18 So if we had more time the property remedy, I think,
19 would be, and we would have no objection, if there were free
20 and open disclosure of what was given to the examiner. But the
21 debtors have not provided that. Indeed, in their depositions
22 they have refused even to discuss the non-privileged
23 information, the non-privileged discussions that they have had
24 with the examiner asserting that this, I guess, examiner
25 privileged.

1 So we are completely unable to test that. And given
2 where we are, we believe that the references should be
3 stricken -- any references to the examiner report.

4 THE COURT: Thank you.

5 MR. NELSON: Thank you.

6 MR. ELBERG: David Elsberg from Quinn Emanuel, Your
7 Honor.

8 I'll start, briefly on the privilege issue. We agree
9 with the way that Your Honor proposed to address it but I want
10 to respond to some of the statements that were made to frame
11 the issue and how it's likely to proceed.

12 Just to be clear, the entire premise of the motion
13 that the TPS group has made in favor of preclusion, is a
14 completely false premise, as I think Your Honor will see as the
15 day goes on and you see the witnesses testifying.

16 They say that in the depositions we supposedly blocked
17 our witnesses from testifying about privileged information.

18 THE COURT: I know you dispute the facts on that. I
19 don't need an argument on it at this point.

20 MR. ELSBERG: If you don't need an argument then I'll
21 move on to the next one, Your Honor.

22 On the examiner, Your Honor, this motion brings to
23 mind the old saying be careful what you ask for. I was in this
24 courtroom when they were fighting tooth and nail, tooth and
25 nail because I was on the other side of it and I remember it.

1 And they were saying that an examiner has to be appointed, must
2 be appointed to help this Court assess the reasonableness of
3 the settlement. And they won that battle. They got exactly
4 what they wanted and the examiner was appointed. But it didn't
5 turn out the way that they hoped. The examiner concluded that
6 the settlement is in fact reasonable.

7 And so now, all of a sudden, they think that the
8 examiner, that they asked for, isn't such a good idea after
9 all. Now all of a sudden they're saying Your Honor should
10 simply erase any thought of the examiner from your mind. They
11 call it hearsay, they call it rank hearsay, they call it
12 unreliable. But Your Honor, this is not a motion based on the
13 law, which I'm going to discuss; it's not based on fairness.
14 This is based on sour grapes and it should be denied.

15 Now, even putting aside the hypocrisy here and the
16 question of whether they should be judicially estopped because
17 they got exactly what they asked for, the most fundamental
18 problem with their motion is that it misconstrues the report
19 and what we're saying should be done with the report. There's
20 a difference between evidence on the one hand and conclusions
21 on the other. And to be clear, it's only the conclusions in
22 the examiner report that we're saying can be considered by Your
23 Honor for whatever they're worth; similar to the way a Court
24 might consider oral argument or opinions by an expert. That's
25 it. It's a very modest position. We're saying Your Honor can

1 take it for whatever it's worth.

2 We're not saying that the facts recited in the report
3 should be taken as established evidence. We're saying that we
4 will prove the facts independently.

5 THE COURT: Well -- but go back. It's not the same as
6 an expert report because, as they point out, an expert cannot
7 testify nor can an expert report be introduced into evidence
8 unless they are given full discovery regarding the bases for
9 the expert's conclusions.

10 MR. ELSBERG: You're right, Your Honor. It is not
11 exactly like an expert report.

12 THE COURT: And it's not really oral argument because
13 it's not based on the record that has been presented before the
14 Court.

15 MR. ELSBERG: That's true too, Your Honor.

16 THE COURT: So --

17 MR. ELSBERG: It's not. I said similar to and let me
18 explain what I mean. The way that this report, the conclusions
19 in this report can be considered is not exactly -- it's not an
20 oral argument, you're right, and it's not an expert report in
21 the classic sense, you're right.

22 But there is a way that it can and should be
23 considered and the way that it can and should be considered is
24 in the way it was considered in the Enron case, which they
25 cite, where the expert report was admitted. In the Fibermark

1 (ph.) case, where the expert report, its conclusions, was
2 admitted and in the Third Circuit's case, PWS Holdings where
3 the expert reports' conclusions were admitted. In fact, Your
4 Honor, they don't cite any case, from any jurisdiction, where a
5 court appointed an examiner and then that same court refused to
6 admit the conclusions from the examiner which was appointed by
7 that same court.

8 They cite some cases that have nothing to do with this
9 case where one court appointed an examiner and then in a
10 different case a different court had a problem with it. But
11 the courts have recognized, and we cite these cases, that it
12 would be an exercise in futility to appoint an examiner, which
13 by the way, here this examiner that they wanted and got cost
14 the estate six million dollars. And now they're saying let's
15 throw that in the garbage.

16 They don't cite a single case that stands for the
17 proposition that there should be that type of waste, having
18 asked for it, knowing the case law and the background which all
19 says it's perfectly appropriate even though it might not be a
20 classic expert. Knowing -- with that case law in the
21 background that says the conclusions are to be admitted, we
22 believe that, again it's a modest request; this Court should
23 follow all of the precedent cited by both sides. It can and
24 should be considered.

25 And the arguments, by the way, that there ought to be

1 more discovery or that there's been some sort of impediment to
2 getting all of the information that they want, they
3 participated in this process. The TPS group had their expert
4 explain their theory to the examiner in all its full glory.
5 The equity committee got to meet with the examiner, point the
6 examiner to whatever they wanted to and the report says the
7 examiner paid, "special deference to the examiner". And
8 they're now, on the day trial is beginning, saying wait a
9 second we want more discovery. Well, it's a little late for
10 that. They could have asked for discovery a month ago, if they
11 don't have it, it's because they chose to try to wait and make
12 it a tactic now.

13 In addition, the key witnesses who gave information to
14 the examiner will be called. They can question those witnesses
15 about the facts. But again, Your Honor, the -- this is a
16 process that they asked for. Mr. Hochberg's credentials are
17 unquestioned. They never objected that he lacks the requisite
18 expertise. Not once did they get up and say wait a second, he
19 doesn't have the expertise to do this, nor could they. He was
20 chosen by the U.S. Trustee precisely because he does have much
21 more than the required expertise to do this job and reach
22 conclusions that will aid this Court.

23 So Your Honor, again in the end what they are asking
24 for is something that has not been accepted by any of the
25 courts in any of the cases that they cite. All of the cases

1 that they cite, all of the cases that we cite say that when
2 you've gotten an examiner, millions of dollars have been spent,
3 the product shouldn't be thrown away in the garbage just
4 because you decide now we don't like the conclusions that have
5 been reached.

6 We respectfully submit that Your Honor can and should
7 consider the conclusions in that report for whatever they're
8 worth. They can argue they're not worth anything but to
9 wholesale strike them all from the record goes too far. We
10 should be able to refer to a particular conclusion, they can
11 argue why that conclusion makes no sense. But it may help Your
12 Honor with an understanding of the facts.

13 Thank you, Your Honor.

14 THE COURT: Well let me make this ruling, I am going
15 to exclude the examiner report from the record in the
16 confirmation hearing. I don't think it's admissible as an
17 expert report or oral argument, for the reasons I just said.

18 I don't think it's a futile gesture to appoint an
19 examiner and then not use the report. If parties did not
20 object, it could be admitted. I think the potential advantage
21 of having an examiner is to have a third party review the facts
22 and perhaps allow all the parties to reach a consensual
23 resolution because they at least had a third party testing the
24 debtors' theses. But I think once we get to court and
25 litigation, I don't think it's appropriate to enter it. I do

1 think it's hearsay and not admissible. So I will exclude the
2 reference to the examiner report in the record.

3 All right. What other preliminary motions do we have?

4 (Pause)

5 MR. NELSON: This is before the first witness, Your
6 Honor. We would just ask that the rule be invoked for any of
7 the witnesses who may be cross examined.

8 THE COURT: Okay.

9 MR. MASTANDO: Good morning, Your Honor. John
10 Mastando from Weil Gotshal on behalf of the debtors.

11 Most of the witnesses who are here have been deposed
12 or we indicated our intention to call them at confirmation
13 several weeks ago, so they clearly could have been deposed. I
14 don't think there's a need -- that it's necessary to have them
15 leave the room but I would just note that for the record, Your
16 Honor.

17 THE COURT: Well, I think they -- there's no reason
18 not to exclude them so I think that they should be excluded
19 from the room during the testimony of other witnesses.

20 MR. SILVERSTEIN: Your Honor -- Paul Silverstein,
21 Andrews for Broadbill.

22 We have a motion, is now the right time?

23 THE COURT: That would be the right time. Yes.

24 MR. SILVERSTEIN: Thank you, Your Honor.

25 Again, for the record, Paul Silverstein, Andrews Kurth

1 for Broadbill investments. My co-counsel in the class action,
2 Mr. Steinberg, will also have some comments as well.

3 Your Honor, on November 29th the Court scheduled oral
4 argument on a summary judgment motion in the adversary
5 proceeding for December 1. The confirmation hearing was
6 obviously set for today, December 2.

7 As we argued yesterday, the defendant's summary
8 judgment motion is, in substance, a motion to dismiss under
9 Rule 12(b)(6), and I don't need to go over that, obviously.
10 But after the 11/29 call with the -- scheduling call with the
11 Court, late that afternoon, and I know that because I was in
12 this courtroom on another matter, the debtor/defendant filed,
13 in this case but not in the adversary proceeding, an affidavit
14 of a so-called expert, Dr. Chamberlain, which in reality
15 appears to be an affidavit of a fact witness although she is
16 proffered as an expert. Again, that's not for this moment, we
17 will see that.

18 There are really four open confirmation issues with
19 respect to the litigation tracking warrants, none of which
20 affect the timing of confirmation because the issue of -- as to
21 whether the LTWs are debt or equity is not germane, in terms of
22 the timing, for today. The four issues are, one, the amount of
23 the reserve for the LTWs as to claims. The debtors initially
24 said 183 million, now in their motion to estimate they've upped
25 that number to 250 million. We believe it will be higher. I

1 think that motion is on for December 7th but at minimum they're
2 acknowledging 250 as the disputed claim.

3 Secondly, whether non-consensual releases should be
4 opposed on the LTW holders. Third, whether the purported sale
5 of the --

6 THE COURT: What was the second one, again?

7 MR. SILVERSTEIN: Whether the non-consensual releases
8 should be imposed on a non-voting class who didn't have an
9 opportunity to --

10 THE COURT: Understood.

11 MR. SILVERSTEIN: -- check the box, so to speak.
12 Third, whether the purported sale of the litigation, free and
13 clear of liens under Section 363(f) is proper. And fourth,
14 whether the 510(b) argument by the debtors in fact destroys
15 their ability to pay postpetition interest. So whether the --
16 which we discussed briefly yesterday. So whether or not the
17 LTWs are ultimately decided by Your Honor to be debtor equity
18 in the adversary proceeding doesn't delay confirmation at all.
19 Again, the substantive issues as to whether the LTWs are debtor
20 equity is the subject of the adversary proceeding.

21 Moreover, the debtors filed a list of witnesses for
22 confirmation on November 15th, Dr. Chamberlain was not listed.
23 They filed their declarations with respect to those witnesses
24 on or about November 24th, no Chamberlain declaration was
25 filed, obviously, for the reason -- the reason that she was not

1 listed as a witness. The witness is solely relevant to the
2 adversary proceeding because it relates directly to the
3 disputed facts concerning the intent of the agreement.

4 Significantly in that declaration, and I'll just be
5 very brief on this, Dr. Chamberlain does not even acknowledge
6 the existence of Article IV of the warrant agreement, which is
7 a critical part of the agreement.

8 THE COURT: All right.

9 MR. SILVERSTEIN: Because it's the operative
10 contractual provision that assures that the LTW holders get the
11 value of the --

12 THE COURT: You don't have to get into the particulars
13 of her testimony that you disagree with.

14 MR. SILVERSTEIN: Okay. But I do want to get into,
15 very briefly, some of the things that we would like to address
16 with her.

17 She is germane to the summary judgment motion and
18 she's germane to the adversary proceeding. And frankly, we
19 suspect why the debtors didn't, when they filed their motion
20 for summary judgment, annex her declaration because that would
21 have enabled us to depose her and that would have enabled us to
22 proffer or introduce our own witness with respect to the things
23 that she would want to testify about today with respect to
24 intent and the like and other disputed facts.

25 We definitely want to examine this witness and

1 interestingly she calls her so-called expert report a
2 preliminary report that she says is subject to modification and
3 amendment and she mentions that it's subject to change based on
4 what she later -- based on her future work. And she says that
5 she's been asked to offer her preliminary thoughts. Frankly,
6 I've never seen an expert report like that but that's, again,
7 for a later date when we do get to depose her in connection --
8 depose her and take her testimony and hopefully adduce that
9 testimony on cross at trial.

10 But that has to be done properly in the adversary
11 proceeding, not by a backdoor ambush on twenty-four hours
12 notice in connection with confirmation. Let us depose her.
13 Let us introduce our own witnesses in opposition to her
14 statements, that's not a confirmation issue. That's what the
15 adversary proceeding is about; let her be subject to normal
16 discovery. And frankly, again, we did in our motion to strike
17 talk about some of the things that we would ask her and some of
18 the things that we noted were, in our view, absurdities in her
19 approach. Just for example, and very, very briefly, she
20 doesn't even acknowledge that she's read Article IV of the
21 warrant agreement and it raises a whole host of questions.

22 For example, I understand that in 2007 TPG was looking
23 to acquire the debtors. It was going to be a going private
24 transaction. Clearly under the agreement cash would have been
25 required.

1 THE COURT: I understand there are lots of areas you'd
2 like to talk to her about. I don't need to get into the
3 details.

4 MR. SILVERSTEIN: Okay. But again, in addition, with
5 respect to how many shares --

6 THE COURT: Okay.

7 MR. SILVERSTEIN: -- I mean, the whole notion of we're
8 entitled to equity, what's the numerator? You know, does the
9 debtor have to go into the market and buy shares? Your Honor,
10 I think you know where I'm going on that.

11 THE COURT: I do.

12 MR. SILVERSTEIN: There's a lot of issues.

13 We believe that it's absolutely inappropriate to allow
14 her to testify as a backdoor ambush and that she does
15 properly -- I'm sorry; as a backdoor ambush in connection with
16 the confirmation hearing, because confirmation is not about
17 whether the LTWs or debtor or equity, that's the adversary
18 proceeding. Confirmation as to the LTWs are the four issues
19 that I mentioned earlier and therefore we would request that
20 our motion be granted.

21 I don't know if Mr. Steinberg has anything to add.

22 MR. STEINBERG: Your Honor, unlike yesterday I'll try
23 to really be brief.

24 The debtors said in its response to this motion that
25 it was not intended to deal at all with the summary judgment

1 motion and they would only be interested in it if the summary
2 judgment motion wasn't granted. So that means only one logical
3 thing, they want this witness to be a witness because they want
4 to have a trial on the merits of the litigation tracking
5 warrants as part of the confirmation hearing. That's the only
6 logical explanation.

7 We believe that with an adversary proceeding out there
8 with ten depositions still scheduled with the ability to want
9 to take a deposition of an expert, with the ability to bring
10 our own expert, the notion that we're going to bog down this
11 confirmation hearing with a trial on the merits on this very
12 short notice, when there's been nothing scheduled, is
13 preposterous. And if that is not their intention, then why is
14 this witness being called.

15 So the debtor has tried, in sort of a gamesmanship
16 way, to have a trial on the merits on two days notice on an
17 issue which is not a show stopper issue for them to confirm
18 their plan of reorganization. They can confirm this plan. We
19 will be a disputed claim standing outside to be resolved like
20 hundreds of disputed claims that will get resolved post
21 confirmation. In fact, they set up an estimation proceeding on
22 reserve for us to take place post confirmation. So why is this
23 witness being called?

24 THE COURT: All right. Thank you.

25 MR. SHIFFMAN: Your Honor, this witness is being

1 called because in the event summary judgment is not granted, we
2 would like the opportunity to show that the litigation tracking
3 warrants are equity, it's not a full trial on the merits but
4 the narrow issue that the --

5 THE COURT: Why do we need that for confirmation?

6 MR. SHIFFMAN: We would like, in connection with
7 confirmation, to provide as generous a distribution to the
8 creditors as possible. That's in the best interest of the
9 estate. And if we could -- if the summary judgment is not
10 granted and we can show the litigation tracking warrants are
11 equity, then there's no need to reach any of the intent issues
12 that Mr. Steinberg wants to discuss. They're equity. All the
13 claims are subordinated under 510(b) and the debtor can provide
14 as generous a distribution to the creditors as possible.

15 THE COURT: Isn't that one of the issues in the
16 adversary?

17 MR. SHIFFMAN: Right. But we would maintain it's a
18 gateway issue. If their equity, all their breach of contract
19 claims would be subordinated, no need to reach that.

20 THE COURT: I understand you've raised that in the
21 adversary?

22 MR. SHIFFMAN: Yes. That is correct. And we've
23 submitted this both for the adversary and for confirmation.

24 THE COURT: Her report was submitted with respect to
25 the adversary as well?

1 MR. SHIFFMAN: For both.

2 MR. SILVERSTEIN: Your Honor, that's false. That's
3 absolutely false. It was not filed in the adversary
4 proceeding.

5 THE COURT: You can't be heard on the record --

6 MR. SILVERSTEIN: I apologize. Paul Silverstein for
7 Broadbill. That's absolutely false. It was not submitted in
8 connection with the adversary. It was filed in the case. It
9 was not filed in the adversary. And when we had our scheduling
10 conference on the 29th it wasn't even mentioned. So it's
11 absolutely not in the adversary proceeding.

12 MR. SHIFFMAN: It is --

13 MR. SILVERSTEIN: And if it was in the adversary
14 proceeding we should have had -- it should have been filed in
15 connection with their motion for summary judgment and we should
16 have had an opportunity to depose that witness as one properly
17 does. This is ambush.

18 MR. SHIFFMAN: This is not an ambush. It has nothing
19 to do with summary judgment. The Court can rule on summary
20 judgment without any reference to the expert report whatsoever.
21 This is only --

22 MR. SILVERSTEIN: Even though the issues are
23 identical?

24 MR. SHIFFMAN: They're not identical. The exp -- as
25 was discussed in summary judgment as -- the argument yesterday

1 can be granted based on the papers alone.

2 THE COURT: Well, I'm not going to decide any issue
3 dealing with the LTW adversary, other than what I heard on
4 summary judgment. So I'm not going to consider her report in
5 connection with confirmation. I do think it's a backdoor
6 around what I should have heard yesterday. If it was relevant
7 to the summary judgment motion, I should have heard it.

8 If it's not relevant to the summary judgment and I
9 deny the summary judgment motion, then I'll hear it at trial.

10 MR. SHIFFMAN: Thank you, Your Honor.

11 MR. STEINBERG: Your Honor, I know we just won but I
12 do want to correct a statement that counsel has made so there's
13 no confusion. The plan is written that a disputed claim will
14 have a cash reserve until there's a final and non-appealable
15 order that is entered with respect to the claim that totally
16 disallows it. Therefore the notion that they want to be, his
17 word was generous to other creditors to make a distribution,
18 they have to have a cash reserve and we have to go through the
19 appeal process before, if there's an appeal from either side --

20 THE COURT: I understand.

21 MR. STEINBERG: -- until there's a distribution. And
22 that should be clear.

23 MR. SILVERSTEIN: Thank you, Your Honor.

24 (Pause)

25 THE COURT: I think I've done all the preliminary

1 motions. Have I?

2 MR. STROCHAK: Just a couple more, Your Honor. This
3 is Adam Strochak from Weil Gotshal for the debtors.

4 I believe item number 2 on the agenda was our motion
5 to seal Exhibits 1, 2 and 3 from the declaration of Mr. Smith
6 submitted in support of confirmation. Those three documents
7 are documents that the Office of Thrift Supervision, takes a
8 position are confidential. From the debtors' perspective,
9 we're agnostic on whether they're a part of the public record
10 or filed under seal. The OTS would like those documents to
11 remain under seal in order to preserve the confidentiality of
12 communications between the regulator and regulated entities.

13 The three documents are a letter from the OTS
14 regarding the conditional exchange. A letter back from the
15 debtors to the OTS regarding the conditional exchange and a
16 memorandum of understanding entered in early September of 2008.
17 Again, the debtors' position is we're fine with these being
18 part of the public record but we did feel obligated to move to
19 seal them given the confidentiality designation that the OTS
20 had requested.

21 THE COURT: Okay. Does the OTS -- is the OTS here?

22 (Pause)

23 MR. STROCHAK: We did speak with them by telephone
24 last week and the position I articulated was the position they
25 articulated to us.

1 THE COURT: Well again, in furtherance of my statement
2 earlier, I'm inclined to not seal that or not keep that
3 confidential. I'd like it -- if it's being offered, and I
4 understand it is, part of the debtors' proffered testimony, I
5 think it should be made part of the public record.

6 MR. STROCHAK: Thank you, Your Honor.

7 One more procedural matter while I have the podium,
8 just to clarify on the order on witnesses. Mr. Smith is the
9 company's general counsel and we'd ask that he be permitted to
10 remain in the courtroom during testimony as the corporate
11 representative of Washington Mutual. And then we do have some
12 people in the courtroom who are potential rebuttal witnesses.
13 I did not understand the Court to be excluding those witnesses
14 as well but obviously I want to make sure I do whatever the
15 Court wishes on that.

16 THE COURT: Let me hear the parties' views on those.

17 MR. NELSON: With respect to the first one, we have no
18 objection. If Mr. Smith is the corporate representative, of
19 course he can remain.

20 With respect to anyone who may testify, if the debtor
21 plans on calling them, then they should not be able to hear
22 prior witness testimony and see how it's developed. And just
23 like the other direct witnesses, they should not be able to
24 discuss what has occurred in the courtroom or discuss the
25 testimony of others.

1 If the debtor wants to call them, then they should be
2 removed from the courtroom until such time as the debtor
3 decides not to call them.

4 THE COURT: I've never heard of rebuttal witnesses
5 being excluded though. That's the point; they're rebutting
6 testimony that's being presented.

7 MR. NELSON: Well I think, Your Honor, the issue is is
8 that we don't really know who they are. The debtor has a
9 pretty good idea about what the case may be and --

10 THE COURT: Do they know what you're going to present?

11 MR. NELSON: No, Your Honor. Fair enough. Fair
12 enough.

13 THE COURT: And since largely part of your case, as I
14 understand it, is going to be through cross --

15 MR. NELSON: In fact, Your Honor, our entire case will
16 be through cross, yes.

17 THE COURT: So --

18 MR. NELSON: That's right.

19 MR. STOLL: Your Honor, if I might. James Stoll,
20 again. That was going to be my point. If our case is through
21 cross, then what are they rebutting? They're going to be
22 rebutting their own witnesses' testimony? That shouldn't be
23 appropriate. It's one thing to rebut our case in chief if we
24 have an affirmative witness but to lead a witness in to rebut
25 people who are impeached or otherwise cross examined, that does

1 not seem appropriate.

2 MR. STROCHAK: Cross examination is their case, Your
3 Honor. I don't know what they're going to ask about. You
4 know, I can certainly speculate as to what they're going to ask
5 about but I don't know. And, you know, it would be, in our
6 view, appropriate for the rebuttal witnesses to be able to
7 observe the proceedings and we'll obviously abide by whatever
8 decision the Court has on this.

9 To be perfectly candid, there's no mystery. Mr.
10 Feilinger is the witness who we would ask be permitted to
11 remain. He's a former employee of Washington Mutual. He's a
12 consultant to the company now and has come a long distance to
13 be able to be here in the event that we need him to testify.
14 He was originally designated as witness when we were
15 contemplating the potential of a full trial on the trust
16 preferred issues. So we don't think that we need to put him on
17 as part of our case in chief, given the Court's ruling on the
18 scope of the trial. But we do want to have him available to
19 address any issues that come up on rebuttal.

20 MR. NELSON: Actually, the equity committee has no
21 objection to Mr. Feilinger. I don't think it's going to come
22 up at all in our case. With respect to Mr. Feilinger in
23 particular, equity committee is comfortable with him staying in
24 the room.

25 THE COURT: But the TPS aren't.

1 MR. STOLL: Well again, Your Honor, I just don't
2 understand the notion of trying to rehabilitate your own
3 witnesses and calling it rebuttal. If the rebuttal witness is
4 somebody who is not offered in the case in chief but is going
5 to comment on something that somebody who was cross examined
6 about, who is prepared to testify and all these witnesses are
7 going to be proposed to you by affidavit as their direct, so
8 their direct cases can, we cross examine them so they bring in
9 another witness who we don't even know what they're going to
10 say to rehabilitate that witness? I mean, that's not rebuttal.

11 MR. SACKS: Your Honor, Robert Sacks for JPMorgan
12 Chase. I just want to address this last point. We are not
13 offering -- you're hearing both approval of the global
14 settlement agreement as part of confirmation of the plan. We
15 don't believe there's going to be any reason to put on any
16 witnesses of our own as part of the direct case.

17 The people, the objectors, are going to offer evidence
18 that they're asking you to consider. They're offering it
19 through the witnesses who happen to be called by the debtors as
20 part of the case, but it is still evidence. It is still being
21 considered by Your Honor and it still may give rise to a right
22 to rebuttal.

23 So I don't have anyone here -- nothing on this issue
24 of witnesses being in or out of the room, but I stand only to
25 address the issue that it's undoubtedly possible that there

1 could be rebuttal evidence based upon the examination by
2 objectors of witnesses who are being put on in the case. It's
3 not simply just disavowing the witness and undermining that
4 witness. They're asking Your Honor to consider their evidence
5 that they're going to put on through that witness and it may be
6 or it may not be subject to rebuttal.

7 THE COURT: Well, I'm going to allow him to stay in
8 but to the extent he's offered as a witness it will be only to
9 rebut any evidence that comes in through cross. Not
10 evidence -- evidence that affirmatively comes in through cross,
11 not simply impeachment of the original witnesses.

12 MR. SACKS: Thank you, Your Honor.

13 MR. BROWN: Your Honor, Daniel Brown on behalf of the
14 TPS consortium.

15 One very minor issue. We had filed a motion to strike
16 deposition designations of witnesses that are going to be here
17 live. It appears as though the debtors may have actually
18 withdrawn those deposition designations. I'm not sure, it's
19 not very clear to me. I just want to make sure that they're
20 not putting in witnesses through affidavit, then having them
21 testify live and also designating deposition testimony. It's
22 inappropriate to have three levels of testimony for the same
23 witness and so I stand just for that purpose.

24 MR. MASTANDO: Good morning, Your Honor. John
25 Mastando from Weil Gotshal, again, on behalf of the debtors.

1 We did agree to withdraw those deposition
2 designations, Your Honor, since the witnesses will be
3 testifying through declaration and/or live. And one other
4 minor housekeeping matter, item 3 on the agenda was a -- is a
5 motion for an order authorizing us to file under seal two
6 exhibits to Mr. Goulding's declaration that are referenced in
7 paragraph 29 of his declaration. They are a net asset value
8 summary and a settlement liability for cash balance pension
9 plan reports. We -- they are subject to confidentiality
10 restrictions and we have not yet been able to obtain the
11 authority to release those publicly, so we filed the motion
12 under seal.

13 We would request that they be under seal. If Your
14 Honor is not inclined, we would be willing to withdraw the
15 exhibits.

16 THE COURT: And under what are they confidential?
17 What basis?

18 MR. MASTANDO: With the -- pursuant to -- the
19 agreement pursuant to which they were done by an outside entity
20 called Towers Perrin (ph.). They're reports of an outside
21 entity and we just didn't have the authority to release them.

22 THE COURT: Well, what are the parties' position on
23 that?

24 MR. NELSON: I'm sure I'll be corrected if I'm wrong.
25 I believe Towers Perrin was hired by the debtors to perform

1 this report.

2 MR. MASTANDO: I don't think that changes, Your Honor,
3 that just as of now we didn't have the authority to release
4 them publicly. Perhaps we can deal with it when Mr. Goulding's
5 testimony comes up and see if we can get a resolution of it
6 before then. He won't be the first witness so perhaps we can
7 defer it until his testimony.

8 THE COURT: Well, if the debtors hire somebody to give
9 them a report and want to offer that into evidence, I think
10 it's got to be public. I don't know on what basis Towers
11 Perrin would have for keeping its report that it's produced for
12 a debtor-in-possession confidential. You may want to talk to
13 them before we get to it.

14 MR. MASTANDO: Okay. We'll do that, Your Honor.
15 Thank you.

16 Your Honor, at this point the debtors are prepared to
17 offer their case in chief on confirmation, if there are no
18 other preliminary matters.

19 THE COURT: All right. Your may.

20 MR. MASTANDO: Okay.

21 THE COURT: Let's talk about how we're going to do
22 that and the order. Maybe we'll take a short break so I can
23 deal with something else.

24 MR. MASTANDO: Your Honor, the debtors filed,
25 approximately two weeks ago, a notice of our intention to call

1 witnesses at confirmation. It was filed on November 15th and
2 it lists the witnesses that we intend to call. As we've
3 indicated, Your Honor, we would like to proceed by submitting
4 the declarations of the witnesses as their direct testimony and
5 then offering the witnesses for cross examination. The first
6 witness that we would offer would be Mr. William Kosturos,
7 who's the chief restructuring officer of WMI. I have his
8 original, signed declaration here if the Court requires and I
9 also have a copy for Your Honor and counsel if necessary.

10 THE COURT: I just -- in what order are you going to
11 go with your witnesses?

12 MR. MASTANDO: Okay. It will be Mr. Kosturos --

13 THE COURT: The order listed in your list of
14 witnesses?

15 MR. MASTANDO: Unfortunately I don't think that's the
16 exact order.

17 THE COURT: Okay.

18 MR. MASTANDO: It will be Mr. William Kosturos first.
19 Then it will be Mr. Jonathan Goulding, then Mr. James Carrion
20 (ph.), then Mr. Charles Smith, then it will be Mr. Steven
21 Simms, it will be Steven Zelin, Mr. Robert Klamser and Mr.
22 David Sharp.

23 THE COURT: Okay. All right. Well, let's take a
24 five minute break and then we can start with --

25 MR. MASTANDO: Okay. Thank you, Your Honor.

1 THE COURT: -- the witnesses.

2 (Recess from 10:31 a.m. until 10:39 a.m.)

3 THE CLERK: All rise.

4 (Pause)

5 THE CLERK: You may be seated.

6 MR. STOLL: Your Honor, one last point of order. A
7 question, actually. Given Your Honor's ruling this morning on
8 the examiner motion, certain of the affidavits have certain
9 paragraphs in which the affiant makes reference to and
10 characterizes the examiner's report and factors that into their
11 presentation. Would it be appropriate for us to provide,
12 tonight or tomorrow but due tonight, a proposed order that
13 strikes those particular paragraphs that make reference to and
14 reliance on the examiner's report?

15 THE COURT: That's fine. And I'll ask counsel to
16 coordinate so that it can be done consensually.

17 MR. STOLL: Thank you.

18 MR. MASTANDO: Good morning, Your Honor. John
19 Mastando, again, from Weil Gotshal on behalf of the debtors.

20 Your Honor, at this time the debtors would like to
21 offer the declaration of Mr. William Kosturos into evidence as
22 his direct testimony in support of confirmation. I have an
23 original, signed copy if Your Honor would like. I also have a
24 copy for Your Honor and counsel that I can hand up if needed.

25 THE COURT: Well, that might be easier than me finding

1 it in the binder.

2 MR. MASTANDO: May I approach, Your Honor?

3 THE COURT: You may.

4 (Pause)

5 THE COURT: Thank you.

6 (Pause)

7 MR. MASTANDO: Your Honor, I would like to call Mr.
8 Kosturos to the stand.

9 THE COURT: You may.

10 MR. MASTANDO: And Your Honor, if I may, briefly I
11 would just like to ask Mr. Kosturos a few questions just to
12 introduce him to the Court and then turn him over for cross?

13 THE COURT: You may. First he should stand and be
14 sworn.

15 (Witness duly sworn)

16 THE CLERK: Please state your full name and spell your
17 last name for the record.

18 THE WITNESS: William Kosturos, K-O-S-T-U-R-O-S.

19 THE CLERK: Thank you.

20 DIRECT EXAMINATION

21 BY MR. MASTANDO:

22 Q. Good morning, Mr. Kosturos.

23 A. Good morning.

24 Q. Could you please describe your educational background for
25 the Court?

1 A. Sure. I have a business degree from the University of San
2 Francisco with an emphasis in accounting.

3 Q. Okay. And where are you currently employed?

4 A. Alvarez & Marsal.

5 Q. And how long have you been at Alvarez & Marsal?

6 A. Approximately eight and a half years.

7 Q. Where did you work prior to that?

8 A. Prior to Alvarez & Marsal I worked at Arthur Anderson.

9 Q. And how long were you there?

10 A. Approximately seventeen years.

11 Q. Okay. And what is your current position at Alvarez &
12 Marsal?

13 A. I'm a managing director as well as the co-head of the west
14 region for restructuring and I'm a member of the executive
15 committee for restructuring, as well.

16 Q. Okay. And do you have any current position at WMI?

17 A. Yes. I am the chief restructuring officer at WMI.

18 Q. Okay. And now, have you worked on restructurings in the
19 past?

20 A. Yes, I have.

21 Q. Can you briefly describe for the Court some of the matters
22 you worked on?

23 A. Sure. I was chief restructuring officer of Movie Gallery
24 as well as interim CEO and chief restructuring officer of
25 Spiegel Inc. And then I was a CFO of a private aircraft cargo

1 carrier and that was -- that's about my roles at A&M. And then
2 previous to A&M, at Arthur Anderson, I was a financial advisor
3 to PG&E Corp, Pexel, Close Time, Sprinkle Industries, just to
4 name a few.

5 Q. Okay. And when did you become chief restructuring officer
6 of WMI?

7 A. It was in October 2008.

8 Q. Okay. And can you briefly describe your responsibilities
9 as chief restructuring officer?

10 A. Sure. I'm -- I oversee the Chapter 11 process and oversee
11 the day-to-day operations at Washington Mutual.

12 Q. Okay. Now, were you involved in the negotiation of the
13 global settlement agreement that is the subject of today's
14 hearing?

15 A. Yes, I was. I was the lead negotiator for WMI.

16 Q. Okay. Thank you, Mr. Kosturos.

17 MR. MASTANDO: Thank you, Your Honor.

18 THE COURT: All right. Cross?

19 (Pause)

20 MR. NELSON: Good morning. First, Your Honor, the
21 equity committee has two binders of which the Court has a copy.

22 THE COURT: I do.

23 MR. NELSON: We've given a copy to the debtors and
24 tried to give a copy to most of the other parties. If it's
25 okay, I'd like to approach the witness and give him a set of

1 the two binders. These will be the two binders that we intend
2 to use with respect to all of our witnesses today, with the
3 exception if there are any of the confidential documents.

4 THE COURT: All right.

5 (Pause)

6 MR. MASTANDO: Your Honor, John Mastando on behalf of
7 the debtors, again from Weil Gotshal. I'd just like to note
8 for the record that we just received the binders right before
9 the testimony began.

10 THE COURT: Okay.

11 (Pause)

12 MR. NELSON: Your Honor, subject to objection of
13 course and for the debtors to review, we would move to admit
14 these documents.

15 THE COURT: Well, let's wait till the conclusion.

16 MR. NELSON: Of course, Your Honor.

17 CROSS EXAMINATION

18 BY MR. NELSON:

19 Q. Good morning. Mr. Kosturos, is it fair to say that this
20 settlement happened because the 2009 tax break that put more
21 money on the table for the parties to divide up?

22 A. I would say that it certainly helped the negotiations.
23 That would be a correct statement. It created much more value
24 for the parties. Sure.

25 Q. I think in your declaration, on paragraph 35, you state

1 that the new tax law that gave this three billion dollar tax
2 break to be divided, reinvigorated the negotiations, is that a
3 fair assessment of how you believe about the effect of the 2009
4 so-called Homeowners Act that gave this five year tax break?

5 A. Well, if those were the words I used in my declaration, I
6 stand by them.

7 Q. This tax break is costing the U.S. government
8 approximately, what, 2.7 to three billion dollars, is that
9 right?

10 A. I think we've estimated it at 2.8 billion dollars.

11 Q. This additional money to be divided was not due to a
12 sudden improvement in your analysis of the strengths and
13 weaknesses of your claims, was it?

14 A. Could you repeat that?

15 Q. Sure. You state that the tax break reinvigorated the
16 negotiations, the fact that we now have a proposed settlement
17 and the additional money that was divided was not due to some
18 new assessment that you made in between the time that you first
19 started negotiating the settlement agreement and the time that
20 the tax break became law in November 2009?

21 A. Well, I think, you know, you have to look at those
22 separately. The negotiations between the parties were, from
23 the debtors' standpoint, to try to maximize the value of the
24 estate and whether we look to one pot of money versus another
25 pot of money, I think the most important thing is that we

1 maximize the value of the estate as well as we balanced our
2 assessment of what our claims strengths and weaknesses were.

3 Q. I'm sorry; I'm just looking for a yes or no answer here.

4 The new money that came in to be divided up was, just to be
5 clear, the estate and WMI is getting a portion of that new tax
6 refund, correct?

7 A. Yes, I think it's plainly laid out in our papers what
8 percentages we're getting. Yes.

9 Q. That extra portion was not due to some revelation that
10 WMI's strengths against JPMorgan and FDIC improved over the
11 interim, correct?

12 A. I think the global settlement statement, you know, stands
13 for itself. We -- at the end of the day we're maximizing the
14 value and we were giving up those claims as part of the
15 releases.

16 Q. Did your analysis of any of the claims change from March
17 till November of 2009, without getting into what that analysis
18 was?

19 MR. MASTANDO: Your Honor, I hate to interrupt and
20 object. I just note that this already is coming perilously
21 close to the line of privileged information and the question
22 also seems to be confusing topics. I just wanted to remind the
23 witness --

24 THE COURT: You have to speak up because nobody in the
25 back or in the other courtroom can hear you.

1 MR. MASTANDO: I'm sorry, Your Honor. John Mastando
2 on behalf of the debtors.

3 I apologize for interrupting. I just want to note, I
4 think this is already coming perilously close to discussing
5 privileged information and as we all know that's a sensitive
6 issue and I just want to remind the witness to --

7 THE COURT: I think the witness knows enough.

8 MR. NELSON: I'll rephrase my question.

9 Q. Without revealing any privileged information, did your
10 analysis of the strengths and weaknesses of any of your claims
11 change between the time you started negotiating the settlement
12 agreement in March 2009 or early 2009 and November 2009?

13 A. Well, of course the claims were being developed. A lot of
14 things happened between March 2009 and November 2009. Chief
15 among them was we hired Quinn Emanuel in April of 2009 and we
16 continued to have discovery through 2009. So of course those
17 claims were being developed throughout 2009 and up until we
18 entered into the settlement.

19 Q. Once the new tax break was enacted you agree that there
20 was significantly more money available via the tax refunds to
21 distribute in the settlement, isn't that right?

22 A. I think I've testified to that already. Yes -- well it
23 created, again, different -- different potentials for recovery
24 from the negotiations. Yes.

25 Q. The answer to my question was yes?

1 A. I stand by my answer.

2 Q. All right. Let's go to your deposition. You had your
3 deposition taken on November 16th, 2010, is that right?

4 A. Yes.

5 Q. You were designated as the estate's corporate
6 representative on numerous topics, including settlement
7 negotiations. Is that right?

8 A. Yes.

9 Q. Do you stand by that testimony?

10 A. Yes.

11 THE COURT: Is that in your binder or do you have
12 copies for the Court?

13 MR. NELSON: Excuse me. I think --

14 (Pause)

15 MR. NELSON: Yes, Your Honor. We at least have a copy
16 for the Court. May I approach?

17 THE COURT: You may.

18 (Pause)

19 Q. I point your attention, Mr. Kosturos, to page 290, which
20 is the upper left corner, the line 21. You state -- the
21 question, I believe, starts on line 11 and you go on and then
22 the new paragraph on line 21, "Once that new tax law became
23 enacted there was significantly more money available via the
24 tax refunds." You stand by the testimony?

25 A. Yes.

1 Q. I'd like to go over with you, briefly, so we understand
2 the lay of the land, the assets that are going to be
3 distributed and the proceeds of the estate.

4 MR. NELSON: May I approach, Your Honor? We have a
5 chart.

6 THE COURT: You may.

7 (Pause)

8 MR. MASTANDO: Your Honor, John Mastando from Weil
9 Gotshal on behalf of the debtors. We haven't seen this before.
10 We don't have a copy. It wasn't given to us in advance. I
11 just want to note that for the record. And so, we have no way
12 of verifying what's on it.

13 MR. NELSON: We will try to get copies. I thought we
14 had copies.

15 (Pause)

16 MR. NELSON: We are -- we do not have copies at this
17 second. We're at the pleasure, we will immediately get copies
18 to the extent we can.

19 THE COURT: Well, let's proceed but I'd like to have
20 copies for the parties and let's see --

21 MR. NELSON: Of course, Your Honor.

22 THE COURT: -- what we can do.

23 BY MR. NELSON:

24 Q. Mr. Kosturos, this is a summary essentially from the
25 liquidity analysis, at least with respect to the gross estate

1 proceeds and the net estate proceeds, you would agree with
2 that?

3 MR. MASTANDO: Your Honor, I'm just going to note my
4 same objection, that it wasn't provided in advance and, you
5 know, we just don't have copies.

6 THE COURT: All right. That's been noted. Can the
7 witness answer? I guess -- what is the question, whether the
8 gross number represents --

9 MR. NELSON: The gross and net and estate expenses
10 numbers are as they appear on the liquidity analysis.

11 Q. Is that right?

12 A. I'm not sure what you mean by liquidity analysis, I'm
13 sorry.

14 (Pause)

15 Q. Excuse me, the liquidity and recovery analysis that
16 appeared in your disclosure statement.

17 THE COURT: Which exhibit to the disclosure statement?

18 MR. NELSON: We're looking -- it's Exhibit C, I
19 believe. Let's see.

20 (Pause)

21 THE COURT: That's not in your exhibit binder, any of
22 the exhibits to the disclosure statement. Is the disclosure
23 statement in the debtors' exhibit binder?

24 MR. MASTANDO: The disclosure statement is in the
25 debtors' exhibit binder, Your Honor. I can --

1 THE COURT: What number?

2 MR. MASTANDO: Let me see if I can look. Exhibit 5,
3 Your Honor.

4 THE COURT: Thank you.

5 BY MR. NELSON:

6 Q. This is -- excuse me -- this might be the -- this is
7 Exhibit C, liquidation analysis for the debtor; do you see
8 that?

9 THE COURT: Well, can you see it on the screen?

10 THE WITNESS: Yeah. I can see it on the screen. I
11 don't seem to have it in the binder.

12 MR. NELSON: Okay.

13 THE WITNESS: There's no exhibits.

14 Q. Okay. We have another demonstrative, I'll show you that.
15 It's a blowup of the recovery analysis.

16 A. I see what you mean. Yeah.

17 Q. You agree that this is an accurate representation of the
18 recovery analysis that's included in your papers to approve the
19 plan and settlement?

20 UNIDENTIFIED SPEAKER: What? I couldn't hear you.

21 MR. NELSON: Approve the plan and settlement.

22 MR. MASTANDO: Your Honor, again, I just object that
23 we were not provided with the demonstrative in advance and I'm
24 not sure where counsel is pointing the witness to.

25 THE COURT: It looks like it's the left-hand side of

1 page C-3.

2 MR. NELSON: Correct.

3 THE COURT: Of the liquidation analysis.

4 Q. Mr. Kosturos, you agree that the total proceeds, expenses
5 and net proceeds in the first demonstrative are coming from
6 this C-3, correct?

7 A. I unfortunately don't have this in front of me.

8 MR. MASTANDO: I'm going to object, Your Honor,
9 because he doesn't have the document in front of him.

10 THE WITNESS: If you could put that back on the screen
11 I can verify that for you. I'm sorry.

12 Q. This is Exhibit 37 in our binder, as well.

13 (Pause)

14 A. Okay. I have it in front of me.

15 Q. My question was intended to be quite simple, which is the
16 numbers on the liquidity analysis and recovery analysis --
17 excuse me -- are represented accurately in the big box on the
18 right-hand side of the demonstrative we're looking at?

19 A. The only slight update is the reorganized WMI that's
20 listed at 145 million. I believe that Blackstone updated their
21 valuation for 157.5.

22 Q. So the net estate proceeds should actually -- and gross
23 estate proceeds should be grossed up by twelve and a half
24 million dollars, is that right?

25 A. Yes.

1 Q. Okay. Thank you. You would agree, then, that the funding
2 of the estate is coming from if the large part of the red
3 circle is the deposits and representing approximately four
4 billion dollars, would you agree that the deposits are
5 representing about four billion dollars of the proposed
6 recovery?

7 A. Yes.

8 Q. The small pie in the red is the intercompany loans that is
9 between 180 and 190 million, you see the little dotted line,
10 you agree that that's an accurate representation of the
11 intercompany loans?

12 A. I presume you're referring to the part of the settlement
13 agreement that JPM will be paying those?

14 Q. Well, that was an asset that was on WMB's books at the
15 time of the seizure, correct?

16 A. It was an interco loan to WMB. There seems to be some
17 question of whether that's with the FDIC receivership or
18 whether that is JPMorgan. So to clarify that, yes.

19 Q. Okay. It was an asset of WMI on the books of WMB at the
20 time that WMB was seized, correct?

21 A. That's correct. It's just -- there seems to be, in our
22 discussions between JPMorgan and the FDIC there seem to be some
23 dispute over who was the obligor on the other side of it, once
24 the FDIC seized the bank.

25 Q. Your opinion was that it was an asset of WMI and therefore

1 belongs to WMI, right?

2 A. Yes. Without a question it's WMI's. The only question
3 is, you know, with the complicated matter of the FDIC's
4 receivership and JPM, the question just is who is going to pay
5 it. And obviously if the FDIC is going to pay it out of their
6 receivership their liabilities are significantly greater than
7 their assets. So that would not be, necessarily, a dollar-for-
8 dollar payment if you had to go through the FDIC receivership
9 process.

10 Q. The pre-existing cash, there's been references to
11 approximately 900 million dollars, do you agree that there's
12 approximately 900 million dollars of pre-existing cash that's
13 being used to fund the settlement?

14 A. I think we phrased that that 900 million dollars was a
15 combination of things. It wasn't necessarily all cash. So
16 there was a few other non-disputed assets, I would agree with
17 that, that totaled 900 million dollars. I do not believe that
18 those were all in cash.

19 Q. The BOLI-COLI policies that you are receiving title to as
20 a result of the proposed settlement is separate from the pre-
21 existing cash, right?

22 A. On your chart it is. Yes.

23 Q. I mean in terms of how the settlement is funded, it's not
24 included in the -- when you say 900 million dollars, you're not
25 speaking of the money that is the BOLI-COLI policies, are you?

1 A. No.

2 Q. The good will litigation of fifty-five million dollars
3 that is being used to fund the settlement, that's no included
4 in the 900 million dollars, is that right?

5 A. That's also correct.

6 Q. Okay. Going then to the upper left, tax refunds is being
7 used to fund approximately 2.195 billion dollars of the
8 proposed settlement, is that right? I'll just turn your
9 attention back to Exhibit 37, C-3; I think that number comes
10 directly from there.

11 A. Yes.

12 Q. Okay. The reorganized WMI, you've already stated that
13 instead of 145 million that number should be 157.5 million
14 dollars, is that right?

15 A. Yes.

16 Q. The investment in subsidiaries and others is an additional
17 twenty-five million dollars used to fund it? And again, I'll
18 point your attention to Exhibit C-3. Is it true that the
19 twenty-five million dollars represented in the pie chart is
20 being used from the investment and other subsidiaries category?

21 A. Yes.

22 Q. And then finally, there's a JPMorgan payment for Visa
23 shares of twenty-five million dollars, is that right?

24 A. That would be right. Yes.

25 Q. Looking at this, the only out-of-pocket payment that

1 JPMorgan is contributing to the settlement that did not already
2 belong to WMI was twenty-five million dollars, correct?

3 A. Oh, I would disagree with that statement. It's a vastly
4 more complex the way -- of how the tax refunds work and
5 probably each and every asset on there. So I would disagree
6 with your general statement.

7 Q. I'm sorry; we just went over every single category of
8 those. The tax refunds are not coming from JPMorgan's pocket,
9 is it?

10 A. Well, let's talk about the tax refunds for a minute.

11 Q. Well, first answer my question. The actual payment --

12 MR. MASTANDO: Objection, Your Honor. The witness is
13 trying to answer.

14 THE COURT: Overruled.

15 Q. The actual payment of the tax refunds is coming from the
16 United States government, correct?

17 A. Yes. That's where tax refunds come from.

18 Q. The only out-of-pocket money that JPMorgan is contributing
19 to this proposed settlement is twenty-five million dollars,
20 correct?

21 A. Again, that is not correct because for various reasons, if
22 you would like me to answer I will, I'd like to.

23 Q. Well my question is, in terms of out-of-pocket outlays, we
24 have gone over -- let me phrase it this way. In terms of
25 everything else on the pie chart, where else is JPMorgan

1 contributing out-of-pocket money that's being used to fund the
2 estate besides the twenty-five million dollars.

3 A. Your Honor, JPMorgan is releasing various claims that
4 clearly have significant value here and I certainly can go
5 through those and describe, on Mr. Nelsons' pie chart, how
6 those amounts really would be looked at in entirety.

7 THE COURT: And nobody's asking where are they writing
8 a check.

9 THE WITNESS: Well, they were giving up their claims
10 as a --

11 THE COURT: Where are they writing a check?

12 THE WITNESS: Were they writing a check? Well,
13 they're going to have to write us a check for the four billion
14 dollars because it's -- the four billion dollars is at
15 JPMorgan, the cash deposits.

16 THE COURT: Uh-huh.

17 THE WITNESS: So they'll have to wire that money to us
18 in some form or fashion, as well as releasing their claims.
19 They will be writing a check for the twenty-five million
20 dollars of Visa shares and for the other ones they'll be
21 turning over assets but not necessarily having to write us
22 checks.

23 BY MR. NELSON:

24 Q. Okay. So it's true that besides your assets that are
25 already on WMI's books but held by WMB that later went to

1 either the FDIC or JPMorgan, the only contribution and out-of-
2 pocket cash is the twenty-five million dollars that JPMorgan is
3 paying for the Visa shares, correct?

4 A. That's incorrect because the tax refunds themselves are
5 not necessarily on our books. There's significant amounts of
6 liabilities that they're giving up as well. So -- just to be
7 clear, the 2.195 tax refunds is not on our balance sheet.

8 Q. Excuse me. Could you repeat that?

9 A. It's not on our balance sheet. I thought you said it was
10 on our books and records, I was just clarifying the fact that
11 it's not on our books and records.

12 Q. Okay. I think -- let's move on.

13 A. Okay.

14 Q. I'd like to go over the assets that JPMorgan is receiving
15 as part of this settlement. You don't know the dollar values
16 that JPMorgan is getting out of the settlement, do you?

17 A. The dollar values that they're getting out of it is an
18 incredibly complex question because, again, they are giving up
19 significant claims on our estate. We certainly can go through
20 each and every line. I believe in your deposition you asked me
21 the totality of the value of which I think I testified is a
22 very complex question.

23 Q. Should we go to your deposition to see what you said?

24 Let's go to page 194, 23.

25 "Q. Do you have a ballpark of what value Chase is getting out

1 of it?

2 "UNIDENTIFIED SPEAKER: Objection to form. I would
3 instruct the answer not to answer.

4 "A. I don't know what dollar values that JPMorgan is getting
5 out of this."

6 Q. Correct?

7 A. Right. As follow-on question to the previous question of
8 which I said, the FDIC and JPM it's very difficult to put a
9 dollar value on what precisely is JPM paying into this.

10 Q. Correct. And then your answer was, you don't know the
11 dollar values that JPMorgan is getting out of it, right?

12 A. On a precise basis. We certainly can go through the
13 settlement agreement. In fact, I think JPM's done a very nice
14 job in their briefing, they have a graph of what they say we're
15 getting and what they're getting and what they're giving up.
16 So I think that's a wonderful summary of the transaction.

17 Q. Okay. Well let's put our next demonstrative up.

18 (Pause)

19 MR. MASTANDO: Sorry to interrupt again, Your Honor.

20 John Mastando from Weil Gotshal on behalf of the debtors.

21 Again, I note this is another demonstrative that was not given
22 to us in advance. We have no idea how it was prepared or what
23 it was based on and we're just now seeing it for the first
24 time, yet again.

25 Q. You would agree, Mr. Kosturos, that with respect to the

1 tax refunds JPMorgan is receiving approximately 2.36 billion
2 dollars of the allocation of the tax refunds?

3 A. I would agree to it. But again I think -- should we put
4 it in context of whether they had ownership of it prior to this
5 agreement or do you just want to say that you're -- we're just
6 going to add up what they already owned? I just want to make
7 sure that -- it's easy to add up a bunch of numbers that
8 shouldn't be added up and I see the direction you're going.
9 But if we want to talk about whether they -- that those assets
10 actually belonged to them prior to the settlement, I think
11 that's really, probably, a more fruitful discussion if you're
12 going to try to value what it is that they received.

13 Q. You, in litigation, disputed who owned the tax refunds,
14 correct?

15 A. In the litigation what we said was specifically we are the
16 consolidated payer of the tax refund. We believe that we
17 should be entitled to receive the entire tax refund. Then the
18 tax sharing agreement governs that and then you have to
19 allocate the tax refunds to who generated those tax attributes
20 or tax losses.

21 In almost every respect the WMB was the generator of those
22 losses therefore was entitled to the majority of the tax
23 refunds, whether that was JPM or FDIC. So if we're going to
24 talk about the five and a half billion dollars of tax refunds
25 and what potentially WMI owned, we can talk about that. But

1 certainly the vast majority of those tax refunds belonged,
2 through the tax sharing agreement, to WMB not WMI.

3 Q. Yes or no, in the litigation the tax refunds and the
4 ownership of the tax refunds was a disputed issue?

5 A. Yes.

6 Q. As part of the settlement JPMorgan is receiving 2.36
7 billion dollars of the tax refunds, correct?

8 A. That is correct.

9 Q. You are aware, by the way, that due to the law of the
10 second tax refund prohibiting any bank who has received bail-
11 out money from participating in the second refund, that whether
12 JPMorgan could receive any of the second refund was very much
13 an open question, correct?

14 A. Whether JPM could receive that certainly was an open
15 question. The other question you had to ask was, did the FDIC
16 receivership own it and they are not bound by TARP and could
17 receive it.

18 Q. The difference between the allocation in the first March
19 proposed settlement and then the later announced settlement in
20 May was due, essentially, to a reallocation of this tax refund
21 money between the first refund and the second refund, isn't
22 that right?

23 A. Well, there was two things. First of all, yes, there was
24 a reallocation of the first tax NOLs from -- WMI received them
25 thirty percent to twenty percent. And then there was also an

1 increase in WMI's allocation of the second NOL, going from 40.6
2 to approximately sixty-five percent.

3 The other thing that was very important along with that
4 was that JPM no longer was giving up their indemnification to
5 the FDIC receivership in corporate and the FDIC was no longer
6 funding a priority claim within the receivership. So that,
7 kind of, all went together. But in any event, WMI got
8 substantially more value in the second -- the second amendment,
9 yes.

10 MR. NELSON: Your Honor, may I approach? I have
11 copies of demonstratives for the Court. We're trying to get it
12 for the witnesses -- excuse me for one second.

13 (Pause)

14 MR. NELSON: I apologize, Your Honor. The slide that
15 was given out referred, in part, to some of the highly
16 confidential information and so therefore we're not using that.
17 It's not up on the screen but we're getting all the slides.

18 May I approach, Your Honor?

19 THE COURT: You may. You're only giving me what's up
20 on the screen?

21 MR. NELSON: No, Your Honor. I'm giving you
22 everything.

23 MR. SACKS: We object to that, Your Honor, at this
24 point. If they're giving you slides --

25 THE COURT: You have to talk into the record.

1 MR. SACKS: Sorry, Your Honor. Robert Sacks for
2 JPMorgan Chase. We object to them giving you slides that are
3 not yet being offered to be used. Why don't they give to you
4 and let us be heard when that happens.

5 MR. NELSON: No objection, Your Honor.

6 THE COURT: Okay.

7 (Pause)

8 THE COURT: Thank you.

9 (Pause)

10 BY MR. NELSON:

11 Q. Mr. Kosturos, the change between the March and May
12 settlement that we just discussed, WMI did not request that
13 change, correct?

14 A. I'm not sure how to answer that. What happened is that
15 the FDIC was unable to get board approval of the deal that we
16 filed in March. We therefore had to continue negotiations,
17 which ultimately led to the amended settlement agreement. So
18 I'm not sure how to answer your question WMI requested that.

19 Q. The dispute that led the FDIC board not to approve the
20 March settlement was a dispute between the FDIC and JPMorgan,
21 correct?

22 A. I do not know that.

23 Q. You described the two issues; one was the allocation of
24 the tax refunds. The second was the indemnity between JPMorgan
25 and the FDIC, correct?

1 A. That's correct.

2 Q. You did not have an issue with the allocation of the tax
3 refunds in the first announced settlement, correct?

4 A. We had agreed to that settlement. Yes.

5 Q. You also did not have an issue with the indemnification
6 provisions between JPMorgan and the FDIC, correct?

7 A. Whatever was filed in the settlement agreement. Yes we
8 did not have an issue with the March settlement agreement.

9 Q. The end result of the changes actually were to benefit the
10 estate by an additional 270 to 300 million dollars, correct?

11 A. I think that's approximately the ballpark. Yes.

12 Q. And the change was accomplished by reallocating the tax
13 refunds so the estate would take a smaller portion of the first
14 tax refund and receive a larger portion of the second tax
15 refund. Is that a fair statement?

16 A. Yes. The allocations of the second NOL were largely
17 changes to the splits between the FDIC and WMI. In fact, they
18 weren't largely they were a hundred percent. We just changed
19 the allocation of the second NOL between the FDIC and WMI.

20 Q. The change had nothing to do with the merits of WMI's
21 right to the first tax refund versus its right to the second
22 tax refund, correct?

23 A. No. It was -- it was part of the negotiations.

24 Q. To be clear, you believe that the March settlement that
25 was between 270 million to 300 million dollars lower than the

1 May settlement also maximized the value of the estate, correct?

2 A. I think the March settlement was a very good settlement.
3 The May settlement was a better settlement. Yes.

4 Q. Well, you didn't seek to renegotiate the March settlement,
5 the FDIC and JPMorgan did, correct?

6 A. Again, I will -- the fact of the matter, to my knowledge,
7 is that the FDIC was unable to get board approval therefore I
8 did not have an agreement with the FDIC and we were back at the
9 negotiating table.

10 Q. The TPS securities, that is an asset that the estate has
11 disputed that is going to JPMorgan in the proposed settlement?

12 A. Well, not to go over that again, I'm sure Your Honor had
13 enough of that yesterday. But there are -- there are certain
14 claims that we believe we have to the TPS. The facts clearly,
15 at least, are that the conditional exchange occurred, it was
16 automatic. That night we made an assignment agreement. We
17 issued a press release. Those are facts in evidence that were
18 discussed yesterday.

19 We believe we have potential claims against that. We also
20 believe that JPMorgan has significant claims back against us.
21 In fact, if we own it -- if we still have it they may very well
22 indeed have a corresponding four billion dollar priority claim
23 against us. We might be able to seek it back through --

24 Q. Is that based -- sorry to interrupt. Is that statement
25 based upon your reliance of counsel?

1 A. No, those were in discussions, settlement discussions,
2 with JPM of which they have continually said that they have a
3 potential priority claim if we didn't transfer it for four
4 billion dollars under 365(o). And if we did transfer it, we
5 believe that we have potential ways of getting back that
6 security through fraudulent conveyance, if that can be proven.
7 But if we did go through that track we'd still owe them a
8 claim.

9 So it's a very complicated situation. It certainly isn't
10 sorted out at this point.

11 Q. You are not here to testify about the strengths or
12 weaknesses of your claim to the TPS, the estate's claim to the
13 TPS securities, correct?

14 MR. MASTANDO: Objection. Your Honor, I have to
15 object because I think counsel is asking the witness questions
16 about these things, he's trying to answer and he's trying to do
17 without revealing privileged information and it sounds like
18 counsel doesn't want him to answer that because he's cutting
19 him off as well.

20 THE COURT: Yeah. I think that last question seeks to
21 characterize his testimony. I don't think it's appropriate.

22 MR. NELSON: Okay. Thank you, Your Honor.

23 Q. You do agree, and I'm just looking for a yes or no answer,
24 you do agree that the TPS securities are a disputed asset that
25 in the allocation of the settlement is going to JPMorgan?

1 A. I agree with a caveat that there's significant liabilities
2 with each and every one of these claims that adding up the
3 assets and not deducting the claims or the liabilities, I'm not
4 sure you're going to have another slide that maybe nets it out.
5 I see you have a couple more to go. But I certainly wouldn't
6 characterize -- you know, I'm not sure that I would agree with
7 your characterization on your board.

8 Q. You don't agree with the characterization that under the
9 settlement agreement all these are assets going to JPMorgan?

10 A. But if they owned them in the first place, what -- my
11 question is who owned them in the first place. So yes, you can
12 add it up like this but are you going to make a determination
13 whether they owned it before the settlement agreement?

14 Q. Have you made a determination of who owned it?

15 MR. MASTANDO: Objection, Your Honor. Sorry, Mr.
16 Kosturos, I just object, and just would instruct --

17 THE COURT: Talk into the mic.

18 MR. MASTANDO: John Mastando on behalf of the debtors
19 from Weil Gotshal, Your Honor. I would just object again and
20 note it's coming perilously close to the line of privileged
21 information. The witness can answer otherwise.

22 THE COURT: The witness knows that. He can answer
23 only without considering attorney-client privileged
24 information.

25 THE WITNESS: Right. Mr. Nelson, I'm trying to do my

1 best to answer the questions and put it in context.

2 Q. My question is, have you -- without revealing what the
3 underlying analysis is, have you done an analysis of these
4 disputed assets?

5 THE COURT: And by you, you mean Mr. --

6 MR. NELSON: I'm sorry; WMI.

7 THE COURT: Or the debtor. Okay.

8 THE WITNESS: I think as we go through this I'm giving
9 you my analysis as we're going. So I think I've stated on the
10 record what we believe the taxes are. We believe that we have
11 a debtor/creditor relationship there. We believe that we owe a
12 significant amount of the tax refund to WMB.

13 So we've talked now about TPS and the issues as it
14 relates to TPS. I guess if we can go on to BOLI-COLI.

15 Q. Well, your analysis that you're giving right now comes
16 from counsel and you're not relying on counsel, isn't that
17 right?

18 A. I've told you what the source of the TPS negotiation -- my
19 knowledge in that was settlement discussions with JPMorgan.
20 I've just merely stated what it is clearly in the claims, what
21 is in the counterclaims and what I learned from discussions. I
22 have not taken a position of anything that my counsel has told
23 me or I've relied on.

24 Q. Okay. Let's go to your deposition. Please turn to page
25 124, line 8.

1 "Q. And was there any analysis conducted by WMI with respect
2 to the strengths and weaknesses of WMI's claims against the
3 FDIC receiver and FDIC corporate that did not involve counsel?

4 Q. Repeated question. Answer begins on line 20.

5 A. I'm sorry; what page are you on?

6 Q. Page 124, it's at the bottom of this.

7 A. Okay.

8 Q. You see right where my --

9 A. Yeah. Thank you.

10 Q. Line 20, "I think all the analysis that we prepared was at
11 the direction of counsel."

12 "Q. And you are refusing to answer any questions regarding the
13 substance of that analysis based on the privilege?"

14 Q. Answer, top of 125, line 6, "Yes." Is that right?

15 MR. MASTANDO: Your Honor, I apologize for objecting.
16 Your Honor, if I may object, if you look at the deposition
17 transcript, first I don't believe it's inconsistent with Mr.
18 Kosturos has testified to already. And second, if you look at
19 the page before that, on 123, Mr. Kosturos explained in
20 response to the question exactly what he was saying, which is
21 what he explained just now. He was not revealing strengths and
22 weaknesses because those were privileged. He was discussing
23 claims, counterclaims and other things raised by the parties.

24 So I don't believe that this is inconsistent in any
25 way with his testimony and it's improper to cite it. And I

1 think the prior page needs to be read to put it in perspective.

2 Q. The testimony speaks for itself. The question was asked,
3 correct Mr. Kosturos;

4 "Q. Was there any analysis conducted by WMI with respect to
5 the strengths and weaknesses of WMI's claims against the FDI
6 receiver and FDI corporate that did not involve counsel?

7 "A. I think all the analysis we prepared was at the direction
8 of counsel."

9 Q. That is your position, correct?

10 MR. MASTANDO: Your Honor, I note the same objection.
11 This is not inconsistent --

12 THE COURT: You can raise it on cross.

13 MR. MASTANDO: Okay. Thank you, Your Honor.

14 THE WITNESS: I don't believe we're talking about the
15 FDIC as the things that we've talked about so far.

16 Q. Let's go to page 122 of your same transcript.

17 "Q. What analysis did WMI conduct with respect to the
18 likelihood of success on its claims?

19 "A. Well, my discussions with my counsel obviously are
20 privileged and confidential. Primarily we had several
21 discussions amongst the legal team."

22 Q. Is that your answer?

23 A. That's my deposition.

24 Q. Do you stand by that answer?

25 MR. MASTANDO: Your Honor, I just note the same

1 objection and that the following question and answer --

2 THE COURT: All right. Raise it on cross, please.

3 MR. MASTANDO: Okay. All right. Thank you, Your
4 Honor.

5 THE WITNESS: Well, should I answer?

6 THE COURT: You can answer the question he's asked
7 you.

8 THE WITNESS: Yeah. If it relates to my discussions
9 with strengths and weaknesses with that, I've obviously cited
10 attorney work product privilege.

11 I certainly have other knowledge of reading the
12 claims, the counterclaims, the defenses, statements that I've
13 had in settlement negotiations. So those are the things that
14 I'm relying on right now. I am not relying on any privileged
15 conversations with my attorneys to answer these questions.

16 (Pause)

17 Q. Let's go to page 128 of your deposition. You recall, Mr.
18 Kosturos that this came up in response to or my question about
19 the preferred securities, correct?

20 A. I'm sorry; where are you referring me?

21 Q. Well first a question, you recall that this came up with
22 respect to a discussion of preferred securities, correct?

23 MR. MASTANDO: Objection to the form, Your Honor.

24 THE COURT: Overrule.

25 Q. Do you want me to rephrase my question?

1 A. Sure.

2 Q. We were just discussing the trust preferred securities,
3 correct?

4 A. Yes.

5 Q. On page 128 of your deposition you are asked about the
6 trust preferred securities.

7 "Q. You're aware that WMI asserted counterclaims with respect
8 to ownership of the trust preferred securities against
9 JPMorgan, is that correct?

10 "A. Yes.

11 "Q. Did WMI conduct an analysis of whether or not it was
12 likely to win on its counterclaims?

13 UNIDENTIFIED SPEAKER: I'm going to instruct the
14 witness not to answer on the grounds of privilege."

15 Q. That was your position?

16 MR. MASTANDO: John Mastando, Your Honor, from Weil
17 Gotshal on behalf of the debtors. I note the same objection
18 and I apologize for interrupting again.

19 THE COURT: Please don't raise it again. You can have
20 a standing objection.

21 MR. MASTANDO: Okay. Thank you, Your Honor.

22 THE WITNESS: I'm sorry, Mr. Nelson, what was the
23 question?

24 Q. The question was, you are asserting privilege on whether
25 WMI conducted an analysis of whether or not it was likely to

1 win the TPS preferred security counterclaim?

2 A. I agree.

3 Q. The questioning went on,

4 "Q. Did WMI determine that it would be successful on its
5 claims with respect to the ownership of the trust preferred
6 securities?"

7 Q. Now turning to the top of 129. The question is repeated.

8 "Q. Are you following your counsel's instructions not to
9 answer that question?"

10 "A. All of those, all of that work has been conducted and
11 completed by our attorneys and it's attorney work product
12 privilege."

13 Q. Is that your position still today?

14 A. I stand by my deposition. I don't think my answers,
15 again, have been -- I haven't stated whether we think we're
16 going to win or lose these. I have not revealed privilege. I
17 have merely stated what the facts are, to my knowledge, that
18 are non-privilege.

19 Q. All of these, on this board, are disputed assets, correct?

20 A. I disagree.

21 Q. You have not asserted in litigation every single one of
22 these assets as being owned by the estate?

23 A. AT some point we did. But let's take BOLI-COLI, for
24 instance, the BOLI-COLI five billion dollars, we went through a
25 line by line analysis of that and it is -- it has been

1 determined, at least for WMI, that we don't own the five
2 billion dollars. We potentially have some claims there but JPM
3 has, to my knowledge, probably liquidated those already.

4 So, you know, do we have potential claims there?

5 Q. I'm sorry; those were -- have already been transferred and
6 have been liquidated by JPMorgan?

7 A. They were never under our control.

8 Q. You disputed these assets and JPMorgan has liquidated
9 them, is that right?

10 A. I don't know. I'm sorry; I may have misspoken. I do not
11 know what JPMorgan has done with those. But those assets are
12 not owned by WMI. Those assets are on the balance sheet at
13 WMB.

14 Q. The analysis that was conducted on BOLI-COLI that you just
15 referenced and say that you do not have ownership on, that was
16 an analysis conducted by counsel, was it not?

17 A. I think there was a fair amount of work that was done by
18 the WMI employees as well.

19 Q. Yes or no, sir, the analysis that the estate conducted
20 with respect to BOLI-COLI that you just testified don't belong
21 to the estate and belong to JPMorgan, that analysis was
22 conducted by your counsel?

23 A. Our counsel participated in that analysis, yes. But it
24 was also largely done with some of our WMI employees, with our
25 WMI experts and A&M experts so it was -- there was some --

1 certain legal input on that but there was a lot of review and
2 analysis completed by the A&M team and the WMI team.

3 Q. That was an analysis conducted by counsel?

4 MR. MASTANDO: Objection, Your Honor.

5 Q. In part by counsel, you just said?

6 A. Counsel had some input to that, yes.

7 MR. NELSON: Your Honor, we move to strike that prior
8 answer as either revealing attorney-client privilege
9 information and going beyond the scope or opening the door for
10 reliance on counsel. Given the fact that he just testified
11 that his analysis was in part due to counsel and that --

12 THE COURT: He didn't tell you -- well, was your
13 statement regarding the BOLI-COLI based on any advice of
14 counsel?

15 THE WITNESS: There would have to be some input from
16 counsel.

17 THE COURT: Well, then I am going to strike your
18 testimony regarding the BOLI-COLI.

19 MR. MASTANDO: Your Honor, then I would also ask that
20 the questions be stricken as well, obviously, be counsel is
21 asking them, I think things that --

22 THE COURT: I'm not going to strike the question.

23 Q. Let me try again, sir. Every single one of these assets
24 is a disputed asset that the estate has disputed as between
25 JPMorgan and the estate, correct?

1 MR. MASTANDO: Objection, Your Honor. I believe this
2 has been asked and answered.

3 THE COURT: I think it has been.

4 MR. NELSON: Okay. Fair enough, Your Honor.

5 Q. I want to go back to the first time that you put an offer
6 on the table to settle the claims with JPMorgan. That was in
7 when, March of 2009, is that correct?

8 A. Yes.

9 Q. Your goal during this negotiation period was to pay off
10 your creditors, is that right?

11 A. No. My goal, as the debtor, was to maximize the value of
12 the estates.

13 Q. You understood that the creditors had to accept a
14 settlement and you were negotiating on behalf of those
15 creditors to accept the settlement, correct?

16 A. Again, my job as the debtor is to maximize the value of
17 the estate and I represent the creditors and interest holders
18 of the estate.

19 Q. You consulted with creditor constituencies before making
20 your March offer, correct?

21 A. Yes, that's correct.

22 Q. I'd like for you to turn to Exhibit 27 in your binder.

23 MR. NELSON: Your Honor, would you like me to wait?

24 THE COURT: Yes.

25 (Pause)

1 THE COURT: You may go ahead.

2 Q. This is an e-mail from Brian Pfeiffer of Fried Frank to
3 others including you, March 5th, 2009, correct?

4 A. Yes.

5 Q. It is -- by the way, Fried Frank represents who in the
6 holders of the estate?

7 A. To the best of my knowledge Fried Frank's representation of
8 creditors has changed. They had some at the beginning and then
9 I think some different ones at the end. So how would you like
10 me to answer that question?

11 Q. In March 2009 who did Fried Frank represent?

12 A. I can't be entirely sure because I don't know the
13 representations. But to the best of my knowledge, at that
14 point, Appaloosa and Centerbridge were among their clients.

15 Q. They represented the four major hedge funds who are -- who
16 own significant portions of the WMI estate, is that right?

17 A. Not at this time.

18 Q. Excuse me?

19 A. Not at this point.

20 Q. They did not represent them at this point?

21 A. Well, again, beyond what I've just said, that was the two
22 main creditors that they represented at March 2009, to the best
23 of my knowledge.

24 Q. Fair enough. You are aware that as we sit here today this
25 e-mail from Fried Frank represented the position of senior

1 noteholders, at least, of some major hedge fund creditor
2 constituencies, correct?

3 A. Yes.

4 Q. They are working on preliminary bullet points for a
5 settlement, is that right?

6 A. That's what appears on this e-mail.

7 Q. It starts, "All of the complex issues in this case, which
8 could otherwise take years to resolve through litigation, get
9 resolved cleanly." That was a reason why they wanted a
10 settlement at that point in March 2009, correct?

11 A. This is their e-mail. I do not know what they were
12 thinking. That word clearly -- cleanly is used in this e-mail.

13 Q. Let's go down to bullet point three. "They had an idea
14 that the going forward business of reorganized WMI will have
15 the benefit of a large NOL based on the company's ability to
16 claim a worthless stock deduction relating to its WMB stock."
17 Do you see that?

18 A. Yes.

19 Q. It is true that in the final settlement there is a
20 reorganized WMI that may have a large NOL, correct?

21 A. That's correct.

22 Q. And point four is, "All parties to the settlement would
23 work together to provide finality on all points". Do you agree
24 with those points that the creditor constituency made in March
25 of 2009?

1 A. I wouldn't agree or disagree. I'm just reading the e-mail
2 with you at this point.

3 Q. Well, you respond and you state, "It's about time the
4 seniors figured this out". Was that your position in March
5 2009?

6 A. I don't know what else to tell you. It's hard to see what
7 the context of this e-mail was without knowledge of the greater
8 discussions that were going on.

9 Q. Did you want a clean settlement in March of 2009?

10 A. I would have loved a settlement in March 2009. We
11 subsequently put a term sheet together and proposed it to JPM
12 that was unfortunately rejected.

13 Q. You say it's about time that the seniors figured this out,
14 how long had you thought that the best resolution of the estate
15 was a global settlement with JPMorgan?

16 A. I don't know.

17 Q. It was before March of 2009?

18 A. To put this time frame in context, Your Honor, when we --
19 when the bank was seized by the -- when the FDIC became the
20 receiver and sold the bank WMI had one employee and he was an
21 interim employee and he was soon to leave. The bank and the
22 employees and the financial records went with the transaction.
23 So WMI had -- we had to rebuild WMI. We had to rebuild the
24 financial statements and a lot of the things that came over the
25 course of these two years were developed as we went because we

1 didn't have a historical amount of people to go, like most
2 companies would, and say where are we, what is our financial
3 position, what are our rights to our assets, that was developed
4 over time as we had no employees to talk to that about.

5 Now we subsequently went out and hired -- I think we had
6 maybe twenty or twenty-one employees at the peak of WMI that we
7 had to hire from people that used to work there or some outside
8 people. But from the very beginning this was a very difficult
9 process to try to understand what rights, what financial
10 assets, what liabilities we had.

11 So it's hard to put this all in context of at this point
12 in time, you know, as we're continuing to develop financial
13 information, did we think a global settlement was the right
14 thing to do with JPM and the FDIC, absolutely. It was the only
15 way that we were going to cleanly take care of this estate.
16 There was claims, there was counterclaim, there was very few
17 things in this entire estate, as Mr. Nelson has put up earlier,
18 I think there's 900 million dollars in this entire estate that
19 was undisputed. Everything else is a fight.

20 MR. NELSON: Respectfully, sir, I'm going to move to
21 strike as non-responsive.

22 MR. MASTANDO: Object, Your Honor.

23 THE COURT: Overruled.

24 Q. My question was, did you think before March of 2009 that
25 it was about time that the seniors figured out the e-mail that

1 we just saw on the prior page?

2 A. I think it stands on its own. That was the e-mail I
3 wrote. I can't put it in context for you any more than what
4 you're showing me.

5 Q. How long -- how much prior before March of 2009 did you
6 think that the correct resolution of the estate was a
7 settlement?

8 A. I don't know.

9 Q. Was it the day you were hired?

10 A. I think the day I was hired, as I explained earlier, I
11 think we were more worried about just trying to sort out what
12 WMI had. We had one employee. The FDIC was there with a lot
13 of people. JPM was starting to take over the banking assets
14 and it was one employee and one conference room at the time.

15 Q. So it was not the day you were hired?

16 A. I can -- I can assure you it was not the day I was hired.

17 Q. Was it a month after you were hired?

18 A. I wouldn't be able to put it in context for you.

19 Q. In other words, after maybe the first couple weeks when
20 you were getting your feet on the ground, so to speak, you
21 can't put in any more precise context when, specifically, you
22 thought that a global settlement resolution was in the best
23 interest of the estate?

24 A. As I sit right now with my recollection, I don't know the
25 date that we decided -- we thought that a global settlement

1 agreement would be a good idea.

2 Now I will say that in a case like this that a consensual
3 agreement, could you get there, is something that one might
4 want to strive for. But you need to balance that with all our
5 potential claims and determine where we're at in any
6 negotiation.

7 Q. How early did you think that a consensual settlement was
8 what you wanted to strive for?

9 A. I don't know. As I sit here today, and perhaps you have
10 more e-mails that will -- that will jog my memory. At this
11 point I don't know.

12 Q. Well, let's turn to the settlement term sheet that you
13 offered JPMorgan in March of 2009. It's Exhibit 36 in your
14 book.

15 (Pause)

16 Q. Do you recognize this document?

17 A. Yes.

18 Q. This is a document created by Sullivan & Cromwell and
19 JPMorgan that summarize your proposals and then give JPMorgan's
20 counterproposals as of the following week, is that correct?

21 A. I believe that this summarizes that. Yes.

22 Q. And I'm going to focus, for the moment, on what's entitled
23 WMI proposal 3/12/09. Your offer to JPMorgan in March 2009 was
24 that JPMorgan would pay the entire amount of the disputed
25 deposit accounts, correct?

1 A. Yes, including postpetition tax refunds.

2 Q. Well the postpetition tax refunds are actually dealt, I
3 think, specifically on the next page but we'll get to that.

4 With respect to the deposit account itself, you had the
5 position -- WMI had the position that the deposit account
6 should be turned over to WMI, correct?

7 A. Yeah, I'm just reading (a) -- little A there to you, under
8 deposit accounts.

9 Q. The 292 million is not separate from the deposit account,
10 it's part of it, correct?

11 A. Yes.

12 Q. In the final settlement that we're talking about today,
13 with the exception of a portion of the postpetition tax refund,
14 you did receive all of the money in the deposit accounts,
15 correct?

16 A. Less the -- less the tax refunds which we have separately
17 split.

18 Q. The tax refunds are a separate issue. With respect to the
19 deposit accounts, WMI receives every single penny of the
20 disputed deposit accounts, correct?

21 A. I'm trying to correct you and just so that we're on the
22 same page. There was a postpetition tax refund receipt that
23 went into the disputed account. So we're not getting all of
24 that money because there's a split of all postpetition tax
25 refunds received. That is my only clarification.

1 Q. Fair enough. With the exception of the postpetition tax
2 refund that is split according to the tax refund sharing part
3 of the settlement agreement, WMI is receiving everything else
4 within the deposit accounts, correct?

5 A. Yes.

6 Q. The next page discusses the trust securities, is that
7 right, as the first bullet point?

8 A. Yes.

9 Q. Your proposal is for the trust securities, the four
10 billion dollars, that those would go to JPMorgan? That was
11 your proposal as of March 2009?

12 A. Yes.

13 Q. That is actually how the settlement agreement allocates
14 the trust preferred securities, correct?

15 A. That's correct.

16 Q. Okay. Now the tax, we discussed a part of this before,
17 your proposal was that WMI takes the 250 million dollars
18 already received in the deposit account, plus the first 500
19 million dollars more, is that right with respect to your first
20 two bullet points?

21 A. That's correct.

22 Q. Now the third bullet point discusses both the first refund
23 and the potential of a second refund, isn't that right?

24 A. Yes.

25 Q. At this point, in March of 2009, the potential of a second

1 refund was completely rumor and speculative, correct?

2 A. We had heard through taxing channels that the
3 administration might be considering this some time down the
4 line so we included it.

5 Q. Sorry sir, let me just repeat my question so you can
6 answer it yes or no. In March of 2009 did you consider the
7 potential of a new tax law to be nothing more than a rumor?

8 A. I don't know how else -- I don't know that -- I don't know
9 if I would characterize it as a rumor but it certainly was not
10 enacted in the law in March of 2009.

11 Q. You did in fact characterize it as a rumor in your
12 deposition, didn't you?

13 THE COURT: Aren't we getting into semantics. Is it
14 really relevant whether it was a rumor?

15 MR. NELSON: Well fair enough, Your Honor.

16 Q. Let me ask this question, and it's fair to say that in
17 March of 2009 the second refund was not a known hard asset of
18 the estate or anybody else because nobody knew for sure whether
19 it was going to happen or not?

20 A. I would agree with that.

21 Q. Okay. So let's just focus on the first tax refund, which
22 is the only known hard asset. Is that okay?

23 A. Sure.

24 Q. You agree that with respect to the -- that was, at that
25 point, the only known hard asset in terms of what could come

1 into the estate, correct?

2 A. From a tax standpoint?

3 Q. Yes.

4 A. Yes.

5 Q. Your proposal was to take 750 million dollars and then the
6 remainder would be split sixty/forty in favor of WMI, is that
7 right?

8 A. Yes.

9 Q. The remainder -- well, let's back up. The first tax
10 refund was approximately 2.7 billion dollars, because that's
11 what you're getting in today for the first tax refund?

12 A. I think that's approximately right.

13 Q. So if we take out the 750 million dollars that WMI would
14 receive first, that would leave 1.95 billion dollars,
15 approximately, to split sixty/forty between the parties,
16 correct?

17 A. The only thing I would put in context was I don't remember
18 what the estimate of the tax refunds was at that point. First
19 of all, I don't believe that we have completed the tax refund
20 for 2008 at this point. We're not sure how big the second --
21 the first set of NOLs are. I'm not sure that we had all of the
22 information yet as of each specific tax refund. So I don't
23 remember -- I think the number we were thinking about, what the
24 first set of tax refunds was actually a little smaller than
25 that.

1 Q. Fair enough. What I'm trying to use is a set number to
2 compare and I want to see, because we know exactly what the tax
3 refund ended up being and on the actual amount of what the tax
4 refund was the parties would have split sixty/forty about 1.95
5 billion dollars as it turned out, correct?

6 A. I'm sorry; can you repeat that?

7 Q. Sure. Based upon the 2.7 billion dollar first tax refund
8 that did, in fact, come to the estate, under this proposal the
9 remainder to be split sixty/forty would be about 1.95 billion,
10 correct?

11 A. I think that's right. Yes.

12 Q. Okay. Now, happy to do the math but at 1.95 billion,
13 sixty percent of that is about 1.12 billion dollars, is that
14 right? Let me see if we can do the math. But is it
15 approximately -- let me phrase it differently.

16 In terms of taking the 750 million dollars that you're
17 going to receive first, plus your sixty percent share of the
18 remainder, based upon what we know to be the tax refund today,
19 the amount you proposed to JPMorgan in March of 2009 that WMI
20 would receive approximately 1.92 billion dollars, is that
21 right?

22 A. Yes.

23 Q. What was the amount allocated to WMI with respect to the
24 tax refunds in the March 2010 first announced settlement?

25 A. It was seventy/thirty for the first set of NOLs -- sorry,

1 for the first set of tax refunds. Sorry, I misspoke. And then
2 we would receive 40.4 percent of the second refunds, second
3 NOLs.

4 Q. And that number was equivalent to about 1.92 billion?

5 THE COURT: For both of them or for the first.

6 MR. NELSON: Let me rephrase.

7 THE WITNESS: I'm going to have to do some math in my
8 head.

9 Q. The combined amount of tax refunds that JPMorgan -- excuse
10 me, let me rephrase. The combined amount of tax refunds
11 allocated to WMI in the first announced settlement in March
12 2010 was approximately 1.92, 1.95 billion dollars, correct?

13 A. Your Honor, let's just try to do this math together. It's
14 thirty percent of the first set of tax refunds which we believe
15 is three billion dollars. So that's 900 million. Plus forty
16 percent of 2.8 billion so I think that's 1.12, I don't have a
17 calculator in front of me. So I think the total number is a
18 little over two billion dollars.

19 Q. 1.12 plus thirty percent of, at the time, was you said 800
20 million? Your share was 800 million?

21 A. Nine hundred.

22 Q. I'm sorry, 900. So it was --

23 Q. Plus -- plus, plus there was obviously some taxes that
24 were already received, of which we would get thirty percent of
25 that. So let's say that that number was -- I think it was

1 about 250 million dollars that we had already received. So
2 let's say that it's another seventy-five on top of that.

3 Q. Well, you testified before that in the current agreement
4 you -- the estate is receiving about 2.195 billion dollars in
5 tax refunds, correct? Should I put that back up on the board?

6 A. I don't remember what the number -- I think that's right
7 on that.

8 Q. You've also testified, both here and your deposition, that
9 in the first announced settlement the allocation of tax refunds
10 was about 300 million dollars less in the first agreement,
11 correct?

12 A. Yes.

13 Q. Subtracting 2.195 from 300 -- excuse me -- 300 million
14 from 2.195 is about 1.95 billion dollars, correct?

15 A. Using that math, yeah. I agree with you.

16 Q. Using that math, the amount that WMI proposed to JPMorgan
17 in March 2009 of known tax assets was, essentially, equivalent
18 to the amount that WMI received a year later in the March 2010
19 announced settlement, correct?

20 A. That's correct. The only context I would put that in is
21 if you look to the other box I believe JPMorgan said we should
22 get zero.

23 Q. Oh, I understand. That was a disputed asset, correct?

24 A. The tax? No, the tax. I'm just saying, in their
25 counterproposal about that time they -- we were pretty far

1 apart.

2 Q. Understood. Thank you.

3 A. Okay.

4 Q. Let's go to the good will litigation. What did the good
5 will litigation refer to? Is that just -- in March 2009, in
6 this, was that just the American Savings or was that also
7 Anchor?

8 A. I believe that we've referred to them together.

9 Q. Okay. My confusion only is that it's the -- it says
10 litigation as opposed to litigations and the box from JPMorgan,
11 well it's confusing. So to the best of your knowledge you
12 think it's both litigations at this point, correct?

13 A. I think that's the way we've referred to it.

14 Q. In March of 2009, with respect to the Anchor Savings
15 litigation, there was a judgment in the Court of Federal Claims
16 for 356 million dollars, correct?

17 A. I don't know.

18 Q. Well --

19 A. I don't recall that at that point in time.

20 Q. Okay. The disclosure statement would reveal that
21 approximately 356 million dollars was the judgment in the Court
22 of Federal Claims. We don't have to look it up; I think the
23 disclosure statement will speak for itself.

24 You understand that the 356 million dollar judgment was
25 still on appeal at that point, correct?

1 MR. MASTANDO: Objection, Your Honor. I think the
2 witness already testified he wasn't aware of it.

3 THE COURT: Were you aware? Can you answer?

4 THE WITNESS: No.

5 THE COURT: Okay. The answer is no.

6 Q. You don't know the status of the procedural history of
7 the --

8 A. That's what I'm testifying to. If it's in the disclosure
9 statement then I apologize for not recalling it as I'm sitting
10 here right now.

11 Q. Okay. Fair enough. The American Savings litigation --
12 excuse me, the American Savings litigation it says 500 million
13 and actually that's actually the Anchor Savings litigation.
14 The American Savings litigation is fifty-five million, is that
15 right?

16 A. That's right.

17 Q. Okay. So the combined -- essentially if you take the 356
18 judgment and the fifty-five at this point, is approximately 410
19 million dollars or so?

20 A. Sure. Yes.

21 Q. At the end of the settlement WMI did in fact receive the
22 fifty-five million dollar judgment from American Savings,
23 correct?

24 A. That's right. WMI will be receiving that in the global
25 settlement agreement. Yes.

1 Q. Okay. So taking solely where we are so far, the
2 differences between, and just looking at the bullet points,
3 between the current settlement and your first proposal, our
4 number one, that with respect to the taxes WMI is receiving
5 approximately 270 to 300 million dollars less -- proposed to
6 receive 270 to 300 million dollars less in this offer then it
7 is currently receiving, correct?

8 A. I would agree.

9 Q. And with respect to the good will litigation, it is not
10 receiving the, what was at the time, a district court -- Court
11 of Federal Claims judgment of 356 million dollars, correct?

12 A. As reconciled between this term sheet and the ultimate
13 settlement, I agree.

14 Q. The rabbi trust and the following or the BOLI-COLI rabbi
15 trust issues, these were eventually how they were distributed
16 in the final settlement plan, correct?

17 A. No.

18 Q. What's the difference?

19 A. Oh, wait. It's -- that -- sorry; that was right.

20 Q. With respect to the --

21 A. The rabbi trust. Yeah, I was thinking about the split
22 dollar policies and everything else, but I see that those are
23 below that.

24 Q. Okay. The rabbi trust, that's how it ended up in final
25 settlement agreement?

1 A. To the best of my knowledge.

2 Q. The split dollar policies, how did that end up? You're
3 not -- the estate's not receiving the split dollar policies, is
4 it?

5 A. I believe the forty-eight million dollars that we're
6 receiving that was disputed was a split dollar policy.

7 Q. Okay.

8 A. But I can't remember if it's a split dollar policy or a
9 BOLI-COLI.

10 Q. That's a disputed PAC life policy, isn't it?

11 A. Yeah.

12 Q. So with respect to the split dollar policies, those are
13 all going to JPMorgan, correct?

14 A. I think this is the way it ended up, yes.

15 Q. With respect to all four of these, this is the way it
16 ended up in the final, current proposed settlement?

17 A. I believe so.

18 Q. Okay. Let's go to the next page. The Visa shares, WMI
19 transfers to JPMC with associated liabilities, that's how it
20 ended up, correct?

21 A. Plus JPMorgan paid twenty-five million dollars for that.

22 Q. Okay. Well, we'll get to that in a second. But in terms
23 of what actually happened to the Visa shares, those are going
24 to JPMorgan, correct?

25 A. That's correct.

1 Q. Pension plan -- your proposal in March 2009 was for that
2 to go to JPMorgan, that's how it turned out, correct?

3 A. That's correct.

4 Q. Contracts and licenses, this is essentially similar to how
5 it ended up, subject to, I'm sure, lots of back and forth
6 negotiation about the this and the that. But essentially it is
7 how it was reflected in the current agreement?

8 A. I think so, subject to the this and that.

9 Q. And the licenses and intellectual property, that is
10 transferred to JPMorgan?

11 A. Yes.

12 Q. The claims for prepetition payments, that's JPMC'd away,
13 that was your proposal in March 2009 and that was also how it
14 ended up, correct?

15 A. I just need to look at the rest of this. That's not how
16 it ended up.

17 Q. How did that end up?

18 A. JPMorgan paid fifty million dollars on account of the
19 prepetition vendors.

20 Q. Okay. So from the final settlement, as a comparison, the
21 current settlement you're getting fifty million dollars more
22 than what's here, correct?

23 A. That's correct.

24 Q. Okay. Tower Insurance, you propose that WMI takes
25 priority status on D&O type policies. I believe in the current

1 proposed settlement you are getting mostly priority but

2 JPMorgan is getting some priority, is that right?

3 A. I believe the FDIC is.

4 Q. The FDIC -- you are -- excuse me -- so but WMI is not
5 taking priority --

6 A. No.

7 Q. -- over all of it?

8 A. No. WMI -- I believe we have priority on one claim and
9 then the rest is jump ball with the FDIC.

10 Q. Okay.

11 A. As we've defined it.

12 Q. Okay. So if the fifty million dollars, you got more for
13 the claims for prepetition payments, it's fair to say that
14 there was some reduction in your settlement here for the Tower
15 Insurance policies, to some degree?

16 A. Probably not.

17 Q. You're saying here take priority claim status on all the
18 Tower Insurance D&O type policies, that's not how it ended up,
19 correct?

20 A. That's correct but we were able to put our biggest claim
21 against this. I don't know if we have other claims, potential
22 claims against this, or not but the D&O policy -- this tower
23 references both WMI and WMB anyway. So, you know, I'm not sure
24 we took a reduction in value for this.

25 Q. You're speaking of the twenty million dollar ERISA

1 settlement? Is that what you're referring to?

2 A. I can't remember the amount or what exactly we put against
3 it. I think it's more in the fifty to sixty million dollar
4 range.

5 Q. Okay. So the fifty, sixty million dollar range that's --
6 you're not receiving in the settlement, certainly, because it's
7 been a settlement now, correct?

8 I'm sorry; let me repeat that. The fifty to sixty million
9 dollar settlement is obviously taken out of the Tower
10 Insurance, correct?

11 A. That's correct.

12 Q. Okay. So the fifty million dollars -- in the current
13 agreement what WMI is getting is approximately fifty to sixty
14 million dollars less in the current agreement than what it was
15 at the time of March 2009?

16 A. No. No. We didn't have -- WMI and WMB were splitting
17 this policy, right. So we both have rights to it. I don't
18 know that we have any more other claims that could go against
19 this policy.

20 Q. Okay.

21 A. That's --

22 Q. Fair enough. Let's move on. Intercompany notes, this is
23 how it turned out; JPMorgan is paying the intercompany notes
24 totaling 178, it's now a little more than that because of
25 interest, correct?

1 A. That's correct.

2 Q. And JPMorgan is forgiving the 275 million dollars,
3 correct?

4 A. That's correct.

5 Q. Okay. And finally, third party loans, there's a twenty-
6 four million dollar payment for principal and interest, how did
7 that turn out?

8 A. I think we ended up keeping that and they're going to
9 service it.

10 Q. Okay. And then JPMorgan proposes the fifty million dollar
11 cash payment to WMI, correct?

12 A. That's not on our column. Yeah.

13 Q. I understand. Let me just -- JPMorgan --

14 A. Can I go on some of their other columns, what they
15 propose?

16 Q. Well, can you bear with me for a second?

17 A. Sure.

18 Q. Okay. With respect to this cash payment there is --
19 JPMorgan is proposing a fifty million dollar payment for cash
20 payment as well, is that right?

21 A. That's what it says, yes.

22 Q. Okay. Was that the cash payment that turned out to be the
23 cash payment for the Visa shares?

24 A. I don't know. I don't know if it's that, if it's the --
25 it could be the payables. I just don't remember, at that point

1 in time, what the fifty was for.

2 Q. In the first announced settlement in March of 2010,
3 JPMorgan was going to pay fifty million dollars for the Visa
4 shares, correct?

5 A. That's correct and that is an interesting coincidence.
6 But I don't remember that being what the fifty million dollars
7 was for.

8 Q. With respect simply to your offer, WMI's offer, to
9 JPMorgan in March of 2009, is it fair to say that generally
10 speaking, within some rounding error, what the amount received
11 in the current proposed settlement for the categories that
12 we've discussed, is essentially equivalent to the current
13 proposed settlement?

14 MR. MASTANDO: Objection, Your Honor.

15 THE COURT: He can answer.

16 A. Again, I haven't added this up, other than having the nice
17 exchange with you. So I don't know. It seems to be, from the
18 numbers that you've described, you know, they seem to be close
19 but I couldn't give you an exact answer.

20 Q. Okay. You did not value individual pieces of the
21 settlement agreement, did you?

22 A. I think that what I've testified to, and been deposed on,
23 is that for the assets received of the 6.1 to 6.8 billion
24 dollars, we certainly both can add those dollars up and there's
25 a value associated with that.

1 As it relates to the claims, some of the claims that we're
2 releasing we have not put an exact dollar value on that in
3 discussions with counsel, those are privileged. So I think --
4 I think that is what I said in my testimony now.

5 There's some other things, obviously, that we would
6 consider as well as stated claims that JPMorgan has in our
7 estate, the FDIC has, the bank bondholders have, so I guess,
8 you know, with a full adding up of everything that we've gotten
9 and everything that we've had released, I haven't added all
10 that up. We certainly can go through that exercise.

11 Q. Well in your deposition, just to be clear, I'm reading
12 from page 215, line 2, this is your answer.

13 "A. Again, we did not value individual pieces of the
14 settlement agreement. It's always been viewed as a collective,
15 as a whole agreement."

16 Q. Do you agree with that?

17 A. If you don't mind, could I see --

18 MR. MASTANDO: Objection to the form, Your Honor.

19 THE WITNESS: Could I see the question I was
20 answering?

21 MR. MASTANDO: Yeah, I think that's appropriate.

22 "Q. Is there any consideration that was identifiable as being
23 related to the Texas litigation?

24 "A. Do you mean in the context of the settlement agreement?

25 "Q. Yes, sir.

1 "A. Again, we did not value individual pieces of the
2 settlement agreement. It's always been as a collective, as a
3 whole agreement."

4 Q. Do you stand by that answer?

5 A. Absolutely. The question that was answered in that
6 deposition was what value did I get or did we get for the Unico
7 (ph.) litigation and what the answer was is that you have to
8 look at the global settlement as a whole. There's no parsing
9 it out saying well this piece we got this, this piece we got
10 that. It's a global settlement statement. It stands on its
11 own. There are assets coming in. There are liabilities being
12 taken by other parties and there's releases of claims

13 Q. To take an example, the difference between twenty-five and
14 fifty million dollars for the Visa shares, that's not because
15 you decided that the Visa shares were suddenly less valuable in
16 between March and May of 2010, correct?

17 A. Well I think, again, let's put that in context. When
18 JPMorgan was talking about the value of the shares they were
19 also taking the interchange liability, which I believe has
20 claims of five billion dollars in our estate. They were taking
21 the loss sharing agreement as well. So that's two things to
22 consider with your statement.

23 The next thing to also consider was we also got
24 significantly more tax dollars, the tax refund dollars, as we
25 went from fifty to twenty-five. So again, one needs to take

1 these things as a whole, not parse out individual facts.

2 Q. And that's all I was trying to ask. Taking it as a whole
3 the reason why the Visa share purchase price dropped from fifty
4 million dollars to twenty-five million dollars was not because
5 you had a change in what you believed to be the strength of
6 weakness of your claim, correct?

7 A. I got more tax dollars -- we got a bigger share of the
8 taxes and in return we reduced the price of the Visas from
9 fifty to twenty-five. On a net basis, we got more value.

10 Q. Got it.

11 MR. NELSON: Your Honor, would you like me to keep on
12 going, it's a breaking point and so I'm happy to keep on going.
13 I'm at the Court's pleasure.

14 THE COURT: Well, I do have a 1 o'clock so we can
15 break now and come back at 1:30 if that works for the parties.
16 You're still under oath so you should not -- and you're on
17 cross so you should not discuss your testimony with your
18 counsel in the interim.

19 UNIDENTIFIED SPEAKER: May we leave our things at our
20 desk, Your Honor?

21 THE COURT: Yes, you may.

22 MR. STROCHAK: Excuse me, Adam Strochak for the
23 debtors. Can I just get a sense from counsel as to how long
24 they anticipate cross examination with this witness, just so we
25 can know who to have here next and obviously when to have them

1 here.

2 MR. NELSON: I expected that the whole thing would
3 take about an hour but the lack of yes or no answers has been
4 causing it to go longer.

5 THE COURT: How much longer do you have?

6 MR. NELSON: I would expect, Your Honor, to be
7 about -- hopefully about thirty minutes but it partly depends
8 on the witness' answers.

9 THE COURT: And the other who intend to cross?

10 MR. STOLL: I'll have at least a half an hour, Your
11 Honor.

12 MR. STEINBERG: I will have thirty minutes, Your
13 Honor.

14 THE COURT: All right.

15 MR. STROCHAK: We'll plan for an hour and a half.
16 Thank you.

17 THE COURT: All right. We'll stay in recess until
18 1:30.

19 (Recess from 12:25 p.m. until 1:46 p.m.)

20 THE CLERK: All rise.

21 (Pause)

22 THE CLERK: You may be seated.

23 THE COURT: All right. You may proceed with cross.

24 MR. NELSON: Thank you, Your Honor.

25 CONTINUED CROSS EXAMINATION

1 BY MR. NELSON:

2 Q. Mr. Kosturos, during the break did you speak to anyone
3 about the substance of your testimony?

4 A. No.

5 Q. You recall that we were discussing the March 2009 term
6 sheet that you proposed to JPMorgan, correct?

7 A. Correct.

8 Q. You testified previously that you hired Quinn Emanuel in
9 April of 2009, is that right?

10 A. Yes.

11 Q. Before that point the debtors' attorneys were Weil Gotshal
12 and Richards Layton, is that right?

13 A. Those were our primary Chapter 11. We had some other law
14 firms that were -- that were retained but certainly not in the
15 role that those two were.

16 Q. Prior to 2009 did Richards Layton ever provide you with
17 any written work product? I'm just looking for a yes or no
18 answer. I don't want to get into the substance of the
19 communications.

20 A. I don't remember

21 Q. Prior to April 2009, when Quinn was hired, had your
22 attorneys provided you any written work product with respect to
23 the fraudulent transfer claims for the capital contributions?

24 A. I don't recall any.

25 Q. Prior to April 2009 had your attorneys or you undertaken

1 any work product analysis of the solvency of WMI? Again, just
2 yes or no.

3 A. I can't remember when we started potentially looking at
4 that. I don't remember if it was April 2009 or later.

5 MR. NELSON: May we approach the bench, Your Honor?

6 THE COURT: You may.

7 (Sidebar conference)

8 Q. Mr. Kosturos, do you recall that the solvency analysis
9 that your company did was dated August of 2009? Does that
10 refresh your recollection?

11 A. Yes, I'm just -- you said when did we begin and that was
12 the thing I was -- I couldn't remember exactly when that -- I
13 believe we called a review, when that review had started. So
14 that was the only thing I was a little unclear of, of when we
15 commenced it.

16 Q. You completed your solvency analysis in August of 2009, is
17 that right?

18 A. I think there was a draft. I don't remember if whatever
19 document you're referring to was the final version of that or
20 was it, you know, an interim, preliminary version. I don't
21 remember the exact date that we completed it.

22 Q. Again, without getting into the analysis or work product,
23 was it Quinn who instructed you to create the solvency
24 analysis? Was it your litigation counsel?

25 A. Yes.

1 Q. So in other words, it would then have to be after April of
2 2009?

3 A. I would agree.

4 Q. Okay. Prior to April 2009, had your attorneys provided
5 you any written work product with respect to the intellectual
6 property claims?

7 A. I don't remember when we -- when we completed that
8 analysis or when we asked -- when we started it.

9 Q. You understand, again without talking about the substance,
10 you understand that there was an intellectual property report?

11 A. Yes.

12 Q. You understand that that was dated August of 2009
13 approximately, correct?

14 A. Correct. Again, I just don't remember when we -- when we
15 first hired them and started that. So I don't remember.

16 Q. Was the decision to have an intellectual property
17 valuation, again without getting into the substance and without
18 any waiver, was that also through litigation counsel and Quinn?

19 A. That I can't be certain of. I can't remember if we
20 started that before Quinn was retained or not.

21 Q. You do remember that it was -- at least you hadn't
22 received any report until August of 2009?

23 A. Right. But as you can well imagine, those reports take
24 some time to complete.

25 Q. By April 2009 had your attorneys provided you any work

1 product with respect to the business tort claims against
2 JPMorgan?

3 A. No.

4 Q. It's also true that to this day you still have not
5 completed an analysis of the tax refund claim, correct?

6 A. In my deposition I stated that we had not completed it.
7 We had done a significant amount of work as it relates to the
8 tax refunds. What I was referring to in the deposition that
9 wasn't complete was really, kind of, tying up the debits and
10 credits that flowed back and forth between WMI and WMB. We
11 have a very good sense of where we stand with our potential
12 claims against WMB, i.e. JPMorgan, should this settlement
13 agreement not be completed.

14 But I was -- there's been an enormous amount of work
15 completed as it relates to that.

16 Q. You did testify in your deposition that the analysis has
17 not been completed, correct?

18 A. I did.

19 Q. The analysis that you undertook about the value of that
20 claim was done with the analysis and support of counsel,
21 correct?

22 A. I believe that most of that, if not all of that analysis,
23 was completed by the A&M tax department as well as the WMI tax
24 department and then we would do that analysis on our own. And
25 then as we had potential issues that arose -- arised out of

1 that, we would -- we'd be thinking about then, we would discuss
2 that sometimes with counsel.

3 Q. You consulted with counsel about the value of that tax
4 refund claim, correct?

5 A. Only as it related to a couple of very specific items.

6 Q. You didn't get counsel's input at all with respect to the
7 tax refund claim?

8 A. Primarily, that is work product that was completed by WMI
9 and A&M. It all flows into the tax return. All of that, the
10 supporting schedules, the analysis, was all completed by A&M
11 and WMI.

12 Q. Weil -- again, without getting to the substance, Weil and
13 Quinn both undertook analysis about the worth of the tax refund
14 claim, correct?

15 A. I would say all of that analysis was completed by the
16 financial team and relied upon to me from the financial team.

17 Q. It's your testimony under oath that neither Weil nor Quinn
18 ever created any document with respect to the strengths,
19 weaknesses, analysis and likely outcomes of the tax refund
20 claim?

21 MR. MASTANDO: Objection, Your Honor. I don't think
22 that's in the testimony. He's asked it several times.

23 THE COURT: You guys take it to the microphone.

24 MR. MASTANDO: I'm just objecting because I don't
25 think that that was his testimony. It's been asked and

1 answered several times.

2 THE COURT: Yes. Sustained.

3 Q. JPMorgan rejected that March offer, correct?

4 A. Yes

5 Q. Moving forward, I think you testified previously that the
6 negotiations were reinvigorated by this possibility of the
7 second tax settlement, correct?

8 A. Yes. I mean we kept in communications throughout. There
9 really wasn't much movement from JPMorgan's position of -- you
10 know, we might have exchanged a term sheet or two that really
11 had no movement to it. But then in the summer or early fall of
12 2009, yes, they restarted again.

13 Q. The creditors were involved in reinvigorating these
14 negotiations, correct?

15 A. Yes. Certain of a couple of the creditors, yes.

16 Q. And, in fact, it was, I think, the creditors who sent the
17 term sheet to JPMorgan. Isn't that right?

18 A. Yes, it was, actually.

19 Q. It's fair to say that the creditors and the senior
20 noteholders certainly don't owe any fiduciary obligation to
21 equity, for example, correct?

22 MR. MASTANDO: Objection, Your Honor.

23 THE COURT: Well, it calls for legal conclusion,
24 doesn't it?

25 MR. NELSON: Well, let me rephrase.

1 Q. Are you aware, based on your experience as chief
2 restructuring officer in this case and your prior history of
3 being involved in bankruptcies, whether senior creditors owe a
4 duty to equity? If you can answer based on your own personal
5 experience.

6 THE COURT: Yes. I'll sustain the objection.

7 MR. NELSON: Fair enough.

8 Q. It is true that both you and JPMorgan had certain goals
9 regarding the potential outcome of the settlement, correct?

10 A. I don't understand your question.

11 Q. Did -- were there any particular metrics by which you
12 and/or JPMorgan needed to make a settlement work?

13 MR. SACKS: Objection, Your Honor. Lack of
14 foundation. Calls for speculation as to JPMorgan.

15 THE COURT: Sustained as to JPMorgan.

16 A. As it relates to WMI as the debtor, our goal is singularly
17 to maximize the value of the estates. There was no goal to say
18 when was enough. We tried to get as much as we could and I
19 think that's what we accomplished in this deal.

20 Q. You did have negotiations with JPMorgan, correct?

21 A. There was really, at the end, a three-way negotiation
22 between the FDIC, JPMorgan and WMI. And one of the wonderful
23 things about a three-way negotiation is at any time two of the
24 parties can try to exert leverage on the other.

25 Q. My question was actually much more simple. You and

1 JPMorgan had communications about the settlement, correct?

2 A. Yes.

3 Q. At any point in those, did JPMorgan ever express to you as
4 part of a settlement negotiation any particular metrics or
5 goals that it needed to establish?

6 A. I wouldn't know what JPM's metrics were in this deal.

7 Q. Could you turn to Exhibit 47 in your notebook, please?

8 And it's the second page on -- ending in 990. There's an e-
9 mail exchange. And you ask JPMorgan "Where is the proposed
10 hundred million going? If to the bondholders, I don't see why
11 this is not negotiable." And then you see JPMorgan's response
12 which is underlined that says, "I am happy to have you
13 negotiate it down as long as we stay heads up like we
14 discussed." Did you understand what he was referring to?

15 A. Yes, I do.

16 Q. What does that mean?

17 A. In the term sheet, and there's quite a lot of term sheets
18 here, but one term sheet in particular is -- a structure was
19 talked about where any settlement to the bank bondholders up to
20 500 million dollars would be split fifty-fifty. That was
21 within the context of that that this was being discussed. It
22 was an offer that we received from the bank bondholders to
23 settle their claims at a point in time. We were unwilling to
24 go forward with the hundred. JPM wanted to go forward with the
25 hundred. I wanted to negotiate it down. And the response back

1 from Mr. McCree is, well, if you negotiate it down as part of
2 the fifty-fifty that's in the term sheet, that's what he was
3 referring to.

4 Q. In other words, I don't want to mischaracterize your
5 testimony. It's again part of this integrated whole that if
6 one piece moves here then it has certain other ramifications
7 later on or is this truly related to the bondholder issue?

8 A. This is purely related to the bond -- and most
9 importantly, it's a point in time, Your Honor, where within the
10 term sheet there was a mechanism -- and again, we walk away
11 from this term sheet, but at the time there was a mechanism
12 where if we were going to take a set side of money and try to
13 settle with the bank bondholders and the FDIC, it was just an
14 iteration of a term sheet that ultimately didn't work. So, it
15 was just part of a negotiation at that specific time.

16 Q. And you aware who Travis Epes is?

17 A. Yes.

18 Q. Who is Travis Epes?

19 A. Travis Epes works for JPMorgan. I believe he works in
20 their general counsel department.

21 Q. You are aware that he was designated as JPMorgan's
22 corporate representative with respect to the settlement
23 negotiations for purposes of plan confirmation?

24 A. I was aware of that.

25 Q. Have you reviewed his deposition testimony?

1 A. I have not.

2 Q. Are you aware about what he said about some of the
3 negotiations between WMI and JPMorgan?

4 A. I am not.

5 MR. NELSON: May I approach, Your Honor?

6 THE COURT: You may. Thank you.

7 Q. On the top of page 179, he's asked a question about what
8 WaMu's position was with respect to the tax assets. And he
9 goes on, "There is a percentage split," and then he says on
10 line 8, "I should characterize that very little of the term
11 sheet discussion related to the merits of the individual assets
12 but rather it was an effort certainly on the part of a lot of
13 funds that were trying to be part of a settlement to achieve
14 certain hurdles of return." Do you agree with that?

15 A. I wouldn't understand the context of his statement.

16 Q. Well, did you discuss the merits of litigation positions
17 with your counterparts at JPMorgan?

18 A. I don't remember discussing our merits with JPMorgan.
19 Certainly, there would be in conversation as we were
20 negotiating what potential positions could be, what potential
21 defenses could be, but I don't remember having a very detailed
22 discussion about merits.

23 Q. Let me turn your attention to -- that's page 180 starting
24 on line 10. You see where it says "So there were many
25 discussions?" This is his answer.

1 "A. So there are many discussions about the split of assets
2 that were more tilted towards how much and who gets what rather
3 than the underlying you ask about a position with respect to
4 taxes. Taxes were really almost a currency by which various
5 parties could be allocated value to reach a settlement.

6 "Q. Okay. And that was the tenure of the discussion relating
7 to taxes for the whole period?

8 "A. I think there were probably some merit based discussions
9 between counsel thrown in as well.

10 "Q. But you don't recall specifically any of those?

11 "A. Not specifically.

12 "Q. You weren't present during any of those?

13 "A. No."

14 Travis Epes was the lead negotiator for JPMorgan on this,
15 correct?

16 MR. SACKS: Objection, Your Honor. Move to strike.

17 What's he reading the testimony of the witness for?

18 THE COURT: Overrule. I think we're going to get it
19 tied in now.

20 A. Travis Epes was not the lead negotiator.

21 Q. He was one of the negotiators for JPMorgan?

22 A. Don McCree undoubtedly was the lead negotiator for
23 JPMorgan. Occasionally, Travis Epes would be at meetings and
24 on the phone but not every time. And there was others that
25 were there as well, so --

1 Q. Based on your experience then, I think you said this, but
2 you don't disagree with Mr. Epes that in the course of
3 negotiations the actual merits of the underlying assets rarely
4 came up, correct?

5 A. Completely discreet.

6 Q. Okay.

7 During the settlement negotiations, you didn't discuss the
8 business tort claims with JPMorgan, did you?

9 A. In the context of discussions, the ANICO litigation was
10 out there. And the ANICO litigation is effectively a business
11 I would -- as a nonlawyer would say that that contained a lot
12 of potential business tort claims.

13 It was well known to JPMorgan if we were to bring suit and
14 claims where those claims would come from, what potentially
15 they would look like. Obviously, without discovery at the
16 time, the form of the claim could change. But I think JPMorgan
17 was well aware of potential claims that WMI could bring.

18 Q. You did not have any discussions in detail with JPMorgan
19 about the business tort claims, did you?

20 A. I don't -- if you want to point me to the deposition
21 that'd be great. But as I'm sitting here from -- if what
22 you're talking about is a business person to business person
23 would it come up? Sure. It would absolut -- the context of
24 are you going to sue me? Of course we are if we don't have a
25 settlement agreement we'll pursue all of our claims. In that

1 context, absolutely, it came up. A detailed discussion of the
2 business tort claims I don't believe was had with JPMorgan.

3 Q. And just to confirm here, you, in fact, in your deposition
4 that was asked to you and on page 262, line 22.

5 "Q. During settlement discussions, did you discuss the
6 business tort claim with JPMC?

7 "A. Not in any detail. No."

8 And at the top --

9 MR. MASTANDO: Objection, Your Honor. It's consistent
10 with the witness's testimony. I'm not sure why it's being
11 shown.

12 THE COURT: Overruled.

13 Q. At the top of the next page,

14 "Q. Did you discuss them with the FDIC?

15 "A. Not in any detail."

16 That's your testimony, correct?

17 A. In my deposition, yes.

18 Q. And still today?

19 A. I think that what I just said is fairly consistent with
20 that. It would come up in conversations and we would not have
21 specific detail about what would consist of those business tort
22 claims.

23 Q. It's true that if creditors did not care about a specific
24 particular asset, WMI did not fight for it, correct?

25 A. Disagree.

1 Q. Let's turn to Exhibit 34 in your book. This is an e-mail
2 from Brian Rosen to counsel for the creditors and you are cc'd.
3 Well, actually, and to you as well, correct?

4 A. That's right.

5 Q. Mr. Rosen answers and says, "Responding to the e-mail, the
6 biggest issues in your e-mail were the two economic ones; the
7 price on the Visa shares and the .5 percent. On the first, I
8 cannot help you and Bill must respond. On the second, your
9 client said they did not care about that long ago and what if
10 JPM gives that all away?"

11 That conversation occurred between you and the creditors'
12 committee, correct? Excuse me; the senior noteholders?

13 A. Do you mind if I just take a minute and read the document?

14 Q. Of course.

15 A. Thank you.

16 (Pause)

17 A. I'm sorry; yes. I finished. Thank you.

18 Q. Okay. I'm sorry; I think there was a question pending.
19 Do you agree that there were conversations between the senior
20 noteholders and WMI about what if JPM gives it all away,
21 correct?

22 A. That's what this e-mail references. I don't know what
23 context it's in and based on the date of this e-mail, this is
24 very close to the filing of the first global settlement and I
25 don't really completely know what the context of this e-mail is

1 in.

2 Q. You are aware that Fried Frank, I think, you testified
3 before that it represented two of the hedge funds. It was
4 representing some of the major senior noteholders by this
5 point. It was representing all four by March of 2010, the
6 hedge funds?

7 A. Yeah. At this point, I believe Owl Creek and Aurelius are
8 in their group.

9 Q. If you want, turn to Exhibit 2 which is the settlement
10 agreement and it's Exhibit C-1. Appaloosa, one of the four
11 hedge funds that Fried Frank represented had 290 million of
12 senior notes, 584 million of senior subordinated notes and 371
13 million of allowed PIERS, correct?

14 A. Yes. That's what the document says.

15 Q. Another one of Fried Frank's clients, Centerbridge, had
16 275 million of senior subordinated and 69 million of allowed
17 PIERS. Is that consistent?

18 A. Yes.

19 Q. A third, Aurelius, had 78 million in allowed senior notes,
20 210 million in allowed senior subordinated, and 128 million in
21 allowed PIERS claims, correct?

22 A. That's what the document says, yes.

23 Q. Owl Creek, which is the fourth of their clients, had 2
24 million of senior notes and 269 million in senior subordinated
25 notes, 250 million in allowed PIERS, correct?

1 A. That's what the document says, yes.

2 Q. This, by the way, those numbers are before post-petition
3 interest, right?

4 A. I think that's just the -- yeah, the par value of their
5 claims.

6 Q. Okay. So, in terms of actual recovery of what these four
7 hedge funds represented by Fried Frank would receive, you would
8 have to include the post-petition interest that they are
9 receiving as well to get the total amount as a percentage of
10 the estate, correct?

11 A. For each of the levels, yes.

12 Q. These hedge funds urged you to create a reorganized
13 company for -- to take advantage of the debtors' NOL, isn't
14 that right?

15 A. We had several discussions with them about that, sure,
16 yes.

17 Q. You wanted to make sure that any proposed term sheet had
18 the support of major creditor constituencies, correct?

19 A. I think at the end of the day, the debtors'
20 responsibility, again, is to create as much value as we can.
21 There are many creditor groups involved. The creditors'
22 committee was very actively involved. The White & Case group,
23 the senior noteholders, were very involved. The Fried Frank
24 group was very involved.

25 At the end of the day, it's important for the debtor to

1 maximize as much value as we can. Where the dollars stopped on
2 the waterfall really would -- really didn't matter. What
3 ultimately was -- the debtors' test is to try to create as much
4 value as we can.

5 Q. What is a NOL?

6 A. An NOL is a net operating loss.

7 Q. What does that mean?

8 A. A net operating loss is a very technical tax term. It's
9 generally created by a loss of an entity during the current
10 year and then can either be carried back or carried forward.

11 Q. And for a carrying forward purposes, you can then write
12 off profit based upon your prior tax loss. Is that right?

13 A. That could be something certainly an NOL is used for.

14 And --

15 Q. And that was -- I'm sorry; go ahead.

16 A. -- go ahead. I'm --

17 Q. -- that was the purpose of -- one of the purposes of
18 setting up WMMRC was to enable the reorganized Washington
19 Mutual, Inc. to take advantage, or WMMRC, to take advantage of
20 a five billion dollar NOL, correct?

21 A. I disagree with that statement. WMMRC was not created for
22 that reason. WMMRC was an existing subsidiary that WMI owned
23 wholly and since the seizure has been in a basis of runoff.
24 That's what WMMRC is.

25 Q. You understand that one of the issues with respect to how

1 much --

2 THE COURT: Excuse me. Somebody has a BlackBerry
3 that's too close to a microphone, I think, and that's why we're
4 getting some feedback. So, if you all could take them off the
5 tables. Thank you. Go ahead.

6 MR. NELSON: Thank you, Your Honor

7 Q. -- you understand that one of the issues in terms of the
8 valuation of WMMRC on a going forward basis is how much of this
9 five billion dollar NOL the company can take advantage of? The
10 new company can take advantage of, correct?

11 A. That's correct. But my only point was WMMRC is an
12 existing subsidiary. You said we created it for this purpose.
13 We didn't.

14 Q. Fair enough. You do agree that the senior noteholders and
15 Fried Frank in their proposals wanted to have a reorganized
16 WMMRC that would be able to take advantage of the full NOL,
17 correct?

18 A. In a value of creation, again by the debtor, one has to
19 look at two different distinct opportunities as it relates to
20 an existing asset. We could, as WMMRC, look to sell it
21 immediately and what we would do there is get a discounted cash
22 value or market value for that or we could turn around and
23 create possibly more value by effectively spinning it off in a
24 new reorg plan. And to the extent that we could use existing
25 NOLs would only create more value. It's really a -- again,

1 it's our job as the debtor to try to maximize the value of the
2 estate. This is one way potentially to maximize the value of
3 the estate.

4 Q. If new business is put into the new company, they can take
5 more advantage of the NOL, correct?

6 A. I think that determination is yet to be determined.

7 Q. You understand that the intention of these hedge funds is
8 to use and create new business for the NOL, correct?

9 A. I don't know what the hedge funds are going to do with it.
10 The most important thing about this transaction is if we were
11 to sell it today, we will sell it for a discount. If we are
12 able to spin it out into WMI reorg and be able to use the NOLs
13 it will create more value. And Mr. Zelin, who will be
14 testifying later, I'm sure, can walk you through the
15 differences of what we would receive if we sold immediately
16 versus if we held it.

17 Q. You understand that one of the issues is the value of a
18 new business and whether they can use the new business and take
19 advantage of it, though, right? Let me rephrase.

20 You understand that the current analysis of the value of
21 WMMRC assumes that there will be no new business, correct?

22 A. I believe that is in Mr. Zelin's report that he is not
23 ascribing any value to the new NOLs.

24 Q. You understand --

25 A. Traditional NOLs beyond what he can see the business using

1 them for.

2 Q. -- you understand that at least -- let me tell you this is
3 document 48, Exhibit 48. This is a term sheet that the
4 noteholders sent to you, correct?

5 (Pause)

6 A. Yes.

7 Q. And the top of the term sheet states that it's the
8 Centerbridge, Appaloosa, Owl Creek and Aurelius, correct?

9 A. Yes. I see where you're pointing to.

10 Q. Their proposal, now turning to the page ending in 405, and
11 their plan is to capitalize WMMRC and expand its business,
12 correct?

13 A. That's what the term sheet says. It certainly wasn't the
14 term sheet that we adopted but this draft says that. And I
15 believe as well as that they were going to think about putting
16 a loan on it, I believe they referred to the term "DIP." So,
17 one of their ideas was to put some capital in the form of debt
18 during the pendency of the bankruptcy to potentially -- around
19 this entity, yes.

20 Q. You are aware that your lawyers in this court have taken a
21 position that equity holders were unlikely to receive any
22 recovery and, therefore, have little, if any, economic interest
23 in the case, correct?

24 A. Were those statements in connection with the formation of
25 the equity committee?

1 Q. Yes. I can show you the documents. I'm reading from the
2 motion to --

3 A. I was just trying to -- I think I remember those, yes.

4 Q. -- it's the motion to disband the equity committee.

5 A. Okay. Yes. I do remember those.

6 Q. Do you agree that equity holders at the time, in January
7 2010, were unlikely to receive any recovery and, therefore,
8 have any -- little, if any, economic interest in the case?

9 A. Well, I think that as you look at the stated liabilities
10 on our balance sheet they are, obviously, very significant.
11 And then below the -- but below the stated -- I believe it is
12 after Class 17, the Class 18 subordinated claims most of those
13 still are unliquidated but potentially could be very large.
14 So, I don't think that there has been a proposal or analysis so
15 far that we have seen that would pay through the subordinated
16 claims. So, by definition, I wouldn't -- I don't see that --
17 oh, and also, I might add, that beyond that is, obviously, the
18 seven billion dollars of preferred stock. So, when you take
19 that all into account, I don't know of any potential ability to
20 go beyond that to get money to common equity, no.

21 Q. You understand that the equity committee represents both
22 preferreds and commons, correct?

23 A. Yes.

24 Q. I think you stated just now that you've never seen any
25 analysis that would place recovery through the subordinated

1 claims. Is that right?

2 A. I don't think that we have been able to do that, no.

3 Q. Okay. Isn't it true that you absolutely think that the
4 business tort claim or the claims against JPMorgan have value?

5 A. I've stated that I believe they have value.

6 Q. But you never ascribed a particular value of those claims?

7 A. I did not ascribe a point value, no. We have talked
8 about, in connection with our lawyers, a range of values --
9 ranges of values particularly. Obviously, those are privileged
10 conversations.

11 Q. As we sit here today, then, you can't tell us or won't
12 tell us whether the value is one dollar or a hundred billion
13 dollars?

14 A. I believe that those are privileged conversation. I
15 certainly can talk to you about what we believe the potential
16 weaknesses and assertions and defenses that have been raised by
17 other people because --

18 Q. I'm not asking you about what's been asserted --

19 MR. MASTANDO: Objection, Your Honor. The witness
20 wasn't done speaking, I don't believe.

21 THE COURT: Well, just answer the question. I'll --

22 A. Your Honor, it's a very difficult conver -- it's a very
23 difficult question because valuing litigation is a very, very
24 difficult thing to do.

25 Q. My question, which I think you answered, was that you

1 cannot put a value on whether it's one dollar or a hundred
2 billion dollars because any of that is work product privilege,
3 correct?

4 A. Again, what I'd like to say is that there are a lot of
5 things that are out there right now. There are claims, there's
6 a counterclaims, there's defenses. There's plenty of things
7 that are out there in the public domain that we would love to
8 talk to you about and I would love to talk to you about why we
9 think that there are certain issues as it relates to those
10 claims.

11 Q. I'm actually only asking what the value is and you're not
12 answering that.

13 MR. MASTANDO: Objection, Your Honor. I think the
14 witness is answering it and has answered it.

15 THE COURT: Well, we're getting argumentative now.
16 He's not going to give you the answer you want, I think.

17 MR. NELSON: Thank you, Your Honor

18 Q. You are aware that when you tried to get documents from
19 JPMorgan in November and December of 2009 that your own lawyers
20 complained about the documents that JPMorgan had given the
21 debtor and about their lack of production, correct?

22 A. I'll let the court records speak for itself.

23 Q. Let's just briefly turn to equity; Committee Exhibit 38.
24 This is a letter from Quinn Emanuel, your litigation attorneys,
25 to JPMorgan's attorneys dated December 28th, 2009, correct?

1 A. Yes.

2 Q. And it addresses just from the first paragraph the, quote,
3 "Deficiencies in JPM's production and reasons to doubt their
4 conclusion that the custodians had excluded, lacked relevant
5 documents, and that the estate would not agree to seek
6 additional documents, that based upon the limited discovery
7 that is still being produced -- or excuse me; the discovery
8 that is still to be produced." Is that right?

9 A. That's what the document says.

10 Q. Before you announced your settlement you never got these
11 documents, did you?

12 A. I don't know.

13 Q. Did you take any depositions against JPMorgan?

14 A. I don't believe we did.

15 Q. Did you take any depositions against the FDIC?

16 A. I don't believe we did.

17 Q. Besides this third-party Rule 2004 production, did you
18 receive any documents produced in the adversary proceedings
19 against JPMorgan? Let me rephrase.

20 Besides the Rule 2004 production that we were just talking
21 about, before you announced your settlement in March 2010, had
22 the estate received any other documents from JPMorgan?

23 A. I don't know.

24 Q. The -- I'm sorry; the estate never received any documents
25 that were produced in litigation from the FDIC, correct?

1 A. I don't know either, I'm sorry.

2 Q. At the time you entered into your settlement, you had no
3 access to WMI or WMB's historical pre-seizure records. Isn't
4 that true?

5 A. No, that's not true.

6 Q. You did have some access to it?

7 A. Yes.

8 Q. Did you have access to the loan portfolio that would be
9 able to determine whether WMI or -- and WMB were solvent at the
10 time of seizure?

11 A. I don't know if we had access to it. We, as part of the
12 analysis that we've done, we didn't look at the detailed loan.
13 If we were to proceed with a fraudulent conveyance we would
14 certainly hire an expert who would look at that data. But I
15 believe that we had access to a very significant amount of pre-
16 seizure documents.

17 Q. Not the loan portfolio?

18 A. I don't know as I -- I don't know as I sit here today
19 whether we did or not.

20 Q. You are aware, aren't you, that even still the FDIC, for
21 example, is refusing to sit for depositions regarding plan
22 confirmation?

23 A. I don't. Again, I don't know that either.

24 Q. What does PIERS stand for? Pop-quiz.

25 A. Give me a minute.

1 Q. Well, how about this. I'll give you where the answer is
2 at least. I believe it's on page 42 of the disclosure
3 statement which is tab 6 in your binder.

4 (Pause)

5 It stands, correct, for Preferred Income Equity Redeemable
6 Securities, correct?

7 A. Yes.

8 Q. The --

9 MR. NELSON: Helen, just leave this up -- 42.

10 WMI issued a debt to Washington Mutual Capital Trust 2001,
11 correct?

12 A. That's correct.

13 Q. WMC 2001 then issued the preferred and common equity,
14 correct?

15 A. That looks to be what this document says, yes.

16 Q. In April 2001, these preferred equity holders bought a
17 security from Washington Mutual Capital Trust 2001 with a face
18 value of 50 dollars and for \$32.33 and a dividend of 5.38
19 percent, correct?

20 A. That's what the document says, yes.

21 Q. And just to be clear, the security that they're holding,
22 it is a security but it's in WMCT 2001, correct?

23 A. Again, that's what the document says. I'm not talking
24 through personal knowledge. I'm just following along with you
25 on the disclosure statement.

1 Q. You understand that as part of this April 2001 purchase,
2 these preferred security holders received about -- had the
3 warrant to purchase 1.2 shares of WMI common stock. Do you see
4 that?

5 A. Um-hum. Yes.

6 Q. In your experience in bankruptcy, have you ever seen a
7 warrant be treated as a debt?

8 A. Are you referring specifically to the PIER -- this
9 document?

10 Q. My question is based on your experience as chief
11 restructuring officer and your qualifications that you told us
12 on direct examination, have you ever seen a warrant be treated
13 as a debt?

14 A. If your specific question is why is this debt --

15 Q. That's not my --

16 A. -- I think we have determined --

17 THE COURT: That's not his question.

18 THE WITNESS: I'm struggling with it.

19 THE COURT: Have you ever seen a warrant in bankruptcy
20 treated as debt in another case?

21 THE WITNESS: In another case?

22 THE COURT: Yes.

23 THE WITNESS: I don't think in any cases I've had any
24 warrants that looked like debts.

25 THE COURT: Okay.

1 Q. The holders of PIERS do not hold a debt against WMI, do
2 they?

3 A. Are you asking me for a legal conclusion?

4 MR. MASTANDO: Objection.

5 Q. I'm asking you as you sit here today as the chief
6 restructuring officer testifying on the settlement, the holders
7 of PIERS do not hold a debt against WMI, do they?

8 MR. MASTANDO: Objection, Your Honor.

9 THE COURT: Well, rephrase. Is it on the books and
10 records, I guess, is the question.

11 MR. NELSON: Excuse me?

12 THE COURT: I guess the question is whether it's
13 reflected on the books and records, this debt?

14 MR. NELSON: Well, that is the question.

15 THE COURT: He can answer that.

16 Q. Is it reflected on the books and records as a debt against
17 WMI?

18 A. Yes, it is.

19 Q. And that debt, however, is not with -- excuse me, the
20 holder of the security has a security with WMCT 2001, correct?

21 A. I would -- there's been a lot of entities over time that
22 have merged into WMI. I don't know whether -- where WMCT sits
23 on an organizational chart, where it sat before. I think it's
24 our determination at this point, Your Honor, that this is a
25 debt of WMI.

1 Q. Is WMCT 2001 in bankruptcy?

2 A. Not to the best of my knowledge.

3 Q. You are aware that the holders -- excuse me; that the
4 overwhelming majority of the owners of these preferred equity
5 holders and WMCT 2001 are the very same hedge funds we've been
6 talking about over the past few minutes, correct?

7 A. Yes. They hold a majority position in dollars of, I
8 believe, of this.

9 Q. They had, these hedge funds, the lion's share of the debt.
10 Isn't that right?

11 A. I don't know what lion's share means but I would --

12 THE COURT: Of which debt? Which level?

13 MR. NELSON: Of the debt of the company. The debt
14 of --

15 THE COURT: All of the debt of the company?

16 MR. NELSON: Yes.

17 THE COURT: Okay.

18 MR. NELSON: That's my question.

19 Q. Did these four hedge funds hold the lion's share of the
20 debt?

21 A. Again, I don't know what lion's share means. They
22 certainly had a significant part of our debt, I will say that.
23 I mean but I don't know quite what you're getting at. I think
24 we could add the four sheets that you had on the paper and have
25 an exact number if you want to do that.

1 Q. Well, you are aware that at least Fried Frank's attorneys
2 thought that it had leverage in the negotiations with you
3 because it had the lion's share of the debt? If you turn to
4 Exhibit 24, this is an e-mail from Fried Frank to you. Is it
5 true that these hedge fund lawyers said that -- on the second
6 paragraph -- "We have the lion's share of the debt. I know you
7 want us on board."

8 A. It would appear that Mr. Scheler has used the word "lion's
9 share of debt" to describe his own groups. So, I would agree
10 with you the document says that.

11 Q. Treating this preferred equity group in WMCT 2001 as a
12 creditor instead of as an equity holder, gives these hedge
13 funds even more of a benefit in this bankruptcy, correct?

14 A. Mr. Nelson, our analysis including our lawyers, our legal
15 team, has determined -- has categorized this as a dead
16 instrument. I don't know what else to tell you. In our view,
17 we believe this is a dead instrument and is classified in Class
18 16. I see what you're referring to. I don't know the history
19 of whether this -- this subsidiary has merged up into WMI over
20 the time. We would -- I don't know what else to tell you.

21 Q. Well, you do understand since you have been propounding
22 this plan that if PIERS, these preferred equity holders, and
23 WMCT were treated as preferreds then the other preferred equity
24 shareholders would be pari passu and there would be recovery
25 for the preferred class, isn't that true?

1 A. It'd be recovery from what? I'm sorry; that last part I
2 didn't get.

3 Q. They'd be recovery for the preferred shareholders and pari
4 passu with the PIERS, correct?

5 A. Well, first of all, I -- we'll have to, obviously, go
6 through and go through the evidence that you're presenting here
7 to determine whether this is a debt or an equity. We believe
8 it's a debt. I think that's part of the confirmation process.
9 But there is a class -- there is one more class between --
10 that's after the PIERS and that will be the Class 18 that is
11 the sub -- the subordinated claims of which most of those are
12 unliquidated and when we go through the claims analysis and
13 estimation process we'll have a sense of the size of that, it
14 will take us some time to work through that class, but if
15 indeed, if in your situation if Class 16 was zero and Class
16 17 -- Class 18 wasn't big enough potentially it could go
17 through; potentially, sure.

18 Q. Your plan that you proposed treats holders of preferred
19 equity within WMCT, the PIERS holders, differently based upon
20 how much they own, isn't that true?

21 MR. JOHNSON: Objection, Your Honor. He's
22 mischaracterizing Exhibit 6 by describing this as preferred
23 equity.

24 THE COURT: Well --

25 MR. NELSON: Let me rephrase.

1 THE COURT: Okay.

2 Q. The PIERS class is treated differently among members of
3 the class based upon how much a person owns of PIERS, correct?

4 THE COURT: Within the class.

5 MR. NELSON: Within the class. Yes, Your Honor.

6 THE COURT: Is that correct?

7 A. I'm not following that que -- I'm sorry; I'm not following
8 this question.

9 Q. Your understand that PIERS -- certain PIERS holders are
10 given the right to buy into WMMRC, the new reorganized company,
11 correct?

12 A. Certain PIERS holders are receiving subscription rights,
13 yes.

14 Q. The only --

15 A. They have zero value and have the ability to subscribe to
16 that. In our estimates, they have zero value. Should they
17 have value, they can -- classes ahead of them should they not
18 be paid, they will have to pay up that value.

19 Q. The value that you have put on even without any ongoing
20 business of WMMRC is 157.5 million dollars, correct?

21 A. You're mischaracterizing my testimony.

22 Q. All right. Well, let me rephrase. I want to understand
23 and get your testimony on how different members of the same
24 PIERS class are treated.

25 It is true that only certain members of the PIERS class

1 are able to buy into these subscription rights, correct?

2 A. I don't believe that's true, no.

3 Q. You don't have to have twenty million dollars in order to
4 subscribe?

5 A. I'm sorry.

6 Q. If I only own a few shares of PIERS, can I subscribe to
7 WMMRC?

8 A. In the subscription rates?

9 Q. Whatever rights the PIERS class has with respect to WMMRC,
10 do small shareholders or small holders of PIERS have that same
11 right?

12 A. Can I refer to the document?

13 Q. Sure. I don't think it's on this page.

14 You are aware, sir, that according to the declaration of
15 David Sharp submitted in this case on direct, that the only
16 people who can -- who can purchase it in the rights offering
17 process, this is paragraph 6 of that declaration, "Certain
18 subscription rights for an aggregate subscription price of at
19 least two million dollars," excuse me; "two million dollars."
20 Do you see that? Let me rephrase.

21 According to paragraph 6 submitted by WMI, the
22 subscription right exists if such holder based on its pro rata
23 share was entitled to subscribe for shares for an aggregate
24 subscription purchase price of at least two million dollars,
25 correct?

1 A. That's what this says, yes.

2 Q. Are you aware of who the members of WMMRC will be?

3 A. Sorry?

4 Q. Members, the shareholders of WMMRC -- excuse me; the board
5 of directors for WMMRC on a going forward basis, do you know
6 who they will be?

7 A. I believe they're listed in the disclosure statement.

8 Q. Do you know who they work for?

9 A. If we can go to that page, we certainly can go name by
10 name if you'd like.

11 Q. This is docket number 6188, notice of prospective
12 appointment of directors for the reorganized company.

13 A. Um-hum.

14 Q. We have Appaloosa's general counsel, correct?

15 A. I don't know him.

16 Q. Jim Bolin, you know him?

17 A. I do know him. He's with Appaloosa.

18 Q. He's with Appaloosa?

19 A. Krueger at Owl Creek, yes.

20 Q. Owl Creek? Kronfield with Owl Creek, correct?

21 A. Yeah.

22 Q. And then Dan Gropper with Aurelius, correct?

23 A. Yes. And Jed Hart with Centerbridge.

24 Q. With Centerbridge. Do you know Arnie Kastenbaum?

25 A. No.

1 Q. So, of the six we were able to identify, six -- all six
2 work for one of these four hedge funds, correct?

3 A. Absent that I don't know that Ken Maiman works for
4 Appaloosa directly. The others, I think, we've identified.

5 Q. With respect to the PIERS, there was actually a common
6 PIERS class as well as a preferred PIERS class, correct?

7 A. I think you're -- yes. I think that's right but I'm going
8 towards the edge of my knowledge as it relates to the specific
9 security.

10 Q. Well, who is the owner of the PIERS common security?

11 A. I don't know how these work. I don't know how the
12 ownership works within these securities.

13 Q. All right. Let's go to the next page of the disclosure
14 statement. It's true, is it not, that WMI itself is the owner
15 of these common securities and WMI stands to get a distribution
16 for itself as part of this plan. Common securities of -- this
17 is the next page. You see that?

18 A. Um-hum.

19 THE COURT: Where are we?

20 Q. Common securities, there is approximately twenty-three
21 million allocated to common securities and there's a footnote.
22 The footnote says, "These securities are owned by WMI." WMI
23 owns these common securities, correct?

24 A. Yes.

25 Q. What will happen to this twenty-three million dollars that

1 WMI is getting from itself as part of this proposed settlement
2 and confirmation?

3 A. I don't believe we're paying ourselves for these.

4 Q. Well, what's happening to the twenty-three million?

5 A. I don't -- I don't think we're paying ourselves, so --

6 Q. Is everybody else just moving up from priority?

7 A. I don't know as it relates to the priority within this
8 debenture that we're talking about, the preferreds and the
9 commons, whether the preferreds need to be paid first. The
10 commons is there some formula for paying them? But as far as I
11 know, we are not paying ourselves for these securities.

12 Q. You are aware that the liquidity analysis and the recovery
13 analysis lists that there is 789 million dollars in pre-
14 petition claims, correct?

15 A. Yes.

16 Q. And the only way to get to 789 million dollars is if you
17 include the 23 million that's going back to WMI, correct?

18 A. That's correct.

19 Q. Where is the twenty-three million dollars going?

20 A. I presume that we're just going to pay it off the 765. I
21 don't know -- I don't know that we're accounting for the
22 twenty-three million that there's going to be a payout within
23 the plan. You would just -- if that was the case, it would be
24 a fairly circular argument because you'd turn around and then
25 pay whoever wasn't paid on the bottom of the waterfall.

1 Q. Is it going to WMMRC?

2 A. I don't believe so.

3 Q. According to your analysis, PIERS pre-petition 789.

4 A. Um-hum.

5 Q. So, at least according to your recovery analysis, they
6 are -- WMI is standing to recover, correct?

7 A. Well, in that total, yes, they would be adding both of
8 them. Again, that's a liquidity analysis. I do not believe
9 that we are transferring those securities to WMI reorg.

10 Q. Can we focus hopefully almost finally on the allowed
11 accrued interest?

12 A. Certainly.

13 Q. And actually, let's turn, please, to, I believe, it's
14 Exhibit C of the plan.

15 THE COURT: Of the plan?

16 Q. For a pre-petition -- for allowed principal of 756 million
17 and pre-petition interest of 9 million dollars for
18 approximately a 2 year period, PIERS are getting -- preferred
19 PIERS are getting 154 million dollars in post-petition
20 interest. Is that true?

21 A. I don't think they're getting paid that. I think that
22 that's the calculation if they were to -- if that would be the
23 mathematical calculation for two years of interest, yes.

24 Q. That's -- and I'm just doing the math, it's 756 million
25 for 2 years, that's -- what, approximately 10 percent a year?

1 A. I don't have the debenture in front of me of how it's --
2 how the interest is calculated.

3 Q. Well --

4 A. Right. Doing the straight math to that, I presume that
5 your estimate's right.

6 Q. Now, with respect to the federal courts rate of interest
7 for all post-petition interest, you are aware that that rate is
8 at the lowest rate essentially in recent memory, correct?

9 A. The federal rates?

10 Q. Yes.

11 A. Yes.

12 Q. You are aware that the decision to treat post-petition
13 interest according to whether it's the debenture or some other
14 thing that equates to ten percent a year is substantially
15 higher than the federal court's interest rate for post-judgment
16 claims, correct?

17 A. I believe that this interest is calculated at the stated
18 rate in the debentures as well as all the interest on the
19 senior notes, the sub-notes. It's the stated interest rate on
20 the debenture.

21 Q. Okay. Finally, I just have a couple more questions.
22 Thank you for your patience.

23 As chief restructuring officer, you are aware that four
24 current board members of WMI served on the board during the
25 events that lead to the seizure, correct?

1 A. Four?

2 Q. Either more or less.

3 A. I don't remember off the top of my head how many current
4 board members we had but we haven't nominated any post-
5 petition.

6 Q. There's been no change in board members except through
7 resignation post-petition. Is that right?

8 A. That's right.

9 Q. No board member has been replaced?

10 A. No.

11 Q. How many board members are there currently?

12 A. I don't know the exact number.

13 Q. Is it twenty?

14 A. Again, I don't know the exact number. It's certainly less
15 than twenty.

16 Q. Okay. Despite these board members oversight of a company
17 that suffered the largest bank failure in history, you are
18 aware that the settlement and plan gives these directors at a
19 minimum a partial release, correct?

20 A. That's correct.

21 Q. Okay. Thank you.

22 THE COURT: Thank you. Why don't we take a short
23 break before we continue?

24 (Recess from 2:55 p.m. to 3:02 p.m.)

25 THE CLERK: All rise. Please be seated.

1 THE COURT: You may proceed.

2 MR. STOLL: Thank you, Your Honor.

3 CROSS EXAMINATION BY

4 MR. STOLL:

5 Q. Good afternoon, Mr. Kosturos. My name is James Stoll.
6 I'm with the law firm of Brown Rudnick. And I represent the
7 trust preferred security holders.

8 Mr. Kosturos, I want to take you back to your direct
9 testimony in the form of your affidavit with respect to your
10 analysis of the fairness -- your opinion of the fairness of the
11 proposed settlement, all right?

12 Now, your testimony regarding the fairness of the
13 settlement comes from your affidavit and it comes from
14 paragraphs 26 through 90 of your affidavit, is that fair?

15 A. 26 through --

16 Q. Paragraph 90. Paragraph 26 through paragraph 90.

17 A. I don't have my declaration in front of me.

18 Q. You do not have a copy?

19 A. No.

20 MR. STOLL: Your Honor, may I approach?

21 THE COURT: You may.

22 MR. STOLL: You have a copy of the affidavit, Your
23 Honor?

24 THE COURT: I do.

25 Could the parties on the phone mute their phone?

1 We're getting feedback. Thank you.

2 Q. I believe that this is Exhibit 13 on the plaintiff's
3 exhibit list. I don't know if I heard it actually entered into
4 as an exhibit this morning but in any event, if you begin with
5 paragraph 25, actually on -- excuse me.

6 (Pause)

7 Well, let me just start this way. Beginning on paragraph
8 5 -- or page 5, paragraph 8 of your declaration, sir, you begin
9 with a background recitation of facts. Is that fair?

10 A. Yes.

11 Q. And then what you do over the next several pages until you
12 get to paragraph 13 is you discuss a variety of events that
13 occurred. Principally, various litigation actions, correct?

14 MR. MASTANDO: Objection to the form, Your Honor.

15 THE COURT: Overruled.

16 A. I think it's just all in this pertinent factual background
17 section.

18 Q. Right. And on page 13, paragraph 30, is the beginning of
19 your discussion of the global settlement and why it should be
20 approved, is that fair?

21 A. Page --

22 Q. Page 15, excuse me.

23 A. 50. Yes.

24 Q. Okay. And then from page 15, paragraph 30 through to
25 paragraph 90 which ends on page 43 running over to page 44, if

1 I at least understand the structure of your affidavit that is
2 your testimony about the global settlement and why it should be
3 approved. Is that fair?

4 A. Right. 43 into 44, yes.

5 Q. Okay. And we're going to look at some of these discreet
6 paragraphs in a moment, sir, but if I can summarize it,
7 essentially what you've stated in your affidavit is that you've
8 engaged in analyses and evaluations and assessments of the
9 claims and looked at the settlement and come to the conclusion
10 that it's fair and reasonable and in the best interest of the
11 estate. Is that fair?

12 A. I don't know that I would maybe limit it to that but I
13 might add the claims extinguishing very large claims as well to
14 that. But broadly let's agree on that for now.

15 Q. Okay. Nowhere in your testimony in your affidavit do you
16 in any way discuss any analysis of the likelihood of success of
17 any particular claim, is that fair?

18 A. I think I go through each claim as in my declaration. I
19 point out that there are potential assertions, defenses, things
20 like that. But do I put a specific value on them? No.

21 Q. That's right. You don't put any value on any particular
22 claim, that's right. Is that fair?

23 A. I think I testified to that, yes.

24 Q. Okay. And you don't put any sort of range of assessment
25 of risk on any particular claim. Is that right?

1 MR. MASTANDO: Objection, Your Honor.

2 THE COURT: Overruled.

3 A. It's difficult to put attorney work product privilege into
4 a public document. So, I'm following it but we didn't put our
5 work product in here.

6 Q. Right. And all I'm trying to understand, sir, is what you
7 are testifying to.

8 A. Um-hum.

9 Q. And so, what you are not testifying to is that any
10 particular claim has any particular assessment of likelihood of
11 success in your opinion?

12 A. Well, what I've done is I've gone to great lengths to talk
13 about what we believe are some of the assertions and defenses
14 against each claim. I think that we have listed and detailed
15 out the business -- the three potential business torts, we've
16 talked about those specifically. I think we've talked about
17 the fraudulent conveyance potential action against the FDIC and
18 JPMorgan. I think we've broadly described what they are.
19 We've talked about what potentially some of the defenses are
20 against those. And I think that's what's in my declaration.

21 Q. Okay. And again, I'm trying to be specific here sir, so,
22 let me just try to wrap this up. But with respect to any
23 particular claim, you did not reach any sort of conclusion and
24 certainly did not put in your affidavit any sort of testimony
25 that any particular claim had, in your mind, any particular

1 likelihood of success on the merits. Is that fair?

2 MR. MASTANDO: Sorry to interrupt, Your Honor. I just
3 want to object to confirm that counsel is talking about the
4 declaration. It wasn't clear to me if he was talking beyond
5 the declaration in the questions.

6 THE COURT: Well, in the declaration.

7 A. And I just want to make sure that I have that. When you
8 refer to claim in my mind I think you're referring to the
9 potential fraudulent conveyance and the business tort claims.
10 Is that right?

11 Q. No, that's not right, sir. I'm talking about components
12 of the settlement agreement. All of the components of the
13 settlement agreement. Not one component of any claim that was
14 settled, any claim, any demand, any right that was settled in
15 the settlement agreement, was there any sort of -- any
16 particular likelihood of success that you are prepared or that
17 you have testified to in your declaration?

18 A. I think the only claims, again, that I'm referencing in
19 this declaration are -- we're talking about the FDIC and JPM
20 potential capital contribution/fraudulent conveyance and
21 business torts. And then we've gone on to talk about -- a
22 little bit about the DC claims and things like that. I'm just
23 struggling to this definition of claims. Because I mean
24 there's significant claims in my estate. There's -- I'm
25 struggling with this definition of claims.

1 Q. The claims that are referred to in your declaration,
2 right, not one of those claims do you provide any testimony
3 regarding your assessment of the likelihood of success of any
4 claim, correct?

5 A. In my declaration --

6 Q. In your declaration.

7 A. -- I agree.

8 Q. Okay.

9 Now, if I understand what you did do, and I believe you
10 say this in your report, is you sat down -- and I'll say that
11 figuratively, I guess, but you personally read pleadings in the
12 case. Is that right?

13 A. I have read pleadings in the case.

14 Q. And you read pleadings that your lawyer submitted and you
15 read pleadings that opposing lawyer submitted. Is that right?

16 A. Yes.

17 Q. And based on that exercise of reading various pleadings,
18 that's how you made your decision as to whether claims
19 should -- had a certain risk associated with them. Is that
20 fair?

21 A. I would also add that there were settlement discussions
22 and negotiations.

23 Q. Sure. You sat in a room perhaps with the lawyers at
24 Sullivan & Cromwell and they told you what they thought about
25 their claims, right?

1 A. As well as their business people, sure. As well as the
2 members from the FDIC and others.

3 Q. Sure. All the theoretical adversaries told you about all
4 the strengths of their claims, right?

5 A. Well, again, obviously I can balance that with I have my
6 own sets of lawyers who are pursuing our claims through our
7 process and --

8 Q. But you -- I don't mean to cut you off but --

9 A. -- but you did.

10 Q. -- but you don't factor into your testimony--

11 MR. MASTANDO: Your Honor, I object. Your Honor --

12 Q. -- if your lawyers --

13 MR. MASTANDO: -- the witness is not done.

14 THE COURT: Please don't interrupt the witness and
15 don't --

16 MR. STOLL: I apologize, Your Honor.

17 THE COURT: -- and don't overtalk each other. Let him
18 finish his answer.

19 MR. STOLL: I apologize. I'm sorry.

20 A. There is a great many pleadings, assertions, counterclaims
21 in this case, in the ANICO case, in all sorts of jurisdictions
22 in this case. There's plenty of things to read. There's
23 plenty of things to look at. There's plenty of things,
24 particularly as it relates to ANICO and how the complexity of
25 FIRREA applies to all of these claims. It really isn't that

1 difficult to assess the risks of these claims.

2 Q. Okay. Are you a lawyer, sir?

3 A. No.

4 Q. Okay. So -- but you feel competent to read pleadings and
5 assess the risks -- the legal risks and assess what that -- how
6 that should be evaluated with a settlement. Is that fair?

7 A. Well, again, it's -- there's no I in this. It's -- we are
8 the debtor. We have, obviously, resources within the company.
9 It's not just me making any decision for the debtor. There is
10 lots of things to assess in review and to consider.

11 Q. Well, in those resources that you have drawn on exclude --
12 exclude your own counsel, Weil Gotshal's, assessment. Is that
13 fair?

14 A. I think we came to this conclusion in our own business
15 judgment.

16 Q. Okay. Which means that you did not receive any legal
17 advice whatsoever regarding the likelihood of success on the
18 claims from your counsel, is that fair?

19 MR. MASTANDO: Objection, Your Honor. I think his
20 mischaracterizes his testimony and the declaration.

21 THE COURT: Overrule. Let him answer.

22 A. Well, I think I've testified in my depositions as well as
23 in my declarations that we have -- we were advised by counsel
24 on strengths and weaknesses of our claims. We were able to
25 review counterclaims. We were able to write -- review

1 assertions, defenses. We were able to gather information from
2 settlement negotiations when we used our own business judgment
3 to settle these claims and enter into the global settlement
4 agreement.

5 Q. So, let me understand if I -- let me try and understand
6 that answer.

7 When you say "you" being the company, use your own
8 business judgment in order to reach your conclusion as to the
9 relative strengths and weaknesses of the claims, are you saying
10 that you are basing that on the advice of counsel?

11 A. No.

12 Q. Okay. So, whatever Weil Gotshal had to say when it came
13 time for you to assess the weaknesses and strengths of the
14 claims for the purposes of evaluating a settlement, you erased
15 anything that they told you from your mind.

16 MR. MASTANDO: Objection.

17 Q. Is that fair?

18 MR. MASTANDO: Objection again, Your Honor.

19 Mischaracterizes the testimony.

20 THE COURT: No, overruled. I'll allow him to answer.

21 Can you answer that? Did you erase it from your mind?

22 THE WITNESS: I don't think you can erase it from your
23 mind.

24 THE COURT: Okay.

25 Q. Okay. You can't erase it from your mind. I take it,

1 then, from your answer that you did receive advice from Weil
2 Gotshal, your counsel, regarding the strengths and weaknesses
3 of claims before you reached your business judgment that the
4 claims had a certain risk and therefore the settlement was
5 reasonable. Is that fair?

6 A. I think we both know I talked to my counsel and, again, as
7 I said earlier, that we talked about our strengths and
8 weaknesses with counsel, of course we did.

9 Q. Okay. So, it's factored into your ultimate conclusion
10 that the settlement is fair and reasonable, right?

11 A. I stand by my previous statement that we -- it was a
12 consideration. We also were able to glean a lot of information
13 as it related to assertions and defenses from other filings
14 within our case and within the ANICO case.

15 Q. So, is it your testimony, sir, that simply by looking at a
16 pleading filed by your opponent that you evaluate that the
17 claim is risky and therefore it should be settled?

18 MR. MASTANDO: Objection.

19 A. I think certainly we can use our business judgment and
20 consider that, yes.

21 Q. Okay. I'd like you to turn to paragraph -- or page 24,
22 paragraph 44.

23 A. I'm sorry. What --

24 Q. Page 24, paragraph 44 of your declaration.

25 A. Um-hum.

1 Q. If you go down six lines to the sentence that begins in
2 the middle of that line, "Based upon careful review." Do you
3 see that?

4 A. Um-hum.

5 Q. Let me read that into the record, if I could, just to
6 preface a question. I'll read as follows, quote, "Based upon
7 careful review and consideration of all the asserted claims,
8 counterclaims and potential claims, in all of the asserted
9 defenses and responses thereto as well as consideration of the
10 strengths and weaknesses of both their own claims and those of
11 our own claims -- of their own claims and those asserted
12 against them and the delay, expense, uncertainty, and risks of
13 continued litigation of these claims, the debtors determine the
14 global settlement agreement is fair and reasonable." Did I
15 read that accurately, sir?

16 A. Yes.

17 Q. And that's a fair statement of your testimony. Is that
18 right? That is your testimony.

19 A. That is my testimony.

20 Q. That is your testimony.

21 And that careful assessment including the strengths and
22 weaknesses is based on the information that we just discussed.
23 Is that right?

24 A. Yes.

25 Q. Okay. So, attorney communications with Weil Gotshal,

1 attorney work product, their assessment of the strengths and
2 weaknesses is embedded in your business judgment as set forth
3 in that sentence. Is that right?

4 A. Did you use the word "embedded?"

5 Q. Embedded, imbedded, embedded.

6 A. I don't know how I can continue to answer the different
7 questions the same way. We exercised our business judgment in
8 evaluating the asserted claims, counterclaims and potential
9 claims and came to our conclusion as our business judgment that
10 this was a fair and reasonable global settlement agreement.

11 Q. And you base that on communications with your counsel as
12 to the assessment of a likelihood of success of the merits. Is
13 that right?

14 A. I think you asked me earlier and I -- the judge even made
15 sure, I could not erase that from my memory. I -- we used our
16 own business judgment in looking at all these strengths and
17 weaknesses.

18 Q. Now, beginning at paragraph 53 of your declaration, sir; I
19 think that's on page 29, you begin discussing certain of the
20 claims specifically. I believe you begin with the deposit
21 claim. And that, I believe, goes through paragraph 63. If you
22 could just take a quick second to just look through that and
23 make sure I've got that correct, sir.

24 A. Yes.

25 Q. All right. So, you spent ten paragraphs talking about the

1 deposit claim. And you culminate, I believe, in paragraph 62
2 on page 32 with a statement that the debtor disputes the FDIC's
3 right of setoff. Do you see that?

4 A. Their 9.5 rights? Is that what you're referring to, I
5 presume?

6 Q. That's right.

7 A. Yeah.

8 Q. Okay. Now, again, just to be clear, in evaluating the
9 four billion dollar deposit claim, that's what that -- those
10 ten paragraphs relate to, right?

11 A. Yes.

12 Q. You did not include or do not have any testimony as to
13 whether the debtor had a 99.9 percent chance of winning on that
14 claim or a 1 percent chance of winning on that claim or
15 anything in-between. Is that fair?

16 A. That's fair. This is -- this claim, this section, the
17 cash deposit account, is under current litigation. We have
18 stated that JPMorgan has filed a motion as it relates to this
19 claiming it's theirs as well as a couple other things including
20 noting some of these factual inaccuracies that they believe
21 would support their claim. We believe that we have put in a
22 lot of evidence here. We've asked for a summary judgment. If
23 we were to win that, obviously, JPMorgan would have appeal
24 rights. If it was deemed to be a cash deposit account, the
25 FDIC would then assert their 9.5 rights. They've asserted

1 potential offset agree -- offset rights. JPMorgan's alleged
2 potential offset rights. I think this is a factual summation
3 of where we're at right now.

4 Q. Okay. So, you looked at all the risks that were
5 potentially associated with a claim but you didn't assess the
6 likelihood of any of those risks. Is that fair?

7 A. We certainly took them all into consideration when we
8 decided to enter into the global settlement agreement.

9 Q. And when you say "we" you mean you and your counsel?

10 A. The debtor, WMI.

11 Q. But not your counsel?

12 A. Well, again, if we're going to -- I get where we're going
13 here in this conversation. I continue to say that we exercised
14 our business judgment and you've continued to try to connect
15 Weil Gotshal and Quinn Emanuel. We have said over and over
16 we've used our business judgment as it relates to what we
17 believe is a very fair and reasonable settlement.

18 Q. Do you in your experience, sir, which, I believe, you said
19 you've been working with Alvarez for eight years. Is that
20 right?

21 A. Eight and a half years, yes.

22 Q. And how many years have you been in the restructuring
23 business?

24 A. Well over twenty.

25 Q. Well over twenty.

1 Is it your opinion, sir, that it's responsible to ignore
2 your counsel's advice and assessment of claims in reaching
3 99 -- reaching settlements in a bankruptcy case?

4 MR. MASTANDO: Object to the form, Your Honor. It
5 mischaracterizes the testimony again.

6 THE COURT: Well, sustained. Just argumentative.

7 Q. Beginning on page 33 of your declaration, sir, paragraph
8 64 and extending over to page 36, paragraph 71, this is the
9 section of your declaration where you discuss the business tort
10 claims, right?

11 A. Yes.

12 Q. And we've heard testimony about that already today. And
13 again I just want to confirm that nowhere in this section of
14 your declaration do you provide any testimony as to the
15 likelihood of success of those claims. Is that fair?

16 A. That's fair. Yes.

17 Q. And nowhere in that section of your declaration do you in
18 any way attempt to value that claim. Is that right?

19 A. We do not attempt to value that claim, no.

20 Q. Fair enough. Beginning on page 37, paragraph 72 and
21 extending through paragraph 80 on page 40 running over to page
22 41, that's the area of your declaration where you discussed
23 the, what you term the capital contribution claims. You see
24 that?

25 A. Yes.

1 Q. That's the so-called fraudulent conveyance claims. Is
2 that right?

3 A. That's right.

4 Q. Okay. And again, nowhere in that section do you provide
5 any testimony as to the likelihood of success of those claims.
6 Is that fair?

7 A. Can you repeat that question, please?

8 Q. I said nowhere in those paragraphs do you provide any
9 testimony as to the likelihood of success of those claims?

10 A. Well, I think we try in this section to list the risks.
11 And the risks in the fraudulent conveyance litigation are very
12 significant. One of the things about the fraudulent conveyance
13 is that it has real tension with the business courts.

14 In the fraudulent conveyance you're trying to prove
15 insolvency as you look back to try to recover potential capital
16 contributions. In the business torts, we would be trying to do
17 the opposite. So, there's natural tension between these two
18 and it makes it very difficult to really proceed with both of
19 them. Likelihood if we were to proceed with litigation, we
20 would have to choose one of them.

21 Q. And that tension that you just described between the two
22 claims, was that tension something that you learned about
23 through counsel?

24 A. No. I think as a business person, one can figure out the
25 differences is that when you're looking at a business tort,

1 there's obviously two components. One is to prove what kind of
2 claims you have and the second is, obviously, the value, the
3 potential damages. If I'm trying to prove an insolvency, it
4 would, I think, take away quite a number of the damage
5 potential calculations that I could potentially get, we could
6 potentially get, under the business torts.

7 MR. NELSON: Objection, Your Honor. Relies on he's
8 already stated that --

9 THE COURT: You have to talk into a microphone or
10 you're just not going to be made part of the record.

11 MR. NELSON: He's already stated that all his analysis
12 of claims is due to attorney/client advice. He's talking about
13 what will happen, what might happen which is clearly analysis.

14 MR. MASTANDO: Your Honor, sorry. If I may?

15 THE COURT: I think he did and I'm going to overrule
16 that objection.

17 Q. Okay. That tension that you described between the
18 business tort claims and the fraudulent conveyance claims, all
19 of those claims are being released under the settlement,
20 correct?

21 A. That would be correct.

22 Q. Beginning at paragraph 81 on page 41 and running through
23 paragraph 84, the next page, that's where you discuss the so-
24 called "preference claims." Is that fair?

25 A. That's fair.

1 Q. And again, like the other claims, there is no attempt
2 to -- there's no testimony provided as to the likelihood of
3 success of those particular claims, right?

4 A. I think this claim is much different than the other
5 claims. In a preference action should we be able to win these
6 arguments, we would have to give them back a corresponding
7 claim and in case like ours where we believe we're paying the
8 guts a hundred percent, it effectively creates no value below
9 the gut claim. So, you know, it's effectively a wash.

10 Q. And you made that legal assessment yourself?

11 MR. MASTANDO: Objection, Your Honor.

12 Q. That you have to -- that you have to provide a claim back?

13 A. I think I'm capable of that with my Chapter 11 experience.

14 Q. Okay. So, the as -- so, the answer is you did not rely on
15 counsel for that?

16 A. I did not rely on counsel for that.

17 Q. On page 42 -- on page 42 beginning at paragraph 85 and
18 extending through paragraph 90, these are the so-called DC
19 claims. Is that fair?

20 A. Yes.

21 Q. And again, like the other claims, this claim has no
22 likelihood of success on the merits associated with it. Is
23 that right? No testimony, excuse me; regarding likelihood of
24 success on the merits?

25 A. That's correct.

1 Q. Okay. Now, that is the end of the section of your
2 declaration analyzing the claims and why you believe it's fair
3 and reasonable -- well, the settlement is a fair and reasonable
4 settlement. Is that right?

5 A. That's right.

6 Q. Okay. And nowhere in any of that testimony, paragraphs 1
7 through 90, do you in any way discuss the claims regarding the
8 trust-preferred securities. Is that right?

9 A. That would be right.

10 Q. You have no testimony on the trust-preferred securities
11 whatsoever, right?

12 A. I have no testimony as it relates, yes, into the first
13 ninety.

14 Q. As it relates to the settlement and the fairness of the
15 settlement, you have given no testimony with respect to the
16 trust-preferred securities in your direct affidavit. Is that
17 right?

18 A. Yes.

19 Q. Even though the company is surrendering a four billion
20 dollar claim, in the settlement you provided no testimony with
21 respect to that claim. Is that fair?

22 A. I personally am not preparing any direct testimony.

23 Q. Okay. Now, I believe you said you were hired of October
24 2008 almost immediately after the bankruptcy filing. Is that
25 fair?

1 A. Yes.

2 Q. And I believe in your declaration you say that settlement
3 negotiations began almost immediately. Is that right?

4 A. The settlement, we had numerous conversations with
5 JPMorgan as I testified to earlier. We only had one employee.
6 We had no access to financial records. We had no access to
7 many records. So, one of the first things that we did when we
8 were meeting with JPMorgan was try to negotiate an information
9 access agreement so could try to get information to that.
10 There was various other administrative-type of issues as it
11 related to employee benefit plans that we tried to identify.
12 So, almost immediately there was a discussion of trying to
13 identify the issues.

14 Q. Okay.

15 A. As well as -- I might add that, obviously, very early on
16 that JPMorgan had put a freeze on the majority of our deposit
17 accounts so, obviously, we were very interested in talking
18 about that.

19 Q. Right. And you stated in your declaration that it was
20 obvious to WMI at the outset of the case that there were
21 already claims and disputes and with JPMorgan. Is that fair?

22 A. Yes. From very early on.

23 Q. All right. Now, you were aware that counsel at Weil
24 Gotshal, counsel for the debtor, was retained and retention was
25 approved with the recognition that Weil Gotshal also

1 represented JPMorgan. Is that fair?

2 A. Yes.

3 Q. You knew that, right?

4 A. I did know that.

5 Q. And when you started negotiating with JPMorgan to settle
6 the claims or to attempt to settle the claims, that negotiation
7 occurred with you as the lead negotiator as you said in your
8 declaration and with Weil Gotshal representing the debtor. Is
9 that right?

10 A. Weil Gotshal, yes.

11 Q. Okay. And did you ever consider the conflicts of interest
12 in having Weil Gotshal represent the debtor in negotiations of
13 claims with JPMorgan when JPMorgan was one of their clients?

14 A. Yes, we considered it. I thought Weil Gotshal did a great
15 job with identifying issues, analyzing legal issues, and moving
16 the case along.

17 Q. And it's fair to say, sir, is it not, that one of
18 Alvarez's principal clients is also JPMorgan?

19 A. We have relationships as we identified in our -- as we
20 have identified. I wouldn't know if I would call him a
21 principal client.

22 Q. Well, when you submitted your retention applications, I
23 think you submitted three of them in the context of this case,
24 you identified a variety of JPMorgan entities as clients of
25 Alvarez. Did you not, sir?

1 A. The documents speak for itself.

2 Q. But did you do that sir? Do you know that?

3 A. Yeah. If it's in the document it's in the document. I
4 think you're saying it's in the document. I'm -- if it's in
5 the document, it's in the document.

6 Q. Okay. And isn't it the case, sir, that in the course of
7 providing the types of services that Alvarez provides that
8 oftentimes in restructurings especially where secured lenders
9 are involved for a debtor, that secured lenders require the
10 retention of workout professionals like yourself?

11 A. Yes.

12 Q. And isn't it the case that Weil -- JPMorgan has from time
13 to time specifically approved or required Alvarez's retention?

14 A. Working for them?

15 Q. Yes.

16 A. Yes. It comes up, sure.

17 Q. Sure. And so, during the whole course of the negotiation
18 of the settlement, the two principal negotiators negotiating on
19 behalf of the debtor, Weil Gotshal and you on behalf of Alvarez
20 and WMI were both negotiating while at the same time your
21 companies were representing the principal party on the other
22 side of negotiations, JPMorgan. Is that fair?

23 A. I think that we have disclosed our relationship with
24 JPMorgan in our application. The -- we've had to bring suit
25 against JPMorgan in the couple various debtor assignments and

1 we have brought suit against them.

2 Q. Okay. Now, you talked earlier on the cross-examination by
3 Mr. Nelson regarding the term sheet that was -- that he put up
4 on the board and he showed you, in March, remember that?

5 A. Yes.

6 Q. Okay. And that term sheet was, I think, dated in the
7 middle of March. Do you remember that? March 2009. You
8 remember that?

9 A. Yep. Yes.

10 Q. And I believe after going through that entire term sheet
11 you agreed with Mr. Nelson that the economic result or
12 culmination of the negotiations between March of 2009 and what
13 was ultimately submitted by the parties as the proposed
14 settlement, that the economic impact remained the same
15 essentially. Do you remember that?

16 A. Yeah. I think the more fascinating point was the other
17 column that Mr. Nelson didn't talk about which was where
18 JPMorgan started in their negotiation which was a significantly
19 smaller number and created a wide gulf between the two -- the
20 two term sheets. I think -- in fact, I think the gulf was over
21 two billion dollars.

22 MR. STOLL: Your Honor, may I hand up a document to
23 mark as an exhibit and approach the witness?

24 THE COURT: You may. Show it to counsel first. We'll
25 mark this TPS-1.

1 MR. STOLL: TPS-1.

2 (WGM Draft term sheet was hereby marked as TPS's Exhibit 1 for
3 identification, as of this date.)

4 Q. Mr. Kosturos, I've handed you what we marked as TPS
5 Exhibit 1 which is a term sheet that is entitled "WGM Draft"
6 which I'll assume means Weil Gotshal & Manges, draft "3509."
7 Have you seen this document before, sir?

8 A. I think so.

9 Q. I believe this is the first term sheet representing
10 written settlement terms in this matter. Would you agree with
11 that?

12 A. I wouldn't know.

13 Q. Okay. Could -- there might have been earlier ones is what
14 you're saying?

15 A. There might have been earlier ones.

16 Q. Okay. I'd like you to turn -- look at the very bottom of
17 the first page which says "363 sale assets." Do you see that?

18 A. Yes.

19 Q. And then it says, if I can just read into the record, "In
20 consideration of the sale proceeds described below, JPMC shall
21 purchase all of WMI's rights, title and interest in and to" and
22 then it lists "the trust-preferred securities, the Visa shares,
23 and the WMI intellectual property." Do you see that?

24 A. Yes.

25 Q. And then the next paragraph says, again, as the 363 sale

1 proceeds "JPMC shall pay or transfer all of its rights, title
2 and interest in and to the funds in the deposit accounts and
3 the goodwill litigation proceeds." Do you see that?

4 A. Yes.

5 Q. And the funds and the deposit accounts, that's the four
6 billion dollar deposit account, right?

7 A. Yes.

8 Q. And the trust-preferred security claim is also a four
9 billion dollar claim. Is that right?

10 A. It has four billion dollars of stated value. Yes.

11 Q. That's right. And that proposal, the exchange of the four
12 billion dollar deposits to WMI and the trust-preferred
13 securities to JPMorgan that exchange has never changed in the
14 course of any of the settlement discussions. Is that right?

15 MR. MASTANDO: Objection, Your Honor.

16 A. I think that there -- the trust-preferred securities has
17 always been a part of every term sheet that I can remember.

18 Q. Okay. As well as the deposit accounts?

19 A. Yes.

20 Q. Okay. And this term sheet, 3509, was entered -- or was
21 exchanged before any litigation was filed against JPMorgan. Is
22 that right?

23 A. Yes, that would be correct.

24 Q. And it was filed before Quinn Emanuel was hired as
25 conflicts counsel. Is that correct?

1 A. That's also correct.

2 Q. Okay. And throughout the time period of these
3 negotiations following this term sheet, at all times Weil
4 Gotshal and not Quinn Emanuel did the negotiation --
5 negotiating with JPMorgan on behalf of the debtor. Is that
6 right?

7 A. Can you say that again?

8 Q. I'm sorry. Yes, let me try that again.

9 At all times after this term sheet and up to the time of
10 the settlement, the settlement negotiations on behalf of the
11 debtor were conducted by you and Weil Gotshal. Is that fair?

12 A. Up to this point?

13 Q. No. From this point to the point where the settlement was
14 actually entered into.

15 A. Quinn Emanuel was definitely involved. They would review
16 some of the terms. We kept them involved and up to date as one
17 would with a good legal team like we had.

18 Q. You kept them informed. Were they the lead negotiators?

19 A. Well, I would say that I was the lead negotiator. I would
20 say that Weil Gotshal drafted a lot of the documents as well as
21 Quinn Emanuel after they had hired -- also had input to some of
22 the documents as well.

23 I might point out that your term sheet has brackets around
24 all the numbers with nothing in them. So, I think this was a
25 form of a term sheet that we considered but clearly there's no

1 numbers in this.

2 MR. STOLL: Your Honor, that's all I have.

3 THE COURT: Anybody else wish to cross?

4 CROSS EXAMINATION BY

5 MR. STEINBERG:

6 Q. Good afternoon, Mr. Kosturos, I'm Arthur Steinberg from
7 King & Spalding. I represent the Dime warrant holders. I
8 wanted to talk to you about the requirements of confirmation of
9 a plan and specifically the best interest test. Do you know
10 what the best interest test is?

11 A. Yes, I do.

12 Q. Okay. It's set forth in Section 1129(a)(7) of the
13 Bankruptcy Code and essentially provides that an impaired party
14 is supposed to get, in a reorganization plan, at least as much
15 as they would get in a liquidation. Is that correct?

16 A. That's correct.

17 Q. And 1129(a)(7) in the best interest test rings into play
18 the distribution scheme in Section -- in Chapter 7 of the
19 Bankruptcy Code. Is that correct?

20 A. That's correct.

21 Q. Okay. So, this case is -- and these are my words, not
22 yours, is a bit unusual in that unsecured claims are getting
23 paid on post-petition interest. Does that only come about from
24 your experience if the entity is solvent?

25 A. It's my understanding that we are going to pay post-

1 petition interest in -- we've talked about that with our
2 lawyers. We believe it's appropriate in this case and will be
3 put in on additional arguments about that later in the case.

4 Q. So, is Washington Mutual, Inc. solvent at this point in
5 time?

6 MR. MASTANDO: Objection, Your Honor.

7 THE COURT: Overrule. Can you answer?

8 A. At this point, I can't make a determination. It's going
9 to largely depend on what the claims reserves are set out and
10 where the ultimate amounts of the guts --

11 Q. Did you do -- I'm sorry.

12 A. -- where the gut claims come out.

13 Q. Did you do a liquidation analysis for purposes of the
14 disclosure statement and plan?

15 A. We did.

16 Q. And did you make assumptions as to what the unsecured
17 claims and the other creditor claims would come out?

18 A. I believe we did.

19 Q. And based on the assumptions that you made in your
20 liquidation analysis, would you say that Washington Mutual is
21 solvent?

22 A. If you might, could we refer to the specific liquidation
23 analysis? I know Mr. Nelson was referring to me to that
24 earlier. I would just --

25 THE COURT: Do you want to put it up again?

1 Q. I was referring to the one that was attached to your
2 disclosure statement that was prepared in connection with
3 solicitation for the plan.

4 A. I believe that's the same one --

5 THE COURT: Well, he has the demonstrative for that.

6 UNIDENTIFIED SPEAKER: Exhibit 37.

7 MR. STEINBERG: Thank you.

8 UNIDENTIFIED SPEAKER: I believe.

9 UNIDENTIFIED SPEAKER: That's Exhibit 6.

10 THE COURT: Equity 6?

11 THE WITNESS: It's also 37.

12 UNIDENTIFIED SPEAKER: 37 is --

13 Q. Sir, if you can turn to page C-3 of the liquidation
14 analysis.

15 A. Um-hum.

16 Q. And if you see the amount set forth for paying post-
17 petition interest in the Chapter 11 scenario for senior notes
18 and senior subordinated notes, nothing for general unsecured
19 creditors and then a small amount for CCB guarantees. You see
20 those numbers?

21 A. Just to correct you there. I believe that we're paying a
22 hundred percent of the general unsecured claims.

23 Q. Right. But nothing -- there's nothing set forth with
24 post-petition interest, right?

25 A. For them, yes.

1 Q. Right. But there's 349 million for post-petition interest
2 on the senior notes and 258 million for the senior subordinated
3 notes and 8 million for the CCB guarantees. Is that correct?

4 A. That's correct.

5 Q. All right. So, I haven't done the exact math but it's
6 close to 700 million dollars? Maybe a little more than 700
7 million dollars?

8 A. On the interest?

9 Q. Yes. Post-petition interest. Three forty-nine --

10 A. I think it's 600.

11 Q. I'm sorry; 600 million dollars.

12 A. Um-hum.

13 Q. And if you look at the principal amounts that are being
14 paid on account of the senior notes, they're getting back their
15 principal in full, right?

16 A. Yes.

17 Q. And the senior subordinated notes are getting their
18 principal back in full, correct?

19 A. That's correct.

20 Q. And the CCB guarantees are getting their principal back in
21 full, correct?

22 A. That's correct.

23 Q. And the only entity that's listed as a debt that's not
24 getting their principal back in full is the PIERS and they're
25 shy by approximately 200 million dollars, right?

1 A. That's correct.

2 Q. So, you have 600 million dollars of post-petition interest
3 being paid and the -- on your debt structure that you assume is
4 part of your liquidation analysis, the only principal that's
5 not being paid on your debt is 200 million dollars. So, does
6 that mean to you that the entity with the assumption to be
7 baked into your liquidation analysis is solid?

8 A. It's kind of circular because if you were to take out the
9 post-petition interest, this would pay a hundred percent to the
10 PIERS and then you'd have to revise the analysis. I believe
11 the analysis also works to the extent that -- so, I mean it's a
12 circular question, if you will.

13 Q. Well, let me see if I can clarify it so it won't be
14 circular.

15 The amount that the PIERS are not getting paid that would
16 otherwise have to be paid for them to be paid a hundred percent
17 of the principal amount of their claim, is 201 million dollars
18 according to your analysis. Is that right?

19 A. That's correct.

20 Q. But the aggregate amount of post-petition interest that is
21 being paid under this plan is with the assumption it's baked
22 into your liquidation analysis is over 600 million dollars.
23 Isn't that correct?

24 A. That's correct.

25 Q. So, if you didn't pay post-petition interest to 600

1 million dollars but you only paid it to 400 million dollars and
2 you topped off the PIERS so they get a hundred percent on their
3 pre-petition claim, you still have 400 million dollars leftover
4 and instead of distributing it to other parties, you make
5 paying it as post-petition interest on unsecured claims. Is
6 that correct?

7 A. Right. That's correct. The point of this analysis,
8 really, is just to compare it the Chapter 7 which is really
9 what the -- if the section you're referring to is asking us to
10 do. And what we've tried to prove is that under a Chapter 7
11 liquidation you would not get as much as you would under a
12 Chapter 11 claim.

13 Q. But is it --

14 A. That's the point of their liquidation analysis.

15 Q. -- but you're comparing it to what your plan is actually
16 providing which is what's in your liquidation analysis which is
17 the left-hand side of page C-3, right?

18 A. Agreed.

19 Q. So, what you're saying is you're positing that under my
20 plan that this is my distribution scheme in Chapter 11 and this
21 is what I think might happen in Chapter 7. But you are
22 starting with the fundamental assumption that your plan
23 provides for the distribution that's in your liquidation
24 analysis.

25 A. That's true.

1 Q. Okay. So, if you have a little familiarity with the
2 distribution scheme of Chapter 7 in best interest, do you know
3 whether post-petition interest gets paid ahead of late filed
4 claims?

5 A. I don't know.

6 Q. Okay. If you wanted to have a reference you'd look at
7 Section 726 of the plan and it'd probably get you there.

8 THE COURT: Well, you can save that for argument.

9 MR. STEINBERG: Okay.

10 THE COURT: If he doesn't --

11 Q. So, do you know whether post-petition interest on
12 unsecured claims get paid ahead of subordinated debt claims?

13 A. Under the terms of our plan, the way that it works is that
14 the PIERS under their debenture will pay up to the post-
15 petition -- to the interest of the senior notes, the senior
16 subnotes, and the CCB guarantees.

17 Q. I wasn't asking that question. I was just saying under
18 the best interest test, do you know whether subordinated debt
19 claims get paid ahead of post-petition interest on unsecured
20 claims? Do you have that basis of knowledge based on your
21 experience in cases?

22 A. Again, I think I answered that. It is our belief and our
23 counsel's belief that it applies in this case and we'll be
24 making our arguments later on in a confirmation.

25 Q. All right. One more time. If you have a Section 510(b)

1 claim which is a debt claim that's being subordinated not an
2 equity claim that's being subordinated, do you know whether
3 that claim under the best interest test would get paid ahead of
4 post-petition interest on an unsecured claim?

5 A. I believe the position that we've taken in our plan is
6 that we will be paying post-petition interest to the unsecured
7 classes. We will be putting it on our testimony to that later
8 in the confirmation.

9 Q. Okay. Now, Section 726 of the Bankruptcy Code which talks
10 about post-petition interest uses the term "legal rate." Do
11 you recall ever having a discussion as to whether you should be
12 paying the contractual rate or the federal judgment rate for
13 purposes of calculating post-petition interest?

14 A. We have taken the position that we should be paying
15 contractual interest.

16 Q. And do you know what the difference is as far as value
17 goes that if you had paid federal judgment interest instead of
18 contractual interest what the difference would be?

19 A. I do not know.

20 Q. Okay. I'd like to turn to the Anchor litigation. That's
21 one of the assets that are being sold to JPMorgan as part of
22 the plan of reorganization. Right?

23 THE COURT: What did you -- can you rephrase that?
24 Say that again?

25 Q. I want to refer to the Anchor litigation. Is that one of

1 the assets that is being sold under Section 363 of the
2 Bankruptcy Code to JPMorgan as part of the global settlement
3 and the plan of reorganization?

4 MR. MASTANDO: Objection to the form, Your Honor.

5 THE COURT: Overrule. Can you answer?

6 A. I believe it is being listed. Again, the form of the sale
7 really is to implement the settlement agreement, if you will.
8 That we believe we have claims to that. JPMorgan believes they
9 have claims to that. The 363 is merely a form of a document to
10 implement a settlement agreement.

11 Q. Okay. So, in the global settlement agreement, there's a
12 defined term called "363 sale and settlement." Is that
13 correct?

14 A. Yes.

15 Q. And the Anchor litigation is listed as one of those assets
16 that as part of the defined term 363 sale and settlement.
17 Correct?

18 A. I agree.

19 Q. And the defined term says that -- it means the compromise
20 and settlement set forth in Bankruptcy Rule 9019 and the plan
21 regarding among other things agreements with respect to
22 ownership or plan contribution assets and the sale transfer and
23 assignment pursuant to the plan in Sections 363 and 365 of the
24 Bankruptcy Code and then it lists a whole bunch of assets and
25 (vii) is the Anchor litigation, right?

1 THE COURT: Do you know it off the top of your head or
2 do you want to --

3 THE WITNESS: I believe it's in there.

4 THE COURT: Okay.

5 THE WITNESS: I mean I would --

6 Q. So, the debtors' taking -- the debtors took the position,
7 by the way, that they own the Anchor litigation, correct?

8 A. The debtor, we have -- we believe we have claims to the
9 Anchor litigation. We've never settled whether -- settled the
10 litigation whether we own it or whether WMI owned it.

11 Q. But you took the position that you owned it, right?

12 A. We took the position we had a claim.

13 Q. You took the position that you owned the litigation. That
14 it was yours and not JPMorgan's. Isn't that right?

15 A. I stand by what I said.

16 Q. In the adversary proceeding that you had with JPMorgan and
17 you filed an answer, but didn't you state in that answer that
18 that litigation, that asset, you said that the Court should
19 adjudicate but we claim that to be our asset?

20 A. I think that's what I said.

21 Q. Okay. Good. And in the confirmation brief and littered
22 throughout some of this stuff there's a reference when talking
23 about this asset to a certificate that was filed by the counsel
24 in the Anchor litigation that said that the real party in
25 interest is Washington Mutual, Inc. as contrasted to Washington

1 Mutual Bank. Isn't that correct?

2 A. I don't recall. If you could point me to a document
3 that'd be very helpful. Thank you.

4 Q. All right. Well, I will try to do that. It is in the
5 confirmation brief and I'll just -- I'll just leave it for
6 that.

7 THE COURT: Leave it for argument.

8 Q. Are you -- are you familiar with the amended warrant
9 agreement relating to the litigation tracking warrants?

10 A. Not very familiar with it.

11 Q. Are you familiar with any of the provisions?

12 A. I listened in a little bit on your trial yesterday but I
13 don't know very much about it.

14 Q. So, if I was to ask you a question about Article 6.3 which
15 says that the bank owns the litigation and the bank is entitled
16 to a hundred percent recovery as compared to Washington Mutual,
17 Inc. and asked you how come you made the conclusion that
18 Washington Mutual, Inc. owns it in the context of a litigation,
19 how you would contrast it and why you thought differently from
20 the language of the agreement you wouldn't have the capability
21 to answer me, would you?

22 A. I'm afraid I wouldn't.

23 Q. Sounds ambiguous to me. Okay.

24 Let me ask you a question. Why is the 363 sale, why do
25 you have to go retroactive for two years? I mean I've never

1 heard of a situation where you're selling an asset pursuant to
2 a plan but you want to have the actual transfer date
3 retroactively applied to 2008. Why is that the case here?

4 A. You know, I don't know about that provision. I don't know
5 why that has to happen that way.

6 Q. Seems unusual to you to backdate a transfer for two years?

7 MR. MASTANDO: Objection to the form, Your Honor.

8 THE COURT: Sustained.

9 A. I wouldn't have a comment on that.

10 THE COURT: You don't have to answer.

11 Q. All right. Now, I think you were asked these questions
12 before. They're two goodwill litigations. There's the
13 American Savings litigation and the Anchor litigation, correct?

14 A. Yeah. Right. Under the term "goodwill" yes.

15 Q. And the -- under the plan, the debtor is keeping the
16 American Savings litigation and JPMorgan is keeping the Anchor
17 litigation, correct?

18 A. Yes.

19 Q. And the Anchor litigation has something called the
20 "litigation tracking warrants" associated with it. The
21 American Savings Bank goodwill litigation didn't have
22 litigation tracking warrants. Is that correct?

23 A. That's correct.

24 Q. Okay. And when you did the global settlement, there's
25 language that says that JPMorgan is going to take the Anchor

1 litigation and then it adds specifically "Free and clear of the
2 rights of the litigation tracking warrant holders." There's
3 something that's specifically referenced that that asset is
4 going to be sold free and clear of the litigation tracking
5 warrant holders. Do you remember why that language was
6 inserted?

7 A. I do not.

8 Q. Do you remember who asked to have that inserted?

9 A. I don't.

10 Q. Okay. Do you know the law firm that represents JPMorgan
11 in this case? Sullivan & Cromwell, right?

12 A. Yes. I'm familiar.

13 Q. Do you know who drafted the Dime warrants and the
14 litigation tracking warrants? Do you know which firm drafted
15 that?

16 A. I don't.

17 Q. Okay. Would it surprise you if I told you it was Sullivan
18 & Cromwell?

19 A. I was expecting --

20 MR. MASTANDO: Objection to the form, Your Honor.

21 Q. How much is the Anchor litigation worth because we're
22 giving that one to JPMorgan? So, what's the value of that?

23 A. I think on some of the previous lives I think we've -- off
24 the top of my -- I think it was in the 360 million, 365 million
25 dollar range.

1 Q. All right. So, if I was to tell you there was, I think,
2 something like 356 million dollars and then there was a request
3 for another 63 million dollars that hadn't been decided, would
4 that sound familiar to you? I mean those words, I think, are
5 in the disclosure statement. But does that sound familiar to
6 you as a person involved in the plan?

7 A. Yes.

8 Q. Okay. So, what about the tax gross up. Are you familiar
9 with that issue at all as to whether that is an additional
10 amount to the Anchor litigation?

11 A. You know, I have not focused on the gross up. I've been
12 aware of the discussions about trying to put an estimate in but
13 I have not been involved in that calculation.

14 Q. Are you familiar with the pleading that JPMorgan filed in
15 the Federal Court of Claims that said that the tax gross up
16 should be at a minimum of 104 million dollars and max of at
17 least 144 million dollars which would take the amount of the
18 Anchor litigation into the 550 million dollar category? Are
19 you familiar with that at all?

20 A. I'm not familiar with that.

21 Q. Okay. Do you know what tax rate that JPMorgan used for
22 purposes of their gross up?

23 A. No, I don't.

24 Q. Okay. So, would it surprise you if I told you that
25 JPMorgan's gross up tax rate was less than what the debtor put

1 in its disclosure statement as to what the tax rate --
2 applicable tax rate should be? That they didn't have the same
3 rate?

4 A. I wouldn't know what to make of that.

5 Q. So, if I told you that the JPMorgan rate was 38.7 percent
6 and the debtor in its disclosure statement had 45.5 percent
7 that would not be familiar to you one way or the other?

8 A. No.

9 MR. MASTANDO: Objection, Your Honor. Counsel's
10 testifying.

11 THE COURT: Agreed. He doesn't know.

12 MR. STEINBERG: Okay.

13 Q. Now, in the definition of what is being sold, is there a
14 value that you think that is being sold to JPMorgan? Is it
15 north of two billion dollars? North of four billion dollars?

16 A. I think I've testified earlier that, you know, I didn't --
17 we haven't looked at it that way. It's a very complex
18 situation. We're having claims released. We're releasing
19 claims against them. It's -- you know, the one thing I can
20 tell you is I know we're getting in our estimation and in our
21 disclosure statement that we said 6.1 to 6.8 billion dollars.
22 What we're given across to JPMorgan very difficult to put a
23 dollar value on because of how much they're releasing us as
24 well as the FDIC. It's a very, very complex --

25 Q. If I wanted to say to this in its most general terms,

1 though, would it be fair to say that you're giving up claims
2 through a 363 process that would be in the billions? Would be
3 more than a billion dollars?

4 A. You know, I have -- we have not put dollar values on
5 those. I really struggle with putting a dollar value.

6 Q. So, right now, the estate has, I think you testified,
7 around 900 million dollars and then after the JPMorgan
8 settlement is done, you'll have 7.5 million dollars and so
9 there's six-some odd billion dollars of value on assets that
10 were otherwise clouded that under the global settlement gets
11 transferred to JPMorgan. Is that correct?

12 A. I would agree with that.

13 Q. Okay. So -- and I think your plan also provides that the
14 assets remaining, the left behind, the reorganized entity, will
15 have something that will be valued at somewhere between 150 and
16 200 million dollars?

17 A. I think that Mr. Zelin will testify to that later. I
18 believe the number that we're using is 157.5 million.

19 Q. So, would you think that it would be fair to say that
20 under the global settlement that Washington Mutual, Inc.
21 through the global settlement is selling substantially all of
22 its assets to JPMorgan?

23 MR. MASTANDO: Objection to the form.

24 A. I would --

25 THE COURT: Sustained. That's a legal conclusion.

1 Q. Now, under the JPMorgan settlement, I think it's somewhere
2 in the myriad of declarations that are filed that there's
3 approximately 580 million dollars of liabilities that JPMorgan
4 is assuming and that's additional consideration for the global
5 settlement. Is that correct?

6 A. It's specific liabilities that they're taking?

7 Q. That they're taking on. Liabilities that Washington
8 Mutual, Inc. otherwise had. As part of the consideration, the
9 global settlement, they're assuming liabilities and Washington
10 Mutual, Inc. is being relieved of those liabilities and that
11 number is north of 500 million dollars, correct?

12 A. I think it's substantially north of that number.

13 Q. Okay.

14 A. They're taking employee claims. They're releasing some
15 inter-company claims. They're taking on the Visa interchange.
16 They're taking on the Visa loss sharing agreement. They're
17 releasing other claims that they have against us. It's
18 significant dollar value.

19 Q. So, who decided which liabilities they should take and
20 which liabilities should be left behind?

21 A. It was all part of the negotiation.

22 Q. Well, who decided that they shouldn't take on the
23 litigation tracking warrant claim? They took on more than a
24 half a billion dollars worth of claims, why didn't they take
25 the obligations relating to the litigation tracking warrants?

1 MR. MASTANDO: Objection, Your Honor. And I believe
2 this is getting into the adversary proceeding and we heard
3 about it this morning that this is not appropriate for now
4 and --

5 THE COURT: I think it's going to the settlement.

6 A. You know, at the end of the day we are very satisfied. We
7 think the global settlement agreements a very fair and
8 reasonable outcome for WMI. Why were certain things left off?
9 Why were certain things included? I don't have a specific
10 answer for that.

11 Q. I know that if I was at the table I would have been
12 negotiated on behalf of the litigation tracking warrant
13 holders. So, you were at the table negotiating on behalf of
14 the entire estate. How did you decide which liability should
15 be taken by JPMorgan and which one shouldn't?

16 MR. MASTANDO: Objection, Your Honor --

17 Q. How did you play God in that one?

18 MR. MASTANDO: -- to the form and the premise of the
19 question.

20 THE COURT: Overrule. How did you make a decision?

21 A. I think that there were some liabilities that were by
22 their nature easier to transfer as they related to the employee
23 claims. A lot of the BOLI/COLI and the assets that went with
24 those liabilities they were now with JPMorgan employees. They
25 naturally fitted in the context of the negotiation to try to

1 get JPM to take those.

2 There are other liabilities, I'm sure. I'm sure there are
3 numerous people in this courtroom who would have liked us to
4 change the structure of the settlement. I can't go back and
5 redo different portions. The settlement agreement speaks for
6 itself. It's --

7 Q. Okay. So, at the settlement table, there was you on
8 behalf of the estate, there was, obviously, JPMorgan, there may
9 have been the FDIC. Which other creditor constituencies were
10 at the table trying to negotiate the chips of the settlement?

11 A. Well, the unsecured creditors' committee clearly was
12 involved at a great extent.

13 Q. Right.

14 A. They were involved in every step of the way.

15 Q. So, did they participate in deciding which creditor --
16 unsecured creditor claims will get assumed by JPMorgan and
17 otherwise pays and which one will be left behind? Is that
18 something that the unsecured creditors' committee participated
19 in?

20 A. The unsecured creditors' committee, obviously, has a great
21 voice in our Chapter 11. They were definitely involved and --
22 but at the end of the day -- the end of the day it's the
23 debtors' job to maximize the value for the estate and it's
24 ultimately the debtors' job to do that.

25 Q. It's the debtors' job also to try to build a consensual

1 resolution and -- as well, too, in the context of managing of a
2 Chapter 11?

3 A. To the extent that a consensual resolution is possible,
4 that is usually the preferred case. In this case, consensual
5 resolution was never going to be an outcome and that's probably
6 why we're two years, three months still here talking about it.

7 Q. But you tried, right?

8 A. We tried.

9 Q. And you tried on behalf of the litigation tracking warrant
10 holders to try to do something with JPMorgan too?

11 A. My job as the debtor is to maximize the value of the
12 estate.

13 Q. Was --

14 A. That is first and foremost my decision -- our
15 responsibility. As it relates to how we pay down the right
16 side of the balance sheet, the liabilities are what they are.
17 They are -- they have contractual rights to them. We pay down
18 as far as we can. That's all a debtor can do.

19 Q. But someone negotiated for JPMorgan to take on -- assume
20 certain liabilities. There were Washington Mutual lease
21 liabilities that they otherwise didn't have. And so, that was
22 decided at the negotiating table that you were at. Isn't that
23 correct?

24 A. That's correct. But it's also part of value. And so,
25 whether they pay me a dollar or whether they take a dollar of

1 liabilities that's going to get paid, it's still a dollar value
2 to the estate.

3 Q. I don't quarrel with that. The question is that someone
4 got the benefit of that value specifically as compared to going
5 to the general part of the estate. And that's what I quarrel
6 with on your answer here.

7 Let me ask you --

8 MR. MASTANDO: Objection, Your Honor. I don't know if
9 that was a question --

10 THE COURT: Yes. Let's save argument for the end.

11 MR. STEINBERG: I'm sorry, Your Honor.

12 Q. Now, let's talk about the goodwill litigations. How did
13 you decide to take the American Savings and give up the Anchor?
14 Anchor is so much bigger?

15 A. I would agree with you that the Anchor -- or the Anchor
16 Savings is a bigger dollar value than the American. Again,
17 it's part of the global settlement agreement. It was a part of
18 how we arrived at the end solution. It is all comprised into
19 one. You know, I can't go back and reparse the decisions of
20 how we got to where we got. I think the global agreement
21 speaks for itself as it is today.

22 Q. You looked at it from the -- on the sort of macro global
23 level. This is what you were getting. This is what you're
24 giving up. And these were all chips to pass around back-and-
25 forth. Is that fair?

1 A. I think at the end of the day we negotiated the best deal
2 of value that we could. That was what we intended to do.
3 That's what we did. So, that's -- whoever's getting what under
4 the global settlement agreement, that was the best deal we
5 could get for the estate.

6 Q. Okay. Let's talk about the releases that are part of the
7 plan and specifically the third-party releases.

8 The debtor originally filed the plan which had some
9 version of third party releases and then filed recently an
10 amendment to change what the third party releases are. And
11 I'll have to confess, even though I think I'm sort of average
12 smart, I don't understand what you did. So, instead of trying
13 to have someone try to write it, which sounds like it's either
14 a combination of a tax and corporate lawyer who wrote it and
15 therefore I still don't understand it, I'm going to ask you to
16 articulate what does someone who under a plan is not getting a
17 distribution, never got a ballot, and therefore didn't check
18 any kind of boxes, what are they -- what are they preserving
19 and what are they giving up under your plan with regard to
20 third-party releases?

21 UNIDENTIFIED SPEAKER: Objection, Your Honor. Is this
22 a legal issue to what the client provides for?

23 MR. MASTANDO: It's also beyond the --

24 THE COURT: I'll allow him to try to tell us.

25 MR. MASTANDO: -- it's also beyond the scope of the

1 direct testimony on declaration.

2 MR. STEINBERG: He's for the plan.

3 THE COURT: Well, overrule.

4 MR. STEINBERG: He's their witness on their plan.

5 THE COURT: Go ahead.

6 THE WITNESS: I will try, Your Honor.

7 A. I believe that the way that the releases are set is that
8 the debtors, the creditors' committee, everyone involved with
9 the estate will be granted a release. And then those who
10 didn't get dollars don't grant releases beyond that.

11 Q. So, does someone who's not getting any money on the plan,
12 are they releasing JPMorgan?

13 A. I don't believe they are.

14 Q. Someone who's not getting any money on the plan, are they
15 releasing the board of directors for their pre-petition acts?

16 A. I believe they are.

17 Q. They are releasing the board?

18 A. I believe so.

19 Q. Even though they're getting no money under the plan?

20 A. They're -- I believe that is -- I believe that is how the
21 releases read.

22 Q. Are they getting -- are they releasing the board for their
23 post-petition rights?

24 A. Yes.

25 Q. Okay. I want to talk a little about the stock collection.

1 General unsecured creditors who have a lot of claims are
2 entitled to take an election to take reorganized stock instead
3 of the cash distribution. Isn't that correct?

4 A. That's correct.

5 Q. The disputed creditors are not entitled to take a stock --
6 to get that kind of election. Is that correct?

7 A. I believe -- I believe actually you said it earlier today
8 in addressing one of the earlier motions that should a disputed
9 reserve be set up, we will put a hundred percent of cash to the
10 side and put that in a liquidating trust and then try to
11 resolve the claim. I believe that's how the plan is written.
12 I actually believe you said that earlier.

13 Q. I did. But I was asking a different question which is
14 that people who have disputed claims didn't have the
15 opportunity to take something other than cash to take the same
16 kind of options to take reorganized stock. Is that correct?

17 A. I believe that's correct.

18 Q. And why is that the case? Why did you draft -- why did
19 you participate in the construction of a plan which does
20 deprive disputed creditors with the same rights that allowed
21 creditors have with the assumption that ultimately the disputed
22 claims would become allowed at some point in time in the
23 future?

24 A. Well --

25 MR. MASTANDO: Objection to the form, Your Honor?

1 THE COURT: Yes. You want to save that for argument?

2 MR. STEINBERG: Well -- okay. Your Honor, I'll ask a
3 different question on the same topic.

4 Q. What is the -- have you put a value on what that election
5 to take reorganized stock is? What it's worth?

6 A. I believe we stated it over and over again. Again, Mr.
7 Zelin will be talking about that but I believe that we believe
8 it's 157.5 million dollars for the reorganized entity.

9 Q. But did you separately value -- and it's not your subject
10 of your testimony but someone else, so I'll ask that other
11 person, the value of the ability to make the election to take
12 stock instead of cash. What's that worth to a creditor to have
13 that right?

14 A. We didn't put a value on that.

15 Q. Okay. Are you familiar with who actually made the
16 election? Who opted under the plan to take the reorganized
17 stock instead of the cash? Are you familiar with the results
18 of the election?

19 A. I believe that's going to be part of the KCC declarations.
20 I could talk about it but I don't have enough detail to talk
21 about it.

22 Q. Okay. Just a couple more questions.

23 Under the global settlement, if there's a sale of an
24 asset, is it correct to say that you're looking to sell that
25 asset to JPMorgan free and clear of all liens and claims?

1 A. I would believe that would be the structure of the 363
2 assets, oh, yes.

3 Q. And if someone actually did have a claim against an asset
4 or a lien against an asset that was being sold, does those
5 liens and claims get preserved, at least, to the proceeds of
6 the sale?

7 MR. MASTANDO: Objection to the form, Your Honor.
8 Calls for legal conclusion.

9 THE COURT: Overruled. Under your plan.

10 A. I'm not aware of any.

11 Q. So, they've not --

12 A. Obviously, you have the -- your warrants which are what
13 they are but I'm not aware of anything else that has a lien
14 attached to any assets that we're selling.

15 Q. So, if you did have a lien or a claim against an asset
16 that was being sold and it's now being stripped away from that
17 asset so it's being sold free and clear of that asset, does
18 that claim attach to anything or did you just lose that right?
19 It got etherized and, you know, disappeared.

20 A. I'm not aware of any -- I'm not aware of anything that --
21 what you're talking about specifically other than your clients,
22 the warrant -- the litigation tracking warrant holders.

23 Q. And does the pan provide that in the event that I actually
24 am right, that there was a claim that attached to the Anchor
25 litigation such that JPMorgan was supposed to take it and you

1 didn't bargain for it, you didn't cause it to happen, you
2 created a breach, all the things I talked about yesterday,
3 whatever that claim is, it doesn't attach to anything that
4 JPMorgan is paying for getting a 600 million dollar litigation?

5 A. Well, currently, you're in Class 21. I guess if you prove
6 your claim we believe that you'll be into Class 12 and you'll
7 have your claim estimated at the next hearing and that's where
8 it will go.

9 Q. Okay.

10 A. That's the mechanics.

11 Q. So, the mechanics would be is that though I can raise this
12 kind of theoretical concern, your plan is structured so that if
13 I can establish that I am a creditor, I will have a fully
14 funded cash claim and I'll get paid out of that anyway. Is
15 that essentially your testimony?

16 A. That is my testimony.

17 Q. Okay. And the debtors' original plan had a footnote as to
18 how you calculated the reserve for the litigation tracking
19 warrants. It was a number, like, 183 1/2 million dollars.
20 There was a little formula. And then on November 17th, you
21 filed a motion that said, you know, I made a mistake. The
22 number is really at least 250 million dollars. Do you know how
23 that came about? What the mistake was and whether the new
24 number is correct?

25 MR. MASTANDO: Objection to the form, Your Honor.

1 THE COURT: Well, you want to rephrase?

2 Q. Yes. Do you know with -- do you know why you changed your
3 number from 183 million to 250 million dollars?

4 A. I don't know why but there's claims estimation process and
5 at the end of the day if your number is -- I can't remember
6 what you said your number could potentially be; 500 million on
7 a tax curve, so then we have a claims estimation procedure to
8 deal with that.

9 Q. You know, I was asking why you changed your number. You
10 originally said it was 183 then you said it's now 250. When I
11 say "you" I mean the debtor. You're the CRO for the debtor.
12 So, why did you change the number?

13 A. I don't know.

14 MR. MASTANDO: Objection. Asked and answered, Your
15 Honor.

16 MR. STEINBERG: I didn't get an answer. That's why I
17 asked it again.

18 THE COURT: All right. Please don't argue.

19 MR. STEINBERG: Okay.

20 A. I don't know.

21 Q. Okay.

22 MR. STEINBERG: I have no other questions, Your Honor.

23 THE COURT: Thank you. Anybody else wish to cross?

24 Good morning.

25 MR. ROQUEMORE: Good afternoon. Your Honor, James

1 Roquemore, Greer Hertz & Adams. I represent the American
2 National and the Texas litigants.

3 Your Honor, previously, debtors' counsel had agreed to
4 stipulate to authentication of certain exhibits and I'd like to
5 introduce these at this time.

6 (Pause)

7 If I may, Your Honor.

8 THE COURT: You may.

9 (Pause)

10 THE COURT: Do you want to tell me which is A-1 and
11 which is A-2 and A-3?

12 MR. ROQUEMORE: I was waiting for the clerk to give me
13 data on that.

14 THE COURT: All right. The order is A-1, the notice
15 of dismissal is A-2, and --

16 MR. ROQUEMORE: Thank you, Your Honor.

17 THE COURT: Are there two orders of -- motions; excuse
18 me, two notices of dismissal?

19 MR. ROQUEMORE: There should be only one notice of
20 dismissal.

21 THE COURT: All right. I just got an extra copy. All
22 right. Thank you.

23 (Order was hereby marked as Exhibit A-1 for identification, as
24 of this date.)

25 (Notice of dismissal was hereby marked as Exhibit A-2 for

1 identification, as of this date.)

2 (Pause)

3 MR. ROQUEMORE: Your Honor, may I proceed then?

4 THE COURT: You may.

5 MR. ROQUEMORE: Thank you.

6 CROSS EXAMINATION BY

7 MR. ROQUEMORE:

8 Q. Mr. Kosturos, you're familiar with the Texas litigation.

9 Is that right?

10 A. Yes.

11 Q. Okay. That's also called the American National Litigation
12 or the ANTICO litigation. Is that correct?

13 A. Yes.

14 Q. Okay. And you're familiar that the Texas litigation was
15 originally filed in Galveston County by American National
16 Insurance Company, Galveston County, Texas, correct?

17 A. Yes.

18 Q. Okay. And later removed to federal court and ultimately
19 transferred to the District of Columbia where it's on appeal
20 pending before the District of Columbia Court of Appeals?

21 MR. SACKS: Your Honor, I object to this. This isn't
22 even a case against the debtor.

23 THE COURT: If you're not talking into a microphone,
24 you're not part of the record.

25 MR. SACKS: I apologize, Your Honor.

1 Objection to all this. This is not even a case the
2 debtor. This witness, he hasn't established has any personal
3 knowledge of anything having to do with this case. It's a case
4 against JPMorgan Chase brought by the --

5 THE COURT: This is not covered by the global
6 settlement?

7 MR. SACKS: There's no release in this -- involving
8 this case under the global settlement, that's correct, Your
9 Honor. They can maintain and continue with this case, that's
10 correct, under the global settlement agreement. It doesn't
11 affect their right to continue with the action. I don't --
12 they have -- they've filed no proof of claim against the
13 debtor. This case is against my client. The global settlement
14 agreement doesn't release this case. I don't understand why
15 they're here, but my objection at this point is to question
16 this witness about a litigation that the debtor is not even a
17 party to.

18 THE COURT: You want to respond to that?

19 MR. ROQUEMORE: Your Honor, the Texas litigation has
20 been put in the global settlement agreement. There are
21 releases that purport to release the litigation with the Texas
22 litigation. We've objected to those. We object to the plan
23 confirmation with regard to those releases; we believe that
24 they're nonconsensual releases that provide no consideration to
25 the Texas litigants. They violate Third Circuit law, and

1 we'll --

2 THE COURT: Well, I'll allow you to ask some questions
3 of this witness to see if you're correct. I won't --

4 MR. ROQUEMORE: Thank you.

5 THE COURT: -- rely on the testimony of counsel.

6 MR. STROCHAK: Your Honor, may I be heard briefly?

7 THE COURT: Yes.

8 MR. STROCHAK: Just on the release issue, I think, you
9 know, Mr. Roquemore is not correct. The releases have been
10 modified to provide that anyone who's not getting a
11 distribution is not covered by the releases. That's the
12 modification that we filed. And to my understanding, Mr.
13 Roquemore's clients are not getting distributions, so therefore
14 they would not be covered by the third-party release in section
15 43.6. The only thing the settlement agreement does is it has a
16 cooperation clause that says the debtors will cooperate in
17 connection with asserting that any of the claims, to the extent
18 that they're derivative actions, to the extent they belong to
19 the estate and, likewise, to the extent that they belong to the
20 FDIC as the receiver, there are provisions for cooperation with
21 respect to those issues. But the releases simply do not apply
22 to their claims anymore, to the extent they are not receiving
23 distributions.

24 MR. ROQUEMORE: Your Honor, if I could, we briefed
25 our -- we provided our briefings. We did explain where we see

1 impermissible releases in the plan and the global settlement
2 agreement. However, I will start off my questioning with
3 regard to what counsel has stated to you on the record, to see
4 the accuracy of that.

5 THE COURT: All right.

6 BY MR. ROQUEMORE:

7 Q. Mr. Kosturos, does the plan provide any releases to --
8 regarding the Texas litigation?

9 A. I believe that the statements that my counsel made is very
10 consistent with my knowledge that the -- they have been -- that
11 the release has been modified such that if you're not receiving
12 anything under the plan, you are not releasing JPMorgan.

13 Q. So it's your testimony that it's your understanding that
14 the plan does not release the Texas litigation, is that
15 correct?

16 A. That's correct.

17 Q. And the provisions -- the definition of related actions,
18 does that include the Texas litigation?

19 A. Again, consistent with my lawyer's comments, I believe,
20 under the global settlement agreement, we have stated that we
21 will use our reasonable best efforts -- if the ANICO litigation
22 is a derivative action that really belongs to WMI or the FDIC,
23 that we will use our reasonable best efforts to exercise our
24 rights. Should your client's rights -- should we not have
25 those rights, you're free to continue on in the pursuit of your

1 litigation. If we believe there are derivative rights, we're
2 releasing those claims. We will use our reasonable best
3 efforts to release those claims.

4 Q. It's true, is it not, that the Texas litigation, as it
5 stands now, involves only holders of WMB bonds?

6 A. I don't remember -- you've modified your claims
7 previously; it was some WMI noteholders. I just don't remember
8 where you've ended up, whether it's just WMB or what have you,
9 but, again, our WMB senior noteholders are -- we're settling
10 with them and they're granting releases towards us.

11 Q. I direct your attention to Exhibit A-2; that's the
12 plaintiffs' notice of dismissal of Washington Mutual, Inc.
13 bondholder and stockholder claims.

14 A. I'm sorry, what's --

15 Q. It's A-2, which is the plaintiffs' notice of dismissal of
16 Washington Mutual, Inc. bondholder and stockholder claims, and
17 I provided that to you at the beginning.

18 A. I'm not following. I'm sorry. I only have --

19 THE COURT: Do you have A-2?

20 THE WITNESS: No. I have the same one.

21 Thank you.

22 Q. Now, do you see the plaintiffs' notice of dismissal?

23 A. Yes.

24 Q. Have you seen that document before?

25 A. No.

1 Q. So your understanding of the -- of what the global
2 settlement agreement applies to -- whether the global
3 settlement agreement applies to the Texas litigants was not
4 based upon this filing, A-2?

5 A. No.

6 Q. Okay. Now, you've testified at your deposition that the
7 debtors do not own claims by WMB bondholders against JPMorgan,
8 is that correct?

9 A. That's correct.

10 Q. Okay. And you understand that the Texas litigants are WMB
11 bondholders?

12 A. Based on your representations to me, yes.

13 Q. And, further, the WM -- the Texas litigants are
14 subordinate -- WMB subordinated noteholders, is that true?

15 MR. MASTANDO: Objection, Your Honor.

16 MR. SACKS: Objection, Your Honor.

17 THE COURT: Well, answer it if you can.

18 A. I wouldn't know. I don't know who -- where their claims
19 would fall. Are you suggesting they're in 17(b)?

20 Q. No.

21 A. 17(b)?

22 Q. WMB subordinated notes. Are you familiar with whether or
23 not the Texas litigants have WMB subordinated notes?

24 A. I'm just going on your representation.

25 Q. Well, don't take just my --

1 THE COURT: If you don't know, say you don't know.

2 A. I don't know.

3 THE COURT: All right.

4 Q. Okay. Are you familiar with the pleading that the debtors
5 filed with regard to their -- this plan confirmation hearing,
6 the debtors' omnibus response to objections to confirmation,
7 the debtors' sixth amended joint plan -- and affiliated
8 debtors -- pursuant to Chapter 11 of the United States
9 Bankruptcy Code?

10 A. I have read that document.

11 Q. You've read that document? Are you familiar with page 42
12 where they discuss the Texas litigation?

13 A. I would greatly appreciate a copy of that.

14 (Pause)

15 Q. Now, you've read the copy that -- of the pleading that
16 your attorneys have filed, is that correct?

17 A. Yes.

18 Q. Okay. Isn't it true the first line says "The Texas
19 claimants" -- or "The Texas litiga" --

20 A. Might not be --

21 Q. -- "litigants have WMB subordinated notes"?

22 A. Yes.

23 Q. Thank you.

24 MR. MASTANDO: Your Honor, I don't have a copy of the
25 exhibit.

1 MR. ROQUEMORE: Sorry, I only made one copy for
2 myself, but this is the debtors' omnibus response.

3 THE COURT: Go ahead.

4 MR. ROQUEMORE: It's part of the record.

5 THE COURT: Yeah, it's part of the record. Go ahead.

6 MR. ROQUEMORE: Thank you, Your Honor.

7 Q. And you would also agree that it's your position that it
8 would not be fair for the plan to call for a release of WMB
9 bondholder claims against the -- against -- it would not be
10 fair for the plan to call for release of WMB bondholder claims
11 against a nondebtor third party --

12 THE COURT: Are you talking about the subordinated
13 notes?

14 MR. ROQUEMORE: Yes.

15 THE COURT: All right, then rephrase.

16 Q. You would agree that it's -- it would be unfair for the
17 plan to call for a release of the WMB subordinated noteholders'
18 claims against a nondebtor third party such as JPMC?

19 A. I believe we've testified that we amended the releases and
20 that's the -- if you don't receive value under the plan, you're
21 not releasing the -- we've changed that -- we've changed a
22 provision and you're not releasing JPMorgan.

23 Q. And you would agree that it would not be fair to release
24 JPMorgan from such claims?

25 MR. MASTANDO: Objection to the form, Your Honor.

1 MR. SACKS: Objection.

2 THE COURT: Sustained. That calls for a legal
3 conclusion. That's argumentative. Save it for argument.

4 MR. ROQUEMORE: Yes, ma'am.

5 Q. Now, you understand the Texas litigation does not include
6 claims against WMB? You're familiar with the Texas litigation,
7 and you would agree that it does not involve claims against WMB
8 or the receivership?

9 MR. MASTANDO: Objection, Your Honor. Calls for a
10 legal conclusion as well.

11 THE COURT: Yeah. Sustained.

12 Q. Are you familiar with the damages claim by the Texas
13 litigation claimants?

14 A. No.

15 Q. Are you familiar with the face value of the bonds that the
16 Texas group holds of WMB?

17 A. No.

18 Q. It's true that with regard to the provisions of the plan
19 as -- and the global settlement agreement, that none of the
20 Texas litigants consented to the provisions of the plan or the
21 releases therein?

22 A. I don't know if they voted, so if they didn't -- if I'm
23 unclear whether they voted, I'm therefore unclear whether they
24 consented.

25 Q. Do you remember your deposition on the 22nd?

1 A. Sure.

2 Q. Okay. I refer you to page 216. Do you still have a copy
3 of your deposition in front of you?

4 A. No, I don't.

5 MR. MASTANDO: For the record, Your Honor, I note that
6 I believe the deposition was on the 16th.

7 MR. ROQUEMORE: November 16th.

8 Q. Page 216, line 16, the question was, "You agree that you
9 never got any consent from us for this provision, right?"

10 Your answer: "I did not receive consent from the ANICO
11 plaintiffs for this provision."

12 And that provision was -- had to do with the releases, is
13 that correct?

14 A. This is clearly what I was deposed on. Since then, the
15 releases have changed. So --

16 Q. So you're saying that they did consent?

17 A. No.

18 Q. It's also true that the Texas -- none of the Texas
19 plaintiffs received any consideration from the debtors for any
20 release of other claims against JPMorgan, is that true?

21 MR. SACKS: Objection, Your Honor. There is no
22 release of the claims --

23 THE COURT: Sustained.

24 MR. MASTANDO: I join the objection, Your Honor.

25 THE COURT: Sustained.

1 Q. I just wanted to clarify something you've testified to
2 earlier. Did you testify that, under the terms of the plan,
3 someone who gets no distribution under the plan and holds no
4 claims against the debtor are releasing claims against a
5 nondebtor third -- can be releasing claims against a nondebtor
6 third party like JPMorgan?

7 MR. MASTANDO: Objection to the form, and calls for a
8 legal conclusion.

9 THE COURT: Well, I'll overrule.

10 Can you answer?

11 THE WITNESS: I think I have. Haven't I?

12 THE COURT: Well, answer it again.

13 Q. I didn't hear the -- your answer; that's why I wanted you
14 to clarify --

15 A. Okay.

16 Q. -- for me.

17 A. My understanding: If a claimant does not receive value
18 under our plan, they are not -- they're not releasing the
19 nondebtors.

20 MR. ROQUEMORE: Those are all the questions I have.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Anybody else?

24 Good afternoon.

25 MS. SLATKO: Your Honor, I am not an attorney, so I'm

1 not here to cross this witness. But I would like for five
2 minutes of time --

3 THE COURT: Okay, well, you have to tell us who you
4 are, for the record.

5 MS. SLATKO: Eileen Slatko.

6 THE COURT: Okay.

7 MS. SLATKO: I would like about five minutes of the
8 Court's time, if I may, please?

9 THE COURT: To -- not to cross-examine the witness?

10 MS. SLATKO: Not to cross-examine the witness.

11 THE COURT: Well, I'm not sure we're at any stage --

12 MS. SLATKO: I'm sorry. I thought that we were done
13 today with him.

14 THE COURT: Not yet.

15 MS. SLATKO: Okay.

16 THE COURT: I think we're still on this witness.

17 MS. SLATKO: I'm sorry.

18 THE COURT: All right.

19 MS. SLATKO: Thank you.

20 MR. SACKS: Again, Robert Sacks from Sullivan &
21 Cromwell, for JPMorgan Chase.

22 CROSS EXAMINATION BY

23 MR. SACKS:

24 Q. Good afternoon, Mr. Kosturos. It's late, I know. I'll be
25 very brief with you.

1 I'd like to bring you back to the subject of negotiations.
2 You've testified both in your written direct and also today
3 about the subject of the negotiations. I'm correct that you
4 were the lead business negotiator for the debtors in that
5 negotiation -- settlement negotiation, correct, sir?

6 A. That's correct.

7 Q. And who is the lead negotiator for JPMorgan Chase?

8 A. It was Don McCree.

9 Q. Okay, and did you understand that Mr. McCree was a senior
10 businessperson at JPMorgan Chase?

11 A. Yes, I did.

12 Q. And prior to your negotiation with Mr. McCree in the
13 context of this matter, did you have any prior relationship or
14 knowledge of Mr. McCree?

15 A. I had never met Mr. McCree prior to Washington Mutual.

16 Q. Would you characterize your negotiations with Mr. McCree
17 as arm's-length business negotiations?

18 A. Yes.

19 Q. Now, you indicated that there were other parties who also
20 participated in the negotiations in this case, is that correct?

21 A. That's correct.

22 Q. The FDIC was one of those parties?

23 A. That's correct.

24 Q. And did you negotiate with individuals on behalf of the
25 FDIC?

1 A. Yes, I did.

2 Q. And who were those individuals?

3 A. Primarily two individuals: at the time, the general
4 counsel of the FDIC, Mike Bradfield, who has since retired, and
5 then Rick Osterman took his place, who's the interim general
6 counsel who concluded the negotiations.

7 Q. And prior to the negotiations with those individuals in
8 this case, did you have any prior business or personal
9 relationship with those individuals?

10 A. No, I'd never met either individual before.

11 Q. Would you describe those negotiations as arm's-length?

12 A. Yes, I would.

13 Q. You negotiated with representatives of the bank
14 bondholders as well, did you not?

15 A. Yes, I did.

16 Q. Okay, and who did you negotiate with on that part of the
17 negotiation?

18 A. Phil Anker and Dan Pine (ph.) and a couple other gentlemen
19 within the bank bondholder group. And then Mr. Anker was
20 replaced by Dean Ziehl from Pachulski Stang Ziehl & Young.

21 Q. And did you have any prior personal relationship with any
22 of those individuals?

23 A. I have known Dean Ziehl for some time, but all the other
24 individuals I'd never met before.

25 Q. But your relationship with Mr. Ziehl was in a professional

1 capacity?

2 A. Yes.

3 MR. STOLL: Objection, Your Honor. We're going to
4 object to the leading questions, because JPMorgan's a settling
5 party and therefore is not adverse to Washington -- WMI for
6 purposes of this plan confirmation.

7 THE COURT: All right, sustained. Try not to lead.

8 Q. How would you characterize your negotiations, sir, with
9 representatives of the bank bondholders?

10 A. I would say that it was arm's-length.

11 Q. Were there any -- you've been involved in many commercial
12 negotiations before, have you not?

13 A. Yes, I have.

14 Q. Were there any circumstances that made these negotiations
15 complicated -- that complicated these negotiations?

16 A. These negotiations were incredibly complicated. You very
17 rarely have the situation that we have in this case where you
18 have a holding company, you have an FDIC receivership and then
19 you have a purchaser of those assets on the other side.
20 When -- you usually don't run into these types of complex
21 negotiations as well as creditors who are at the bank level who
22 have claims. This was an incredibly complex case.

23 Q. I'd like to stay on the subject of the negotiations but
24 just switch topics, and I promise I won't be much longer with
25 you.

1 You were asked a number of questions by Mr. Nelson and by
2 others that related to the value that was being transferred; do
3 you recall that?

4 A. Yes.

5 Q. And you recall indicating that there was a schedule in
6 JPMorgan Chase's brief that you thought summarized principal
7 components of the settlement agreement? Do you recall that?

8 A. Yes.

9 MR. SACKS: Your Honor, may I approach?

10 THE COURT: You may.

11 MR. SACKS: Thank you.

12 (Pause)

13 THE COURT: Mark this JPMC-1.

14 (Chart was hereby marked for identification as JPMorgan's
15 Exhibit JPMC-1, as of this date.)

16 Q. If you would look at the exhibit that's been marked as
17 JPMC Exhibit 1, Mr. Kosturos. Is that a copy of the chart you
18 were referring to?

19 A. Yes, it was.

20 Q. Okay. Now, Mr. Kosturos, let me just go through a few of
21 the items on here. You were asked a lot of questions about
22 value being transferred but very few questions about claims
23 being released or liabilities being assumed, and I'd like to go
24 through a few of those, if I could. First, looking at the
25 first entry under Disputed Accounts, do you see that?

1 A. Yes.

2 Q. Okay. And it indicates that JPMorgan is -- was releasing
3 its claims as to all of those, the approximately four billion
4 in those accounts, correct?

5 A. That's correct.

6 Q. All right. Did you understand what some of those claims
7 were at the time of the negotiation?

8 A. Yes. They were mainly documented in JPMorgan's motion; I
9 believe it was dated March 24th.

10 Q. Did you understand, in addition to its claims to those
11 accounts, that JPMorgan Chase had challenged the jurisdictional
12 aspects of the litigation?

13 MR. STOLL: Objection, Your Honor. Leading.

14 THE COURT: Sustained.

15 Q. In the negotiation, did JPMorgan Chase tell you any -- do
16 you recall JPMorgan Chase telling you anything about what might
17 happen were it to lose an appeal with respect to those issues?

18 A. If it would lose --

19 Q. Yes. Did JPMorgan Chase tell --

20 MR. STOLL: Objection, Your Honor. That's hearsay.

21 It's an out-of-court statement with a nondebtor. It's not an
22 admission. There's no exception to that.

23 MR. SACKS: I'm not offering it for the truth but only
24 for what was -- what went back and forth in the negotiations,
25 Your Honor.

1 THE COURT: Yeah, overruled. I think it's for what
2 was discussed in the negotiations.

3 Q. Do you recall Mr. McCree or others on behalf of JPMorgan
4 Chase telling you JPMorgan Chase's -- what do you recall them
5 telling you?

6 A. As it related to the disputed accounts --

7 Q. Yes.

8 A. -- I believe that JPMorgan continually brought up the
9 subject that, were they to lose within the bankruptcy court or
10 face summary judgment, that they would continue to appeal it
11 and that we're also looking to potentially move this to the
12 district court, and also that, I believe, because they are a
13 bank, that they don't need the bond in the appeal.

14 Q. Do you -- and as part of the settlement, am I correct that
15 JPMorgan Chase gave up all of its rights to any portion of
16 those accounts; it released those claims?

17 A. Yes.

18 Q. Okay. And the FDIC similarly, as part of the settlement,
19 it was releasing its claims to all or any portion of those
20 accounts, correct?

21 MR. STOLL: Objection, Your Honor. Leading.

22 THE COURT: Sustained.

23 Q. What releases did the FDIC give in the settlement
24 agreement that related to the deposit accounts, if any?

25 A. The FDIC was releasing their 9.5 rights to the deposit as

1 well.

2 Q. Okay. Do you recall whether there were any claims
3 involving a 922 million dollar payment?

4 MR. STOLL: Objection, Your Honor. Leading.

5 THE COURT: Overruled.

6 Q. Do you recall whether there were any claims in the
7 litigation relating to amounts specifically from the FDIC that
8 are related to amounts that had been transferred into or out of
9 those accounts in the month prior to bankruptcy?

10 A. The FDIC had brought forth a claim of -- they believed it
11 was a preference of 922 million dollars, which was a tax
12 transfer from WMB to WMI. And they were looking -- if they had
13 developed their 9.5 rights, they believed that they had a valid
14 offset claim for at least 922, and we're going to release it as
15 part of the settlement.

16 Q. Let's look at taxes for a moment, if we could, please,
17 sir, the next item. Now, Mr. Nelson asked you about the amount
18 that was going to JPMorgan Chase. My question to you is, in
19 your negotiations with Mr. McCree, did he describe -- what did
20 he say to you, if anything, about what JPMorgan Chase might be
21 giving up with respect to taxes?

22 A. It was Mr. McCree's position that JPMorgan owned the
23 entire tax refunds, both of the first NOLs and the second NOLs.

24 Q. And did you and Mr. McCree discuss the second NOLs, I take
25 it, as well?

1 A. Yeah.

2 Q. And do you recall -- did you and he -- or did he discuss
3 with you whether his view as to whether the estate would ever
4 get any value out of the second NOL?

5 A. It was Mr. McCree's position that they owned the second
6 NOL. It was also -- I don't believe that the F -- I think
7 that, as it relates to the FDIC, I think that they had agreed
8 with JPMorgan that they owned the first set of NOLs, the three
9 billion. That was --

10 THE COURT: That who owned the --

11 THE WITNESS: That JPMorgan owned the three billion
12 dollars of -- that we refer to as the first set of NOLs.

13 A. I believe that the FDIC never on record declared that
14 either JPMorgan or the FDIC owned the second NOL, but certainly
15 Mr. McCree asserted rights that JPMorgan had purchased that
16 when they purchased the WMB assets.

17 Q. Do you recall -- you were asked some questions earlier
18 about JPMorgan Chase's status as a TARP bank; do you recall
19 that?

20 A. I do.

21 Q. Do you recall discussing that subject with Mr. McCree?

22 A. I do.

23 Q. Do you recall any discussion of what would happen if
24 JPMorgan Chase were not to get the NOLs because of that, where
25 they might go?

1 A. I believe that it was their position that if JPMorgan
2 wasn't able to receive it, it would likely go to the FDIC.
3 It -- I think they made the point very clear to us that,
4 according to the tax-sharing agreement, that WMI was not
5 entitled to keep any of the tax refunds, that it would need to
6 be sent to WMB or its successors.

7 Q. Let's look at the next item on this list, TRuPS, if we
8 could, and I promise I won't go through all the items. Did Mr.
9 McCree make clear to you that JPMorgan Chase would not settle
10 without getting the TRuPS free and clear?

11 A. Yes. It was Mr. McCree's position that JPMorgan had
12 purchased the TRuPS via the P&A agreement with the FDIC.

13 Q. Okay. Now, let's look at a number of the liabilities here
14 which have not been identified. Look, if you would, down under
15 Pension and Medical Plans. Is JPMorgan Chase assuming
16 liabilities with respect to that? Or you were asked some
17 questions about the value of what might be going over to them,
18 but is JPMorgan Chase assuming liabilities?

19 A. Yeah, we never did get to the value of the pension plan.
20 The pension plan, at various states depending on if the market
21 could be overfunded, could be -- it generally is in an
22 overfunded state. I think that we, as -- we've used the 350
23 million dollars as a proxy for what we believe the overfunding
24 state is, but that would really be a -- let's say, for
25 instance, an asset -- assets of 1.6 billion and liabilities of

1 1.25 billion. So they are assuming some of those liabilities.
2 Again, it's all together, if you will, but it is -- it's
3 encompassing in the pension plan.

4 Q. And you understood JPMorgan Chase was going to continue to
5 handle liabilities for these people who are now their
6 employees?

7 A. Yes.

8 Q. Okay. And the assets that you've described, whether
9 overfunded, underfunded, those assets change in value day to
10 day, don't they, sir?

11 A. Well, they change in value day to day as well as what it
12 was worth to the debtor is uncertain. It's very difficult to
13 terminate a pension plan. There's a very -- there's a lot of
14 steps that one needs to go: through a cash funding process,
15 through -- there's very significant taxes should you have to
16 actually try to liquidate a pension plan. So the pension plan
17 and the value of WMI was nowhere near worth 350 million
18 dollars. But that was the state of the overfunding. And to be
19 fair to what we were trying to do in value, what we received in
20 the 6.1 to 6.8 billion dollars, there was a deduct on the low
21 side of 350 million dollars, so that we could range what we
22 believed the value was.

23 Q. Okay. Just a few more, sir. Goodwill; you were asked
24 some questions about the Anchor litigation and the American
25 Savings litigation. Am I correct that the party to the Anchor

1 litigation, which is going to JPMorgan Chase, was Washington
2 Mutual Bank, not Washington Mutual, Inc.?

3 A. I believe that the party was Washington Mutual Bank.

4 Q. Thank you. The Visa shares -- you indicated that in your
5 testimony that JPMorgan Chase was assuming some significant
6 liabilities. Would you describe what those liabilities are
7 that they're assuming?

8 A. The two significant ones that come to mind are the
9 interchange liability, which is a claim that's been filed in
10 our estate that they claim that we owed them five billion
11 dollars. Now, the way that the Visa shares work is that
12 they're restricted shares issued to a trust and then, once the
13 litigations come into the trust and they pay off the trust, at
14 some point those restricted shares may be released. The main
15 liability -- or the main claim that's in those -- that's in
16 against the Visas right now is this interchange liability. So
17 we were in a very difficult position. If we had kept those and
18 didn't -- but didn't let -- didn't have JPMorgan assume those
19 liabilities, we would have been in a very difficult point of
20 trying to quantify those claims.

21 Also, within the Visa shares, it's my understanding
22 there's a loss-sharing agreement that goes along with it such
23 that if the restricted shares that are in the trust aren't
24 enough to cover the litigation that goes against it, then
25 the -- then there's a loss sharing that goes back to the

1 participants to fund those additional losses.

2 Q. And the potential magnitude of those liabilities that
3 you're talking about are what, sir?

4 A. Unquantifiable.

5 Q. Potentially substantial?

6 A. I'd prefer my "unquantifiable".

7 Q. Okay.

8 THE COURT: Thank you.

9 Q. Let's go down -- there are some other things as well
10 there. There's BKK, which is down there. What's -- just
11 explain very briefly what BKK is.

12 A. BKK is a landfill liability, I believe. I'm probably not
13 going to give this enough justice to what it is, but it is a --

14 Q. That's sufficient.

15 A. Okay.

16 Q. It's a land -- hazardous landfill?

17 A. Of which there is a liability that was a legacy liability
18 within some of the subsidiaries of WMB and one of the
19 nondebtors. So the BKKs -- I believe it made a claim in our
20 estate for that. JPMorgan will be effectively taking the
21 liability or indemnifying the estate for that. Again, I don't
22 know what the total liabilities are. They're very significant.
23 I think they've been asserted somewhere in the 3- to 500
24 million dollar range, and it's joint and severable.

25 Q. Let's -- finally, sir, let's talk for a moment, if we

1 could, about the releases here. One of the provisions of the
2 settlement is broad mutual releases, correct?

3 A. That's correct.

4 Q. And I'm correct that JPMorgan Chase insisted that they
5 would get broad releases as part of the settlement and the
6 negotiation, is that right?

7 A. That's correct.

8 Q. Okay, now, JPMorgan Chase and the FDIC are releasing
9 claims against the estate, aren't they?

10 A. Yes, they are.

11 Q. Okay, and with respect to JPMorgan Chase, what's the size
12 of the claim, just the liquidated estimated portion of JPMorgan
13 Chase's claim that's been filed against the estate?

14 A. I think it's somewhere in the 12 to 15 billion dollar
15 range.

16 Q. And with respect to the FDIC, in addition to the claims
17 you've described here, they did file a claim in the DC action
18 against the estate, did they not?

19 A. Yes. I believe they also filed a proof of claim as well.

20 Q. Okay, and what's the magnitude of those claims that are
21 being released?

22 A. Twenty billion dollars.

23 Q. Okay. Thank you, sir.

24 MR. SACKS: Nothing further.

25 MS. NAGLE: Good morning -- or evening, Your Honor.

1 Shannon Nagle from Fried Frank, on behalf of the settlement
2 noteholders. I will be brief. I have five minutes.

3 THE COURT: Okay.

4 CROSS EXAMINATION BY

5 MS. NAGLE:

6 Q. Mr. Kosturos, if you can turn to what I believe was Equity
7 Committee 3? It's the plan. It's, I believe, in those binders
8 behind you.

9 A. (Witness complies).

10 Q. Specifically, section 42.4 entitled "Directors of the
11 Reorganized Debtor".

12 A. (Witness complies).

13 Q. Pursuant to the plan, who selects the directors of the
14 reorganized debtor?

15 A. The creditors' committee.

16 Q. And on the effective date, assuming there's no sale
17 transaction as that term is described in the plan, is it likely
18 that reorganized WMI will be a public company having more than
19 300 shareholders?

20 MR. MASTANDO: Objection. Leading.

21 MS. NAGLE: I'm sorry.

22 Q. Do you know if --

23 THE COURT: Overruled.

24 Go ahead. Can you answer?

25 A. You know, I haven't gone back and looked at where

1 everything's come in right now. I'm unclear of how many owners
2 it could be. But that is a very real possibility that that'll
3 be a public company.

4 Q. Okay. And back to that section of the plan, when does it
5 say that the new shareholders of reorganized WMMRC will have
6 their first annual meeting to select a permanent board?

7 A. It should take place within the first six months after the
8 effective date.

9 Q. Okay. But on the effective date, shares are going to be
10 distributed to the shareholders, right? I believe a majority
11 of them are going to the peers; is that correct?

12 A. Yes, but, again, it depends upon whether there's been
13 other elections by some of the other senior creditors who've
14 elected to get some stock. So, yes, some could go up as well.

15 Q. Okay. And so on the effective date, there will be maybe a
16 public company that somebody's going to have to run, so it has
17 to have a board, is that correct?

18 A. That's correct.

19 MR. MASTANDO: Objection. Leading.

20 THE COURT: Sustained.

21 Q. Do you know how much of the peers are owned by the
22 settlement noteholders? An approximate guess.

23 A. I think it's approximately sixty-six percent.

24 Q. Okay. And the class above that, the senior subclass, do
25 you know how -- approximately how much of that class the

1 settlement noteholders own?

2 A. I don't remember off the top of my head. It's
3 significant. I want to think around forty to fifty percent,
4 somewhere in that range. But, again, I don't -- didn't add up,
5 unfortunately, Mr. Nelson's screen; I should have.

6 Q. That's okay. Is it your understanding that the settlement
7 noteholders -- as of the effective date when these shares are
8 initially distributed for reorganized WMMRC, is it your
9 understanding that they will be the majority shareholders of
10 reorganized WMMRC?

11 A. Yes, I believe they'll be the majority shareholders of
12 WMMRC.

13 Q. So before you were asked about who was going to be on the
14 board of directors, and you know that I was selected by the
15 committee, do you think the committee's choice for the board
16 makes sense?

17 A. I think, given that the settlement noteholders will own a
18 majority of the stock, I think it makes a lot of sense to have
19 them be the initial board. And should it go public thereafter
20 or that not be the case for whatever reason, you certainly have
21 another election period very soon thereafter.

22 Q. Thank you. We've had a lot of testimony today about the
23 negotiations leading up the settlement -- global settlement
24 agreement and who was involved in those negotiations. Did you
25 attempt to include all the major creditor groups in your

1 negotiations?

2 A. Yes. We included the unsecured creditors' committee at
3 various levels; the White & Case group, which generally
4 represents senior noteholders, was involved; and then the Fried
5 Frank group was very much involved.

6 Q. And were the bank bondholders often involved in those
7 negotiations, the WMB bank bondholders?

8 A. They were to some extent. Largely, the FDIC receiver
9 negotiated on their behalf.

10 Q. Okay. And how would you describe the negotiations?

11 A. Well, I would describe -- I'd use a lot of words. I'd use
12 the word "complex". I think we used "arm-length". I would use
13 the word "intense". There's a lot of words that would have to
14 describe the acrimony that went throughout this negotiation.
15 So I would say the settlement negotiations were very, very
16 difficult throughout.

17 Q. Several term sheets were highlighted today, some in
18 e-mails, some up on the screen. Did they in any way reflect a
19 portion of what you considered?

20 MR. MASTANDO: Objection. Leading and vague.

21 THE COURT: Yeah, what are you talking about?

22 MS. NAGLE: Sorry.

23 Q. The several term sheets that were highlighted today and
24 that -- used in exhibits -- I don't -- can't remember how many;
25 I think it was three or four -- were those the only term sheets

1 the debtor was given to consider?

2 A. No.

3 Q. About how many term sheets or settlement proposals did you
4 receive?

5 A. I -- I'm not sure I could estimate, but I -- it has to be
6 in the ten to twenty range.

7 Q. And did you receive them from groups other than the
8 settlement noteholders and JPMorgan?

9 A. I think that there was a number of groups that weighed in
10 with structures. I believe the FDIC had some ideas, the bank
11 bondholders had some ideas, the senior noteholders had some
12 ideas -- that'd be the White & Case group -- all floating
13 completely different structures and ideas. But, you know,
14 there was a wide range of thought process that people gave us
15 their ideas of how they'd like to see the negotiations go.

16 Q. And what ultimately led to the form of the global
17 settlement agreement, the term sheet or the document itself?

18 A. I'm not sure I understand what --

19 Q. Why did you pick that one?

20 A. I think -- we picked that one because that was the best
21 deal that we thought we could get for the estate. We thought
22 it created the most value for the estate. And it took away a
23 lot of claims, counterclaims. A lot of different things were
24 taken care of in the global settlement agreement, major claims
25 removed. All in all, it was the best deal that we could

1 negotiate for the debtor.

2 Q. There was a reference to the settlement noteholders'
3 negotiations or involvement with the negotiations in the global
4 settlement agreement. The settlement -- are the settlement
5 noteholders getting anything under the plan or the settlement
6 agreement that their class as a whole at the various levels --
7 seniors, senior subs, peers -- are not getting?

8 A. Not to my knowledge.

9 MS. NAGLE: Thank you. I have nothing further.

10 THE COURT: Thank you.

11 Anybody else wish to cross?

12 (No response)

13 THE COURT: Any redirect?

14 MR. MASTANDO: Your Honor, John Mastando from Weil
15 Gotshal, on behalf of the debtors. We will have some redirect,
16 hopefully short. The witness has been going for a while. I
17 submit it might be a good time to potentially break for the day
18 and finish with him in the morning, or --

19 THE COURT: Any objection to that?

20 MR. NELSON: Yes, Your Honor. If we have any chance
21 of finishing by tomorrow, we should go on. And it's -- we're
22 still in court and, if the debtor has redirect, now's the time
23 for it.

24 THE COURT: How long will the debtor be?

25 MR. MASTANDO: Maybe we could just take a short break

1 and discuss it?

2 THE COURT: Let's take five minutes.

3 MR. MASTANDO: Okay. Thank you, Your Honor.

4 (Recess from 5:09 p.m. until 5:19 p.m.)

5 THE CLERK: All rise. Please be seated.

6 THE COURT: All right, you may be seated.

7 MR. MASTANDO: Your Honor, John Mastando from Weil
8 Gotshal, on behalf of the debtors again. In the interest of
9 efficiency and moving the proceedings along, we have no
10 redirect for Mr. Kosturos. And, Your Honor, at this time we
11 would suggest either breaking for the day, or we do have a
12 witness here who is probably going to be shorter in his timing
13 than Mr. Goulding and is trying to make his father's eightieth
14 birthday. So if Your Honor wanted to proceed, we could proceed
15 with that witness.

16 THE COURT: How long is he going to be?

17 MR. MASTANDO: Well, again, we'd submit him by
18 declaration. I'm just guessing that the cross would be --

19 THE COURT: Mr. Carrion?

20 MR. MASTANDO: It would be Mr. Zelin.

21 THE COURT: Mr. Zelin.

22 MR. MASTANDO: And then there was no deposition of
23 him, even though, you know, he was listed on our list of
24 confirmation witnesses over two weeks ago.

25 THE COURT: Any idea how long cross will be?

1 MR. NELSON: An hour? I think at most an hour;
2 probably substantially shorter. Your Honor, while I have the
3 podium for one second, after we finish the logistics, can I be
4 entitled to literally about two minutes of recross with respect
5 to the settling party's questions of Mr. Kosturos?

6 THE COURT: Well, let's do that first. I don't know
7 that we'll go ahead with Mr. Zelin tonight. I think we'll
8 finish this witness and come back tomorrow, then.

9 MR. NELSON: Okay.

10 MR. MASTANDO: Your Honor, we would object and -- to
11 the questioning, and also reserve our right to redirect based
12 on the questioning.

13 THE COURT: Well, I'm going to allow him, because some
14 of the other settling parties aren't really cross-
15 examination --

16 MR. NELSON: Thank you, Your Honor.

17 THE COURT: -- or adverse.

18 RE-CROSS-EXAMINATION

19 BY MR. NELSON:

20 Q. With respect to JPMorgan's questioning of you regarding
21 the negotiations, you stated that JPMorgan talked about how bad
22 your claims were, correct?

23 A. The claims being liti --

24 Q. The claims that --

25 A. -- potential litigations against them?

1 Q. Correct.

2 A. Yes, they weren't generally impressed with our potential
3 claims.

4 Q. Have you -- you've been involved in a lot of negotiations,
5 correct?

6 A. Yes, I have.

7 Q. Have you ever been involved in any negotiation where the
8 other side has conceded the strength of your claims?

9 A. Very rarely.

10 Q. Did you rely on JPMorgan's word about how valid your
11 claims were in deciding whether to settle these claims?

12 A. As it related to the settlement negotiations and those
13 discussions, absolutely not.

14 Q. I believe the peers -- or the settlement noteholders
15 questioned you, and your response was that you included all
16 creditor groups in the negotiations; is that right?

17 A. As it relates to -- let me just be specific. The
18 creditors' committee, the Fried Frank group and the White &
19 Case group were the three creditor groups that I was referring
20 to.

21 Q. You did not attempt to include any member of equity or the
22 equity committee after it was formed from January 2010 till the
23 settlement was announced -- the first settlement was announced
24 in March 2010, correct?

25 A. That's not true. We made some settlement offers to the

1 equity committee.

2 Q. Let me rephrase. I'm not speaking between the equity
3 committee and WMI. I'm speaking as between -- in the
4 negotiations that led to the global settlement, you did not
5 invite or include the equity committee in those negotiations,
6 did you?

7 A. That's correct.

8 Q. Finally, the settlement noteholder lawyer questioned you
9 with respect to whether there was any difference in the
10 treatment of classes among any of the different classes; do you
11 recall that testimony?

12 A. Yes.

13 Q. You stated that, to the best of your knowledge, there was
14 no differentiation among members of the same class, is that
15 correct?

16 A. That's correct.

17 Q. How, then, can you explain that in the peers class you
18 only get subscription rights if you have two million? That is
19 a difference in treatment based upon the amount of peers'
20 holdings you have, correct?

21 A. As it relates to subscription rights. Currently we value
22 the subscription rights at zero. So to the extent that -- what
23 you say is correct, but to the extent that those are worthless,
24 which we believe they have no value associated with them, I
25 would agree with your comment that we are -- that there is that

1 class in there largely because you'd be issuing fractional
2 shares. So --

3 Q. The -- in your opinion, it's worthless, yet people paid to
4 subscribe to join the new reorganized company, correct?

5 A. People have exercised some of those rights, yes. I
6 believe the amount is thirty-one million dollars.

7 Q. So it's not worthless; they paid at least thirty-one
8 million dollars for that, right?

9 A. It's valueless. There's no value associated with it.
10 Certainly Mr. Zelin can get into that with you of what he
11 believes the value of the subscription rights is, and that will
12 be part of his testimony.

13 Q. Did I hear you say on examination by the settlement
14 noteholders' attorney that there's a possibility that WMMRC
15 will become a public company after emergence -- reemergence
16 from bankruptcy?

17 A. I haven't added everything up. At some point you would --
18 if you have more than 300 holders, there may be a requirement
19 for that company to go public. It depends on how everything's
20 tallied, you know, who's selected what. We haven't added all
21 that up of how many people have elected and how many different
22 holders there are. It -- all I said was it's a possibility.

23 Q. Is a public company valueless?

24 MR. MASTANDO: Objection, Your Honor.

25 THE COURT: Sustained.

1 MR. NELSON: Okay. Thank you, Your Honor. Nothing
2 further.

3 MR. STOLL: Your Honor, can I ask a couple of follow-
4 up questions as well to Mr. Sacks' --

5 THE COURT: All right.

6 RECROSS EXAMINATION BY

7 MR. STOLL:

8 Q. Sir, during the examination from Sullivan & Cromwell's
9 counsel, you were asked a couple of questions about other
10 liabilities on a chart that he provided to you. Do you have
11 that chart in front of you still?

12 A. Yes, I do.

13 Q. I think it's been marked as JPMC Exhibit 1. And this is a
14 document prepared by JPMorgan, is that right?

15 A. It was attached -- it was within their filings, yes.

16 Q. And you talked about a couple of liabilities at the very
17 bottom, specifically the BKK liability and the FDIC releases;
18 you see that?

19 A. Yes.

20 Q. Okay, you remember that testimony?

21 A. (No audible response).

22 Q. I think you testified the BKK litigation involves a
23 landfill litigation, is that right, or landfill liability?

24 A. To the best of my knowledge.

25 Q. Okay, and that's a landfill -- what do you mean by a

1 "landfill liability"?

2 A. It is a hazardous waste site that is -- it has some
3 rehabilitation cost to it.

4 Q. And one of the WMI/WMB subsidiaries is a party that is
5 potentially subject to liability at that landfill site?

6 A. Specifically my testimony is it was WMB or one of its
7 successors and, I believe, WMI Rainier, which is a nondebtor.

8 Q. And is that a Superfund site, sir?

9 A. I don't know.

10 Q. And is WMB the only party liable at that site, sir?

11 A. No.

12 MR. MASTANDO: Objection.

13 A. No, there's several.

14 Q. There's several. Do you know how many?

15 A. No, I don't.

16 Q. And in the chart that Sullivan & Cromwell provided on
17 behalf of JPMorgan, they have two columns, "Unquantified Value"
18 and "Unquantified Cost". Did I hear you testify that the
19 estimated range of liability for WMB was 300 to 500 million?

20 A. No, that was the estimate of the entire site. They're
21 joint and several.

22 Q. Ah.

23 A. I'm sorry if there was any --

24 Q. And none of that testimony was in your affidavit that was
25 submitted as your direct testimony, was it, sir?

1 A. I don't think so, but I was deposed on it.

2 Q. None of that -- no documents have been produced in this
3 case by the debtor supporting the liability assertion of 3- to
4 500 million dollars for that landfill site, is there, sir?

5 MR. MASTANDO: Objection, Your Honor.

6 A. I -- it's --

7 THE COURT: Let him answer.

8 A. I don't know.

9 Q. Okay. And of the several parties, has there been any sort
10 of allocation of liability amongst the various parties?

11 A. I'm not aware of any.

12 Q. And, again, do you even know whether it's a Superfund site
13 that's being administered by a -- by the EPA?

14 MR. MASTANDO: Objection. Asked and answered, Your
15 Honor.

16 THE COURT: Sustained.

17 Q. Okay, let's go down to the bottom column, the FDIC
18 releases. Did I hear you say that the FDIC releases, which
19 are -- again, are listed as an unquantified value and an
20 unquantified cost, has a twenty billion dollar liability
21 associated with it?

22 A. I believe you heard that wrong. I --

23 Q. Okay, what did I hear wrong?

24 A. I testified that they have -- I believe they have filed a
25 claim within our estate that's approximately twenty billion

1 dollars.

2 Q. I see. That's the FDIC's assertion of a potential damage
3 claim, is that what you're saying?

4 A. That's what I'm saying. It's --

5 Q. Okay.

6 A. -- a claim.

7 Q. And like in your response to Mr. Nelson's questions just a
8 moment ago, just because they made a claim doesn't mean that
9 you accept it or believe it or think it has anything to do with
10 reality, is that fair?

11 A. I'm merely stating what the claim says.

12 Q. Okay. Now, you also testified, with respect to Mr. Sacks'
13 question, that the negotiations that you had with JPMorgan on
14 behalf of the debtor were arm's-length, is that right?

15 A. Yes.

16 Q. And you identified the fact that Mr. -- I'm going to get
17 his name wrong -- is it McCreety?

18 A. Don McCree.

19 Q. McCree?

20 A. McCree.

21 Q. McCree. -- that that was an individual at JPMorgan that
22 you didn't know prior to the negotiations, right?

23 A. That's correct.

24 Q. Okay. But you do acknowledge that Alvarez does a
25 substantial amount of business with JPMorgan? That's right,

1 isn't it?

2 A. I believe I testified to that already.

3 MR. MASTANDO: Objection. Asked and answered, Your
4 Honor.

5 THE COURT: Yeah, let's not repeat.

6 MR. STOLL: Okay.

7 Q. Do you know who Jeffrey Sell is, sir?

8 A. I do know who Jeff Sell is.

9 Q. And Mr. Sell's a partner of yours?

10 A. I do not believe he's a partner of ours, but I believe he
11 works for Alvarez & Marsal.

12 Q. He's a senior advisor at Alvarez & Marsal, is that right?

13 A. I think that's his role, yes.

14 Q. And he was hired -- prior to being hired by Alvarez, he
15 worked for JPMorgan Chase, did he not?

16 A. Yes, he did.

17 Q. And he's a substantial source of business for Alvarez from
18 JPMorgan Chase, is he not?

19 A. I don't think so. I wouldn't say that.

20 Q. Do you know who Tom Jones is?

21 A. I have met Tom Jones before.

22 Q. He's a managing director at Alvarez, is that right, sir?

23 A. I believe that's right.

24 Q. And prior to working -- coming to work for Alvarez, he
25 worked with JPMorgan for over twenty years, is that right, sir?

1 A. I don't know.

2 MR. STOLL: I have nothing further, Your Honor. Oh --
3 one moment, Your Honor, if I could.

4 (Pause)

5 MR. STOLL: May I approach the witness, Your Honor?

6 THE COURT: You may. Give counsel a copy first.

7 MR. MASTANDO: Can I have a copy, Counsel?

8 MR. STOLL: Yes.

9 MR. MASTANDO: Thank you.

10 THE COURT: TPS-2 and 3?

11 MR. STOLL: Yes, please.

12 (Biographies for Jeffrey Sell and Tom Jones were hereby marked
13 for identification as TPS's Exhibits TPS-2 and TPS-3, as of
14 this date.)

15 Q. Mr. Kosturos --

16 MR. MASTANDO: Sorry to interrupt.

17 Your Honor, I object to these on grounds of relevance
18 and beyond the scope of the cross.

19 MR. STOLL: It's absolutely within the scope. It goes
20 to the issue of the arm's-length negotiation and the conflict
21 of interest.

22 THE COURT: All right, I'll allow very briefly.

23 Q. Alvarez, I take it, with respect to its professionals,
24 maintains a Web site that publishes their biographies?

25 A. Certain of them.

1 Q. Okay. And Mr. Sell and Mr. Jones, as you testified, are
2 both employed by Alvarez currently; that's right?

3 A. Yes.

4 Q. And are these biographies in the form that you normally
5 see a biography from Alvarez?

6 A. I think biographies and resumes can come in many different
7 forms. I -- you got them from my Web site -- you got them from
8 Alvarez's Web site, you got them from Alvarez's Web site.

9 Q. And Alvarez keeps the updated biographies on behalf of its
10 employees on its Web site, that's fair?

11 A. We try to.

12 Q. Okay. And they try to make them accurate and truthful?

13 A. (No audible response).

14 MR. STOLL: Okay. Thank you, Your Honor.

15 THE COURT: Anybody else?

16 MR. SACKS: Just as a housekeeping matter, Your Honor,
17 I realize -- I don't know what you're going to do with respect
18 to admission into evidence, but I'd offer JPMorgan Exhibit 1
19 into evidence.

20 THE COURT: All right. Well, let me let the witness
21 step down.

22 MR. SACKS: Okay.

23 THE COURT: You may step down.

24 (Witness excused)

25 THE COURT: Anybody object to any of the exhibits that

1 were marked, JPM-1C -- JPMC-1, TPS-1 through 3, ANICO-1 and 2,
2 and the various documents in the exhibit binders identified by
3 the debtors and equity committee? Any objections?

4 MR. MASTANDO: Your Honor, are you referring to all
5 of -- all the documents, or just the documents from today?

6 THE COURT: Just the ones from today?

7 MR. MASTANDO: I note the objection to TPS-2 and 3.

8 THE COURT: And I'm overruling that objection.

9 (The chart was hereby received into evidence as JPMorgan's
10 Exhibit JMPC-1, as of this date.)

11 (Term sheet WGM Draft 3509 was hereby received into evidence as
12 TPS's Exhibit TPS-1, as of this date.)

13 (Biographies of Jeffrey Sells and Tom Jones were hereby
14 received into evidence as TPS's Exhibit TPS-2 and TPS-3, as of
15 this date.)

16 (ANICO's Exhibit ANICO-1 was hereby received into evidence, as
17 of this date.)

18 (ANICO's Exhibit ANICO-2 was hereby received into evidence, as
19 of this date.)

20 (The plan was hereby received into evidence as Equity
21 Committee's Exhibit 3, as of this date.)

22 (Order was hereby received into evidence as Exhibit A-1, as of
23 this date.)

24 (Plaintiffs' notice of dismissal of Washington Mutual, Inc.
25 bondholder and stockholder claims was hereby received into

1 evidence as Exhibit A-2, as of this date.)

2 (The settlement agreement was hereby received into evidence as
3 Exhibit 2, as of this date.)

4 (Disclosure statement was hereby received into evidence as
5 Exhibit 5, as of this date.)

6 (E-mail from Fried Frank to Mr. Kosturos was hereby received
7 into evidence as Exhibit 24, as of this date.)

8 (3/5/09 e-mail from Brian Pfeiffer of Fried Frank was hereby
9 received into evidence as Exhibit 27, as of this date.)

10 (Settlement term sheet offered to JPMorgan in March of 2009 was
11 hereby received into evidence as Exhibit 36, as of this date.)

12 (Liquidation analysis for Debtors was hereby received into
13 evidence as Exhibit 37, as of this date.)

14 (Noteholders' term sheet was hereby received into evidence as
15 Exhibit 48, as of this date.)

16 (12/28/09 letter from Quinn Emanuel to JPMorgan was hereby
17 received into evidence as the Committee's Exhibit 38, as of
18 this date.)

19 MR. SACKS: Your Honor, I don't know whether they're
20 being offered. I don't think they were marked, the charts that
21 were used as demonstratives by Mr. Nelson. Assuming those are
22 excluded, I don't have any issues.

23 MR. MASTANDO: Yeah, I object to those as well, Your
24 Honor. I don't think there's been a foundation --

25 MR. NELSON: Those are demonstratives, although --

1 MR. MASTANDO: Can I finish, Counsel?

2 MR. NELSON: I'm sorry.

3 MR. MASTANDO: I don't think there was a basis or a
4 foundation for what's in them, and they were just given to us
5 right before the hearing began.

6 MR. NELSON: Those are demonstratives. We're not
7 offering them as exhibits. I will say that there's not a lot
8 of difference between that and JPMorgan's, but it's -- it
9 speaks for itself. So --

10 THE COURT: All right, they're not being offered, so
11 they won't be admitted.

12 All right --

13 MR. JOHNSON: Your Honor, with respect to the equity
14 committee exhibits, I'd just like to clarify all that's being
15 asked about is the equity committee exhibits that were actually
16 used today and not the remainder of the binder --

17 THE COURT: Yes.

18 MR. JOHNSON: -- because we have not yet reviewed
19 those.

20 THE COURT: Yes, only the ones identified today, both
21 the debtors' and the equity committee's.

22 MR. JOHNSON: The creditors' committee has no
23 objection to those.

24 THE COURT: Okay.

25 I think I'm going to ask Mr. Slatko if she wanted to

1 make a comment. I don't know what it relates to, but before we
2 recess for tonight --

3 MR. ROSEN: Your Honor, before we do recess, I just
4 wanted to talk overall schedule for tomorrow.

5 THE COURT: Okay.

6 MR. STARK: Your Honor, maybe I can be helpful.

7 THE COURT: Okay.

8 MR. STARK: Ms. Slatko is a shareholder, and she'd
9 like to make a personal statement with respect to these
10 proceedings. I've made the recommendation to Ms. Slatko that
11 it might be better to wait until after the evidence has been
12 admitted at the time in which we have closing argument. And I
13 think that's acceptable to you, but I'm just trying to help.

14 THE COURT: Yeah, I'm going to hear statements from
15 all of the parties at the end of the testimony and, if that's
16 what you're interested in making, I'll hear you then as well.

17 MS. SLATKO: It is.

18 THE COURT: Okay.

19 MS. SLATKO: And I appreciate you letting me come up
20 again this evening. Thank you.

21 THE COURT: Okay. Thank you.

22 Let's talk about -- I don't think we're going to
23 finish the next seven witnesses tomorrow, are we?

24 MR. ROSEN: Your Honor, if today was any indication of
25 what some people have in store, I think not, although I think

1 that many of those that are going to go tomorrow will be much
2 briefer than today. But I can't vouch for that. So, Your
3 Honor, that would of course lead to how much time the Court has
4 tomorrow and if in fact we cannot finish tomorrow, which I
5 think you're correct -- certainly we wouldn't get to closing
6 statements -- when we would be able to return to finish
7 confirmation.

8 THE COURT: Well, unfortunately for me, I have Monday
9 free, although we could not use this courtroom. Are the
10 parties available Monday?

11 UNIDENTIFIED SPEAKER: No objection, Your Honor.

12 THE COURT: Okay.

13 MR. ROSEN: We're here.

14 THE COURT: All right. I have all day tomorrow and
15 all day Wednesd -- excuse me -- Monday. So I hope we can
16 finish Monday.

17 MR. ROSEN: Okay. Thank you, Your Honor.

18 THE COURT: All right, well, I'll see the parties back
19 here tomorrow morning at 9:30.

20 MR. ROSEN: Thank you very much.

21 MR. STEINBERG: Your Honor --

22 MR. ROSEN: Can we leave our --

23 THE COURT: Mr. Steinberg has a comment.

24 MR. ROSEN: Can we leave our materials here in the
25 courtroom?

1 THE COURT: You may.

2 MR. NELSON: For planning purposes, we're not planning
3 to get to closing statements tomorrow, correct?

4 THE COURT: We certainly are not planning.

5 MR. NELSON: Okay. Thank you.

6 MR. ROSEN: Thank you, Your Honor.

7 THE COURT: Mr. Steinberg, you had a comment?

8 MR. STEINBERG: Yeah, I just wanted to know the order
9 of the witnesses, whether there's any change, so we could
10 prepare our crosses effectively in order.

11 MR. ROSEN: Your Honor, we are going to keep them as
12 we outlined them this morning.

13 MR. STEINBERG: So Mr. Zelin is not going to start
14 tomorrow?

15 MR. ROSEN: No. We were trying to get him out to
16 attend his father's eightieth birthday, but that didn't work.

17 MR. STEINBERG: All right. Thank you.

18 MR. ROSEN: So --

19 THE COURT: All right.

20 MR. ROSEN: Thank you, Your Honor.

21 THE COURT: We'll stand adjourned.

22 MR. ROSEN: Have a nice evening.

23 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

24 UNIDENTIFIED SPEAKER: Thank you.

25 (Whereupon these proceedings were concluded at 5:38 p.m.)

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

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

PNINA EILBERG (CET**D-488)
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Date: December 6, 2010