

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF DELAWARE

3 Case No. 08-12229 (MFW), Adv. Case No. 10-51387 (MFW),

4 Adv. Case No. 10-50911 (MFW), Adv. Case No. 10-50911 (MFW)

5 - - - - -x

6 In the Matter of:

7 WASHINGTON MUTUAL, INC., ET AL.,

8 Debtors.

9 - - - - -x

10 BLACK HORSE CAPITAL LP, ET AL., Plaintiffs,

11 - against -

12 JPMORGAN CHASE BANK, N.A., ET AL., Defendants.

13 - - - - -x

14 BROADBILL INVESTMENT CORP., Plaintiff,

15 - against -

16 WASHINGTON MUTUAL, INC., Defendant.

17 - - - - -x

18 U.S. Bankruptcy Court

19 824 North Market Street

20 Wilmington, Delaware

21 December 3, 2010, 9:33 AM

22 B E F O R E:

23 HON. MARY F. WALRATH

24 U.S. BANKRUPTCY JUDGE

25 ECR OPERATOR: BRANDON MCCARTHY

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

7
8 Debtors' Motion for an Order Authorizing the Debtors to File
9 Under Seal Exhibits A and B to the Declaration of Jonathan
10 Goulding in Support of Entry of an Order Confirming the Sixth
11 Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11
12 of the United States Bankruptcy Code

13
14 Sixth Amended Joint Plan of Affiliated Debtors Pursuant to
15 Chapter 11 of the United States Bankruptcy Code

16
17 Motion of Defendant, JPMorgan Chase Bank, N.A., for Partial
18 Summary Judgment and Motion of Defendant, Washington Mutual,
19 Inc. (ADV. 10-51387)

20
21 Motion of Defendant, Washington Mutual, Inc., for Summary
22 Judgment (ADV 10-50911)

23
24 Motion in Limine to Preclude any Use or Reference to the
25 Examiner's Report

1
2 Plaintiff's Motion in Limine to Strike and Preclude Evidence of
3 Analysis that was Withheld from Discovery on the Basis of the
4 Attorney-Client Privilege

5
6 Motion of the Official Committee of Equity Security Holders for
7 Entry of an Order Granting Relief from the Confidentiality
8 Agreement Governing Confirmation Discovery to Permit Reference
9 to Debtors' Work Product upon Closing of the Courtroom

10 Emergency Motion to Strike Declaration of Charlotte Chamberlain
11 and to Preclude her from Testifying at the Confirmation Hearing

12
13 Motion to Strike Declarations and Arguments Relying on
14 Examiner's Report or, in the Alternative, to Compel Production
15 of All Debtors' Work Product and Communications Related to the
16 Examiner's Report

17
18 Motion of the Official Committee of Equity Security Holders for
19 an Order Authorizing it to (I) Unseal and Publicly File its
20 Motion to Strike Declarations and Arguments Relying on
21 Examiner's Report or, in the Alternative, to Compel Production
22 of All Debtors' Work Product and Communications Related to the
23 Examiner's Report, and (II) Use Confidential Information at the
24 Confirmation Hearing

Debtors' Motion for an Order Authorizing the Debtors to File
Under Seal Certain Portions of the Debtors' Omnibus Opposition
to the TPS Consortium's Motion in Limine and the Official
Committee of Equity Security Holders' Motion to Strike, both
Relating to the Examiner's Report

Plaintiff's Motion in Limine to Strike the Debtors' Designation
of Deposition Testimony of Steve Simms

Transcribed by: Karen Schiffmiller

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

WEIL, GOTSHAL & MANGES, LLP

Attorneys for Debtors

BY: BRIAN S. ROSEN, ESQ.

ADAM P. STROCHAK, ESQ.

JOHN MONSTANDO, ESQ.

ANGELA ZAMBRANO, ESQ.

KELLI DIBLASI, ESQ.

SUNNY THOMPSON, ESQ. (TELEPHONICALLY)

JARRAD WRIGHT, ESQ. (TELEPHONICALLY)

RICHARDS, LAYTON & FINGER

Attorneys for Debtors

BY: MARK COLLINS, ESQ.

CHUN I. JANG, ESQ.

MARCOS RAMOS, ESQ. (TELEPHONICALLY)

AKIN GUMP STRAUSS HAUER & FELD LLP

Attorneys for Official Committee of Unsecured Creditors

BY: ROBERT A. JOHNSON, ESQ.

CHRIS CARTY, ESQ.

FRED S. HODARA, ESQ. (TELEPHONICALLY)

ROBERT JOHNSON, ESQ. (TELEPHONICALLY)

ROBERT K. OZOLS, ESQ. (TELEPHONICALLY)

BRIAN M. ROTHSCHILD, ESQ. (TELEPHONICALLY)

ROBERT J. BOLLER, ESQ. (TELEPHONICALLY)

DAVID SIMONDS, ESQ. (TELEPHONICALLY)

ARENT FOX LLP

Attorneys for Wilmington Trust Company

BY: HEIKE M. VOGEL, ESQ.

JEFFREY ROTHLEDER, ESQ. (TELEPHONICALLY)

ASHBY & GEDDES, P.A.

Attorneys for Equity Committee

BY: GREGORY A. TAYLOR, ESQ.

STACY NEWMAN, ESQ.

BROWN RUDNICK LLP

Attorneys for Plaintiff TPS

BY: ROBERT J. STARK, ESQ.

BLANK ROME LLP

Attorneys for Appaloosa, Centerbridge, Aurelius Capital,
Owl Creek

BY: TORI GUILFOYLE, ESQ.

FOX ROTHSCHILD LLP

Attorneys for WMI Noteholder

BY: SETH NIEDERMAN, ESQ.

JEFFREY SCHLAB, ESQ.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

Attorneys for Appaloosa, Centerbridge, Aurelius Capital,
Owl Creek

BY: SHANNON LOWRY NAGLE, ESQ.

1
2 LANDIS RATH & COBB LLP

3 Attorneys for JPMorgan Bank

4 BY: ADAM LANDIS, ESQ.

5
6
7 DLA PIPER (US)

8 Attorneys for FDIC

9 BY: TOM CALIFANO

10
11
12 PACHULSKI STANG ZIEHL & JONES LLP

13 Attorneys for WMB Senior Noteholders

14 BY: TIM CAIRNS, ESQ.

15 DEAN A. ZIEHL, ESQ.

16 ALAN J. KORNFELD, ESQ. (TELEPHONICALLY)

17 JEREMY RICHARDS, ESQ. (TELEPHONICALLY)

18
19
20 PEPPER HAMILTON LLP

21 Attorneys for Official Committee of Unsecured Creditors

22 BY: DAVID B. STRATTON, ESQ.

PINCKNEY, HARRIS & WEIDINGER, LLC

Attorneys for Sonterra Capital, LLC

BY: DONNA L. HARRIS, ESQ.

POLSINELLI SHUGHART P.C.

Attorneys for Wilmington Trust Company

BY: SHANTI M. KATONA, ESQ.

SULLIVAN & CROMWELL LLP

Attorneys for JPMorgan Bank

BY: ROBERT A. SACKS, ESQ.

STACEY R. FRIEDMAN, ESQ.

BRENT J. MCINTOSH, ESQ.

BRIAN D. GLUECKSTEIN, ESQ.

BRUCE E. CLARK, ESQ. (TELEPHONICALLY)

HYDEE R. FELDSTEIN, ESQ. (TELEPHONICALLY)

JOSHUA J. FRITSCH, ESQ. (TELEPHONICALLY)

NOAH FULMOR, ESQ. (TELEPHONICALLY)

M. DAVID POSSICK, ESQ. (TELEPHONICALLY)

WHITE & CASE LLP

Attorneys for WMI Noteholders

BY: GREGORY M. STARNER, ESQ.

THOMAS MACWRIGHT, ESQ.

WILLKIE, FARR & GALLAGHER LLP

Attorneys for Track Insurance Exchange/Fire Insurance
Exchange

BY: MATTHEW FELDMAN, ESQ.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Attorneys for FDIC

BY: BLAKE CLEARY, ESQ.

MORRIS NICHOLS

Attorneys for Tranquility Master Fund

BY: CURTIS MILLER, ESQ.

KING & SPALDING

Attorneys for CRU Holders

1 BY: ARTHUR STEINBERG, ESQ.

2 EDWARDS, ANGELL, AND DODGE

3 Attorneys for Law Debenture Trust Company as Indentured

4 Trustee

5 BY: R. CRAIG MARTIN, ESQ.

6

7

8 PATTERSON, BELKNAP, WEBB & TYLER

9 Attorneys for Law Debenture Trust Company as Indentured

10 Trustee

11 BY: DANIEL A. LOWENTHAL, ESQ.

12 BRIAN GULNEY, ESQ. (TELEPHONICALLY)

13

14

15 PHILLIPS, GOLDMAN & SPENCE

16 Attorneys for BKK Joint Defense Group

17 BY: MEGAN C. HANEY, ESQ.

18

19

20 SUSMAN GODFREY

21 Attorneys for Equity Committee

22 BY: JUSTIN NELSON, ESQ.

23 EDGAR SARGENT, ESQ.

24 SETH ARD, ESQ.

25

PILLSBURY WINTHROP SHAW PITTMAN LLP

Attorneys for Bank of New York Mellon and Trustees

BY: LEO CROWLEY, ESQ.

MARGOT P. ERLICH, ESQ. (TELEPHONICALLY)

LOWENSTEIN SANDLER

Attorneys for Plaintiff in Securities Litigation

BY: MICHAEL ETKIN, ESQ.

U.S. TRUSTEE'S OFFICE

Attorneys for the U.S. Trustee

BY: JANE LEAMY, ESQ.

ECKART SEAMANS

Attorneys for Relizon Company/Truck Insurance Exchange
Fire Insurance Exchange

BY: RONALD GELLERT, ESQ.

STEVEN & LEE

Attorneys for Keystone Entities

1 BY: JOSEPH HUSTON, ESQ.

2 SEWARD & KISSEL, LLP

3 Attorneys for Trustee, Wilmington Trust Company

4 BY: ARLENE R. ALVES, ESQ.

5

6

7 REED SMITH LLP

8 Attorneys for Dime Trust

9 BY: JAMES ANDRIOLA, ESQ.

10

11

12 LOEB & LOEB, LLP

13 Attorneys for Wells Fargo, N.A.

14 BY: WALTER H. CURCHACK, ESQ.

15 VADIM J. RUBENSTEIN, ESQ.

16

17

18 SCHINDLER COHEN & HOCHMAN

19 Attorneys for Blackwell Capital Partners, LLC

20 BY: JONATHAN HOCHMAN, ESQ.

21

22

23 WHITE & CASE

24 Attorneys for Noteholder Group

25 BY: ADITI PARANJPYE, ESQ.

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25

ZOLFO COOPER, LLC

Attorneys for Zolfo Cooper LLC

BY: LYLE POTASH, ESQ.

ATTORNEY GENERAL'S OFFICE

Attorneys for Department of Toxic Substances Control

BY: JAMES R. POTTER, ESQ.

STUTMAN, TREISTER & GLATT

Attorneys for Elliot Company

BY: K. JOHN SHAFFER, ESQ.

IVINS PHILLIPS & BARKER

Attorneys for Ticadia

BY: ROBERT H. WELLEN, ESQ.

MORGENS, WATERFALL, VINTIADIS & CO.

Attorneys for Morgens, Waterfall, Vintiadis & Co.

BY: MICHELE WHALEN, ESQ.

ALSO PRESENT:

JIM BOLIN, Appaloosa Management

GEORGE BRICKFIELD, The Seaport Group

PEG BRICKLEY, Dow Jones & Co.

DAN BULLOCK, Pro Se

LAWERENCE N. CHANEN, JPMorgan Chase

TIMOTHY CHEN, Puma Capital

EDWIN CRESPO, Broadridge Investor Communications

EPHRIAM DIAMOND, DK Partners

DAVID DUBACK, Waterstone Capital Management, LP

JIM F. FARNER, Morgan Stanley

STANISLAV FEDORENKO, Centerbridge Partners

BRYCE FRASER, Fortress Investment Group

HAL F. GOLTZ, Anchorage Advisors

ROB HALDER, Tejas Securities Group

JOEL HAWKINS, Carval Investors

JAMES JACOBS, Gruss & company LLC

ANNA KALENCHITS, Pro Se

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

MICHAEL LINN, Farallon Capital Management

ANDERS MAXWELL, The Peter J. Solomon Company

CHRIS MILLER, Mediant Communications

DANIEL PINE, Marathon Asset Management

MICHAEL C. SCOTT, Venor Capital

1 ANDREW SOLE, Esopus Creek Advisors, LLC
2 KEVIN STARKE, CRT Capital Group, LLC
3 MITCHELL E. SUSSMAN, Stone Lion Capital
4 BRAD SWEENEY, Barclays Capital, Inc.
5 WILLIAM VRATTOS, York Capital Management
6 MICHAEL WILLINGHAM, Washington Mutual, Inc.
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1 P R O C E E D I N G S

2 THE COURT: Good morning.

3 MR. ROSEN: Good morning, Your Honor. Brian Rosen,
4 Weil, Gotshal & Manges on behalf of Washington Mutual, Inc.

5 Your Honor, I'd like to start this morning's
6 proceeding off by announcing that we've reached some resolution
7 on a certain number of objections, and that they either have or
8 will be withdrawn.

9 Your Honor, with respect to the objection that has
10 been interposed by the Cassis (ph) plaintiffs. If the Court
11 will recall, that was subject of an adversary proceeding or
12 excuse me, a litigation in the Eastern District of New York,
13 and the Court had provided a relief from the automatic stay to
14 allow that to proceed, and it has been proceeding for over a
15 year or so, Your Honor, I believe.

16 The debtors have actually reached a resolution on that
17 litigation. We'll be filing with the Court the appropriate
18 papers for that settlement, and as part of it, the Cassis
19 plaintiffs, which had some issues concerning releases, they
20 will be withdrawing their objection to the plan.

21 Additionally, Your Honor, there was a claim that was
22 filed in the bankruptcy case by the Alexander and Reed people,
23 and that also relates to a purported class action that's
24 pending outside of this court against Wimrick (ph), the FDIC,
25 and FSB, which was a subsidiary of the bank, Your Honor. And

1 that matter has been resolved. There will be no cost to the
2 estate, and the claim will actually be withdrawn against the
3 estate. That is subject to documentation, and we're hoping to
4 finish that resolution over the weekend, Your Honor.

5 The Tranquility Master Fund also filed an objection
6 relating to certain of the release language. If the Court will
7 recall, that was the subject of an objection to claim process.
8 The Court ruled, they filed an amended proof of claim, I
9 believe on November 30th, Your Honor.

10 We have agreed with the Tranquility Group for some
11 language with respect to the releases, and they will be
12 withdrawing their objection to the plan as well.

13 The California Franchise Tax Board had some concerns
14 about their efforts with respect to some of the debtor's
15 affiliates and the releases, and we have agreed with them on
16 language as well, and they will be withdrawing, I believe --
17 excuse me, they have withdrawn their objection to the plan.

18 The Relizon Company also has already filed a notice of
19 withdrawal of their objection to the plan.

20 Steven Rotella, a former officer with the company, had
21 filed an objection because of concerns regarding
22 indemnification obligations, and that matter has been resolved,
23 and he will be withdrawing, or that objection has been
24 withdrawn as well to the plan.

25 The Keystone entities, Your Honor, that is an entity

1 associated with the American Savings litigation. It's another
2 party in connection with that and has some residual rights to
3 that litigation proceeds. They filed an objection to the plan
4 on several bases, all relating to their ongoing rights, though,
5 in the litigation proceeds.

6 We have been working with the Keystone entities and
7 have resolved their objections to the plan. That is subject to
8 documentation, Your Honor, and we will be finishing those
9 today, if not, over the weekend, and they will be also
10 withdrawing their objection to the plan.

11 Likewise, Your Honor, lastly, there is -- there was a
12 filing made by the WMI Noteholders' Group -- do you want to
13 read it into the record, or do you want me to? Okay.

14 Your Honor, I'll start the afternoon off by reading.
15 There is a reservation that the parties have agreed to on the
16 senior notes versus the subordinated note basis. I will read
17 that into the record beginning the afternoon's events, but they
18 will be withdrawing as part of that, as well.

19 And, Your Honor, I believe that concludes those which
20 we have resolved at this moment. There are others that we're
21 in the process of resolution, but as they're not at the level
22 that I can say that we're done, I didn't want to announce them
23 yet, but we are moving forward on others.

24 THE COURT: Okay. Just for a timing perspective, I
25 think my clerk advised that we'll be ending today at 4:30. We

1 do have Monday. There's a possibility of Tuesday. I'm waiting
2 for the agendas to come in to see if we can use Tuesday.

3 MR. ROSEN: Thank you, Your Honor.

4 THE COURT: Other parties?

5 MR. ROSEN: Excuse me. The noteholders have -- the
6 senior noteholders have said they're not withdrawing their
7 objection, they are deferring their objection, Your Honor,
8 based upon what we will announce into the record.

9 THE COURT: Okay.

10 MR. STROCHAK: Good morning, Your Honor. Adam
11 Strochak from Weil Gotshal for the debtors.

12 Just a housekeeping matter, and I know Mr. Stoll wants
13 to be heard. He's sharing the podium with me.

14 THE COURT: Glad to see you're sharing now.

15 MR. STROCHAK: We've learned to share, Your Honor.
16 Just on a housekeeping note, as we were going through exhibits
17 last night and thinking about the record of the confirmation
18 hearing, one thing we thought about is we do have the extensive
19 summary judgment record from the trust preferred Blackhorse
20 adversary. We're working under the assumption that that is
21 included as a part of the confirmation record, but I thought
22 I'd just ask for clarification. We obviously would want some
23 of those documents included as exhibits at the confirmation
24 hearing as well. So if it's not a part of the record already,
25 we just wanted to get some clarification on that.

1 THE COURT: All right. If the parties don't object,
2 that can be incorporated.

3 MR. STARK: Your Honor, Robert Stark from Brown
4 Rudnick on behalf of the plaintiffs.

5 I'm not -- I'm wary of getting up and saying I object,
6 but I do want to go back and take a look. You know, to be
7 honest with you, we prepare these things separately, and I
8 don't want to be sort of ambushed at the morning of a hearing
9 and say, okay, you know, everything in that -- those prior
10 binders are hereby entered into this one by osmosis, so I think
11 we need to come back on that.

12 THE COURT: All right. You can let us know.

13 MR. STROCHAK: That's fine. We'll work through over
14 the weekend and make sure there's no problems with that, and
15 I'll turn it over to Mr. Stoll now.

16 MR. STOLL: Good morning, Your Honor. Jim Stoll from
17 Brown Rudnick on behalf of the Trust Preferred Securities.

18 At the end of the motion in limine order yesterday,
19 Judge, you had allowed us or instructed us to submit an order
20 addressing the paragraphs in the affidavits which made
21 reference to the examiner's report.

22 We did that last night. We got some comments back
23 this morning. We're not in quite complete agreement, and
24 there's two points that I wanted to bring up with Your Honor to
25 make sure that we don't have an unnecessary fight, and they

1 deal with paragraph 77 and 79 of Mr. Kosturos' deposition, or
2 excuse me, affidavit. Paragraph 79, the last sentence of that
3 paragraph has a summary of Mr. Kosturos' characterization of
4 the capital contribution claim, the FDIC receiver potential
5 claims, et cetera, and then he cites to the examiner report.

6 We propose that that be stricken. The debtors have
7 said, no, they'll only strike the actual citation to the
8 examiner's report. When you go back to the examiner's report,
9 which is at, at this point, is on the citations to page 199,
10 and you compare that last sentence to the sentence in the
11 second paragraph, this last sentence in the second paragraph of
12 page 199 and the cited footnote, you basically see that what
13 Mr. Kosturos has done, is he's paraphrased and summarized what
14 the examiner's said and then put the examiner's citation in
15 there.

16 So, in other words, his testimony in his affidavit is
17 again channeling, if you will, the examiner's report. So I
18 believe just removing the citation alone is insufficient and
19 that that sentence should come out with it. The --

20 THE COURT: Well, but doesn't the footnote -- I mean,
21 the footnote cites to other -- perhaps there's other sources of
22 those assertions. I'd just strike the reference to the
23 examiner report. I think there's other support for it.

24 MR. STOLL: All right. And maybe that'll answer the
25 second question I have, Your Honor, which is paragraph 77.

1 Again, a statement is made by Mr. Kosturos and his citation for
2 the source of his statements are the examiner's report at page
3 197 and also the JPMorgan submission at pages 17, 18, that's
4 their confirmation brief, which then if you look at the
5 JPMorgan submission at paragraph 17 and 18, there again, you
6 find JPMorgan quoting to the examiner's report, and actually
7 quoting the examiner's report on page 18, and with appropriate,
8 or at least with citation to the examiner's report.

9 And so again, it's -- it appears to be a method of
10 bringing into his testimony the actual statements of the
11 examiner through citations to a pleading filed by JPMorgan, and
12 again it seems to us, I guess if we're only going to strike the
13 citations, then we should -- the support for his records should
14 not be the citation to a pleading that in turn quotes and cites
15 to the examiner's report.

16 THE COURT: Let me look at the JPMorgan. What
17 paragraph of JPMorgan?

18 MR. STOLL: It's page 17 and 18, and it's actually the
19 last paragraph -- second paragraph on page 18.

20 (Pause)

21 THE COURT: Well, I'm going to ignore the last
22 quotation on page 18, and otherwise, I will consider the JPMC
23 submission as supportive of paragraph 17.

24 MR. STOLL: All right. Thank you, Your Honor. And
25 then I think with the declarations revised, with the paragraphs

1 and references deleted, we're filed for everyone except for
2 Mr. Zelin (ph), which I believe was just an oversight, if I
3 understand that correctly, and a revised declaration to leaving
4 the one paragraph that Mr. -- or the one reference that
5 Mr. Zelin makes to the examiner's report will be filed; and
6 with that, we're satisfied, Your Honor.

7 THE COURT: All right. Thank you.

8 MR. STROCHAK: Adam Strochak, Your Honor. Just one
9 more brief housekeeping note.

10 We're providing some comments on the order on the in
11 limine motion to counsel, but one thing we did want to ask --
12 request from the Court is that we'd like that order to attach a
13 copy of the examiner's report, just to make a complete record
14 for purposes of any appeal, should we ever end up in the
15 district court or the circuit court on an appeal. Just to make
16 it clear that we've proffered the examiner's report, Your Honor
17 has ruled on it, that it's excluded and we'll have a complete
18 record for purposes of appeal. I'm not sure it's necessary
19 since it's on the docket anyway, but.

20 THE COURT: I don't think -- yeah, I don't think it's
21 necessary if it's already docketed.

22 MR. STROCHAK: As long as the record's clear, Your
23 Honor, that that document was proffered as an exhibit, it is
24 part of the confirmation record, it was excluded from evidence,
25 we're comfortable with that, Your Honor.

1 THE COURT: You can make that clear in the --

2 MR. STROCHAK: We'll put that language in the order,
3 Your Honor.

4 THE COURT: -- form of order.

5 MR. STROCHAK: Thank you.

6 MR. MASTANDO: Good morning, Your Honor. John
7 Mastando from Weil Gotshal on behalf of debtors.

8 At this time, the debtors would like to offer the
9 direct testimony of Mr. Jonathan Goulding through his
10 declaration, and offer that into evidence as his direct
11 testimony. Mr. Goulding is here to be cross-examined, and I
12 have a copy of the declaration that does have the references to
13 the examiner report removed, as per Your Honor's instruction.

14 And also, Your Honor, yesterday there was an
15 uncontested motion by the debtors to file Exhibits A and B to
16 Mr. Goulding's declaration under seal, excuse me. We will now
17 withdraw that motion and the exhibits are attached and are no
18 longer sealed. They've been unsealed and are attached to the
19 declaration.

20 THE COURT: Okay.

21 MR. MASTANDO: May I approach?

22 THE COURT: You may.

23 MR. MASTANDO: Okay.

24 MR. STEINBERG: Do you have extra exhibits so that
25 those can --

1 MR. MASTANDO: I believe we do.

2 THE COURT: If you want that part of the record, it's
3 not, your comment.

4 UNIDENTIFIED SPEAKER: No. She said if your voice, if
5 you want to be on the record.

6 THE COURT: Yeah.

7 MR. STEINBERG: Oh, my apologies.

8 THE COURT: All right. Copies are available to
9 others.

10 MR. MASTANDO: Can we call Mr. Goulding to the stand?

11 THE COURT: You may. Please remain standing so you
12 can be sworn.

13 JOHN GOULDING, WITNESS, SWORN

14 THE CLERK: Be seated, please, and state and spell
15 your last name.

16 THE WITNESS: Jonathan Goulding. The last name's G-o-
17 u-l-d-i-n-g.

18 MR. MASTANDO: Okay. We offer Mr. Goulding for cross-
19 examination, Your Honor.

20 THE COURT: All right. Well, just for the record, can
21 you confirm that your declaration is true and correct and would
22 represent your direct examination if called?

23 THE WITNESS: I can.

24 THE COURT: Okay.

25 (Pause)

1 MR. NELSON: Your Honor, may I approach with copies of
2 the deposition of Jonathan Goulding?

3 THE COURT: You may. Thank you. Please don't forget
4 to identify yourself for the record.

5 MR. NELSON: Justin Nelson, Susman Godfrey,
6 representing the Equity Committee.

7 (Pause)

8 CROSS-EXAMINATION

9 BY MR. NELSON:

10 Q Good morning.

11 A Good morning.

12 Q Mr. Goulding, first of all, have you discussed the
13 testimony or the proceedings in court in any form or fashion
14 since trial began yesterday?

15 A No.

16 Q Have you reviewed any new exhibits or documents over the
17 past twenty-four hours?

18 A No. I've reviewed some of the same, nothing new.

19 Q Thank you. You are the treasurer of WMI, correct?

20 A I am.

21 Q You have been designated to discuss certain assets of WMI
22 that have been resolved by the proposed settlement; is that
23 true?

24 A That's true.

25 Q You have also been designated to discuss the liquidation

1 and recovery analysis; is that right?

2 A The liquidation analysis, that's correct.

3 Q You prepared and helped with the recovery analysis as
4 well?

5 A I did.

6 Q You state in your declaration that the estate will receive
7 approximately 7.5 billion of total funds available for
8 distribution to the debtors' stakeholders; is that correct?

9 A There will be approximately seven and a half billion
10 available for distribution to stakeholders pursuant to the
11 settlement agreement.

12 Q Okay. Thank you.

13 MR. NELSON: May I approach the easel to present a
14 demonstrative, Your Honor?

15 THE COURT: You may.

16 Q This is a blow-up of the liquidation analysis that is --
17 and recovery analysis that is Exhibit C to your declaration; is
18 that right?

19 A This is a section of it, yeah, that's correct.

20 Q And it discusses the recovery analysis and states there
21 will be 7.446 billion dollars of distribution; is that right?

22 A Net proceeds, sure.

23 Q Net proceeds. That is based upon the reorganized WMI
24 value of seven -- excuse me, 145 million dollars; is that
25 right?

1 A That's right.

2 Q So we would have to increase that to make it essentially
3 by twelve and a half million now, correct?

4 A Right. I believe the new number is 157 and a half.

5 Q And so we would now say that the new number is about
6 7.458, approximately?

7 A Approximately, sure.

8 Q Okay.

9 MR. NELSON: May I approach again with another
10 demonstrative, Your Honor?

11 THE COURT: You may.

12 (Pause)

13 MR. NELSON: Your Honor, the parties have this
14 exhibit. May I approach the Court with a copy for the Court?

15 THE COURT: You may. Thank you.

16 MR. NELSON: And I said exhibit, it's a demonstrative.

17 BY MR. NELSON:

18 Q Mr. Goulding, the 361 million dollars on the left-hand
19 column, that's the difference between your recovery analysis,
20 and the amount under your recovery analysis where the preferred
21 equity would start to be in the money, correct?

22 A I don't know. You just covered up the piece that would --

23 Q If you go to Exhibit 37 in the binders behind you, it has
24 the exhibits.

25 (Pause)

1 A That's correct.

2 Q The other sources on the right are some of the potential
3 other categories for recovery; is that right?

4 MR. MASTANDO: Objection, Your Honor, I think
5 counsel's testifying.

6 THE COURT: Overruled. This is cross.

7 THE WITNESS: Well, no, I mean a lot of the items
8 that you've listed here on the right-hand side are included in
9 the settlement agreement. Therefore, the proceeds there are
10 included in the seven and a half billion that we were talking
11 about before.

12 BY MR. NELSON:

13 Q Okay. Fair enough. These are some of the potential
14 values of some of the assets that are being transferred; is
15 that right?

16 MR. MASTANDO: Objection to the form and the
17 foundation for the exhibit, as we discussed yesterday, Your
18 Honor.

19 THE COURT: All right. Overrule.

20 THE WITNESS: I'm sorry. Could you repeat the
21 question?

22 Q These are the values of some of the assets that are being
23 transferred and/or released under the proposed settlement,
24 correct?

25 A Well, there -- these are values. I don't know, there are

1 certain of these values that would probably be misleading, but
2 sure, there are certain book values or other values that would
3 be on this page. I don't think that this is a fair
4 representation of a comparison.

5 Q Well, we'll get to that in a second. You would agree, and
6 we'll get to this later, but you would agree for now, that
7 Wimrick and the reorganized WMI has a five billion dollar NOL,
8 correct?

9 A It could have a five billion dollar NOL.

10 Q And by NOL, you mean a tax shelter of five billion dollars
11 for future profits, correct?

12 A Net operating loss carried forward, sure.

13 Q Yeah. In your deposition, you called that a tax shelter
14 for five billion dollars, right?

15 A I don't know if I used that exact words, but if you -- if
16 that's what's in the deposition, I don't remember every word I
17 said in my deposition.

18 Q Okay. Well, we can check if you want. I just want to --

19 A No, no, that's a fair statement.

20 Q Okay. BOLI COLI the assets that are going to either
21 JPMorgan or to WMI are approximately five billion dollars,
22 correct?

23 A That's correct.

24 Q The analysis that was performed to determine what was
25 owned by JPMorgan and what was owned by WMI was done on

1 reliance of counsel, correct?

2 MR. MASTANDO: Object to the form.

3 THE WITNESS: You're talking about with respect to
4 BOLI COLI?

5 Q With respect to BOLI COLI?

6 A Well, no, I mean, I think the initial work that was done
7 on the asset identification with respect to BOLI COLI when we
8 got there, we didn't have a lot of books and records, but we
9 worked with folks to gain access to books and records. We
10 worked with the team who oversaw the BOLI COLI program within
11 the treasury department of Washington Mutual. We received
12 documentation for them that would support the books and
13 records. There was approximately 90 million of value on the
14 books and records of WMI, and about five billion of value on
15 the books of WMB.

16 We reviewed those. We also gathered all the documents,
17 submitted them to counsel. They did an analysis as well, but
18 we can certainly look at the information, the support for what
19 was on the books and records.

20 Q I think you just said this in your answer, you relied in
21 part on counsel's advice to determine the ownership of assets
22 of BOLI COLI and by BOLI COLI, the Rabbi Trust, you understand
23 that's all part of the same type of analysis here? I mean,
24 it's sort of all grouped together.

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

1 THE WITNESS: Well, BOLI COLI and --

2 THE COURT: Sustained. Rephrase.

3 BY MR. NELSON:

4 Q By BOLI COLI -- let me rephrase again. Are Rabbi Trusts
5 part of BOLI COLI assets?

6 A Some of the BOLI COLI are held within Rabbi Trusts. There
7 are additional other securities that are held within Rabbi
8 Trusts.

9 Q Okay. So they're sort of -- they're intermingled, the
10 Rabbi Trust and the BOLI COLI, correct?

11 A A little bit, yes.

12 Q Okay. With respect to the assets of determining ownership
13 valuation and value of BOLI COLI and the Rabbi Trusts, you
14 relied, in part, on counsel, correct?

15 A Well, for the purposes of value, you'd be looking at the
16 cash surrender value of BOLI COLI policies, and for that, we
17 wouldn't be looking at -- to counsel for an answer. We looked
18 at a number of factors to determine ownership, and certainly
19 in, you know, looking at the books and records as well as
20 getting an understanding from the legacy personnel who managed
21 the BOLI COLI, but certainly we submitted documentation to
22 counsel to continue their review.

23 Q With respect to the determination of ownership, it was
24 always a counsel issue, wasn't it?

25 MR. MASTANDO: Objection, Your Honor, asked and

1 answered.

2 THE COURT: Sustained.

3 MR. NELSON: Okay. I'm just -- Your Honor, I'm trying
4 to be clear, because I want to make sure. There's record
5 evidence that BOLI COLI --

6 THE COURT: Well, he's answered, so --

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

8 THE COURT: He's answered your question, I think
9 you're stuck with it the way it is.

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

11 BY MR. NELSON:

12 Q Well then --

13 MR. NELSON: Can we have the elmo, please?

14 Q Let's go to page 76 of your deposition.

15 "Question, in your early investigation, did you
16 conclude that other trusts were rightfully WMI's?

17 "Objection, no privilege.

18 "With respect to determination of ownership, it was
19 always a counsel issue. So we were always relying on counsel's
20 advice with respect to that."

21 Is that your testimony?

22 A Yeah. I think the final determination, it's certainly,
23 you know, it's a legal title analysis to determine
24 definitively, but there are a number of factors that we used
25 initially to understand what the assets were that we were

1 looking at.

2 Q With respect to how the disputed assets should be
3 resolved, that was a counsel issue?

4 A We actually --

5 MR. MASTANDO: Same objection, Your Honor. Asked and
6 answered again.

7 THE COURT: Sustained.

8 MR. NELSON: Okay. I'll move on.

9 BY MR. NELSON:

10 Q You've stated here, and I'm only looking for a yes or no
11 answer here, I think as Mr. Kosturos also stated, that you
12 believe the settlement is fair and reasonable, correct?

13 A Correct.

14 Q And again, yes or no, you believe that the settlement
15 maximizes the value of the estate, correct?

16 A Correct.

17 Q In order to make these determinations, you need to decide
18 the likelihood of success on all of the disputed assets,
19 correct?

20 MR. MASTANDO: Objection.

21 THE COURT: What is the objection?

22 MR. MASTANDO: Object to the form.

23 THE COURT: Overruled.

24 THE WITNESS: I think that it's difficult to ascertain
25 a specific value for all of the elements of this case. And so

1 you're looking at whether or not a settlement is fair and
2 reasonable in the context of evaluating all of the outcomes on
3 all of the disputed items. I don't think you can look at it as
4 I'm just going to define this one number.

5 BY MR. NELSON:

6 Q You can't tell us the likelihood of success with respect
7 to any of the disputed claims, can you?

8 A Well, there are a number of them that we can discuss for
9 sure. The best example of this issue would be with respect to
10 the VISA shares, which we could talk about at length. But
11 you'd be hard pressed to determine what the exact value of the
12 VISA shares is, you have a dispute with respect to ownership of
13 the VISA shares, you don't know what the value of the VISA
14 shares is, you have shares that are currently restricted that
15 will be converted into VISA Class A shares when that
16 restriction is lifted.

17 You have a settlement of an interchange litigation for
18 which we don't know what that ultimate resolution is going to
19 be. So to put a number on any one of these and say, that's my
20 number, would be very difficult. I think you have to look at
21 the whole range of possibilities with any one of these assets.

22 Q Fair enough. In other words, I think what you're saying,
23 if I can summarize, is that there might be a value on the VISA
24 claims, that you've attempted to do, correct?

25 A We looked -- again, similar to all of the assets, we

1 looked at a range of possible outcomes, as to what those assets
2 were worth.

3 Q Well, whether the settlement, for example, is substantial
4 depends upon the likelihood of success of prevailing on the
5 disputed claims. Whether, for example, whatever the value of
6 the VISA claims, it belongs to JPMorgan or WMI, correct?

7 MR. MASTANDO: Objection to the form, and I think
8 counsel's testifying, Your Honor.

9 THE COURT: Well, overrule.

10 THE WITNESS: Well, I think you have to look at the
11 possible outcomes, but I don't think that everybody would agree
12 as to what the interpretation or the likelihood of success is
13 on any of those. So I think you look at the possible range of
14 outcomes, and in the context of looking at the possible range
15 of outcomes, you can determine whether or not the settlement is
16 within the zone of reasonableness.

17 BY MR. NELSON:

18 Q In order to determine whether the settlement is within the
19 zone of reasonableness, you have to know what the likelihood of
20 success of prevailing with respect to ownership disputes about
21 the assets, correct?

22 MR. MASTANDO: Objection, Your Honor. Calls for a
23 legal conclusion as well.

24 THE COURT: Overrule.

25 THE WITNESS: I don't think you have to know a

1 specific likelihood, I think you have to understand the
2 strengths and weaknesses of arguments, but I don't think you
3 have to know -- there's not going to be a point value. There's
4 not going to be one answer for how you would ascribe value to
5 anything included within the settlement agreement.

6 BY MR. NELSON:

7 Q You did not conduct any analysis into the fairness and
8 reasonableness of the settlement without input from counsel;
9 isn't that true?

10 MR. MASTANDO: Object to the form.

11 THE COURT: Well, it's been asked and answered. He's
12 answered that.

13 MR. NELSON: If the answer is yes I'm okay with that,
14 but I just want the record to be clear on this.

15 THE COURT: Well, you've asked this three times now.
16 Sustained.

17 MR. NELSON: Okay. May I approach, Your Honor?

18 THE COURT: You may.

19 (Bench conference held.)

20 BY MR. NELSON:

21 Q Okay. In your deposition, this is page 142 of your
22 deposition, you stated that the factual basis for your
23 determination that the settlement is fair and reasonable is
24 privileged, correct?

25 A That's what it says here on the page, yeah, but I think as

1 we've discussed, I mean, we obviously would've solicited advice
2 of counsel on any number of issues, but I think you can
3 determine, one can determine whether the settlement is fair and
4 reasonable without the advice of counsel.

5 Q When you were asked at your deposition whether you did any
6 analysis into the fairness and reasonableness of the settlement
7 without input from counsel, your answer was no, you did not,
8 correct?

9 A Right. You were asking me if I did anything without
10 counsel and I didn't, but I don't think you need that for the
11 determination of the fairness and reasonableness of the
12 settlement.

13 Q Okay. Thank you. You stated that you don't need it for
14 the fairness and reasonableness of the settlement?

15 A That's correct.

16 Q But just to be clear, the measurement that you did, any
17 measurement that you did was privileged and taken under
18 counsel, correct?

19 MR. MASTANDO: Objection to the form, and completely
20 mischaracterizes the testimony, Your Honor.

21 THE COURT: Sustained. Put some background.

22 Q In your deposition, isn't it true that when asked, I'm
23 looking now at page 129, line 12,

24 "What was the metric by which you measured the
25 reasonableness of the settlement?"

1 Answer, "We discussed with counsel how you would
2 evaluate the merits of the settlement.

3 "But what did you look into into evaluating the
4 reasonableness of the settlement?"

5 Answer, "We discussed with counsel the criteria for
6 what would make the settlement fair and reasonable."

7 Do you stand by that answer?

8 MR. MASTANDO: Your Honor, I object also, because for
9 completeness the deposition from page 128 through 131 must be
10 read where Mr. Goulding clearly testifies as to his views --

11 THE COURT: Well --

12 MR. MASTANDO: -- on fairness and reasonableness.

13 THE COURT: -- you can raise that on redirect.

14 THE WITNESS: I'm sorry, could you leave that paper up
15 there?

16 Again, I think it's the same answer as what I've been
17 saying, which is for the purposes of determination for the
18 debtors, as to whether or not the settlement was fair and
19 reasonable, we would've discussed it with counsel. I don't
20 think that that's necessary for the -- making the determination
21 as to whether or not the settlement's fair and reasonable.

22 BY MR. NELSON:

23 Q Okay. I'll move on.

24 You can't tell us, though, for example, the value of the
25 intellectual property that the estate is giving to JPMorgan,

1 correct?

2 A I can't. I'm not an intellectual property evaluation
3 expert. I wouldn't want to try to opine on the value of
4 intellectual property. I'm sure you could get any number of
5 people to give you a value for IP that would have a relatively
6 wide range, given the set of circumstances.

7 Q Well, you are here testifying with respect to some of the
8 assets transferred, correct?

9 A Correct.

10 Q And with respect to intellectual property, in particular,
11 the estate had a report on what the value of intellectual
12 property is, correct?

13 A We engaged an intellectual property evaluation firm to do
14 some work for the estate.

15 Q And you are asserting privilege over the result of that
16 valuation report, correct?

17 A Correct.

18 Q The result of that report could be a dollar, correct?

19 MR. MASTANDO: Objection, Your Honor, it calls for
20 speculation and it's attempting to get into a privileged area,
21 I believe.

22 MR. NELSON: Well, let me rephrase then.

23 Q Without knowing the results, that result could be any
24 range from a dollar up to a hundred billion dollars, correct?

25 MR. MASTANDO: Your Honor, it's a hypothetical, it

1 calls for speculation, and frankly I don't really understand
2 the question.

3 THE COURT: Overruled.

4 THE WITNESS: Well, I mean, to say that it's worth a
5 hundred billion is probably a little aggressive. I don't know
6 that you can -- I mean, I'd have to sort of speculate as to
7 what sort of range seemed plausible within the context of the
8 report.

9 BY MR. NELSON:

10 Q Well, how are you able to say even that a hundred billion
11 is overly aggressive if we have no way to judge it, if the
12 report that you're relying on, and that you've done is
13 privileged?

14 A Again, I don't think we're relying entirely on the report
15 that was done and prepared in the context of a litigation
16 position. We're looking at what's been asserted with respect
17 to ownership by JPMorgan, what defenses do they have with
18 respect to whether or not WMB owned the intellectual property.
19 We're looking at what are the merits of the arguments that WMI
20 has with respect to ownership of intellectual property. We're
21 looking at what the assets are that we're having, how could you
22 monetize those assets, would you need to win on litigation for
23 an intellectual property infringement. If you won that the IP
24 was yours but there was no infringement, what would you do with
25 those assets, would you sell those assets, who would you sell

1 them to. There's a range, like all of these outcomes, you're
2 trying to pin down a point estimate. There's a range of
3 possible outcomes here for any number of these assets. You
4 can't look at it that way. You have to look at what's the --
5 what could happen. Could we win on IP that is ours. Could
6 JPMorgan win that it's theirs. All of those types of issues.

7 Q And on those types of issues, you relied on counsel to
8 determine a range, correct?

9 MR. MASTANDO: Objection, and mischaracterizes the
10 testimony.

11 THE COURT: Sustained.

12 Q You stated in your previous answer that it's a range of
13 potential values based upon who could prevail about ownership,
14 correct?

15 A That's one of the factors, correct.

16 Q In the determination of who could prevail about ownership,
17 you relied on counsel, correct?

18 MR. MASTANDO: Objection. I don't think there was any
19 foundation for that.

20 THE COURT: Overrule.

21 THE WITNESS: We discussed with counsel that issue,
22 but you could look at what assertions were made by the various
23 parties within their pleadings to understand the legal
24 arguments that are being made with respect to ownership.

25 BY MR. NELSON:

1 Q Well, with respect to whether you believe that the
2 assertion of an opposing party is likely to be correct, you
3 relied on counsel, correct?

4 A It's a legal issue, we would've discussed it with counsel,
5 but I think there's nothing privileged about the arguments that
6 are put into the pleadings.

7 Q Fair enough. So you're just relying on the assertions
8 that you made versus the assertions that JPMorgan made; is that
9 right?

10 A That's not what I said. I said, we would've discussed it
11 with counsel, but anyone looking at evaluating the fairness and
12 reasonableness of the settlement, can see the arguments that
13 would've been made by both sets of counsel with respect to
14 ownership.

15 Q With respect to the value of intellectual property, in
16 particular, without getting into who owns it, you are unable to
17 tell us right now any potential range of that value, correct?

18 A That's correct. I frankly even -- well, yes, that's
19 correct.

20 Q And that value, because you can't tell us a range, could
21 be as high as billions and billions of dollars; isn't that
22 right?

23 MR. MASTANDO: Objection to the form, Your Honor, it
24 calls for speculation. There's no foundation.

25 THE COURT: Overrule.

1 THE WITNESS: It's highly speculative. I wouldn't
2 want to try to value what the IP is.

3 MR. NELSON: Your Honor, may we approach?

4 THE COURT: Yes.

5 (Bench conference held.)

6 BY MR. NELSON:

7 Q Just to be clear, for the record, you cannot tell us with
8 respect to the intellectual property whether, in terms of how
9 much it's worth, the value of it is in the billions and
10 billions of dollars, correct? Yes or no.

11 MR. MASTANDO: Object to the form.

12 THE WITNESS: I wouldn't be able to testify on the
13 value of the IP.

14 Q With respect to the pension plan, you state that it's been
15 over funded by about 350 million dollars; is that right?

16 A I don't think that's what we referenced.

17 Q Well, how did you determine the value of the pension plan
18 asset that was going to transferred?

19 A If you look at the monthly operating report, there's a
20 note that's been in there for a fairly long period of time that
21 describes how that pension plan is valued and kept on
22 Washington Mutual, Inc.'s books. The pension plan is valued
23 based on the December 2nd, 2008 assets and the settlement
24 liability estimate as prepared by Towers Perrin. The net of
25 those two numbers is approximately 39 million.

1 Q I see, okay. So you're relying on it in terms of the net
2 value as of the underlying assets of the pension plan as of
3 December 2nd, 2008, correct?

4 A The plan assets as of 2008, yes --

5 Q And even --

6 A -- December 2nd, 2008.

7 Q I'm sorry, I didn't mean to interrupt.

8 A That's okay.

9 Q At that point, you would agree that December 2nd, 2008 was
10 almost the bottom of the market, correct?

11 A Actually, no.

12 Q The market bottom, what, March 2009?

13 A I think October is significantly worse. The market had
14 responded by December. A lot of what's in the pension plan
15 assets are fixed income securities, so you have a very
16 different view of what the market value looks like. But you
17 also have significant other changes when you're talking about
18 the value of the pension plan as you move forward from 2008.
19 You have an interest rate environment that's declined
20 substantially. If you're looking at annuitizing the plan
21 liabilities, that becomes considerably more expensive, so we
22 don't view that, when you're looking at it on a settlement
23 liability estimate versus the plan assets that it's probably
24 within a fair range of reasonableness to that 39 million,
25 otherwise, we would've felt compelled to change that answer.

1 Q Have you or your counsel done any other analysis of what
2 the pension plan is worth as of today?

3 A There are requirements to be filed in annual funding
4 notices, as well as a Form 5500 that sets forth what the funded
5 status of the plan would look like.

6 Q Have you or your counsel done any more analysis since
7 December 2nd, 2008?

8 A We rely on others to perform certain liability
9 calculations for the purposes of the pension plan. We don't do
10 them ourselves. We can look at the asset values at any point
11 in time.

12 In connection with an annual funding notice, we would be
13 asking those that value the assets for us and those that value
14 the liabilities for us, to prepare that information in
15 connection with those notices.

16 Q Have you done that since December 2nd, 2008?

17 A We do it regularly in connection with the pension plan.

18 Q And what is the last estimated value?

19 A Well, it depends substantially on -- under what context
20 you wish to value it. So the difficulty with the pension plan
21 is that on a go forward basis, the liabilities and what the
22 discount rate is that's used to value those liabilities, is
23 substantially different than what you could settle those
24 liabilities for today.

25 So there's a lot of -- similar to a lot of the other

1 assets, there's a lot of different possible outcomes here with
2 respect to what happens with the pension plan.

3 Q In other words, if the asset is disposed now, it's worth
4 one thing, but if it's kept on and transferred to JPMorgan,
5 then it might be worth more, correct?

6 A The way that the accounting rules work, yes. If you
7 didn't -- if you have to terminate the plan today or if you
8 attempt to basically immunize the plan from further market
9 activity, those two actions taking place today cause an
10 increase in the liabilities given the interest rate
11 environment, as compared to the discount rate that would be
12 used to carry those liabilities forward.

13 Q You stated that as of December 2nd, 2008 there was a 39
14 million dollar over-funding, correct?

15 A That's right.

16 Q Do you have an idea about what the over-funding will be as
17 of, say, December 31st, 2010?

18 A Again, I think you have to look at it in which of those
19 contexts you're looking at it.

20 Q I want the same context as what you used for December 2nd,
21 2008 report.

22 A Yes. So it would be relatively similar. I wouldn't be
23 able to tell you exactly within what range, but again, even
24 though the asset values may have increased, performing a
25 settlement liability estimate with interest rates that have

1 declined and purchasing annuities to satisfy those liabilities,
2 that liability will have increased substantially. So the net
3 number is probably relatively close.

4 Q Has your counsel ever performed an analysis that suggests
5 differently? Just don't answer or get into what it is, but do
6 you know whether your counsel has done an analysis that
7 suggests differently?

8 MR. MASTANDO: Well, object to the form, Your Honor,
9 and it sounds like the question calls for privileged
10 information.

11 THE COURT: Well, yes or no, can you answer?

12 THE WITNESS: Counsel doesn't prepare an analysis of
13 the value of the pension plan.

14 BY MR. NELSON:

15 Q Counsel has never come to a conclusion with respect to
16 what the pension plan, the over-funding of the pension plan is?

17 A No. The value of the pension plan assets and the value of
18 the liabilities are done by actuaries retained by the plan.

19 And so, no, I mean, we don't look at it that way. The plan
20 investment committee and the plan administration committee look
21 at all of the factors of the plan. We don't ask for valuations
22 from counsel.

23 Q You did not place a value on the liabilities that you were
24 transferring from the estate; isn't that true?

25 A I don't know what you mean.

1 Q All right. Let's go to your deposition.

2 A Are you talking with respect to the pension plan
3 liabilities?

4 Q No, I'm sorry. With respect to any of the liabilities
5 that you are transferring to JPMorgan, you did not place a
6 value on those liabilities, correct?

7 A Again, I think you'd have to look at it in the context of
8 liabilities being similar to assets, so that any of the items
9 included within the settlement agreement have a number of
10 disputes, so there's a range of possible outcomes.

11 So for example, deferred compensation programs that
12 JPMorgan is taking pursuant to the settlement agreement, there
13 are questions about whether or not they're the true --
14 whether that liability is their liability or not their
15 liability. So you have to look at the range of outcomes as to
16 whether or not that represents a -- you know, what that number
17 looks like.

18 Q And in the range of outcomes, that analysis is privileged
19 and you're not relying on it, correct?

20 A Well, again, I think you can see from most of what the end
21 outcome is, there's a lot of paper filed in this case, you can
22 see what positions people assert, and you can look at what's
23 there.

24 Q Okay. Let's go to your deposition. The bottom of page
25 124. Question, on line 25:

1 "For purposes of settlement, did you consider this a
2 275 million dollar liability?"

3 Answer, "As I said, we didn't have a way to sort of
4 place a value on it, so we looked at a range of possible
5 outcomes. We looked at whatever it might represent, and does
6 it represent significant value, but we didn't have a way of
7 quantifying that issue.

8 "Did you say that you added up the value of all these
9 assets?"

10 Answer, "That -- there is an analysis that was done in
11 connection with counsel, where we looked at different outcomes
12 associated with the settlement agreement."

13 Do you understand --

14 MR. MASTANDO: Objection, Your Honor. The testimony
15 is -- the deposition is not inconsistent with the witness'
16 testimony and --

17 THE COURT: You can save it for argument. Is that
18 what you testified to?

19 Q Do you stand by that testimony?

20 A Yes.

21 Q Okay. And the range of ways to assess value is all
22 privileged, correct?

23 MR. MASTANDO: Objection, and asked and answered
24 already.

25 Q I'll go to your deposition.

1 THE COURT: All right. No, overrule. You can answer.

2 Q We'll continue.

3 "What does that mean, different outcomes?" Object --

4 THE COURT: Is that question or answer, you're not --

5 Q Question, "What does that mean, different outcomes?" Same
6 question on the top of page 128, "What do you mean by different
7 outcomes?"

8 Answer, "A range of ways to assess values."

9 Question, "Such as?"

10 Answer, "I think that would be privileged for me to
11 disclose what the nature is of that analysis."

12 Question, "This is an analysis that you performed?"

13 Answer, line 15, "In connection with counsel."

14 Is that true?

15 A Yeah. I think as I said before, we would've involved
16 counsel in evaluating for ourselves the reasonableness of the
17 settlement, but I don't think that somebody needs the input of
18 counsel to determine whether or not the settlement is within
19 the zone of reasonableness.

20 Q All of the analysis that you and WMI performed was done in
21 connection with counsel, correct?

22 MR. MASTANDO: Objection, asked and answered, and
23 mischaracterizes the testimony.

24 THE COURT: Overrule. You can answer.

25 THE WITNESS: Again, it's the same issue. We would've

1 -- with all of these being legal disputes with respect to
2 ownership of assets or different outcomes, we would've
3 discussed them with counsel as is prudent, but I don't think
4 that you need to know, I think that there's enough information
5 in the pleadings, that I don't think that you need to know what
6 those conversations were, in order to determine whether or not
7 the settlement's reasonable.

8 BY MR. NELSON:

9 Q Okay. I'm sorry, but let's just go back to your
10 deposition. Now, we're going to the bottom of that same page,
11 line 24,

12 Question, "Did you perform any numerical analysis
13 yourself, did you perform any numerical analysis on this
14 issue?"

15 Answer, "On which issue?"

16 Question, "On the issue of looking at different
17 outcomes, the total value of these assets under different
18 outcomes of the settlement."

19 "Objection."

20 Answer, "I don't think there is anything that I could
21 answer with respect to the form of an analysis that was done in
22 connection with analyzing with counsel."

23 Do you stand by that testimony?

24 A Right. I don't think I can share with you the privileged
25 information that we discussed with counsel. I don't think you

1 need that information to determine whether the settlement is
2 reasonable or not.

3 Q Okay. With respect to the VISA shares, JPMorgan is buying
4 those for 25 million dollars; is that right?

5 A It's a -- I wouldn't characterize it that way. The VISA
6 line item pursuant to the settlement agreement contemplates
7 that JPMorgan pays 25 million dollars, assumes liability under
8 the loss sharing agreement, and assumes liability with respect
9 to the plaintiffs in the interchange litigation, proof of claim
10 as filed against the estate.

11 You also can't look at any one line item within the
12 context of the settlement agreement, and look at whether that
13 treatment is fair and reasonable without reviewing the global
14 settlement agreement as a whole.

15 Q Well, you just said a lot there, so let me try to unpack
16 it. The first -- actually, the last thing you said is that you
17 can't just look at that 25 million dollar line item standing
18 alone, correct?

19 A That's right.

20 Q You have to look at it in terms of the total value of all
21 the assets being transferred, correct?

22 A You have to look at it in the context of the overall
23 agreement, that's correct.

24 Q Okay. So even, for example, the VISA shares are worth
25 more than 25 million dollars. There might be other assets that

1 the estate is getting to offset that. Is that your testimony?

2 A It's possible, if that were the determination of value,
3 sure.

4 Q You have made a determination of the value taking to
5 account the assets and liabilities of the VISA shares, correct?

6 A We didn't make a specific valuation. We used a range
7 similar to what I discussed before, where we looked at what the
8 value would be of the VISA shares, assuming that there was no
9 -- that the value of the interchange settlement was a zero, and
10 that would give you a maximum possible value.

11 We looked at the -- what the value of the interchange
12 litigation settlement would be for the shares to be determined
13 to be worthless, and we knew that beyond that, there was
14 liability exposure. For the purposes of settlement, we looked
15 at that range, and we thought about that range in the context
16 of settlement negotiations.

17 Q So you placed a range as between the likely outcome of the
18 -- excuse me, let me rephrase. You placed your range based on
19 the potential outcomes of the VISA litigation; is that right?

20 A The interchange litigation, that's right.

21 Q And you say that there's substantial risk -- this is your
22 analysis, by the way, not counsel's analysis, correct?

23 A That's correct.

24 Q Okay. You say that there is substantial risk with the
25 VISA shares because this possibility of ongoing litigation,

1 correct?

2 A There's a contingent liability associated with the ongoing
3 litigation, that's correct.

4 Q How much on the open market are the VISA shares worth
5 today?

6 A My understanding is that the Class B shares are restricted
7 shares, so they don't trade. So I wouldn't know what they are
8 worth.

9 Q We do know what the unrestricted VISA shares trade at
10 today, correct?

11 A We do. But there's a conversion ration and there's a
12 restriction with respect to the Class B shares.

13 Q Okay. So let's just take it one at a time. What do the
14 common VISA shares trade at approximately today?

15 A I believe it's roughly seventy-five dollars a share.

16 Q So JP -- excuse me, JPMorgan's going to get them. The
17 estate has about 3.15 million shares, something like that?

18 A 3.147 of Class B shares.

19 Q Okay. And if you do the math, that comes out to
20 approximately 250 some odd million dollars, correct?

21 MR. SACKS: Objection, Your Honor, misleading. Those
22 aren't the shares they own.

23 MR. MASTANDO: Yeah, same --

24 THE COURT: Sustained.

25 MR. MASTANDO: -- objection, Your Honor.

1 THE COURT: Sustained.

2 THE WITNESS: The shares themselves, regardless of who
3 they're owned by, convert from Class B shares into Class A
4 shares, so you can't multiply 3.147 times 75 and get the value
5 of the -- the maximum value of those shares.

6 BY MR. NELSON:

7 Q Well, we're getting there. I'm asking you just a simple
8 math question. If -- in terms if a -- on a hypothetical basis
9 those were common shares, 3.15 million times 75 is
10 approximately 250 million dollars, right?

11 MR. MASTANDO: Same objection, Your Honor.

12 MR. SACKS: Objection to the form, Your Honor.

13 THE COURT: Well, overrule. I'll allow him to --

14 THE WITNESS: You're asking me to testify on math?

15 BY MR. NELSON:

16 Q I want to -- do you want to do the math? Do you want to
17 do the math?

18 A I'm asking you, is that what you're asking me --

19 Q I want to make sure --

20 A -- to testify on math? I'm just trying to clarify the
21 question.

22 Q I want to make sure that we're on the same page so we can
23 get to the value of what these VISA shares are worth today.
24 You would agree that the first step in determining that value
25 is what the common shares are worth, correct?

1 A I think it's important to know what the share price is, so
2 that you can figure out how to convert the B's into the A's.

3 Q Okay. Well -- so that's what I'm trying to do with you
4 right now. So if -- with the -- in converting the B's into the
5 A's, looking at just the A's, you would agree that it's
6 approximately 250 million dollars if it was common A stock,
7 correct?

8 A Well, the conversion ratio as it's currently set forth,
9 based on what's been funded into the escrow so far, it's not a
10 one-to-one conversion from Class B shares into Class A shares.

11 Q Let me approach it a different way. The conversion ratio
12 that VISA has established is .56; is that correct?

13 A Currently, yes.

14 Q That is the current. And that is set by the amount of
15 money in the escrow account to fund settlements and exposure
16 from these potential liabilities, correct?

17 A Correct.

18 Q You understand that VISA has an obligation to estimate
19 that as practically as possible, correct?

20 A Correct.

21 Q And based upon its sworn independent judgment, its value
22 was to put things in escrow that make the current exchange .56,
23 correct?

24 A Correct.

25 Q If you multiply the .56 by the approximately seventy-five

1 dollars a share, you get what, approximately forty -- low
2 forties, right, forty-two, forty-three dollars a share,
3 correct?

4 A That sounds about right.

5 Q Okay. Then if you multiply that by 3.15 million shares,
6 you're talking about a value, based upon those criteria, that
7 is a little less than 150 million dollars, correct?

8 A That sounds about right.

9 Q Okay. Thank you. So based upon the analysis that VISA
10 did in the conversion ratio that VISA established, according to
11 those, we're talking about a value between 140 and 150 million
12 dollars.

13 MR. MASTANDO: Objection to the form.

14 THE COURT: Sustained.

15 MR. NELSON: Okay. I'll move on.

16 Q You are aware that WMI will emerge as a reorganized
17 company; is that right?

18 A I am aware.

19 Q The board will be composed by a chief executive of the
20 reorganized company and six people associated with the
21 creditors' committee; is that right?

22 A I think that's right. I don't know exactly there.

23 Q Who will be the chief executive of the reorganized
24 company?

25 A I haven't been staying up on that issue, to be honest.

1 Q You do give in your declaration an analysis of what WMI
2 did to value the reorganized company in Wimrick, correct?

3 A We hired someone to do a valuation with respect to the
4 reorganized company.

5 Q You provided them some assumptions and analysis as part of
6 that, correct?

7 A We prepared financial projections in connection with that
8 valuation.

9 Q Well, let's first go to Docket No. 6188.

10 MR. NELSON: Your Honor, would you like me to move to
11 admit this or would it's being on the docket sufficient?

12 THE COURT: I think you need to admit it.

13 MR. NELSON: Okay. Move to admit this.

14 THE COURT: Any objection?

15 MR. MASTANDO: No objection, Your Honor.

16 THE COURT: All right. What's the docket number
17 again?

18 MR. NELSON: 6188.

19 THE COURT: Thank you.

20 (Docket No. 6188 was hereby received.)

21 BY MR. NELSON:

22 Q This is a notice filed on Wednesday, correct, by you,
23 meaning WMI?

24 A I'm not sure if it was filed on Wednesday or not. I'm not
25 familiar with every filing in this case.

1 Q Okay. You understand that this is the appointment of
2 directors of the reorganized debtors, correct?

3 A Yep, that's what it says.

4 Q Exhibit A then lists their biographies; is that right?

5 A It appears to, yes.

6 Q Every single one of these reorganized board of directors
7 is associated with either -- well, let's just go through them.
8 Daniel Krueger is with Owl Creek; is that right?

9 A That's what it says.

10 Q Mark Kronfeld, Owl Creek, correct?

11 A Yep.

12 MR. MASTANDO: Objection. I think we went through
13 this yesterday, Your Honor.

14 THE COURT: Yeah. Do we need to repeat it?

15 Q Okay. Well, you are aware that all seven are actually
16 members of these four hedge funds, correct?

17 A I am.

18 MS. NAGLE: Objection, Your Honor, that's not what
19 the --

20 THE COURT: Yeah, sustained.

21 MR. NELSON: Your Honor, then may I go through it
22 then?

23 THE COURT: No.

24 MR. NELSON: Okay.

25 THE COURT: The document speaks for itself.

1 MR. NELSON: Okay.

2 BY MR. NELSON:

3 Q One of the reasons why you didn't consider -- well, let me
4 back up.

5 The valuation you referred to done by an independent
6 company is the Blackstone valuation, correct?

7 A That's correct.

8 Q They put a range of between 135 and 180 million of what
9 could be the reasonable outcomes of reorganized WMI based on
10 the current assumptions, correct?

11 A Correct.

12 Q The midpoint of that is 157.5, right?

13 A Right.

14 Q And you used that midpoint in determining valuation,
15 right?

16 A We used the midpoint in determining valuation?

17 Q In determining the worth of reorganized WMI for purposes
18 of liquidity and recovery analysis?

19 A Right. The 157 and a half is a revision from the version
20 that was filed, but yes, we were using the midpoint of that
21 range.

22 Q You gave Blackstone the assumption that reorganized WMI
23 would not take on new business, correct?

24 A We gave Blackstone a set of financial projections which
25 projected the only operating asset of reorganized WMI, which is

1 Wimrick, which is a captive reinsurance company in run-off. We
2 gave them a projection that was based solely on the captive
3 reinsurance company Wimrick continuing to run off its business
4 through the run-off period.

5 Q Those assumptions and projections did not consider whether
6 Wimrick would take on new business, correct?

7 A We did not project new business.

8 Q That was, in fact, your primary assumption, correct?

9 A I don't know if it would be the primary assumption, but
10 certainly one of the main assumptions.

11 Q Well, the projections are the primary assumption that was
12 used to value the new business, correct?

13 A I think you'd want to ask Blackstone what they viewed
14 their -- the primary part of their valuation to be. We gave
15 them projections for Wimrick, which was the only component of
16 reorganized WMI for which we had an operating company.

17 Q Well, let's go to your declaration which you've just
18 submitted and sworn instead by. Let's go to paragraph 137,
19 last sentence, "The projections are based on the primary
20 assumption that 100 percent of the operating results of
21 reorganized WMI will stem from the operation of its only
22 remaining active operating subsidiary, Wimrick."

23 A Right. This is in connection -- what you're reading from
24 is in connection with a feasibility requirement, which talks
25 about the financial projections. It does not talk about the

1 valuation or what Blackstone considered in their valuation.

2 Q Okay. But the financial projections for reorganized WMI
3 that you gave to Blackstone are based on the primary assumption
4 that 100 percent of the operating results will stem from the
5 operations of its only remaining active operating subsidiary,
6 correct?

7 A That's correct.

8 Q Okay. Thank you. If that assumption turns out to be
9 faulty, then we cannot rely on the results in the Blackstone
10 report, correct?

11 A I think their projections that we probably won't hit every
12 number exactly, but that won't mean that the valuation is
13 inaccurate.

14 Q Well, okay. One of the reasons why you didn't consider
15 the potential of new business is because you claim not to know
16 who the owners of the reorganized WMI stock would be, correct?

17 A That's right. We don't actually still know exactly who
18 the owners of the reorganized WMI stock will be.

19 Q Well, we have a pretty good idea of who they're going to
20 be, right?

21 A It's still a little bit difficult to determine. It'll
22 depend significantly on the size of the general unsecured
23 claims pool at the effective date, and therefore, whether or
24 not the senior notes will be entitled to receive stock that
25 they've elected, whether or not there will be redistribution of

1 stock to various classes, and whether or not it will all be pro
2 rata across the peers, assuming that we would pay down to that
3 level. So we don't really know until we've set the disputed
4 claims reserve as to where the stock will actually go.

5 Q You do know that of the senior notes, 31 million dollars'
6 worth have opted in, correct?

7 A We do.

8 Q Do you know who among the senior notes have opted in?

9 A I don't off the top of my head, no.

10 Q The remaining value would then go to the peers, correct?

11 A No, the senior notes elect and then the subnotes, and then
12 the peers. There's also a provision in the ballot that allows
13 for redistribution, to the extent that there's a deficiency.
14 So that could be redistributed up to senior notes or
15 subordinated notes.

16 Q And any remaining distribution goes to peers?

17 A That's correct.

18 Q Okay. And we do know that the peers are primarily owned
19 by the four hedge funds we discussed, correct?

20 A I believe based on their holdings that they hold more than
21 a majority.

22 Q Okay.

23 MR. NELSON: Can we approach, Your Honor?

24 (Bench conference held.)

25 THE COURT: All right. We're going to take a five-

1 minute break. You're still under cross, so you should not
2 discuss anything with counsel in the interim, all right?

3 THE WITNESS: Thank you, Your Honor.

4 (Recessed at 10:47 a.m.; reconvened at 10:59 a.m.)

5 THE COURT: Okay.

6 MR. MASTANDO: May we approach very briefly?

7 THE COURT: Yes.

8 (Bench conference held.)

9 THE COURT: All right.

10 BY MR. NELSON:

11 Q If confirmation is approved, which assets will belong to
12 reorganized WMI and which assets will go into the liquidating
13 trust?

14 A Reorg'd WMI is composed of Washington Mutual, Inc., WMI
15 Investment Corp., and Wimrick, and whatever assets aren't
16 distributed, other than those assets would go into the
17 liquidating trust.

18 Q If there are any distributions that the estate itself is
19 getting from the proposed plan and settlement, those will then
20 be transferred into reorganized WMI?

21 A No.

22 Q Where will those go into?

23 A If you're talking about with respect to the peers, the
24 ownership of --

25 Q Correct.

1 A Yeah. Those would flow back into the liquidating trust
2 and be available for distribution further down the chain.

3 Q Okay. So those were -- that's exactly my question. Those
4 are going into the liquidating trust; is that right?

5 A Well, I think the way that it's being clarified is that
6 WMI would waive any distribution with respect to the ownership,
7 and therefore, the distribution -- initial distribution will be
8 made and then, you know, we wouldn't take a distribution on
9 account of the common securities of the peers.

10 Q So, in other words, when the liquidation -- excuse me.
11 When the plan is confirmed, if confirmed, the liquidating trust
12 will start with at least the 29 or 30 million dollars that WMI
13 is getting from the peer settlement?

14 A No.

15 Q It will just be distributed as part of the liquidating
16 trust?

17 A No, I'm sorry. I think maybe we should go through what
18 the peer structure is, in order to make clear what we're
19 talking about.

20 Q Okay.

21 A So the peers show up here on the bottom here, where you
22 see that it's prepetition 789. Of that 789 million, there's
23 about 35 million of that number that represents common
24 securities.

25 Q Okay.

1 A But the structure itself is relatively complex, so maybe
2 we should go through that. So the way that the structure
3 actually works, WMI issued debt to a trust.

4 Q Correct.

5 A As well as putting in 35 million of cash into the same
6 trust.

7 Q Okay.

8 A And then that trust issued peers units.

9 Q Okay.

10 A And those peers units are in the amount of 1.15 billion
11 face amount.

12 Q Correct.

13 A And the trust when it issued debt --

14 Q I'm sorry, when the --

15 A Sorry. When WMI issued debt to the trust, it's in the
16 amount of 1.185 billion.

17 Q Okay.

18 A And they put 35 billion into the trust. Then the trust
19 issued the peers units worth 1.15 billion.

20 Q So there's 35 million dollars left over?

21 A No.

22 Q I'm sorry, go on. I didn't mean to interrupt, go on.

23 A The claim as it relates to, back to WMI from the trust,
24 would be for 1.185 billion.

25 Q Okay.

1 A It's reduced to the 789 pursuant to original issued
2 discount associated with warrants that were attached to the
3 peers units.

4 Q Okay.

5 A So for the purposes of setting a claim amount as between
6 the trust and WMI, we used the full amount, that is the 789.

7 Q Okay.

8 A That's relevant only realistically from the standpoint of
9 paying pro rata to the various classes of creditors, but what
10 will ultimately happen is, if you were to get past the recovery
11 as indicated here and pay all the way down, you would
12 essentially pay 765 of prepetition claim, and you would pay a
13 portion of that 160, I don't know the number off the top of my
14 head, but let's just say it's about 150 million. And then if
15 there were still money left, it would trickle down to the next
16 classes. No money is going into reorg'd WMI on account of
17 those, and no money would stay within the liquidating trust on
18 account of that.

19 Q I understand what you're saying. You're saying that
20 because it's coming a little bit short, there's no money going
21 in the liquidating trust?

22 A No. We're not taking a distribution on account of common
23 securities. The claim as it relates from the trust is for the
24 gross amount, but we wouldn't do anything -- I mean, if we ever
25 got past that, the money would flow back into the trust and

1 continue to pay down the waterfall.

2 Q The next step in the waterfall would be the preferred
3 equity, right?

4 A There's subordinated claims and then preferred equity.

5 Q Subordinated claims being --

6 A 510(b) subordinated claims.

7 Q 510(b) subordinated claims are at the same level of
8 common, right?

9 A Well, it depends on who -- my understanding is, it depends
10 on who it is that brought the claim itself. So if a debt
11 holder brought something that was subordinated under 510(b) I
12 think -- I'm not really sure exactly how those last pieces
13 work, but it would go to whoever would have the actual priority
14 there.

15 Q Okay. Assuming no 510(b) claims or whatever, preferreds
16 are next, right?

17 A Right. Assuming there was a zero for preferreds, then
18 preferred equity would be next.

19 Q Okay. So what assets will the liquidating trust have when
20 it starts?

21 A It will likely have some amount of cash when it starts.
22 We need to make a determination with respect to certain of the
23 BOLI COLI policies as to whether we monetize those on the
24 effective date or hold them for a persistency bonus. There's
25 an assurant trust which is associated with the wrap-up of the

1 Marion Insurance Company, which we'll have to wait for a period
2 of time in order to liquidate, and then there will be an income
3 tax receivable for the remaining amounts that have not yet been
4 either received from the tax escrow or received from taxing
5 authorities.

6 Q Okay.

7 A There are other smaller items, but those are the principal
8 assets.

9 Q Okay. I got you. And then those will be distributed
10 according to the waterfall; is that right?

11 A That's right.

12 Q Okay. The liquidating trust will also have the claims
13 against third parties that aren't released?

14 A I believe that's correct.

15 Q So all of the claims that aren't released will belong to
16 the liquidating trust, correct?

17 A That's my understanding.

18 Q Okay. The liquidating trust will have a trustee, correct?

19 A That's right.

20 Q That's Mr. Kosturos?

21 A It is.

22 Q The liquidating trust will have a trust advisory board; is
23 that right?

24 A That's right.

25 Q In that same notice that we discussed, you list the

1 members of the trust advisory board.

2 A Sorry, I'm not that familiar with this notice. I'm sure I
3 can find it.

4 Q It's the second page.

5 A Okay.

6 Q Okay. And if we go to the actual exhibits, one of them is
7 Mr. Thomas Korsman (ph) if I'm pronouncing that right; is that
8 right?

9 A Right.

10 Q Wells Fargo is the trustee for the peers; is that right?

11 A That's correct.

12 Q Okay. So there's essentially a representative of the
13 peers on the trust advisory board?

14 A That's correct.

15 Q Okay. The three members were jointly selected by the
16 debtors, creditors' committee, and settlement noteholders; is
17 that right?

18 A I believe that's what it -- how it happened, yes.

19 Q What happens to the extent that there are third party
20 claims that make it so that the liquidating trust has gone
21 through the waterfall and preferreds start recovering?

22 A What happens to the liquidating trust?

23 Q Well, will they still -- is the intention still that these
24 three members jointly selected by the debtors, creditors'
25 committee, and settlement noteholders would dictate the

1 recovery of going forward for preferreds and common equity?

2 A You know, I'm not exactly sure what the mechanism is with
3 respect to replacing the liquidating trust advisory board, or
4 how those mechanics would work. So I think it's laid out in
5 the plan or the plan supplement, as to how that would actually
6 work.

7 Q You don't know as we sit here today whether there's any
8 provision for these trustees to be or the trust advisory board
9 to be replaced if the waterfall goes to equity?

10 A I don't know exactly what the provisions are for replacing
11 liquidating trust advisory board.

12 Q Okay. Did the board approve this proposed settlement?

13 A So you're changing topics?

14 Q We're changing topics.

15 A Did the board approve the global settlement agreement?

16 Q Yes.

17 A Yes.

18 Q Did they rely on advice of counsel when they did so?

19 A I'm sure counsel was on and discussed some of the merits
20 of that.

21 Q What did WMI tell the board in order to approve the plan?

22 A The conversation would've been in connection with counsel,
23 so I would think that would be a privileged conversation.

24 Q So you're unable to tell me what conversation occurred
25 with the board that justified there being a fair and reasonable

1 settlement here. Is that your testimony?

2 A Well, I guess I shouldn't have been speculating. I wasn't
3 on the call in which the board actually approved the plan, so I
4 don't know. I assume counsel was represented, but I don't know
5 what the conversation was.

6 Q With respect to the assets that you're testifying about
7 and all the other assets, what did you or WMI discuss about the
8 worth of the assets that were being settled?

9 MR. MASTANDO: Objection to the form, where he's
10 talking about when.

11 THE COURT: Yes, and with whom.

12 MR. NELSON: Excuse me?

13 THE COURT: And with whom.

14 MR. NELSON: Yeah. Well, I will rephrase.

15 BY MR. NELSON:

16 Q When you discussed with -- excuse me. When the board
17 discussed whether to approve the settlement, what did WMI
18 discuss with the board regarding the worth of the assets that
19 were planned to settled?

20 MR. MASTANDO: Objection. I think the witness just
21 answered he wasn't present, Your Honor.

22 THE COURT: Sustained.

23 UNIDENTIFIED SPEAKER: Lack of foundation.

24 Q Okay. You oversaw the preparation and review of the
25 recovery analysis I think you stated?

1 A I refer to this as the liquidation analysis, but this
2 chart that you're referring to, yes.

3 Q Okay. You had an obligation to get things as nearly as
4 correct as possible, I assume, correct?

5 A That's correct.

6 Q There was an earlier recovery analysis as well, correct?

7 A And there's a different document that I referred to as the
8 recovery analysis. This document is the liquidation analysis.

9 Q All right. In your binder, turn to Exhibit 39, please.
10 This is the recovery analysis done on October 5th, 2010; is
11 that right?

12 A That's right.

13 Q Did you participate in this?

14 A Sure.

15 Q This was the day before the disclosure statement was
16 submitted to this Court, correct?

17 A That's right.

18 Q Let's turn to page four of this document. Cash and cash
19 equivalents is at the top; is that right?

20 A You're on page five? I think you --

21 Q I believe it's page marked as 004.

22 A I'm sorry. I guess I'm looking at a different document
23 than you are. This is 39 in the binder?

24 Q Exhibit 39 and you see there's a Bates number at the
25 bottom, sir, and it says 00004.

1 A I'm sorry, there are page numbers as well on the --

2 Q Okay. I apologize.

3 A -- pages that follow.

4 Q Yeah. Are you with me?

5 A I am.

6 Q Now, it says cash and cash equivalents of 4.58 billion
7 dollars; is that right?

8 A That's right.

9 Q Now, going back to the liquidation analysis and the
10 recovery analysis, there's a category for cash; is that right?

11 A That's right.

12 Q The category of cash, if you go to the note, states that
13 cash is comprised of cash including WMI's share of tax refunds,
14 restricted cash, WMI Investment Corp and its subs, plus
15 payments from JPMC for VISA and intercompany loans, proceeds
16 related to the goodwill litigation, BOLI COLI, and Rabbi Trust
17 assets; is that right?

18 A That's right.

19 Q Okay. This cash and cash equivalents is then part of the
20 cash that's used to calculate the cash number; is that right?

21 A It is part of that number, yeah.

22 Q Okay. And on page four, you conclude that the net
23 estimate of recovery is 4.34; is that right?

24 A Right.

25 Q Okay. And it's slightly -- it's 12 million dollars or so

1 off, but it's essentially the same as what we're talking about
2 here. And you conclude at the bottom that there's -- the gap
3 is 228 --

4 UNIDENTIFIED SPEAKER: Say it again, please.

5 Q You conclude at the bottom here, that the residual value
6 is negative 228 million, so we're 228 in the hole; is that
7 right?

8 A Right.

9 Q So -- and you understand then if we adjust back for the
10 WMI, reorganized WMI on this, it's listed at 145 million, we
11 increase it and so you're another 12 and a half million dollars
12 ahead --

13 A Uh-huh.

14 Q -- correct?

15 A Correct.

16 Q Okay. The other categories of assets then are -- that are
17 part of your cash contribution on the liquidity and recovery
18 analysis here are then broken down here; is that right?

19 A Right.

20 Q Okay. And so and that's how we get the total; is that
21 right?

22 A Right.

23 Q This category, all other assets, for 62 million dollars,
24 is that included in the cash total?

25 A Certain components of all other assets would be included,

1 I believe.

2 Q Okay. What components?

3 A Principally there's cash at subsidiaries that -- so I
4 guess to give you some context to get from the cash number
5 that's in the liquidation analysis to the cash number that's
6 shown here, what we did for the purposes of the Chapter 11 plan
7 is assuming what we would have available in cash at the
8 effective date.

9 So, for example, certain assets we anticipated monetizing
10 like BOLI COLI policies, in anticipation of paying those out as
11 of the effective date. So there's actually a separate schedule
12 that breaks down a build-up to get that cash number. There's
13 -- in the all other assets, there's approximately 40 million of
14 cash at subsidiaries that would be dividended up prior to
15 getting to the effective date and making an initial
16 distribution, so that would also be included in the cash
17 number.

18 Q The cash and cash equivalents at the top comes from where,
19 the monthly operating report?

20 A Excluding the post petition refund component, yes.

21 Q Okay. And if you go to page six, I believe, of this
22 document, the top line if you can see, states that -- just try
23 to zoom in.

24 A Sure.

25 Q Whoops, that the cash and cash equivalents is 4.3 for WMI,

1 275 for Wick, with a combined 4.81, and that's where the number
2 on page four came from, correct?

3 A Correct, that 4581, yep.

4 Q Okay. Now, this is dated balance sheet as of June 30th,
5 2010.

6 A Uh-huh.

7 Q Right?

8 A That's right.

9 Q If you go to the monthly operating report, which is
10 Exhibit 40 in your binder.

11 THE COURT: For which month?

12 MR. NELSON: Exhibit 40. It's -- I believe it's in
13 the second binder, Your Honor.

14 THE COURT: Yeah, but for which month is it?

15 MR. NELSON: It's the June 30th monthly operating
16 report.

17 THE COURT: Thank you.

18 BY MR. NELSON:

19 Q And if you go to I believe it's page three of that
20 document. The cash for Wick is the same, but the cash for WMI
21 is about 250 million dollars more; is that right?

22 A Right. The cash that's listed in this schedule, it says,
23 cash excluding post petition refunds. And the cash on the
24 balance sheet would include post petition refunds.

25 Q The --

1 A On the monthly operating report, the number includes post
2 petition refunds.

3 Q Where on the balance sheet here, it says tax refunds, and
4 it's 23 million in post retention refunds; is that right?

5 A That's correct.

6 Q Okay. And --

7 A Yeah, I think the name here where it says post petition
8 refunds includes the refunds that were received shortly before
9 the petition was filed.

10 Q But on your draft recovery analysis, page four, there's a
11 different category for post petition refunds, right?

12 A Right. That's our share of the post petition tax refunds.

13 Q Okay. And --

14 A So that number represents --

15 Q I'm sorry. I thought you told me --

16 MR. MASTANDO: Will you let the witness --

17 MR. NELSON: I'm sorry, go ahead.

18 MR. MASTANDO: -- finish, please, counsel.

19 BY MR. NELSON:

20 Q I'm just trying to figure this out. I thought you told me
21 that on page six, that this is the balance sheet, the 4308 is
22 -- also includes -- excluding the post petition tax refunds,
23 right?

24 A That's right.

25 Q Okay. And so we have to then subtract what, about that 23

1 million dollars to get to --

2 A Actually if you go back to page six.

3 Q Sure.

4 A You can see that the post petition tax refund number there
5 is there for 250 million. And what you see on the other page
6 is the 20 percent of that number, that's WMI's share for 50
7 million.

8 Q Okay. Where are you looking?

9 A So right underneath the 4306, cash and cash equivalents,
10 exceeding post petition refunds.

11 Q Uh-huh.

12 A And then you see it says post petition tax refunds, 250
13 million.

14 Q I see. And so based upon the number here, this includes
15 post petition tax refunds?

16 A That's right.

17 Q Ah, okay. I got you. So, in other words, when the asset
18 is distributed -- when it's distributed only something like
19 what, the -- your share of the first settlement of tax refunds
20 will be included --

21 A Right. The 250 is included in the first set of tax
22 refunds and WMI gets 20 percent of that, which corresponds to
23 the 50 million.

24 Q Okay. Okay. And just to be clear, I'm changing subjects
25 a little bit. With respect to your own analysis and the

1 analysis that you've done on the assets that you've testifying
2 (sic) about, all of those analyses are done with the advice of
3 counsel, correct?

4 MR. MASTANDO: Objection, Your Honor, it
5 mischaracterizes the testimony, and asked and answered.

6 THE COURT: It is sustained.

7 MR. NELSON: Okay. No further questions.

8 CROSS-EXAMINATION

9 BY MR. STOLL: Good morning, Mr. Goulding. My names is Jim
10 Stoll, I represent the Trust Preferred Security Holders. I
11 have a few questions for you to follow up on Mr. Nelson's
12 questions.

13 I was a little, frankly, confused by some of your
14 testimony, so I want to start if I can back at the beginning,
15 which I define I as your declaration, that you've submitted.
16 And your declaration constitutes your direct testimony in this
17 case. Is that fair, sir?

18 A Yes.

19 Q And that direct testimony, as I understand it, you have
20 articulated or described a series of claims that are subject to
21 the global settlement agreement, and have expressed your view
22 as to the fairness and reasonableness of those claims; is that
23 fair?

24 A Yeah. In the context of the overall agreement, I've
25 expressed that view, yes.

1 Q Okay. And just to make sure I can, I guess, pair your
2 declaration up with that of Mr. Kosturos, is you're discussing
3 claims that Mr. Kosturos did not discuss in his declaration; is
4 that right?

5 A I think that's fair.

6 Q And am I right that you discussed all the other claims
7 that are subject to the settlement agreement that Mr. Kosturos
8 did not discuss, other than the tax claim?

9 MR. MASTANDO: Objection.

10 THE COURT: Overruled. Go ahead.

11 THE WITNESS: Sorry, what do you mean by the tax
12 claim?

13 BY MR. STOLL:

14 Q Mr. Carrera (ph) -- I'm sorry --

15 A Oh, sorry, Mr. Carreon will be discussing the various tax
16 issues.

17 Q Yes, I'm sorry. That's what I meant, that the
18 distribution and resolution of the tax issues is Mr. -- was it
19 Mr. Carrera?

20 A Carreon.

21 Q Carreon, that's the subject of his declaration and not
22 yours; is that fair?

23 A It's -- yes.

24 Q Okay. Now despite the testimony that I heard in respect
25 to Mr. Nelson's cross, it is the case that your declaration is

1 submitted on the premise that you are not relying in any way on
2 the advice of counsel; is that fair?

3 MR. MASTANDO: Objection. I think it mischaracterizes
4 the testimony, but --

5 THE COURT: Well, let him answer. Overrule.

6 THE WITNESS: We're submitting the declaration with
7 information that's not privileged.

8 BY MR. STOLL:

9 Q That's right. So it's as if when I look at the
10 declaration, the statements that you make are made without
11 regard to anything that counsel may have told you?

12 A Right. We talk about the assertions in there and the
13 like.

14 Q So it's as if, with respect to looking at your declaration
15 and reading the statements and conclusions, it is as if you
16 never spoke to counsel; is that fair?

17 MR. MASTANDO: Object to the form, Your Honor.

18 THE COURT: Overrule.

19 THE WITNESS: I guess you could characterize it that
20 way.

21 BY MR. STOLL:

22 Q Sure. Now, I thought I heard you say when Mr. Nelson was
23 going over these questions and asking you specifically about
24 certain claims, say that well, I did talk to counsel, but
25 somebody could read this, the pleadings, and come to the

1 conclusion as if they didn't talk to counsel; is that fair?

2 A That's correct.

3 Q Okay. And so -- and that somebody I would take it could
4 mean anybody, anybody could sit down in a room with all the
5 pleadings and read those pleadings and determine that the
6 settlement was fair and reasonable; is that right?

7 MR. MASTANDO: Objection, calls for speculation.

8 THE COURT: Overrule.

9 THE WITNESS: Sure. I think somebody who had, you
10 know, enough knowledge, I don't know that any individual could
11 do it, but certainly a person who was competent in, you know,
12 financial matters and the like probably could come to a
13 conclusion.

14 BY MR. STOLL:

15 Q Sure. You certainly don't need to be a lawyer to do that,
16 right?

17 A No. I think you can look at the arguments that are
18 asserted. I think you can look at what's out there, make a
19 conclusion.

20 Q Right. You're not a lawyer?

21 A I'm not.

22 Q You didn't need to be a lawyer to look at those pleadings
23 and determine that the settlement was fair and reasonable,
24 right?

25 A I think you can look at what's laid out in the pleadings

1 in terms of strengths and weaknesses.

2 Q Sure. So anybody could do that, but that's not what you
3 did, is it, sir?

4 A No, we thought it was prudent to involve counsel in the
5 conversation to make sure that we understood all of the legal
6 issues.

7 Q Sure. I mean, you've paid your counsel over 30 million
8 dollars in this case, I'm hoping that you did that, and you did
9 do that.

10 MR. MASTANDO: Objection, Your Honor.

11 THE COURT: Sustained, argumentative.

12 MR. STOLL: I apologize, Your Honor.

13 BY MR. STOLL:

14 Q But when you actually sat in the room before this trial,
15 and you sat down to figure out that this was a fair and
16 reasonable settlement, you did it talking to your lawyers; is
17 that right, sir?

18 A Well, I didn't sit in preparation for this to do that. I
19 -- in the context of the case, we certainly looked at the
20 fairness and reasonableness of the settlement. We did do it in
21 connection with attorneys, but I don't think it's necessary to
22 do it in connection with attorneys.

23 Q Right. And you want the Court to pretend, when the Court
24 reads your declaration, that you never talked with counsel; is
25 that right, sir?

1 MR. MASTANDO: Object to the form, Your Honor.

2 THE COURT: Overrule.

3 MR. MASTANDO: With respect to the characterization of
4 the testimony.

5 THE COURT: Overrule.

6 THE WITNESS: I don't think we're putting any
7 privileged information into the declaration.

8 BY MR. STOLL:

9 Q Okay. Thank you, sir. Well, sir, I'm going to shift
10 gears a little bit here, I'd like to talk with you about your
11 liquidation analysis.

12 MR. STOLL: And what I'd like to hand up, I think
13 there'll be five or six exhibits all at once, they're all
14 debtor's exhibits, and if you'll just give me one moment, I'll
15 compile them, I'll hand them out. Is that all right, Your
16 Honor?

17 THE COURT: That's fine. Could the parties on the
18 phone mute their lines?

19 (Pause)

20 MR. STOLL: May I approach, Your Honor?

21 THE COURT: Yes. Thank you. We're up to TPS-4; is
22 that right?

23 MR. STOLL: Your Honor, just so I don't create any
24 sort of lack of clarity on the record, what I'm going to be
25 handing to the witness are the following exhibits.

1 First of all, there will be a copy of the liquidation
2 analysis, which is already in the record, I believe, as
3 Debtor's Exhibit 5C. It will be the full copy of the exhibit,
4 but ultimately it will be the page that you see on the board.

5 I'm also going to hand to the witness what I believe
6 has been marked on the debtor's exhibit list as Exhibit 4,
7 which is the second modification of Sixth Amended Joint Plan of
8 Affiliated Debtors.

9 I'm going to be handing to the witness what has been
10 marked on debtor's exhibit list as Exhibit 2, which is the
11 Sixth Amended Plan. And then I have two samples of the ballots
12 that are used in this particular -- that are used in this case.
13 I don't believe the sample ballots are marked, but I do believe
14 that the ballots are otherwise in record to the extent that
15 they've actually been voted, and they appear as Debtor's
16 Exhibit 148.

17 THE COURT: All right. Well, all of those are, I
18 guess, part of the record already or identified as exhibits, so
19 I'm not going to mark these as TPS exhibits.

20 (Pause)

21 MR. STOLL: May I approach the witness, Your Honor?

22 THE COURT: You may.

23 BY MR. STOLL:

24 Q Okay, sir. Thank you for bearing with me while I got
25 organized there. I'm going to ask you a series of questions

1 regarding the liquidation analysis, sir, which is Debtor's
2 Exhibit 5C. And if you could, turn to the third page.

3 Before I ask you a question about the liquidation
4 analysis, sir, how long have you been with Alvarez?

5 A Since 2002.

6 Q Eight years, right?

7 A Yep.

8 Q And I take it, doing restructuring work in the bankruptcy
9 court is what you do?

10 A I am a restructuring person for A&M, yes.

11 Q Is this the first liquidation analysis that you've done?

12 A No.

13 Q How many have you done?

14 A If I had to guess, five or six at least.

15 Q Okay. Five or six. Now, you're aware that the purpose of
16 the liquidation analysis, at least in part, is to satisfy the
17 best interests of creditors test in the Bankruptcy Code?

18 A Yes.

19 Q And the purpose of that test is to establish that the
20 recoveries that each and every creditor would get or could get
21 under the plan which is better than what they would do in a
22 liquidation?

23 A Sure. I mean, for unimpaired, I think it's at least as
24 good if not, you know, and then better for those that are.

25 Q Okay. And as part of that analysis, you have to value all

1 of the claims that creditors possess that they will otherwise
2 be having discharged as a result of the plan; is that right?

3 A I'm not sure I follow you.

4 Q Sure. Well, in order to understand if a creditor is
5 getting -- is doing as well under the plan as they would do in
6 liquidation, you have to look at all the rights that a creditor
7 has that are being compromised by the plan; is that fair?

8 MR. MASTANDO: Objection to the form, and calls for a
9 legal conclusion.

10 THE COURT: Sustained.

11 Q Do you understand all of the types of claims that you are
12 supposed to value in coming up with a liquidation analysis?

13 A I guess --

14 MR. MASTANDO: Same objection, Your Honor.

15 THE COURT: Overrule.

16 THE WITNESS: I guess I understand most of the
17 differences between a Chapter 11 and a Chapter 7, but I don't
18 know if I would understand every one of them.

19 BY MR. STOLL:

20 Q Okay. Well, let me ask it this way. Do you understand
21 that if a creditor is being compelled to give up a claim
22 against a third party non-debtor, as part of a plan, that you
23 have to value that claim for the purpose of determining whether
24 the creditor is doing better under the plan, or would do better
25 in liquidation?

1 MR. MASTANDO: Objection to the form, and calls for a
2 legal conclusion, Your Honor.

3 THE COURT: Overrule.

4 THE WITNESS: I guess I would understand that.

5 Q Okay. Now, no place in your liquidation analysis have you
6 provided any valuation for the claims that third -- that
7 creditors are being compelled to give up against third parties,
8 have you?

9 A No.

10 Q Okay. But creditors are being compelled to give up claims
11 against third parties, are they not?

12 A I'm not as familiar with the relief section of the plan,
13 so I understand that there are certain releases being granted.

14 Q Sure. I mean, there's releases and there's other
15 provisions in the plan that compel third parties to give up --
16 compel creditors to give up claims against third parties. You
17 understand that, right?

18 MR. MASTANDO: Objection to the form, asked and
19 answered, and calls for a legal conclusion.

20 THE COURT: Overrule.

21 THE WITNESS: Yeah, I understand that there are
22 certain release provisions within the plan.

23 BY MR. STOLL:

24 Q I mean, you have to know that in order to be able to
25 discharge your responsibility to prepare the liquidation plan,

1 correct?

2 A Correct.

3 Q Okay. Now, I want you to look at what's been marked as
4 Debtor's Exhibit 4, which is the second modification of the
5 sixth amended plan filed on November 24, 2010. Are you with
6 me, sir?

7 A Just a second. Yep.

8 Q Now, I'm going to try to walk through some of this release
9 language with you to under -- to make sure I understand what
10 plans are being compelled to be released by creditors that
11 you've not valued. And this may get a little tedious, sir, so
12 if I put you to sleep, you can ask me for a Red Bull or
13 something like that, and I'll be happy to wake you up.

14 A Okay.

15 Q But the provision that we should be looking at is on page
16 three of Exhibit 4, I believe. That is identified as exhibit
17 or excuse me, section number seven. And if at the same time,
18 sir, you could take --

19 THE COURT: Excuse me, this is Debtor's Exhibit 2?

20 MR. STOLL: Debtor's Exhibit 4.

21 THE COURT: Sorry. Okay. Go ahead.

22 MR. STOLL: Thank you, Your Honor.

23 THE COURT: Go ahead.

24 BY MR. STOLL:

25 Q And at the same time, sir, if you could open up Debtor's

1 Exhibit 2, which is the actual full text plan, Sixth Amended
2 Plan, to page 86. So we have the two paragraphs of release
3 language that we can talk about together. And just tell me
4 when you get there, sir.

5 A Okay.

6 MR. MASTANDO: Your Honor, I'll just object to note
7 the witness was not designated on this topic, and there's been,
8 you know, foundation for his knowledge of the releases.

9 THE COURT: All right. So acknowledged. Go ahead.

10 MR. STOLL: Thank you, Your Honor.

11 BY MR. STOLL:

12 Q Now, sir, if you would look at section seven of Exhibit 4
13 on page three, the preamble of that section says, that Section
14 43.6 of the plan is hereby amended by deleting the provisions
15 in their entirety and replacing them with what is in Exhibit 4.
16 Is that fair?

17 A Yeah, that's what it says.

18 Q Okay. And Exhibit 40 or excuse me, Exhibit 4, Section
19 43.6 is now the release language that tells us whether a party
20 is being compelled to release their claims -- a creditor is
21 being compelled to release their claims against non-debtor
22 third parties; is that right?

23 MR. MASTANDO: Objection, calls for a legal
24 conclusion.

25 THE COURT: Sustained.

1 MR. STOLL: Okay.

2 Q Did you look at Exhibit 4, specifically the revised
3 language, 43.6 to determine what claims third party creditors
4 were being compelled to give up against -- excuse me. What
5 claims creditors were being compelled to give up against non-
6 debtor third parties when you did your liquidation analysis?

7 MR. MASTANDO: Objection to the form.

8 THE COURT: Overrule.

9 THE WITNESS: As we discussed, I didn't -- this
10 modification would be subsequent to the one that's filed, but
11 we didn't value releases for the purposes of the liquidation
12 analysis.

13 BY MR. STOLL:

14 Q Did you perform your liquidation analysis before or after
15 Exhibit 4 was filed on November 24, 2010?

16 A It would've been before.

17 Q Okay. Now, were you told by anyone not to value third --
18 creditor claims that were being released against -- released by
19 -- against third parties?

20 A No.

21 Q Okay. Did you consider at all the claims of creditors
22 that were being compelled to be released against third parties?

23 A For the purposes of the liquidation analysis, we only had
24 looked at two modifications between the 11 and 7 plans, so we
25 didn't look at that issue.

1 Q Okay. Did you consider claims that shareholders were
2 being compelled to give up against third party non-debtors as
3 part of your liquidation analysis?

4 A No, we didn't.

5 Q Did not?

6 A We did not.

7 Q Okay.

8 MR. STOLL: Your Honor, that's all I have of this
9 witness.

10 THE COURT: Okay.

11 CROSS-EXAMINATION

12 BY MR. STEINBERG:

13 Q Good morning, Mr. Goulding, my name is Arthur Steinberg
14 from King and Spalding. I represent the Dime warrant holders.

15 I have a few questions to ask you with regard to your
16 declaration, and I'd like to first turn to the topic of the
17 global settlement. I asked Mr. Kosturos yesterday a bunch of
18 questions, and he was not able to answer me -- answer to me the
19 response for these questions, so I'm going to ask the same to
20 you with regard to the global settlements, some particular
21 aspects of it.

22 The first is, the global settlement provides for a Section
23 363 sale and transfer of assets to JPMorgan, retroactive for
24 two years back to 2008. Why is this sale being retroactive for
25 two years?

1 A It's my understanding that it's then corresponds with the
2 timing of the P and A, so certain assets would've transferred
3 at the date of the P and A.

4 Q But this, the -- did the debtor make the request to make a
5 sale to be approved by the Court retroactive two years to the
6 bankruptcy filing date?

7 A I wouldn't know who made the request.

8 Q And what's the purpose of doing a sale now pursuant to a
9 plan and making it retroactive for two years?

10 A I just think it was done as a mechanism to transfer the
11 assets to the respective parties.

12 Q I don't understand that. Why couldn't it be done as a
13 mechanism to transfer it as of the current date, which in my
14 experience at least is the normal way things are done.

15 MR. MASTANDO: Objection to the form --

16 THE COURT: Sustained.

17 MR. MASTANDO: -- and counsel is testifying.

18 MR. STEINBERG: Okay.

19 THE COURT: Sustained. No testifying.

20 MR. STEINBERG: All right.

21 BY MR. STEINBERG:

22 Q Why?

23 A I'm sorry, why what?

24 Q Why didn't you do it --

25 MR. MASTANDO: Same objection.

1 MR. STEINBERG: I didn't --

2 THE COURT: Overrule.

3 Q Why didn't you do it as of the current date?

4 A I wasn't involved in the discussion with respect to that
5 issue.

6 Q All right. Now, I asked Mr. Kosturos and he told me that
7 there was more than a half a billion dollars of liabilities
8 that Washington Mutual, Inc. has that are being transferred to
9 JPMorgan as part of a global settlement. And I asked him how
10 it was decided which liabilities would get transferred and
11 assumed by JPMorgan, and which ones would stay behind with
12 Washington Mutual, and he didn't know the answer. Do you know
13 the answer?

14 A With respect to --

15 MR. MASTANDO: Object to form and the characterization
16 of the testimony, but he can answer.

17 THE COURT: Yeah, let's not talk about others'
18 testimony, just ask the question.

19 Q All right. Do you know how liabilities were decided to be
20 assumed under the global settlement?

21 A It would depend specifically with respect to each of the
22 liabilities that you're discussing. So, for example, with
23 respect to deferred compensation liabilities, in the context of
24 discussing the settlement agreement, we felt that it was fair
25 and reasonable, that to the extent an asset went to one party,

1 the corresponding deferred compensation liabilities would go,
2 regardless of who might be the sponsor of those plans.

3 So it's sort of a case-by-case basis, it would depend
4 greatly on which liabilities specifically you're talking about.

5 Q So with respect to at least some of the liabilities that
6 were transferred, the debtor advocated for Washington Mutual,
7 Inc. to be relieved of that obligation and for JPMorgan to
8 assume that obligation?

9 A It was certainly important for us to have certain
10 liabilities be transferred, sure.

11 Q Okay. And so you were an advocate in certain instances at
12 least, of selecting which liabilities should be assumed by
13 JPMorgan, and that was the subject matter at the negotiating
14 table of the global settlement; isn't that correct?

15 MR. MASTANDO: Objection to the form.

16 THE COURT: Overrule.

17 THE WITNESS: Sure. There were lots of discussions
18 about transferring different liabilities and negotiating
19 different items.

20 BY MR. STEINBERG:

21 Q And were you involved personally in these discussions?

22 A I was involved in some, but not all.

23 Q Okay. Were you involved -- was there a criteria that was
24 used that if an asset was actually being transferred to
25 JPMorgan, that the liabilities associated with that asset

1 should also be transferred?

2 A Not globally, no.

3 Q Okay. So in which circumstances was an asset transferred
4 to JPMorgan where the associated liabilities were not?

5 A It'd be difficult for me to go through each and every one
6 of the items of the settlement agreement, and determine which
7 ones might have had assets going one direction and liabilities
8 going another.

9 Q Does any come to mind at all?

10 A Do any come to mind where the assets went one direction --

11 Q Where the assets went to JPMorgan and the liabilities
12 stayed behind, associated with that asset?

13 A I'm not sure that I can recall any at the moment, but.

14 Q How about the Dime warrant and the Litigation Tracking
15 warrant? Were you involved in those discussions, as to whether
16 JPMorgan should take on the Litigation Tracking warrant
17 liability that was associated with the Anchor litigation, which
18 was being transferred to JPMorgan?

19 A I was involved in the discussion of the split with respect
20 to the awards on the goodwill litigations.

21 Q Right. Were you involved in asking JPMorgan to take on
22 the associated liability with regard to the Anchor litigation?

23 A I think that the liability to the extent that it exists
24 was under the amended restated warrant agreement, and ran to
25 WMI. I think we -- I don't recall having a discussion about

1 that topic with people from JPMorgan.

2 Q Do you know that -- are you familiar with the language in
3 the global settlement agreement that the Anchor litigation is
4 going to be transferred free and clear of any liability
5 relating to the Litigation Tracking warrant?

6 A It's a big document. I'm not sure I know all the language
7 in there.

8 Q Do you recall the discussion about how that language got
9 inserted into the agreement?

10 A No. I wasn't involved in the drafting of the settlement
11 agreement.

12 Q Okay. But I think you did say that you were involved in
13 the goodwill litigations and the split between the American
14 Savings litigation and the Anchor litigation, right?

15 A Sure. I think if you look at the term sheets, there's a
16 section there that relates to that, and with respect to the
17 split on who got American Savings Bank and who got Anchor.
18 There was some back and forth on that item.

19 Q So why didn't you keep Anchor and give them American
20 Savings?

21 MR. MASTANDO: Object to the form, calls for
22 speculation.

23 THE COURT: Overrule.

24 THE WITNESS: In the context of the settlement
25 agreement and looking at the arguments that each raised, that's

1 where it fell out.

2 BY MR. STEINBERG:

3 Q Okay. I'd like you to turn to your declaration. I want
4 to ask you some questions specifically. On page 42, which is
5 paragraph 97, which is where you're talking about the Anchor
6 Savings litigation.

7 A I'm not sure I have a copy of that declaration in front of
8 me.

9 Q All right. Well, I'll just read it to you because it's
10 your words, right.

11 THE COURT: Give me the paragraph number.

12 MR. STEINBERG: Paragraph 97, top of page 42.

13 Q I'll read you up to the point that I want you to comment
14 on.

15 Ultimately on March 14th, 2008, the United States Court of
16 Federal Claims entered a judgment against the United States in
17 the amount of approximately 382 million (together with any and
18 all additional future proceeds or recoveries) from the Anchor
19 Savings litigation, which you define then as the Anchor Saving
20 litigation proceeds.

21 This decision held that Anchor Savings Bank was entitled
22 to recover lost profits and other damages in the amount of
23 approximately 382 million, plus an undetermined amount for a
24 gross-up of tax liabilities. This decision ruled that certain
25 portions of the recovery will be grossed up to pay for the

1 taxes associated therewith.

2 My questions relate to the gross-up.

3 MR. MASTANDO: Your Honor, may I approach and give the
4 witness a copy of his declaration?

5 THE COURT: You may.

6 MR. STEINBERG: Sure. I'm sorry, I'm not the Honor.

7 THE WITNESS: Thanks. Go ahead.

8 BY MR. STEINBERG:

9 Q Okay. What's the amount of the gross-up?

10 A Well, I think it's still to be determined with respect to
11 what the amount of the gross-up is, but my understanding from
12 the two items that are included in what the anticipated gross-
13 up is and the motion that's filed from JPMorgan, that the
14 gross-up would be something like 144 million.

15 Q Okay. So when the debtor filed its estimation motion for
16 establishing a cash reserve for the Litigation Tracking
17 warrants, it said that the amount would be 250 million dollars.
18 Were you involved in the calculation of that amount?

19 A Yes, I was.

20 Q All right. Do you remember that the disclosure statement
21 originally had a smaller number, like 184 million dollars;
22 isn't that correct?

23 A That's correct.

24 Q And so the debtor voluntarily changed it from 184 million
25 to 250 million. Was it because they forgot about the gross-up?

1 A Actually, there was a difficulty in initially determining
2 whether or not there had been any award with respect to a
3 gross-up, and then the actual amount of the calculation. So
4 subsequently, we were able to go back and take a further look
5 at that.

6 Q Okay. But the difference in numbers is because you hadn't
7 factored in the gross-up amount; isn't that correct?

8 A That's correct.

9 Q Okay. And --

10 A Sorry. There are other factors that changed the number
11 from 100 -- roughly 184 to 250.

12 Q What were the other factors that were increasing the
13 number, besides the gross-up?

14 A Sorry, that were increasing the number?

15 Q Yeah, besides the gross-up.

16 A There aren't any other factors increasing the number
17 there. There are other factors decreasing the number.

18 Q Oh. But the number went up on a raw basis from 184 to the
19 debtor's calculation of 250, right?

20 A That's right.

21 Q So why don't we break it down. What were the factors that
22 increased the number, and what were the factors that decreased
23 the number so it landed at the 250 million dollar amount?

24 A We added the 144 million into the calculation based on the
25 tax gross-up, and then we were able to fine-tune our estimate

1 of the expenses and fees associated with the Dime warrants that
2 are deductions to the calculation; and so we added some
3 additional numbers to that.

4 Q And how much was that reduction for the added expenses
5 that you did your further refinement on?

6 A It's difficult for me to recall exactly, but I would say
7 something like 10 to 20 million.

8 Q You left out 10 to 20 million dollars of expenses the
9 first time you did your calculation?

10 A We didn't have access to the information at the time.

11 Q Where did you get the information, to ultimately get a
12 better number?

13 A We had to go back to the counsel and those folks involved
14 in the original drafting of the Dime warrants to understand
15 those expenses.

16 Q So you talked to Sullivan and Cromwell?

17 A I believe there were conversations with some folks from
18 Sullivan and Cromwell, among others.

19 Q And you talked to Jones Day, the counsel for the Anchor
20 litigation to try to get an updated litigation number?

21 A Sure.

22 Q And you think that that number was a 10 to 20 million
23 dollar miss?

24 A I think that we had to revise the number for those fees
25 and expenses by about that amount.

1 Q Okay. But the gross-up number that you used was the 144
2 million dollar number that was in the JPMorgan pleading, right?

3 A That's right.

4 Q Okay. So what was the tax rate that JPMorgan used in
5 their gross-up pleading that was the basis of their 144 million
6 dollar number?

7 MR. MASTANDO: Objection to the form and the capacity
8 of the witness to know.

9 THE COURT: Overrule. Can you answer?

10 THE WITNESS: I don't recall exactly, but it's
11 something like 38.7 or thereabouts.

12 BY MR. STEINBERG:

13 Q 38.7 percent is very good. And what was the amount that
14 the debtor used in its 184 million dollar calculation as to
15 what the appropriate tax rate will be when this award is
16 issued?

17 A I'm not sure I follow your question.

18 Q Doesn't the debtor use a 45.5 percent rate when it
19 calculates what the effective taxes are in connection with this
20 award?

21 A Actually, the calculation that you're referring to is a
22 deduction pursuant to the amended and restated warrant
23 agreement that sets forth that the calculation will be based on
24 the highest federal, state -- the highest federal income tax
25 rate, state tax rate, and city tax rate in the State of New

1 York. And it sets forth that rate. So based on those rates,
2 as prescribed in the amended and restated warrant agreement,
3 it's 45 and a half percent.

4 Q Oh, but the rate fluctuates each year, right?

5 A Sure. It could go up or down, and --

6 Q Okay.

7 A -- if we're into next year, it depends on when the
8 judgment's awarded.

9 Q And didn't JPMorgan file its pleading saying that I'm
10 going to be taxed at the highest rate for both federal, state,
11 and local and therefore, I can calculate that amount now, and
12 my amount is 38.7 percent?

13 MR. MASTANDO: Objection to the form, Your Honor, the
14 characterization of the --

15 THE COURT: Overrule. Is that what JPMorgan said?

16 THE WITNESS: My understanding is that it's JPMorgan's
17 effective tax rate, but that's not what's prescribed in the
18 amended and restated warrant agreement.

19 BY MR. STEINBERG:

20 Q They don't pay local taxes?

21 A I don't know how they derived their 38.7 number. I know
22 how to derive the 45 and a half percent number.

23 Q Okay. If JPMorgan had used a 45.5 percent number, would
24 that affect the gross-up amount, instead of a 38.7 percent
25 number?

1 A Sure.

2 Q And would increase it pretty substantially, right?

3 A Sure.

4 Q Do you have any idea what the difference would be?

5 A You would gross-up the two components, which I don't
6 exactly have the values in front of me as to which those two
7 are, but you're increasing it by approximately seven percent of
8 those values. I don't know. I don't know what those two
9 numbers are in the breakdown of the --

10 Q Okay. I won't ask you to try to do the math off the top
11 of your head. I know it's a difficult calculation.

12 In your declaration, on page -- on paragraph 100,
13 paragraph 40 -- page 43, paragraph 100, you describe what the
14 Anchor litigation proceeds are. And you say that it's 356
15 million plus 63 million; is that right?

16 A That's right.

17 Q That's a mistake, isn't it? Didn't you leave out the
18 gross-up here? Isn't the number at least 144 million dollars
19 more than this?

20 A I guess for the purposes of this, we had left out the
21 gross-up number here.

22 Q Yeah, okay, so it's a mistake of that magnitude. And if
23 I'm right about the difference in the percentage of interest
24 rates, the tax rates, and that you should use a different
25 amount for the tax rate the number is even bigger than 144

1 million dollars; isn't that correct?

2 A I'm not sure I'd want to speculate on whether or not
3 you're correct on changes in the tax rates.

4 Q Well, just assume I'm correct. It would be a bigger
5 number, that's what I'm trying to get at, isn't it?

6 MR. MASTANDO: Object to the form, Your Honor.

7 THE COURT: Overrule.

8 THE WITNESS: Sure, it would be a bigger number.

9 BY MR. STEINBERG:

10 Q So when you negotiated with JPMorgan over this split of
11 the asset, did you forget about the gross-up too, the 144
12 million plus of value that is not reflected in your
13 declaration?

14 A I think we knew that there was a potential for a gross-up,
15 but the motion that was filed by JPMorgan with respect to the
16 effective tax rate that they included was filed post
17 settlement.

18 Q It was filed in the summer of this year, right?

19 A That's right.

20 Q But when you filed your declaration, you also knew about
21 the gross-up, and that number should've been in here, right?

22 A Yeah. I think there's a reference in the prior section.
23 This is just intended to be a summary. There's a reference to
24 the grossed up.

25 Q But it's a summary of numbers, but you left out a 144

1 million dollar plus number, right?

2 A There -- it should have been included, yes.

3 Q All right. Let's stay with your declaration, and look at
4 page 42, footnote 38. This was the footnote that I couldn't
5 remember when I was talking to Mr. Kosturos. Can you tell me,
6 is the impact of that statement, is that the lawyer in the
7 Anchor litigation on September 22, 2008 filed a pleading saying
8 that the real party in interest in the Anchor litigation was
9 Washington Mutual, Inc., as contrasted to Washington Mutual
10 Bank.

11 A Right.

12 Q And then you put that in your declaration to indicate that
13 that was one of the arguments that you have as to why this is a
14 disputed asset, and you believed it belonged to the Washington
15 Mutual, Inc. estate, as contrasted to Washington Mutual Bank;
16 isn't that right?

17 A Right. We were trying to set forth a fulsome statement of
18 facts.

19 Q Okay. And did you look at the amended warrant agreement,
20 which is cited in paragraph 99 of your declaration?

21 A (No audible response.)

22 Q And was there anything in that document that would give
23 you comfort with the statement that the real party in interest
24 in the Anchor litigation was Washington Mutual, Inc.?

25 A I reviewed certain sections of the amended restated

1 warrant agreement for purposes of performing the calculation,
2 but I haven't reviewed it in its entirety and wouldn't know.

3 Q Right. As you sit here today, do you recall anything in
4 the amended warrant agreement that would give you comfort that
5 this asset was really owned by Washington Mutual, Inc. instead
6 of Washington Mutual Bank?

7 A Well, that it's executed by Washington Mutual, Inc.

8 Q Okay.

9 A Maybe that would be helpful.

10 Q Other than that? Other than the signature line?

11 A I don't recall anything else in the document, but again, I
12 haven't reviewed it in full and wouldn't know all of it.

13 Q Okay. But the debtor took this position also in the
14 JPMorgan adversary proceeding, that it was the owner of the
15 Anchor litigation, correct?

16 A That's correct.

17 Q And even the creditors' committee joined in and said that
18 Washington Mutual, Inc. is the owner of this asset, right?

19 A Right.

20 Q So they must have seen something in the amended warrant
21 agreement that neither one of us could recollect right now,
22 that must have given them a basis for saying that, right?

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

24 MR. STROCHAK: Objection.

25 MR. MASTANDO: Calls for speculation.

1 THE COURT: Sustained. Save it for argument.

2 MR. STEINBERG: Okay. Just wanted to make sure people
3 are listening.

4 MR. STROCHAK: We are, I assure you.

5 MR. STEINBERG: Okay.

6 BY MR. STEINBERG:

7 Q So let's talk about -- you know, you used a word in
8 describing your overall assessment of the global settlement. I
9 have to confess that I went to the dictionary because I never
10 used -- I never saw it used this way, and it's in paragraph 127
11 on page 54.

12 And you say, I believe that taking a holistic view of the
13 global settlement agreement and the various facts, issues,
14 claims and defenses, and including the risks and uncertainties
15 and then it goes on, saying that why you believe the settlement
16 is fair and reasonable. But I was struck by the word holistic
17 used in that way.

18 Did you mean to say that you looked at it from almost like
19 a macro view, from the totality of what the estate was getting
20 and what it was giving up, and it fit within your range of what
21 you thought was fair and reasonable?

22 MR. MASTANDO: Your Honor, I'd just like to object to
23 the form again, and note counsel's testifying again.

24 THE COURT: Overrule.

25 THE WITNESS: Yeah, we were looking at in the context

1 of the overall agreement, that's what I had intended.

2 BY MR. STEINBERG:

3 Q Right. And if one component was a little shy, you made up
4 for it with another component; is that right? Because in the
5 overall, your approach to this deal was in the context of a
6 holistic view, right?

7 A Right.

8 Q Okay. And that's why I think on page 43 in paragraph 100,
9 when talking about the split with the American Savings and the
10 Anchor litigation in your last sentence you say, the debtors
11 believe that in the context of the global settlement agreement,
12 as an integrated whole, the allocation of the American Savings
13 litigation proceeds and the Anchor Savings litigation proceeds,
14 is fair, equitable, and benefits the debtor's estates. It's
15 that same holistic view, right?

16 A That's correct.

17 Q Okay. Let's turn to the liquidation analysis. On page
18 57, you talk about the impact of Chapter 7 versus Chapter 11,
19 and in paragraph 134, you say, for most creditors, this will
20 result in the same value recovered, but only after a
21 significant delay. For holders of peers claim, however, this
22 would mean a smaller recovery than what is projected in the
23 plan, as the peers claim being the fulcrum security and the
24 major impact by going from Chapter 11 to Chapter 7; is that
25 correct?

1 A Right.

2 Q Okay. But creditors, just not to try to parse your words
3 too much, creditors would get -- senior creditors would
4 actually get more dollars, right, because they're getting more
5 post petition interest for a longer period of time?

6 A Right.

7 Q So --

8 A I don't think that those guys would want that post
9 petition interest.

10 Q I'm sorry?

11 A I don't think that they want to delay in order to get --
12 continue the post petition interest at that level.

13 Q This is too low?

14 A Yeah. I think that there would be --

15 Q They would --

16 A -- it's too low, and they'd rather do it, put it someplace
17 else.

18 Q But -- so it really wouldn't be the same value, would it?
19 It would be -- it's more dollars to the senior creditors, isn't
20 it, in Chapter 7?

21 A It's the same recovery.

22 Q Well, it's a hundred percent plus post petition interest,
23 but it is more post petition interest, right?

24 A Right. On account of the case lasting longer.

25 Q Right. And I think your testimony was that there's a

1 substantial overlap between the peers creditors and the senior
2 creditors, right?

3 A The subordinated noteholders, is that what you mean?

4 Q Yeah.

5 A I think there is an overlap between the subordinated
6 noteholders and the peers.

7 Q And the senior noteholders as well?

8 A I am sure that there are some who hold seniors as well as
9 -- there's a lot of cross holdings among the capital structure.

10 Q So with respect to those people in some respects, taking a
11 holistic view, it's the left pocket becoming a little less and
12 the right pocket becoming a little more?

13 A Well, again, I think when you're looking at capital and
14 repayment of capital, there's an expected rate of return on
15 that capital. So the delay would mean that they would get --
16 would be entitled to additional monies. So I don't think you
17 can look at it as getting a certain amount of money and you get
18 more, because post petition interest continues to run. And the
19 cross holdings between senior noteholders, subordinated
20 noteholders, and peers are not the same holdings. So the same
21 guys don't hold the same amount of each of those individual
22 classes.

23 Q Now, when you did a calculation of what is being paid on
24 post petition interest on these -- to these unsecured
25 creditors, you're using the contractual rate, right?

1 A That's correct.

2 Q Did you look at what the difference would be if you used a
3 federal judgment rate?

4 A We didn't perform that calculation.

5 Q Do you have any idea what it would be?

6 A I don't know, no.

7 Q Would it be more than 100 million dollars difference?

8 A I'm not certain.

9 Q Okay. I think I want to turn to the page 64 and your
10 discussion about the value of the reorganized entity. I think
11 when you talked about the valuation, you said that there was no
12 -- well, I'm going to take that back.

13 Under the valuation of the reorganized company, is there a
14 contemplation that there'll be full utilization of the hundred
15 million dollars of NOL that's assumed as part of the valuation?

16 A In the financial projections that we prepared, the net
17 income is approximately a hundred million, and the assumption
18 for tax expense was that there would be enough net operating
19 loss to shelter that net income.

20 Q Would there be more net operating loss left over if the
21 company had greater profits to be utilized?

22 A Depending on when the effective date occurs, there could
23 be more net operating loss than what's projected.

24 Q How much extra net operating losses will there be on the
25 optimal circumstance of timing the effective date?

1 A You could have as much as five billion.

2 Q Five billion?

3 A Uh-huh.

4 Q Okay. And under this plan, there's a rights offering for
5 a hundred million dollars, right?

6 A Up to a hundred million, yes.

7 Q And the purpose of raising that capital is to acquire
8 additional income generating assets and utilize the up to five
9 billion dollars of NOL?

10 A I'm not totally sure what they're going to use the rights
11 offering for, but presumably, they'll use it to do something
12 with the business.

13 Q And they'll try to use that five billion of NOL?

14 A I would assume they'll try. I think this is a -- to look
15 at this in the context, reorganized WMI is effectively a Hawaii
16 captive reinsurance company that's been in run-off since the
17 receivership date. So whatever capital is being put up, I
18 would say is akin to start-up money. You're looking at either
19 restarting a business that has been, you know, not really
20 operating, not doing any new business for two years, or
21 investing in some business that's similar.

22 And I think if you look at the success of start-up
23 ventures and the like, I think it's difficult to know whether
24 they would ever be able to generate any income to utilize the
25 NOL.

1 Q But someone drafted a plan to raise -- to provide for the
2 potential raising of a hundred million dollars, so they can
3 utilize all this extra NOL; isn't that correct?

4 A They're going to raise some additional money to attempt to
5 utilize -- that could attempt to utilize NOL.

6 Q Well, isn't that why they're raising the money and having
7 a rights offering in this case? Am I missing something?

8 A They're raising money to attempt to go forward with a
9 reorganized entity.

10 Q The reorganized entity, if they didn't raise the rights
11 offering money would be a liquidating insurance portfolio that
12 is in run-off for two years, right?

13 A It is in run-off, that's correct.

14 Q All right. So why would someone put capital into a run-
15 off with an insurance company if they didn't have a NOL?

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

17 THE COURT: Overrule. Can you answer?

18 THE WITNESS: Well, I think you could put money in to
19 continue to invest those proceeds, restart the business, that's
20 one option, but you could do other things with that money that
21 might not satisfy the business continuity argument.

22 You could would want to own the stock because you take
23 a different view with respect to the projections than what's
24 been prepared.

25 BY MR. STEINBERG:

1 Q Okay. Let me finish by asking you to turn to paragraph 97
2 of your declaration. It's the sentence that starts at the
3 bottom of page 41, and goes over to -- I'm sorry, bottom of
4 page 42, and goes over to page 43.

5 Says the amended warrant agreement executed by WMI and the
6 warrant agent in 2003 provides that while the LTWs are
7 convertible into shares of WMI, the LTWs become exercisable
8 when the bank receives the proceeds of the Anchor litigation.

9 Do I understand that the reason why you put this in is to
10 try to show the balancing of the argument that JPMorgan
11 potentially had a claim for this asset?

12 A Yeah. We put it in to just try to put as much as we could
13 in about the facts and circumstances of all the assets.

14 Q Okay. And the statement that the 2003 warrant provides
15 that the LTWs are convertible into shares of WMI, that's not
16 always the case, right? The amended warrant agreement that you
17 reviewed also provides that if there's a combination before, a
18 trigger event, that it could be converted and payable in cash,
19 right?

20 MR. MASTANDO: Objection. Calls for a legal
21 conclusion, Your Honor.

22 THE COURT: Sustained.

23 Q Are you familiar with the adjustment section of the
24 amended warrant agreement, Article 4?

25 A I'm not, no.

1 Q Oh, so you wrote this statement without regard to what
2 Article 4 might say about adjustments to how the LTWs get paid?

3 A I wrote the section based on looking at it in the context
4 of what I could pull out of it, and putting that forward in my
5 declaration.

6 Q Took a holistic view?

7 A I attempted to, yes.

8 Q All right. But do you think if there's an entire article
9 of the amended warrant agreement which talks about having to
10 make adjustments and pay the LTWs in something other than stock
11 that that would be relevant, if you're going to set forth a
12 statement in your declaration?

13 MR. MASTANDO: Objection. Calls for legal
14 conclusions, argumentative, Your Honor.

15 THE COURT: Sustained.

16 MR. STEINBERG: Okay. No more questions.

17 THE COURT: Thank you.

18 MR. SACKS: I'll be relatively brief, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. SACKS:

21 Q Good morning, Mr. Goulding.

22 A Good afternoon.

23 Q Good afternoon, I guess. I'm sorry about that. I'm just
24 going to ask you some questions on a few limited subjects if I
25 could.

1 First, you were shown a chart that was up there before,
2 and it had a lot of bars on it, and one of them related to BOLI
3 COLI and you were asked some questions about BOLI COLI,
4 correct?

5 A Correct.

6 Q Am I correct that in connection with your analysis, you
7 spent time, you and your people spent time looking through the
8 actual BOLI COLI policies to determine whether the bank or the
9 holding company owned those?

10 A We did in connection with counsel, as well as looking and
11 reviewing the books and records, and where each of those
12 policies fell in the books and records.

13 Q And am I correct there was a number that was put up there
14 as five billion and --

15 MR. NELSON: Your Honor, objection, leading.

16 MR. SACKS: I'm just bringing him to the subject, Your
17 Honor.

18 THE COURT: Overrule. You can.

19 Q There is a number that was up there that was five billion.
20 Of that five, you indicate in paragraph 46 of your declaration
21 that in most instances, JPMC and the debtors have agreed as to
22 ownership of particular BOLI COLI policies. Of the five,
23 approximately five billion, how much did you agree was properly
24 owned by the bank?

25 A We agreed that it was approximately five billion.

1 Q Okay. And those were the bank's, not WMI's?

2 A Right. We agreed in the context of reviewing in
3 settlement discussions.

4 MR. NELSON: Your Honor, objection, we're going to
5 move to strike, because he has previously testified that that
6 analysis was done on the basis of counsel, both he and Mr.
7 Kosturos.

8 MR. MASTANDO: Your Honor, if I may, the witness was
9 testifying about what they agreed to in connection with
10 negotiations, that's purely --

11 THE COURT: I'll allow --

12 MR. MASTANDO: -- the subject of the back and forth.

13 THE COURT: -- it. I mean, he's not saying the basis
14 for it -- well, excuse me.

15 MR. SACKS: Let me -- maybe I can clarify.

16 BY MR. SACKS:

17 Q You and people other than counsel did look through these
18 policies, didn't you?

19 MR. NELSON: Same objection, Your Honor. He's
20 previously testified --

21 THE COURT: Sustained.

22 MR. NELSON: -- that it's from counsel.

23 THE COURT: Sustained. He said he did not do any
24 conclusion regarding the ownership without consulting with
25 counsel. Sustained.

1 BY MR. SACKS:

2 Q Okay. For purposes of settlement, however, there
3 factually it was determined that five billion was owned by
4 JPMorgan Chase.

5 MR. NELSON: Objection, Your Honor, the same
6 objection.

7 THE COURT: Sustained.

8 MR. NELSON: The conclusion was counsel.

9 BY MR. SACKS:

10 Q Well, let's continue on. You indicate that in certain
11 instances, the debtors and JPMC initially disputed the
12 ownership of certain BOLI COLI policies. What policies were
13 those?

14 A Well, I think at the outset, we weren't sure. We didn't
15 have the books and records, so we weren't sure what was owned
16 by who, so we sent a letter with respect to just telling
17 JPMorgan not to move on those policies while we took the time
18 to look at each of those.

19 And then when it came time for settlement discussions, I
20 believe that WMI proposed a list that we thought would be the
21 list that should come to us pursuant to the settlement
22 agreement. And in that context, that list had the Pac Life
23 list bills (ph.) coming to us, and the CCBI's (ph.) split-
24 dollar policies coming to us. The rest of the split, I think
25 is consistent with what's in the settlement agreement.

1 Q Okay. And then ultimately of those two that you had
2 coming to you, it was ultimately agreed that one came to WMI
3 and one came to JPMorgan, correct?

4 A That's right. The CCBI split-dollar policies went to
5 JPMorgan.

6 MR. NELSON: Objection, Your Honor, to the extent that
7 it's referring not to what was agreed in the settlement
8 agreement, but what refers to what WMI concluded based on
9 counsel.

10 THE COURT: No. I think he's said it's ultimately
11 what we agreed to. Overrule.

12 BY MR. SACKS:

13 Q It was what was agreed to in the settlement agreement.
14 And with respect to the one that went to JPMorgan Chase, am I
15 correct that that was on the books and records of the bank?

16 A It was.

17 MR. NELSON: Objection, Your Honor. That's a legal
18 conclusion, whether --

19 THE COURT: Overrule. It was on the records. Whether
20 it was owned by them or not is a different question. Overrule.

21 Q Okay. Now, you did actually mention books and records and
22 that raises a question. Are you familiar with something known
23 as the Information Access Agreement?

24 A I am.

25 Q Okay. And explain what that is.

1 A Well, essentially it set forth the information sharing as
2 between WMI and JPMorgan, with respect to various records and
3 the like.

4 Q And did it, in essence, provide the debtor with the
5 ability to request whatever historical books and records it
6 wanted?

7 MR. NELSON: Objection, Your Honor, leading.

8 THE COURT: Overrule.

9 THE WITNESS: Yes, it did.

10 BY MR. SACKS:

11 Q And pursuant to that agreement, did the debtor make
12 requests of JPMorgan for books and records that it wanted in
13 order to perform its analyses?

14 A We did.

15 Q And were those provided?

16 A They were.

17 Q Let me switch topics if I could very briefly at the
18 moment.

19 You were asked some questions about again, the first item
20 on Mr. Nelson's demonstrative, which has the reference to a
21 five billion dollar NOL. You've been asked by several people
22 about that, correct?

23 A Correct.

24 Q There's nothing in the settlement agreement that you're
25 aware of that gives any of that value to JPMorgan Chase, is

1 there?

2 A No, there's not.

3 Q Or that transfers that away from the reorganized debtor?

4 A No.

5 Q Okay. Now, you also testified about a liquidation
6 analysis and testified that you did not do an analysis of the
7 value of releases of third party claims, correct?

8 A Correct.

9 Q All right. Do you have your liquidation analysis there?

10 A Yeah.

11 Q And look at C-2. There's some notes to that analysis,
12 aren't there?

13 A There are some notes.

14 Q Okay. And one of those notes under six, settlement
15 agreement indicates that your analysis assumes that the value
16 to be received would be for purposes of the liquidation
17 analysis, equivalent to the value being received under the
18 settlement agreement?

19 A That's right.

20 Q And I am correct, did you under --

21 THE COURT: What footnote are you on?

22 MR. SACKS: Six on page C2, Your Honor.

23 THE WITNESS: It's actually the lead-up notes, not
24 the --

25 MR. SACKS: I'm sorry, I said footnote, but it's the

1 -- it's the footnotes, but the footnotes precede -- I should
2 say preceding notes, I guess.

3 THE COURT: Okay.

4 MR. SACKS: Do you have it, Your Honor?

5 THE COURT: I have it.

6 BY MR. SACKS:

7 Q And just again, to go back for Her Honor. It assumes that
8 the value to be received is the value to be received under the
9 settlement agreement, correct?

10 A Correct.

11 Q Or equivalent to the value to be received under the
12 settlement agreement?

13 A Right. We made the assumption that a Chapter 7 trustee
14 would continue with the settlement agreement in its current
15 form if they were able to effectuate it.

16 Q And that settlement agreement was dependent upon the
17 provision of those third party releases, wasn't it, sir?

18 A That's how I understand it.

19 Q So no releases, no settlement agreement, no value?

20 A Right.

21 Q Okay. Now, there's been a lot of back and forth over
22 privilege here, and you've indicated fairly clearly that you
23 are not testifying as to the advice that you received from
24 WMI's counsel, correct?

25 A Correct.

1 Q But you are putting forward, apart from that advice
2 received, the bases on which you conclude the settlement is
3 fair and reasonable, correct?

4 A Correct.

5 MR. NELSON: Objection, Your Honor, that was -- well,
6 I believe that he's prior -- previously stated that his
7 personal analysis is due to counsel.

8 MR. MASTANDO: Objection, Your Honor. That
9 mischaracterizes the testimony and the declaration.

10 THE COURT: Restate the question.

11 BY MR. SACKS:

12 Q Did you have information other than advice of WMI's
13 counsel that caused you to believe that the settlement in this
14 case is fair and reasonable that you are offering to the Court?

15 A That's what I'm attempting to do, sir.

16 Q What type of information other than the advice of counsel,
17 of WMI's counsel, are you offering to the Court to support the
18 fairness and reasonableness of the settlement in this case?

19 A Well, we looked at lots of documents, WMI's books and
20 records, WMB's books and records, certainly the back and forth
21 pursuant to a number of discussions with JPMorgan with respect
22 to ownership merits of arguments, the whole process associated
23 with that settlement negotiation.

24 MR. NELSON: Move to strike, Your Honor, to the extent
25 he just said merits of arguments, and to the extent based upon

1 counsel --

2 THE COURT: You can recross.

3 MR. NELSON: Okay.

4 THE COURT: On that point.

5 MR. NELSON: All right.

6 THE COURT: I'll let the answer stand.

7 BY MR. SACKS:

8 Q You had an assessment of merits of arguments independent
9 of counsel's assessment of the merits of the argument, is that
10 what you're saying?

11 A No, I guess what I was saying is that in the context of
12 settlement agreements, the merits of arguments were discussed
13 as between us and JPMorgan, so JPMorgan might take a stance as
14 to its position, and we would take a stance as it relates to
15 our position. So in that context, you can get an understanding
16 of the various strengths and weaknesses of the arguments.

17 Q Okay. So that factual basis informed your opinion?

18 A Right.

19 Q And you mentioned books and records, and you had access to
20 the books and records, correct?

21 A Correct.

22 Q Okay. Now, you also had some access to people and
23 witnesses, did you not?

24 A We did have access to many people.

25 Q Okay. And do you know of any -- let me -- you met with

1 the equity committee, didn't you, sir?

2 A We did.

3 Q And they asked you questions and you provided them with
4 information?

5 A Yes.

6 Q And you're aware that the equity committee had access to
7 books and records and information in this case?

8 A Yes.

9 Q And are you aware that the equity committee had access --
10 that we, JPMorgan Chase, did not have to the debtor's advice of
11 counsel?

12 A Yes, that's my understanding.

13 Q Okay. And are you aware of any reason that the debtor's
14 counsel could not make their own assessment of whether the
15 settlement is fair and reasonable, based upon the same factual
16 information you had available to you?

17 A You said debtor's counsel, did you mean --

18 Q I'm sorry, I meant the equity committee's counsel.

19 A I would believe that they could make that assessment.

20 MR. NELSON: The equity committee's counsel, that was
21 your question?

22 MR. SACKS: Equity, yes.

23 MR. NELSON: Thank you.

24 MR. SACKS: Based upon the information they had
25 available, the factual information that they could've had

1 access to, that's correct.

2 BY MR. SACKS:

3 Q Are you of any -- I think the question's been asked.

4 THE COURT: Obviously, they disagree with the
5 conclusion, though, or they wouldn't be here.

6 MR. SACKS: I understand they -- they do disagree with
7 the conclusion, Your Honor, but we're -- we seem to be in a
8 debate over whether the debtor should be forced to waive its
9 attorney/client privilege in order to have a Court assess the
10 fairness and reasonableness of the settlement. And so --

11 THE COURT: All right.

12 MR. SACKS: -- questions are simply --

13 THE COURT: Save it for argument.

14 MR. SACKS: Okay. My questions are simply factual
15 based, Your Honor.

16 BY MR. SACKS:

17 Q To your knowledge, sir, did the equity committee have the
18 ability to take depositions and speak to people?

19 A Yes.

20 Q Okay. And they had the ability to request and look at
21 books and records, just as you did?

22 A Yes.

23 Q And they had the ability to read the pleadings and make
24 judgments based upon those pleadings?

25 A Yes.

1 Q Okay.

2 MR. SACKS: That's all I have for you. Thank you,
3 sir.

4 MR. MASTANDO: Your Honor, John Mastando from Weil
5 Gotshal for the debtors. Before redirect, might I suggest this
6 might be an appropriate time to break for lunch, and the
7 witness has been on for a while.

8 THE COURT: How long will you be on redirect, do you
9 think?

10 MR. MASTANDO: I'm guessing not too long. I can go
11 through my notes and try to streamline it.

12 THE COURT: Do you want to take a break?

13 MR. NELSON: Your Honor, I think we can probably -- if
14 it's not going to be too long, why don't we just go ahead and
15 wrap up.

16 THE COURT: With this witness. Let's do it.

17 MR. MASTANDO: Okay.

18 THE COURT: And we can take a five-minute break.

19 MR. MASTANDO: Sure.

20 THE COURT: Then we'll try and go to lunch.

21 (Recessed at 12:26 p.m.; reconvened at 12:33 p.m.)

22 THE COURT: I thought we were all ready?

23 MR. MASTANDO: I'll go get the --

24 (Pause)

25 THE COURT: I'm sorry, but somebody said you were

1 ready, so.

2 MR. MASTANDO: I apologize, Your Honor. I was really
3 trying to streamline my argument. My questioning, I should
4 say.

5 MS. NAGLE: Your Honor, Shannon Nagle for the
6 settlement noteholders from Fried Frank. That's okay, it's
7 just one question for the witness.

8 THE COURT: Yes.

9 CROSS-EXAMINATION

10 BY MS. NAGLE:

11 Q In equity six, it's the disclosure statement, it's in the
12 binders behind you, it's Exhibit 6.

13 A This is the disclosure statement?

14 Q Yes.

15 A Okay.

16 Q The disclosure statement. In Article 4, in the copy I
17 have it's on page 43, there's a description of junior
18 subordinated debentures, the peers. It's on 42 in your copy.

19 A Okay. Yep.

20 Q Have you got that? And I know that you described the
21 peers earlier in your testimony, but I just have sort of a
22 question to just sort of dumb it down. Are the peers debt or
23 equity?

24 A Debt.

25 MR. NELSON: Objection, Your Honor.

1 THE COURT: Sustained. Isn't that a legal conclusion?

2 MS. NAGLE: Not the way he explained it before.

3 MR. NELSON: I was --

4 THE COURT: Are they debt or equity, isn't that a
5 legal conclusion? If you want to say are they treated as debt
6 or equity, maybe?

7 MS. NAGLE: Thank you, Your Honor.

8 BY MS. NAGLE:

9 Q Are the peers treated as debt or equity?

10 A They're on the books of WMI as debt.

11 Q And why is that?

12 A Well, the structure that -- my understanding of the
13 structure is that the trust is a debt holder of WMI and the
14 peers holders owned security interest in the trust, and
15 therefore, there's a debt issuance as from WMI to the trust,
16 and that therefore means that it's effectively debt.

17 Q Okay. All right.

18 MS. NAGLE: Thank you very much.

19 REDIRECT EXAMINATION

20 BY MR. MASTANDO:

21 Q Good morning, Mr. Goulding. John Mastando from Weil
22 Gotshal on behalf of the debtors.

23 Mr. Goulding, can you explain for us why you believe the
24 global settlement agreement is fair and reasonable?

25 A Sure.

1 MR. NELSON: Objection, Your Honor. He's already put
2 in his testimony on direct through an affidavit. He's been
3 crossed, but he shouldn't be able to now go back through and
4 give his direct testimony all over again.

5 THE COURT: Well, overrule. I hope it's going to be
6 short.

7 MR. MASTANDO: Yes.

8 THE WITNESS: In the context of settlement
9 negotiations, I believe we got the best result that we could in
10 terms of that. And looking at the other outcome of litigating
11 all of these issues and the post petition interest of 30
12 million a month, plus eight to ten million a month of
13 professional fees that continue to run in this case, the bar
14 would keep getting higher on a month by month basis in order to
15 get a result that would be in excess of the settlement
16 agreement that we're putting forward.

17 BY MR. MASTANDO:

18 Q Okay. And can you explain why you view the global
19 settlement agreement as an integrated whole or in a holistic
20 way?

21 A Yeah. Any number of those issues may have different
22 outcomes in their own right, but in the context of the overall
23 agreement, it made sense to agree where we agreed. There may
24 be some issues that went one way or the other, but were
25 balanced out in the context of the overall agreement.

1 Q Okay. Now, we had testimony earlier about the BOLI COLI
2 policies. Can you tell me and describe the negotiation process
3 with JPMorgan with respect to the BOLI COLI policies?

4 A Sure. With respect to BOLI COLI, initially as I said, we
5 were doing asset identification, so looking at what was on our
6 books, what was on WMB's books to see what assets might be
7 WMI's. In that context, we met with a number of then JPMorgan
8 but legacy WaMu people who had overseen that program, and we
9 got records from them that supported what was on the books and
10 records from an accounting perspective.

11 Q And what did that show?

12 A It showed 90 million dollars on the books of WMI and
13 approximately 5 billion on the books of WMB.

14 Q Okay. And do you know, when was the last time WMI's and
15 WMB's books and records were audited, as far as you know?

16 A The last audit I guess would've been in connection --
17 well, the audit would've been done on an annual basis, I guess,
18 so in connection with their 2007 financials.

19 Q Okay. We had some testimony earlier about the VISA
20 shares. Do you recall that?

21 A I do.

22 Q Okay. And can you describe the process you went through
23 to analyze the VISA shares and your discussions with JPMorgan?

24 A Sure. So in terms of looking at the value of the VISA
25 shares, leaving aside the ownership issue for a moment, we

1 looked at the range of outcomes associated with what could
2 happen in the interchange litigation. Previously there was one
3 other unsettled litigation, so we were looking at more, but in
4 the context of -- as this evolved, we were looking at just the
5 interchange litigation being the only litigation remaining.

6 And so we looked at if there was a complete win on the
7 interchange and the settlement was zero, the maximum value you
8 could ascribe to the VISA shares, assuming the 75 dollar a
9 share price, would have been around 150 million dollars.

10 If the settlement in the interchange litigation went to
11 approximately 11 and a half billion, again depending on the 75
12 dollar share price, the shares would then be worthless.

13 If the settlement exceeded 11 and a half billion, there
14 would be a liability for WMI or whomever would be determined to
15 be the person on the hook for the lost sharing agreement, WMI
16 is the signatory to that agreement, there could be further
17 liability associated with a decision that was above the 11 and
18 a half billion dollars.

19 Q And were there any other potential liabilities involved?

20 A Yeah. The interchange plaintiff filed a proof of claim
21 against the estate in the amount of five billion dollars.

22 Q Okay. And pursuant to the global settlement, what did the
23 parties agree to with respect to the VISA shares?

24 A So the VISA shares transferred to JPMorgan or are deemed
25 to have transferred to JPMorgan, and there's 25 million that's

1 paid to WMI, and the assumption of any liability that WMI has
2 under the loss sharing agreement, as well as any liability
3 associated with the proof of claim filed by the plaintiffs in
4 the interchange litigation are assumed by JPMorgan.

5 Q And is that the -- that's the five billion dollar proof of
6 claim?

7 A That's right.

8 Q And -- going back to BOLI COLI for a minute, can you also
9 tell me what the parties resolved in the global settlement
10 agreement?

11 A Sure. In the global settlement agreement, we got the BOLI
12 COLI that was listed on WMI's books, plus the two Pac Life list
13 bills that were not on WMI's books, and the balance of them
14 went to JPMorgan.

15 Q And in the context of the settlement discussions, did you
16 and JPMorgan agree on the ownership of the policies?

17 A We agreed on everything but for those two Pac Life
18 policies, which we ended up getting pursuant to the settlement
19 agreement.

20 MR. NELSON: Your Honor, we --

21 Q Now, Mr. --

22 MR. NELSON: Excuse me. Your Honor, we object to the
23 limited extent. Again, if his answer is purely related to what
24 JPMorgan and WMI agreed to, we have no objection. To the
25 extent it is what -- it was the conclusion of WMI that they

1 belonged to JPMorgan, we disagree and would move to strike.

2 THE COURT: Sustained.

3 BY MR. MASTANDO:

4 Q Mr. Goulding, can you describe what you and JPMorgan
5 agreed to in connection with the BOLI COLI policies?

6 A Yeah. We agreed that we would keep the policies that were
7 on WMI's books and would get the two Pac Life list bills that
8 were not on WMI's books, and that JPMorgan would get the
9 others.

10 Q Okay. Now, I believe it was Mr. Nelson who asked you some
11 questions about the exercise of subscription rights in the
12 peers class. Do you recall that?

13 A I believe he talked a little bit about the stock elections
14 and who would own it.

15 Q Of the hundred million shares available to the peers, how
16 many were subscribed, do you know?

17 A Oh, in the rights offering, I think there's about 31
18 million that was subscribed.

19 Q Okay. And do you know who exercised the subscription
20 rights in the peers class?

21 A I don't know, actually.

22 Q Okay. And Mr. Steinberg was just asking you about the
23 split of the goodwill litigation under the settlement. Do you
24 recall that?

25 A I do.

1 Q Okay. In your view, does the split affect the total value
2 of the settlement to the estate as a whole?

3 A I'm sorry, could you repeat that question?

4 Q Does the split affect the total value of the settlement to
5 the estate as a whole?

6 A Yeah. The split is --

7 MR. NELSON: Objection on vagueness and confusion
8 grounds.

9 THE COURT: Sustained.

10 Q Well, let me ask you, based on the negotiations with
11 JPMorgan, do you believe that they would've agreed to have the
12 Anchor litigation go to WMI without reduction of other value to
13 WMI under the settlement?

14 MR. NELSON: Objection, Your Honor, calls for
15 speculation.

16 THE COURT: Sustained.

17 Q Can you describe the negotiations with JPMorgan regarding
18 the Anchor litigation?

19 A Yeah. With respect to the goodwill litigations, we both
20 took the initial position that we were entitled to both of the
21 goodwill litigations. The negotiations continued. Our next
22 proposal was that we would split them, with JPMorgan taking the
23 Anchor Savings litigation and us keeping American; and
24 JPMorgan's counter proposal to that was that they would keep
25 both but for 15 million; and then we ultimately reached the

1 resolution where we got to in the settlement agreement.

2 Q And did JPMorgan ever give you any indication that they
3 would agree to have the Anchor litigation go to WMI?

4 A We didn't ever hear that from them, no.

5 MR. MASTANDO: Okay. Thank you. Nothing further,
6 Your Honor.

7 THE COURT: Anybody wish to cross, briefly?

8 RECROSS EXAMINATION

9 BY MR. NELSON:

10 Q Justin Nelson, Sussman Godfrey on behalf of the equity
11 committee. Mr. Sacks asked you with respect to whether there
12 was any data that you, being WMI, requested and that JPMorgan
13 didn't give you, and you said there wasn't, you got everything
14 you asked for; is that right?

15 A I think for the most part, for what we asked for, there --
16 to the extent that JPMorgan had the documents, I believe that
17 they were given to us.

18 Q There is a portfolio of loans that has the loan data, the
19 historical loan data pre-seizure, you're aware of that?

20 A You're talking about for WMB loans or?

21 Q WMB loans, correct, that are now in JPMorgan's books and
22 records and possession.

23 A I'm not that aware of that issue, but there is likely to
24 be information on the loans that are on WMB's books.

25 Q You understand, right, that that information is necessary

1 to determine the solvency of WMB and then to WMI, correct?

2 MR. MASTANDO: Objection, Your Honor, calls for a
3 legal conclusion, it's beyond the scope of the cross and
4 direct.

5 MR. NELSON: I'll rephrase.

6 THE COURT: All right.

7 BY MR. NELSON:

8 Q Did you ever receive that loan data from JPMorgan?

9 MR. MASTANDO: Same objection, it's beyond the scope.

10 THE COURT: Overrule.

11 THE WITNESS: I don't know, I wasn't part of the group
12 of people that asked for it if it was asked for.

13 Q So when you testified that JPMorgan gave you everything
14 you asked for, you don't know whether that's true with respect
15 to WMI generally, you just know with respect to your personal
16 knowledge of what's (sic) you particularly asked for; is that
17 right?

18 A Yeah. I was -- I guess I was referencing things that I --
19 that either I requested or items that I was aware of.

20 Q Okay. So for example, you don't know whether -- assume
21 with me that you did not get, WMI did not get, this loan data.
22 you don't know whether that's because you didn't ask or because
23 JPMorgan didn't give it to you; is that right?

24 MR. MASTANDO: Objection to the form.

25 THE COURT: Overrule.

1 THE WITNESS: Yeah, I don't know if it was asked for.
2 I don't know why it wasn't given or what the issue is.

3 BY MR. NELSON:

4 Q Okay. With respect to this issue of WMI's books and
5 records, did your analysis about what was on WMI's books and
6 records involve consultation with counsel?

7 A No.

8 Q You then did consult with counsel about the underlying
9 legal claim as to who owned which assets as part of the
10 disputed resolution, correct?

11 A Sure. We can -- we discussed with counsel on those types
12 of issues.

13 Q You discussed the NOLs for taxes, and Mr. Sacks asked you
14 whether JPMorgan was receiving any of that potential five
15 billion dollar NOL that is going to JPMorgan, correct?

16 MR. SACKS: Objection.

17 Q Excuse me, that is going to the reorganized WMI?

18 A Right. He asked me about that.

19 MR. SACKS: We'll take it if he --

20 Q That is not completely true, is it? Well, let me
21 rephrase.

22 THE COURT: Please do.

23 UNIDENTIFIED SPEAKER: Objection.

24 Q Does that analysis include the fact that isn't it true
25 that JPMorgan is receiving about 2.3 billion dollars of tax

1 refunds from the past?

2 MR. MASTANDO: Objection, calls for a legal
3 conclusion.

4 MR. SACKS: Objection, there's --

5 MR. NELSON: Can you give me some leeway, Your Honor,
6 I'm getting -- I need this foundational question to get to my
7 question.

8 THE COURT: You can answer that question, yes.

9 THE WITNESS: Sorry, can you give that to me again?

10 BY MR. NELSON:

11 Q Sure. Isn't it true that JPMorgan is receiving, as part
12 of the settlement, approximately 2.3 billion dollars of
13 historical tax refunds?

14 A Pursuant to the settlement agreement, there's a split on
15 the refunds, I think that's about where the number works out to
16 be.

17 Q Okay. And that is part of an NOL, correct?

18 A I think it's not part of the five billion dollar NOL, that
19 carry forward that we were discussing.

20 Q It's not part of the carry forward, but it is an NOL,
21 correct, of WMI or WMB?

22 A It's a refund non-account of carry back of net operating
23 losses.

24 Q Okay. You are also aware that the reason why the 5.5
25 billion dollars or five billion dollar NOL is five billion

1 dollars, is because you have to deduct the past tax refunds and
2 NOLs on a historical tax refund basis, correct?

3 MR. MASTANDO: Objection. It calls for a legal
4 conclusion, Your Honor.

5 THE COURT: Overruled. I think he can answer that.

6 THE WITNESS: For a determination of an NOL carry
7 forward, you would have to know what had been used up prior.

8 BY MR. NELSON:

9 Q In other words, you're aware, correct, that from an
10 accounting perspective, WMI actually has about 19 billion of
11 losses associated with the stock of WMB, correct?

12 A I think this is probably a better question for a tax
13 person. I know what an NOL carry forward is, and I know what
14 the five billion relates to on a carry forward basis, but the
15 specific math on the derivation of the five billion is probably
16 something better suited for Jim Carreon.

17 Q Okay. I'm only asking because -- then do you retract your
18 answer about whether you know for sure whether JPMorgan is
19 receiving any part of the tax carry forward?

20 MR. SACKS: Objection, Your Honor, that was not --

21 THE COURT: Save that for argument.

22 MR. NELSON: Okay. Well, let me just ask a few more
23 questions on this.

24 BY MR. NELSON:

25 Q If it is true that that is a -- that you have to deduct

1 the prior stock -- excuse me, the prior tax refunds that were
2 given to WMI or WMB, that would affect the value of the carry
3 forward NOL, correct?

4 A I believe the question that was asked was, the five
5 billion dollar NOL carry forward, is JPMorgan getting any of
6 that carry forward, and the answer was no. So I'm not sure I
7 understand your question.

8 Q You understand that the carry forward would be higher but
9 for the tax refunds that were historic?

10 A Again, as I said, yes, if you carry back an NOL, then you
11 would utilize some of those attributes.

12 Q Okay. And changing subjects. Just to be clear, when you
13 did testify to the fact that there is agreement between you and
14 JPMorgan, that's agreement that you reached during settlement.
15 That was not agreement that you had internally among the WMI
16 group, correct?

17 A I'm not sure what you mean.

18 Q You said a couple of times that there were places where
19 you, meaning WMI and JPMorgan, reached agreement on how these
20 assets would be distributed, correct?

21 A Right. In my declaration, I say we reached agreement with
22 respect to the BOLI COLI agreement on ownership of those.

23 Q Okay. And that agreement, again, it does not involve the
24 agreement of what is proper -- who is properly the legal owner
25 of those assets, correct?

1 MR. MASTANDO: Objection, Your Honor, it
2 mischaracterizes the testimony.

3 THE COURT: Overrule.

4 THE WITNESS: It doesn't involve legal title analysis,
5 but certainly our proposal in the back and forth discussed the
6 merits of the various arguments as between us and JPMorgan of
7 the BOLI COLI policies.

8 BY MR. NELSON:

9 Q Your opinions on the merits of the arguments are based
10 upon counsel.

11 A Well, I wasn't making the arguments on the merits,
12 JPMorgan's counsel or our counsel would've been making
13 arguments in connection with the settlement negotiations about
14 whether we owned them or they owned them.

15 Q You testified about the VISA shares. Do you recall that
16 testimony?

17 A I do.

18 Q You -- there was this five billion dollar claim. Do you
19 remember that?

20 A I do.

21 Q You stated that the -- there is -- the five billion dollar
22 claim, that affected potentially how you valued the VISA
23 shares; is that right?

24 A Well, it was important for us to have it go away.

25 Q You do realize that that claim has been dismissed, right?

1 A I believe it was either withdrawn, subsequent to the
2 settlement agreement being done or perhaps dismissed, I'm not
3 sure.

4 Q It was withdrawn with prejudice, correct?

5 MR. MASTANDO: Objection, Your Honor, calls for a
6 legal conclusion, and asked and answered.

7 THE COURT: Overrule.

8 Q All right. Well, let's go to your declaration, where you
9 state under oath that it was withdrawn with prejudice.

10 A Yeah. I believe I said it was withdrawn, but it was
11 withdrawn after the settlement agreement was reached.

12 Q Okay. Fair enough.

13 MR. NELSON: Thank you, Your Honor.

14 RECROSS EXAMINATION

15 BY MR. STEINBERG:

16 Q I'll be brief, Mr. Goulding. Arthur Steinberg again.

17 I think you testified when your counsel was asking you
18 questions that initially in the negotiation on the goodwill
19 litigations, the debtor said I wanted to retain both
20 litigations, and JPMorgan said, I wanted to retain both
21 litigations; is that correct?

22 A That's right.

23 Q And so then the debtor countered and said, I'll give up
24 the Anchor litigation, but I want to keep the American Savings
25 litigation; is that correct?

1 A That's my recollection.

2 Q When the debtor made that proposal to give up the Anchor
3 litigation, had they consulted the board, as to whether they
4 should be able to do that?

5 MR. MASTANDO: Objection to the form and the
6 characterization of the testimony, Your Honor.

7 THE COURT: Overrule.

8 THE WITNESS: I'm not sure. I wasn't involved in all
9 the consultations with the board, so I certainly don't know
10 what was or wasn't consulted with the board prior to changing
11 the term sheet.

12 BY MR. STEINBERG:

13 Q Did anybody suggest that the board needed to make a good
14 faith judgment, as to whether they were giving up the Anchor
15 litigation would protect the intent and principles of the
16 amended warrant agreement?

17 MR. MASTANDO: Objection, Your Honor, and
18 argumentative.

19 THE COURT: Sustained.

20 Q Do you know what the intent and principles of the amended
21 warrant agreement are?

22 A I don't.

23 MR. MASTANDO: Objection, beyond the scope of the
24 redirect, Your Honor.

25 THE COURT: Sustained.

1 MR. STEINBERG: Okay.

2 THE COURT: You got your answer.

3 MR. STEINBERG: We'll save it for argument.

4 THE COURT: Thank you.

5 MR. STOLL: No further questions from us, Your Honor.

6 THE COURT: All right. Debtor?

7 MR. MASTANDO: Nothing further, Your Honor, thank you.

8 THE COURT: All right. We'll stand adjourned and I'll
9 see the parties back here at 2:00. Will that work? Again, I'm
10 breaking at 4:30, so.

11 MR. ROSEN: Your Honor, before that, I know that we've
12 laid out a schedule of witnesses, but based upon travel plans,
13 Your Honor, we were hoping that we -- I don't know who's next,
14 Carreon? Your Honor, we will do Mr. Carreon next, but if
15 there's time, we may go out of order, Your Honor, solely to try
16 and accommodate Mr. Zelin, and we'll try and see that
17 afterwards.

18 THE COURT: Okay.

19 MR. ROSEN: Thank you.

20 (Recessed at 12:57 p.m.; reconvened at 2:02 p.m.)

21 MR. ROSEN: Good afternoon, Your Honor. The next
22 witness, Your Honor, is Mr. James Carreon. My partner Angela
23 Zambrano will be handling that witness.

24 THE COURT: Okay.

25 MS. ZAMBRANO: Good afternoon, Your Honor.

1 THE COURT: Good afternoon.

2 MS. ZAMBRANO: At this time, the debtors would like to
3 offer the declaration of James Carreon into evidence as his
4 direct testimony, and I have a copy of his declaration if Your
5 Honor would like one. May I approach?

6 THE COURT: You may.

7 MS. ZAMBRANO: We'd ask that James Carreon now be
8 available for cross-examination.

9 THE COURT: Okay. You should take the stand. Would
10 you remain standing so you can be sworn.

11 THE BAILIFF: Please raise your right hand and face
12 the clerk.

13 JAMES CARREON, WITNESS, SWORN

14 THE CLERK: Please state your full name, spelling your
15 last name for the record.

16 THE WITNESS: James Edward Carreon, C-a-r-r-e-o-n.

17 THE COURT: And can you confirm for the record that
18 the declaration would be your direct if you were called?

19 THE WITNESS: Yes.

20 THE COURT: All right. You may proceed with cross
21 then.

22 MR. NELSON: Thank you, Your Honor. Justin Nelson,
23 Sussman Godfrey representing the equity committee.

24 CROSS-EXAMINATION

25 BY MR. NELSON:

1 Q Mr. Carreon, you are a lawyer, correct?

2 A I have a law degree, yes.

3 Q In your practice -- in your business practice, do you
4 perform legal tasks?

5 A No. I am prohibited from performing legal tasks, because
6 I'm a member of a consulting firm.

7 Q Anything that you do therefore is not legal advice; is
8 that right?

9 A Correct. I do not provide any legal advice whatsoever.

10 Q You rely on others to provide you with legal advice?

11 A In what context?

12 Q Well, with respect to the tax refund issue, you conclude
13 that the debtors are owed at least 352 million dollars. That's
14 your testimony, correct?

15 A That is my testimony, correct.

16 Q That analysis is due in part to your communications with
17 counsel, correct?

18 A No, that is not correct. We looked at the terms of the
19 TSA to determine the historical practice and application of the
20 TSA.

21 Q Okay. I think, sir, we're separating out two issues here.
22 The first is that there's the calculation that you personally
23 made; is that right? You've made a calculation of 352 million
24 dollars?

25 A Yes. We determined that number, yes. We, meaning A & M.

1 Q There is a separate issue about the ownership of the tax
2 issues and tax refunds, regardless of historical practices.
3 You're aware of that, correct?

4 A I am aware of the dispute concerning the tax refund, yes.

5 Q You are not here to testify in any form about the
6 ownership of the overall tax issues as it respects to the legal
7 disputed aspect; is that right?

8 A I'm not here to testify with respect to the ownership of
9 the tax refund. I am generally aware of the parties'
10 positions, but that's just based on general knowledge.

11 Q So for example, with respect to the purchase assumption
12 agreement, whether that belongs to WMI or the FDIC or to
13 JPMorgan, you have no opinion on that whatsoever; is that
14 right?

15 A I have deferred to our counsel with respect to any
16 contract legal interpretation along those lines.

17 Q With respect to analysis, and I think you just testified
18 about this, with respect to the analysis of the worth of the
19 tax refund claim, the legal analysis, that counsel contributed
20 to that, correct?

21 MS. ZAMBRANO: Objection, that misstates his
22 testimony.

23 THE COURT: Well, overrule. Let's test it on cross.
24 Is that what you said?

25 THE WITNESS: I -- could you repeat your question?

1 BY MR. NELSON:

2 Q Yeah. Counsel engaged in analysis to determine the worth
3 of the tax refund claim, correct?

4 A I don't know what analysis counsel did or did not enter
5 into. If you're asking me what the value of the tax refund is,
6 then that is to me, a different consideration.

7 Q I think -- if I understand your testimony correctly, what
8 you are saying is, without any regard to the underlying legal
9 dispute of who owns the asset, WMI, based on prior historical
10 practice, is entitled to 352 million dollars, based upon
11 certain assumptions that you've made, correct?

12 A We performed an analysis that reflected that 352 million
13 dollars, based on the historic practice and application of the
14 TSA was owed to WMI from WMB.

15 Q Did you perform any other analysis that would reflect a
16 higher or lower amount that would come in to WMI?

17 A We only performed the one analysis.

18 Q And that analysis was solely based upon essentially
19 saying, here's what happened in the past with respect to WMI
20 and WMB, and applying that on a going forward basis, WMI would
21 receive 352 million dollars?

22 A Just to be clear, we looked at the historic application of
23 the TSA, looked at what the separate company tax liabilities
24 may be, what the transfer of cash was, looked at some certain
25 historic documents, understand tracking of entity changes, and

1 based on that, up until the date of bankruptcy, we determined
2 that under the TSA, WMI was owed that 352 million dollars from
3 WMB.

4 Q Okay. At least 352 million dollars.

5 A 352 million dollars, yes.

6 Q Because you understand that it could be substantially
7 higher on that, than that, based upon the results of the
8 dispute between JPMorgan, the FDIC, and WMI regarding the
9 ownership of the tax asset, correct?

10 A No. The reason that it could be greater than 352 million
11 dollars, is because there's certain information that wasn't
12 readily available to us at the time of that analysis.

13 Q What information wasn't available to you?

14 A There's just certain internal record keeping gaps for
15 earlier periods where we made reasonable assumptions, and given
16 that we have that information gap, you know, we didn't know if
17 the number would be higher or not.

18 Q Well, what information are you missing?

19 A Again, it's certain internal accounting records, things
20 like with like ledger accounts, and those types of information
21 gaps towards the first part of the analysis period.

22 Q Do that -- does that information exist?

23 A No. I mean, not to the best of my knowledge.

24 Q Did you ask JPMorgan for it?

25 A We looked internally, we also asked, we made several

1 information requests to JPMorgan as well.

2 Q Did you ever issue, for example, a formal request for
3 production for those documents?

4 A If you're asking me, did we formally ask them for that
5 information, we asked them to provide a great deal of
6 information in that regard.

7 Q You understand in litigation, there are requests for
8 production, by which a party is legally obligated to produce
9 those documents. Did you do that in this case?

10 A Well, again, I'm not a practicing lawyer, so I did not
11 make any document demands, and you know, in the form of a legal
12 sense.

13 Q Well, you just testified that you were missing
14 information. My question to you is whether you asked through a
15 formal request for production on JPMorgan to produce that
16 information.

17 MS. ZAMBRANO: Objection, asked and answered.

18 THE COURT: Overrule.

19 THE WITNESS: If you're asking me did we ask our
20 lawyers to make a formal request for production, no, we did
21 not. We had a fairly collaborative exchange with them on many
22 issues, including information exchange.

23 BY MR. NELSON:

24 Q And was with respect to the legal ownership of the tax
25 refund claim that might make the worth to WMI substantially

1 higher, that was based upon counsel's advice, correct?

2 MS. ZAMBRANO: Objection.

3 THE COURT: Overrule.

4 THE WITNESS: Well, I think it's important to
5 understand what we did, what we do.

6 Q I'm actually just looking for a yes or no answer to that
7 question.

8 A I don't think a yes or no answer is appropriate here,
9 because you're asking me about the 352 million dollars, and
10 that is based on the historic application of the TSA to the
11 group.

12 When you're asking me about any of the value associated
13 with the refund on a going forward basis, that was an issue of
14 contract interpretation, which we deferred to counsel on.

15 Q Okay. I understand that you stated that with respect to
16 352 million dollars, you personally have done that calculation.
17 My question to you is whether your counsel did analysis to
18 determine the worth of the tax refund claim for anything from
19 352 million dollars, to the amount that you have -- WMI has
20 asserted is in dispute in this litigation.

21 A I don't know what analysis counsel has done.

22 Q You do understand that they have done that analysis,
23 correct?

24 A I would assume that analysis has been done, but again, I
25 don't know exactly what specific analysis you're referring to.

1 MR. NELSON: Would you mind turning on the elmo,
2 please?

3 THE COURT: What is it?

4 MR. NELSON: It's testimony from yesterday.

5 BY MR. NELSON:

6 Q Mr. Carreon, this is testimony from yesterday from Mr.
7 Kosturos. I asked him without getting into the substance, Weil
8 and Quinn (ph.) both undertook analysis about the worth of the
9 tax refund with the claim, correct?

10 He stated, all of the analysis was completed by the
11 financial team and relied upon by the financial team.

12 That statement is true with respect to the 352 million
13 dollars, but it is untrue with respect to the underlying legal
14 dispute about who owns the tax refund claim, correct?

15 A Well, I guess I'm a little unclear as to what analysis
16 Mr. Kosturos may be referring to. You must understand that
17 Mr. Kosturos was the chief restructuring officer and had a much
18 broader view of the case than I did. My view was, for the most
19 part, confined to tax considerations.

20 Q I'm sorry, can you answer my question, please?

21 MR. SACKS: Objection. He's answered, Your Honor.

22 THE COURT: Sustained.

23 Q Do you agree that with respect to the legal analysis of
24 the claim to determine the worth of the tax refund claim,
25 debtor's lawyers did, in fact, undertake that analysis?

1 MR. SACKS: Objection, Your Honor.

2 MS. ZAMBRANO: Objection.

3 MR. SACKS: He's testified multiple times he doesn't
4 know what debtor's lawyers did.

5 THE COURT: Yeah, I think sustained, he doesn't know.

6 MR. NELSON: Okay. Nothing further. Thank you.

7 THE COURT: Anybody else?

8 MR. STOLL: We have no questions of this witness.

9 THE COURT: Okay. None by the warrant holders, okay.
10 Anybody, JPMorgan?

11 MR. SACKS: Nothing, Your Honor.

12 MS. ZAMBRANO: I have a brief redirect, Your Honor.

13 THE COURT: Okay.

14 REDIRECT EXAMINATION

15 BY MS. ZAMBRANO:

16 Q Mr. Carreon, does the 352 million dollar analysis have
17 anything to do with the NOL carrybacks that are also in the
18 declaration?

19 A No. The 352 million dollar number is based on a
20 historical application of the tax sharing agreement and certain
21 reimbursements that were not made.

22 Q So the 352 million dollars was past historic and you did
23 or did not rely on counsel with respect to that analysis?

24 A Did not rely on counsel with respect to that analysis.

25 Q And the carryback NOL issue that's also -- you testified

1 about in your declaration, did that have anything to do with
2 any analysis of counsel?

3 A The carryback claim?

4 Q Yes.

5 A The calculation of the carryback claim, is that what
6 you're referring to?

7 Q Let me ask a better question. Did counsel provide any
8 advice with respect to the NOL carryback claim?

9 A No.

10 Q And you're not relying upon any advice from counsel with
11 respect to, in your declaration and your testimony, with
12 respect to that claim; is that correct?

13 A That's correct.

14 MS. ZAMBRANO: No other questions, Your Honor.

15 THE COURT: Any redirect, recross? No. All right.
16 Thank you. You may step down.

17 THE WITNESS: Thank you.

18 MR. ROSEN: Your Honor, if we could at this time
19 release Mr. Carreon so that he does not have to stay for the
20 remainder of the proceedings.

21 THE COURT: Any objections?

22 UNIDENTIFIED SPEAKER: No objection, Your Honor.

23 THE COURT: All right. He may.

24 THE WITNESS: thanks.

25 MR. ROSEN: Thanks. Your Honor, during the lunch

1 hour, we were looking at the scheduling of the witnesses and
2 trying to see what time would permit, based upon what we
3 understand cross-examination might be. And so we informed the
4 parties to the other side, Your Honor, that we would be
5 altering the schedule slightly, specifically to move forward
6 Messrs. Klamser and Sharp. These were the two representatives
7 from KCC that were involved in the solicitation process and the
8 tabulation of the votes, so they would be moving forward at
9 this time. My colleague Kelly DiBlasi will be handling those.

10 THE COURT: Any issue with that?

11 MR. NELSON: Not at all on that, Your Honor. They did
12 inform us that Mr. Smith was going to be moved to Monday, and I
13 think actually we can very much even well before 4:30, probably
14 get Mr. Smith's questioning under way.

15 MR. ROSEN: Your Honor, we're not sure if it's going
16 to be Mr. Smith or Mr. Simms going next after those two.

17 THE COURT: Okay.

18 MS. DIBLASI: Good afternoon, Your Honor, Kelly
19 DiBlasi from Weil Gotshal and Manges on behalf of the debtors.

20 Your Honor, I'd like to submit the declaration of
21 Robert Q. Klamser with respect to the tabulation of votes on
22 and elections pursuant to the plan, as his direct testimony,
23 and I have a copy with me if the Court would like a copy.

24 THE COURT: You may hand it up, yes.

25 MS. DIBLASI: Your Honor, I have no additional direct

1 for Mr. Klamser.

2 THE COURT: He should take the stand. Please remain
3 standing so you can be sworn.

4 THE CLERK: Raise your right, please.

5 ROBERT Q. KLAMSER, WITNESS, SWORN

6 THE CLERK: Please state your name, spell your last
7 name.

8 THE WITNESS: Robert Quincy Klamser.

9 THE CLERK: Would you spell it?

10 THE WITNESS: Klam -- Quincy, Q-u-i-n-c-y, Klamser, K-
11 l-a-m as in Michael, s-e-r.

12 THE COURT: Does anybody wish to cross Mr. Klamser?

13 UNIDENTIFIED SPEAKER: No questions, Your Honor.

14 THE COURT: I'm sorry.

15 UNIDENTIFIED SPEAKER: No questions, Your Honor.

16 THE COURT: Nobody, huh? Well, just for the record,
17 your declaration is what you would testify to on direct?

18 THE WITNESS: That's correct.

19 THE COURT: All right. You may step down.

20 THE WITNESS: Thank you.

21 MR. ROSEN: Same request for Mr. Klamser to release
22 him, so that he can travel back. Thank you.

23 MS. DIBLASI: Your Honor, they're just bringing in the
24 next witness, who is waiting outside the courtroom.

25 Your Honor, the debtor's next witness is David Sharp,

1 who also is employed by KCC. We filed two declarations for Mr.
2 Sharp, one with respect to tabulation of votes and elections
3 pursuant to the plan, with respect to classes of securities,
4 and the other one with respect to tabulation of the rights
5 offering elections. We'd like to submit these as his direct
6 testimony, and I have copies if you'd like.

7 THE COURT: You may hand them up. Thank you. You
8 should take the stand as well. Remain standing so you can be
9 sworn.

10 THE CLERK: Raise your right hand, please, sir.

11 DAVID SHARP, WITNESS, SWORN

12 THE CLERK: Please state your name, spelling your last
13 name.

14 THE WITNESS: My name is David M. Sharp, S-h-a-r-p.

15 MS. DIBLASI: And, Your Honor, we do have some limited
16 questions for Mr. Sharp to supplement his direct testimony in
17 response to a handful of objections to confirmation that were
18 filed by certain shareholders.

19 THE COURT: All right. You may.

20 DIRECT EXAMINATION

21 BY MS. DIBLASI:

22 Q Mr. Sharp, just to confirm, where are you currently
23 employed?

24 A Kurtzman & Carson Consultants.

25 Q And what is your position there?

1 A I'm director of public securities.

2 Q And Kurtzman & Carson Consultants often is referred to as
3 KCC; is that correct?

4 A Correct, uh-huh.

5 Q And what is KCC?

6 A KCC is primarily on one hand a claims agent, a
7 solicitation agent, a tabulation agent for debtors in Chapter
8 11 bankruptcies.

9 Q And what is KCC's general experience in this?

10 A KCC has considerable experience working with debtors in
11 Chapter 11 bankruptcy providing these services, and I am
12 qualified to testify on their behalf.

13 Q And what is KCC's role in these Chapter 11 cases?

14 A In the Washington Mutual Chapter 11 cases, we were
15 retained as the claims and noticing agent, as well as the
16 solicitation and tabulation agent.

17 Q And how long have you been employed at KCC?

18 A I've been there for just over two years.

19 Q And prior to that, did you -- were you employed elsewhere?

20 A I was. Prior to that, I worked for almost four years at
21 Epic Financial Balloting Group, as a vice-president,
22 specializing in Chapter 11 bankruptcy, solicitations involving
23 public securities, international aspects of the Chapter 11
24 cases, as well as a specialist in treatment elections and
25 subscriptions.

1 Q Have you reviewed the objections to confirmation that were
2 filed by shareholders raising issues and questions with respect
3 to the voting procedures?

4 A I have.

5 Q And just in general terms, can you describe what some of
6 the allegations were in these objections?

7 A There was some concern about holders not being able to
8 receive materials, solicitation materials timely. That seemed
9 to be the thrust of --

10 Q And were these concerns raised with respect to any holders
11 in particular?

12 A The ones that I saw seemed to come primarily from equity
13 holders.

14 Q Were you involved with the distribution of solicitation
15 materials to equity holders in these Chapter 11 cases?

16 A I was, yes.

17 Q How did you identify the holders of equity securities that
18 were entitled to receive solicitation materials?

19 A Once we had identified the equity securities that would be
20 involved, we went to the transfer agent, who was the keeper of
21 the records of each of the equity securities, and asked them
22 for a record date listing of the holders of those securities.

23 Q And once you received that list, what did you -- I
24 apologize, let me restart. What does that list show?

25 A The list would show all of the holders of record of any --

1 of that particular security. Typically, with equity
2 securities, you could have what are known as registered holders
3 of the securities, who are holders that hold the securities in
4 their own name, they're not holding it through an intermediary.
5 So when you get the list, you would see a listing of these
6 various individuals' names who hold it in their own name.

7 You would also typically see a large position in the name
8 of CD & Company (ph), which is the nominee name for the
9 depository trust company, which is then depository for the
10 United States. DTC holds the position on account of nominees
11 who are the banks and brokers holding it in turn for their
12 clients.

13 Q So for those registered holders on the list that you
14 received from the transfer agent, who were the actual
15 beneficial holders of the securities, how did you distribute
16 solicitation materials to them?

17 A Anyone who's a registered holder, whose name appears
18 directly on the transfer agent's list, we would send the
19 materials directly to them, because we know who they are.

20 Q And is that what you did in these cases?

21 A We did, yes.

22 Q Okay. And then turning to the securities that were
23 registered in the name of DTC, how did you distribute
24 solicitation materials with respect to those securities?

25 A DTC typically will not act on behalf of the banks and

1 brokers. So what we do is we go to DTC and request a listing
2 of the banks and brokers as of the record date that we're
3 holding at the depository trust company. We would then mail
4 materials, either to them or to an agent that acts on their
5 behalf. Many of the banks and brokers use a company called
6 Broadridge to do all of the mailings to their beneficial
7 holders.

8 Some of the others use a company called Media
9 Communications to do so, and there are a handful of banks and
10 brokers that actually mail to their own beneficial holders.

11 So what we do is, we would send sufficient materials or
12 subsequent distribution to the beneficial holders to
13 Broadridge, Media and the few banks and brokers that actually
14 distribute to their own holders. We would also send a courtesy
15 copy to every bank and broker that appeared on the DTC list, so
16 that they would be aware that the action was happening.

17 Also we electronically notify the major depositories,
18 which would be the Depository Trust Company in the U.S., the
19 Canadian Depository, Euroclear and Clearstream in Europe, and
20 Sega Intersettle in Switzerland.

21 There's also a few banks and brokers that have asked us to
22 provide them with electronic materials any time we're working
23 on an action like this, so we would've provided them with
24 electronic materials as well.

25 Q So to be clear, are the banks and brokers the ultimate

1 beneficial holders of the securities?

2 A No. They're usually holding it on behalf of other
3 beneficial owners. Unfortunately, they don't let us know who
4 their clients are, or who they're holding for.

5 Q And is there any other way for you to determine who the
6 beneficial holders are?

7 A No. The banks and brokers do not disclose that
8 information.

9 Q One of the shareholder allegation -- objections alleges
10 that German shareholders specifically did not receive copies of
11 the voting materials. Did KCC provide solicitation materials
12 to foreign equity holders?

13 A We did, yes.

14 Q Can you please describe how you distributed materials to
15 those foreign shareholders?

16 A Yes. As I was saying, the transfer agent holds the full
17 listing of the equity issuance on their books and records. DTC
18 would be a large part of that, underneath that would be the
19 banks and brokers holding through DTC.

20 Typically, the foreign -- any foreign holders would be
21 holding through one of the European depositories, who in turn,
22 hold through one of the U.S. custodians, so we would've
23 provided materials to the U.S. custodian, who then were to pass
24 it on to one of the European depositories.

25 Typically then the banks and brokers in Europe would hold

1 through those depositories, so would have to receive it from
2 either Euroclear or Clearstream or Sega Intersettle and then
3 pass it on down the chain to the beneficial owners. Because we
4 realize there can sometimes be a lapse between the U.S.
5 custodian getting it to the European depository, we also as I
6 mentioned, send the materials electronically to the European
7 depositories, so that they have it right away, so that they can
8 go on and pass it down the chain.

9 Q And is there any way for KCC to control or ensure that the
10 materials make their way through that chain that you just
11 described?

12 A We cannot, no.

13 Q Are you generally familiar with the list of registered
14 holders of Class 2 -- 22, which are common equity interests,
15 that --

16 A Yes.

17 Q -- were attached to KCC's affidavit of service of
18 solicitation materials as Exhibit AV?

19 A I am, yes.

20 Q Was this intended to be a complete list of all beneficial
21 holders of common equity interests?

22 A It's a list of the registered holders, which would be the
23 holders, as I mentioned, that hold the securities in their own
24 name, as well as the position for the Depository Trust Company.

25 Q So to be clear, if a beneficial holder was not listed on

1 that exhibit, does that mean that such holder was not sent
2 solicitation materials?

3 A No. It means the solicitation materials would've been
4 sent to their voting nominee, and it was the voting nominee's
5 responsibility to send it on to the actual ultimate beneficial
6 owner.

7 Q Were any of the preferred equity interests in Class 20
8 registered in the name of the ultimate beneficial holders?

9 A No. When we requested the list of the Class 20 equity
10 securities, the only holder of record was CD and Co. or the
11 Depository Trust Company.

12 Q What solicitation materials did you distribute to
13 registered holders and voting nominees on behalf of beneficial
14 -- excuse me, on behalf of equity securities?

15 A For Class 19 and 20, which were the voting equity classes,
16 we sent the disclosure statement order, the confirmation
17 hearing notice, a CD ROM that included the disclosure statement
18 and plan, several letters that were both in support and in
19 opposition to the plan, as well as a ballot.

20 Q And Classes 21 and 22?

21 A Classes 21 and 22 were non-voting classes, so they
22 received the notice of confirmation hearing, as well as a
23 notice of non-voting status.

24 Q The materials that you sent out that you just described,
25 were these the materials that were set forth in the disclosure

1 statement order, as being required to be sent to these specific
2 classes?

3 A They were, yes.

4 Q Did the solicitation packages contain return envelopes
5 addressed to KCC?

6 A They did not, no.

7 Q Why?

8 A The ultimate beneficial owners, because -- let me back up
9 a moment. The Class 19 and 20 only had DTC as the holder of
10 record, so there were no direct registered holders. Therefore,
11 all of the solicitation materials needed to go to the voting
12 nominees to be passed on to down to the beneficial holders.

13 The beneficial holders must vote the ballots through their
14 voting nominee in order for it to be counted, and the voting
15 nominees typically turn in their master ballots to us, either
16 by overnight mail or by courier.

17 Q And why is it that the beneficial holders must return
18 their ballots through their voting nominees?

19 A It's the only way that we can verify that they are, in
20 fact, a holder of the security, because we don't have a list of
21 the names and positions of those holders. We only know the
22 names and positions of the nominees.

23 Q And are you aware that certain nominees -- certain ballots
24 were faxed or otherwise electronically submitted to nominees by
25 beneficial holders?

1 A It's not uncommon for the nominees to set their own
2 procedures for how they wish to receive information, including
3 votes and elections from their clients. The requirements for
4 us were that we receive an original master ballot from the
5 voting nominees, so we don't really have any say as to what
6 procedures they set up between the nominees and their own
7 clients.

8 Q So if a beneficial holder faxed or electronically
9 submitted a beneficial ballot to their voting nominee, and that
10 voting nominee then submitted an original copy of a master
11 ballot to KCC, would that vote have been counted?

12 A Absolutely, yes.

13 Q When were the solicitation packages served by KCC on
14 holders of equity securities?

15 A They were served on or before October 25th.

16 Q And when was the voting deadline?

17 A The voting -- the original voting deadline was, I believe,
18 December 16th. It was extended to the 18th or 19th.

19 Q Did you mean to say November?

20 A I'm sorry, November, yes.

21 Q Are you aware that certain nominees required beneficial
22 holders to provide them with their ballots in advance of the
23 debtor's voting deadline?

24 A Yes.

25 Q Is this customary, in your experience?

1 A It is, yes.

2 Q Do you have any sense for why voting nominees may require
3 this?

4 A Often the voting nominees like to give themselves a few
5 days to assemble the instructions that they receive from their
6 beneficial owners, so that they can transcribe it onto a master
7 ballot, and ensure that they can deliver an original master
8 ballot to us by the voting deadline.

9 Q Did any equity holders contact KCC seeking copies of
10 solicitation materials?

11 A They did, yes.

12 Q And did KCC provide them with copies?

13 A We did, with instructions that they were to return them to
14 their nominees.

15 Q Did KCC receive calls from holders of claims or equity
16 interests with questions about the solicitation process?

17 A We did, yes.

18 Q And what is KCC's policy on responding to these calls?

19 A We answered questions related to the voting mechanics and
20 to how it is that they need to turn in their ballots through
21 their nominees. We try to direct them to areas in the
22 materials where they can find answers to any questions that
23 they may have, like the disclosure statement or plan.

24 We do not and cannot give them any legal advice, or offer
25 them any opinions on what they should be doing.

1 Q Are you familiar with the opt out and opt in provisions in
2 the ballots with respect to the releases?

3 A I am, yes.

4 Q And can you explain what would physically happen to an
5 equity holder's shares within DTC if they elected to opt out of
6 the releases, or with respect to Class 19 if they elected to
7 opt in to the releases?

8 A Yes. If they chose to make one of the opt elections in
9 the class, they would need to notify their nominee that they
10 wish to do so. The nominee would then tender their position
11 into a segregated account called a contra CUSIP at the
12 Depository Trust Company. Once the position was moved into
13 that contra CUSIP, it could not be traded. And then the
14 nominee would send us information related to that opt election
15 and what's called a VOI number that is a designator of the fact
16 that they had tendered it into the contra CUSIP to us on the
17 master ballot.

18 Q And why is this process required?

19 A There are a few reasons. One is that any time a holder
20 makes any kind of a treatment election on a security, you have
21 to be sure that that particular election stays tied to that
22 security; and the only way to do that is to actually lock it up
23 and prevent it from trading, because otherwise, someone could
24 make an election and then trade it to someone else, and you
25 would have no way of tracking that that election was moving

1 along with the security.

2 The other reason is that when you are making
3 distributions, when you get to the point where you're making
4 distributions through DTC, you have to have -- DTC can only
5 accept standard distribution information for any particular
6 pool of holders. So any time someone's making anything that
7 varies from the standard distribution, you need to move it into
8 a separate pool so that you can make distributions to that.

9 Q And in your experience, is this process of forcing
10 security holders to transfer their shares into a CUSIP when
11 they're making an election on a ballot customary?

12 A Very much so, yes.

13 Q In general, based upon your experience, are the
14 solicitation procedures in this case customary?

15 A They are, yes.

16 Q Have you employed similar procedures in other bankruptcy
17 cases you've been involved with where a debtor held publicly --
18 where a debtor had publicly held securities?

19 A I have, yes.

20 MS. DIBLASI: I have nothing further at this moment,
21 You Honor.

22 THE COURT: All right. Cross?

23 CROSS-EXAMINATION

24 BY MR. NELSON:

25 Q Good afternoon. Justin Nelson, Sussman Godfrey for the

1 equity committee. I just have a few questions for you.

2 First, you were aware that there were multiple, multiple
3 complaints from shareholders, both preferred and commons, that
4 they were unable to receive their ballots and then get them
5 back in time, correct?

6 A Correct.

7 Q You have experience and just testified as to customary
8 practices with respect to the ballot procedures. How does this
9 case compare to other cases in which you've been involved, in
10 terms of timing?

11 A It's very similar to many other cases that I've had in
12 terms of timing.

13 Q What do you mean by very similar?

14 A It's -- typically we have anywhere from 15 to 30 day
15 period of time.

16 Q That's a normal time?

17 A Yes.

18 Q And is there longer times or shorter times, as well,
19 during certain circumstances?

20 A There can be, yes. Rarely is it -- rarely have I ever
21 seen it be longer than 20 to 25 days, of late.

22 Q Okay.

23 MR. NELSON: Thank you very much. That's all I have.

24 THE COURT: Anybody else?

25 UNIDENTIFIED SPEAKER: Nothing for us, Your Honor.

1 THE COURT: All right. Any redirect?

2 MS. DIBLASI: No, Your Honor.

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

4 MR. ROSEN: Your Honor, may Mr. Sharp be released?

5 THE COURT: You may.

6 MR. ROSEN: Thank you. Your Honor, the next witness
7 is going to be Mr. Steve Simms of FTI.

8 MR. JOHNSON: Good afternoon, Your Honor. Robert
9 Johnson on behalf of the official committee of unsecured
10 creditors. At this time, we would like to offer the
11 declaration of Steven D. Simms, and I have a copy for Your
12 Honor.

13 THE COURT: You may hand it up.

14 MR. JOHNSON: May I approach?

15 THE COURT: Thank you.

16 MR. JOHNSON: I'd like to offer the declaration into
17 evidence and I have no questions at this time.

18 THE COURT: You should take the stand. Remain
19 standing so you can be sworn.

20 THE CLERK: Raise your right hand, please.

21 STEVEN SIMMS, WITNESS, SWORN

22 THE CLERK: State your name and spell your last name,
23 please.

24 THE WITNESS: Steven, S-t-e-v-e-n, David Simms, S-i-m-
25 m-s.

1 THE COURT: And can you confirm for the record that
2 the declaration submitted on your behalf would be your direct
3 testimony if you were called?

4 THE WITNESS: Yes, I could.

5 THE COURT: Okay. Anybody wish to cross?

6 MR. BROWN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BROWN:

9 Q Mr. Simms, good to see you again.

10 A Good to see you.

11 Q Daniel Brown on behalf of the TPS Consortium.

12 A Excuse me, Mr. Brown. I have someone else's declaration
13 up here, I don't know if you want --

14 THE COURT: I guess you can pass along and give you a
15 copy of his.

16 MR. BROWN: Does the witness have a copy?

17 UNIDENTIFIED SPEAKER: You can have mine.

18 MR. BROWN: Yeah, that'd be great. Thank you.

19 THE WITNESS: Thank you.

20 BY MR. BROWN:

21 Q Mr. Simms, as I said, you know, good to see you again. We
22 have seen each other before. Do you recall your deposition a
23 couple of weeks ago in my office?

24 A Yes, I do.

25 Q And during that time, you remember you and I had a dialog

1 throughout the day at various points regarding privilege
2 issues. Do you recall that?

3 A Yes, I do.

4 Q And you know I asked you certain questions about the
5 analysis that was conducted by the creditors' committee in
6 connection with the global settlement agreement during that
7 time. Do you recall that?

8 A Yes, I do.

9 Q And during that time, you actually did assert the
10 privilege and refused to answer several questions. Do you
11 remember that?

12 A I remember answering a lot of questions, and I remember
13 asserting privilege on certain questions, that's correct, yes.

14 Q All right.

15 MR. BROWN: May I approach the witness and bench, Your
16 Honor, with copies of the transcript?

17 THE COURT: You may.

18 THE WITNESS: Thank you.

19 Q Mr. Simms, I did hand you a copy of the deposition
20 transcript. It's a little bit hefty because I did the big
21 pages, not the minu-script, but if you could go ahead and turn
22 to page 91 of that for me.

23 A Okay.

24 Q Okay. I'd like to go ahead and review some of the
25 questions and answers that you and I went through. At the

1 time, I was asking you about the analysis that was conducted by
2 the creditors' committee, and I believe -- well, here on this
3 page, you had testified that the creditors' committee concluded
4 that the global settlement agreement was prudent to enter into;
5 is that accurate?

6 A I see from page 91, the first sentence says, "The
7 creditors' committee concluded that the global settlement
8 agreement was prudent to enter into, yes."

9 Q Okay. And actually at the conclusion of that paragraph,
10 that answer actually says the something repeated again; is
11 that right? See at lines 12 through 14?

12 A Uh-huh. Just looking. Yes.

13 Q Okay. And is that your position again today, that the
14 creditors' committee concluded that the global settlement
15 agreement was prudent to enter into?

16 A We believe that it was prudent to enter into, yes, we did.

17 Q Okay. And my follow-up question to you, exactly what
18 analysis was conducted to come to that conclusion; is that
19 accurate? Lines 15 to 16 there.

20 A Yes, I agree with that.

21 Q And your attorney objected and instructed you not to
22 answer on behalf of the -- or because of the attorney/client
23 privilege, do you recall that?

24 A That is correct.

25 Q Okay. And you actually did follow that instruction with

1 respect to some of the analysis, didn't you?

2 A I followed that instruction with regard to the conclusions
3 of the analysis.

4 Q Okay.

5 A I think, as I stated in here, was the analysis was done
6 with counsel, and I believe I go on to say in the answer, that
7 carries over to 92, that we walked through the analysis that
8 was done on many of the things, solvency, fraudulent
9 conveyance, deposits, disputes over other items, so --

10 Q Okay.

11 A -- we did a lot of analysis as I indicated that day, and
12 as indicated here, that was done without counsel, but the
13 conclusions on many of these, yes, I said are subject to
14 attorney/client privilege.

15 Q Okay. Understood. And I guess, you know, just to
16 clarify, I'll go ahead and read your answer as it was complete.

17 A Uh-huh.

18 Q "The analysis on the major assets, liabilities, and claims
19 was done fully in conjunction with counsel. I think -- I
20 believe earlier today, we walked -- talked through some of the
21 analysis that was done, solvency, fraudulent conveyance would
22 be used, disputes over deposits, disputes over other items,
23 that was the type of analysis that was done, claims against
24 JPM, it was all done with counsel."

25 Is that accurate still?

1 A Work was done with counsel, all that was done with
2 counsel, there was independent analysis that was part of those
3 analyses that were done by FTI, but, yes, they were all done at
4 some point with counsel at the end.

5 Q Okay. And the analysis that was performed with counsel,
6 was that with respect to the merits of the legal claims
7 involved in these Chapter 11 cases?

8 A Merits of potential legal claims, but analysis that we did
9 throughout the case where counsel was involved, there were
10 parts of it that were clearly done independently by FTI, as an
11 example, where to use an example of the deposit accounts, where
12 we looked at issues related to the inflows and outflows of
13 various deposit accounts, where the accounts were, where the
14 money went, who it came from, what the back and forth was
15 between WMI and WMB, each of the different deposit accounts.
16 There were components of that analysis at the end that included
17 counsel with regard to the merits of winning arguments, but
18 there was extensive analysis done by FTI independently.

19 Q And I just want to make sure that I understand this
20 correctly. As you just testified, the merits of the claims,
21 the analysis regarding the merits of the claims was done by
22 counsel; was it not?

23 MR. JOHNSON: Objection, ambiguous.

24 THE COURT: Overrule.

25 THE WITNESS: Can you repeat the question?

1 BY MR. BROWN:

2 Q The analysis that was done with respect to the claims that
3 we just went through in your deposition answer, was done in
4 connection with counsel, or in conjunction with counsel; was it
5 not?

6 A I think I just stated that we did analysis independent of
7 counsel, looking at different components of it. As far as the
8 likelihood of winning in litigation on many of those, yes, it
9 was done in conjunction with counsel.

10 Q Okay. And, in fact, at the time during your deposition,
11 as we went through the various claims that were raised, this is
12 claims between JPMorgan, the FDIC and the debtors --

13 A Uh-huh.

14 Q -- you asserted the privilege with respect to the results
15 of that analysis, didn't you?

16 A The results of likelihood of winning on those claims, yes.

17 Q Right. And that included the analysis that was -- or the
18 -- excuse me, the results of the analysis with respect to
19 claims on the disputed deposit accounts of four billion
20 dollars.

21 A As I just mentioned, we did extensive work on the claims
22 themselves, looking at the to's and fro's of the deposit
23 accounts, what the deposit was, we met with personnel from the
24 company, we received extensive data from the company. But on
25 the merits of winning legal litigation, it was clearly done in

1 conjunction with counsel.

2 Q Okay. And the analysis of whether the debtors would win
3 any legal litigation with respect to the disputed tax returns
4 was also done by counsel; is that right?

5 A We did extensive work as it related to taxes, looking at
6 the tax -- getting an understanding of who generated the
7 losses, where the losses were generated, what the intercompany
8 transactions were with regard to taxes, what the merits were,
9 but as far as winning on a rejection versus repudiation or
10 things of that, yes, we had advice of counsel, but we got an
11 enormous amount of information from the debtor regarding their
12 taxes and other information with taxes directly from the folks
13 at Alvarez.

14 Q All right. I'm just going to focus you -- back on your
15 deposition, if you can turn to page 99.

16 A Uh-huh.

17 Q Because we also discussed during your deposition certain
18 claims to the ownership of the trust preferred securities. Do
19 you remember that?

20 A Not specifically, but I'm happy if you refresh my memory.

21 Q You have an understanding that there was a dispute
22 regarding the ownership of the trust preferred securities
23 between WMI and JPMorgan. Do you recall that?

24 A Yes, I guess I know there's a dispute.

25 Q Okay. And you understand that that is one of the claims

1 that is being settled under the global settlement agreement.

2 A Yes, it is.

3 Q And pursuant to the global settlement agreement, WMI
4 would, if it's approved, transfer the trust preferred
5 securities to JPMorgan? Do you have that understanding?

6 MR. JOHNSON: Objection to the characterization of the
7 transaction in the plan.

8 MR. SACKS: Objection to the form of the question,
9 Your Honor.

10 THE WITNESS: Yeah, I think --

11 THE COURT: Overrule. I think you can answer.

12 THE WITNESS: I wouldn't say that they're transferring
13 it. I think there's been claims made that the assets were
14 already transferred. So if it's confirmation of certain
15 treatment of that, I'll agree with you, but I know there's a
16 dispute over whether or not that's been transferred yet or not.
17 JPM would argue that it's already been transferred, the debtors
18 would argue differently.

19 BY MR. BROWN:

20 Q Okay. Well, under the global settlement agreement, if
21 it's approved, who will own the securities?

22 A I believe JPMorgan will own the securities.

23 Q Okay. And looking back at on page 95, I believe you're
24 there; is that right?

25 A You had me at 99. Do you want me to go to 95?

1 Q I'm sorry, yeah, I apologize. I did say 99, I meant 95.

2 A Okay.

3 Q Line 8 there,

4 Question, "What was the basis for concluding that the
5 debtors should contribute the trust preferred securities to
6 JPMorgan?"

7 There was an objection, attorney/client privilege.
8 Then a follow-up question,

9 "Are you going to follow your attorney's presumed
10 instruction to not answer that question based on the
11 attorney/client privilege?"

12 Answer, "I will follow my attorney's instruction."

13 And as you sit here today, are you continuing to assert
14 the attorney/client privilege with respect to the basis for
15 concluding that the debtors should contribute the trust
16 preferred securities to JPMorgan?

17 A With regard to conclusion of termination, I think it is
18 subject to attorney/client privilege. We did obviously
19 extensive work with regard to trust preferred securities, but
20 with regard to the conclusion that was reached, it was subject
21 to attorney/client privilege, yes.

22 Q Okay. And, in fact, here I asked you what was the basis
23 for concluding, the basis, not just the conclusion, but the
24 basis, and you asserted the attorney/client privilege, did you
25 not?

1 A Yes, I did.

2 Q Okay. And the next question,

3 "What was the basis for determining that Washington
4 Mutual should agree to split the tax returns in the amount set
5 forth in the global settlement agreement?

6 "Objection, as to attorney/client privilege and
7 attorney work product on this specific line item, and I will
8 instruct you not to answer."

9 Question, "You are following your attorney's
10 instruction?"

11 Answer, "Yes."

12 Now, are you continuing to assert the attorney/client
13 privilege with respect to the basis for determining that
14 Washington Mutual should agree to split the tax returns?

15 A For the conclusion aspect, I -- yes. However, as I said
16 earlier, we did an extensive amount of work independently in
17 assessing the tax situation, who owed what to whom, who
18 generated the losses, what the outcome would be if certain of
19 the terminations on that, so, yes, we did an extensive amount
20 of work on that. But for the final conclusion, I do assert
21 attorney/client privilege.

22 Q Okay. And during your deposition, I asked you not just
23 for the conclusion, but the basis for reaching that conclusion,
24 and you asserted the attorney/client privilege, did you not?

25 MR. STROCHAK: Objection, Your Honor, it seems to be

1 hair splitting, the basis for the conclusion and the
2 conclusion.

3 THE COURT: Overrule.

4 THE WITNESS: I did answer that question that we
5 assert attorney/client privilege, yes.

6 BY MR. BROWN:

7 Q And on page 96, line 9,

8 "What specific conclusions were reached with respect
9 to any cost benefit analysis of continuing to litigate the
10 claims related to the disputed accounts?"

11 You asked me to repeat the question and it was read
12 back.

13 Answer, "As we've talked about previously, specific
14 conclusions that were reached were based on advice of counsel,
15 on merits of claims. As a result, I don't think I can answer
16 that without revealing attorney/client privilege."

17 Is that accurate?

18 A That is correct.

19 Q Okay. And as you sit here today, you aren't relying on
20 the advice of counsel with respect to your testimony?

21 MR. STROCHAK: Objection, ambiguous.

22 UNIDENTIFIED SPEAKER: Objection, vague.

23 THE COURT: Sustained.

24 BY MR. BROWN:

25 Q Okay. Are you -- in preparing your affidavit today, did

1 you rely on the advice of counsel in reaching the conclusion
2 that the settlement is fair and reasonable?

3 A We believe the settlement is fair and reasonable. I do
4 not rely on counsel for that. We believe this settlement is
5 fair and reasonable.

6 Q Okay. And in your affidavit, you're not relying on what
7 counsel told you with respect to the claims that are being
8 settled?

9 A Can you repeat the question?

10 Q In preparing your affidavit, are you relying on what
11 counsel told you with respect to the claims that are being
12 settled?

13 A The conclusions that we reached with regard to the
14 individual claims were dependent on advice from counsel. So,
15 yes, we were dependent on advice from counsel. As far as the
16 reasonableness of the global settlement, we -- that is we
17 support that settlement.

18 Q Okay. Did you independently conduct an analysis that did
19 not -- strike that.

20 Who drafted your affidavit for you?

21 MR. STROCHAK: Objection.

22 THE COURT: What is the objection?

23 MR. STROCHAK: Withdrawn.

24 THE WITNESS: Counsel drafted my affidavit for me with
25 my input on various -- they drafted it initially. I'm sorry,

1 counsel drafted initially the affidavit. We provided input to
2 it, but counsel drafted it initially.

3 BY MR. BROWN:

4 Q Okay. And whose counsel drafted it initially?

5 A The committee's counsel, Akin Gump.

6 Q Okay. And was that affidavit approved by debtor's counsel
7 before it was submitted?

8 A Not that I'm aware of.

9 Q Okay. Do you know if it was approved by -- any of the
10 words were approved by debtor's counsel before you signed it?

11 A Not that I'm aware of.

12 Q Okay. But every word in there was approved by your
13 attorneys?

14 A I don't know if it was approved by my attorneys, they -- I
15 didn't ask them for their approval on it.

16 Q Okay. Well, they drafted it and reviewed it and then you
17 signed it, right?

18 A They drafted it, I assume they reviewed it, I don't know,
19 and then I signed it.

20 Q Okay. I'd like to take a look at your declaration, go
21 through some of these paragraphs here.

22 A Okay.

23 Q I'm looking specifically at paragraph six on page three.

24 A Okay.

25 Q If you want to look at the first sentence there where it

1 said, "throughout its professionals --" excuse me, "through it
2 professionals, the creditors' committee promptly and thoroughly
3 investigated the debtor's assets and liabilities, including
4 potential causes of action that could be asserted by or on
5 behalf of the debtor's estates."

6 Now, that analysis was conducted by counsel, was it not?

7 A It was -- there was an analysis conducted by FTI, and
8 there was analysis conducted by counsel.

9 Q Okay. And your analysis with respect to the potential
10 causes of action was conducted with the assistance of counsel,
11 was it not?

12 A Sometimes yes and sometimes no.

13 Q Okay. And the work actually entailed thousands of hours
14 of financial and legal analysis; is that correct?

15 A That is correct.

16 Q Okay. And the analysis, some of the analysis anyway, I'm
17 not going to go through all the bullet points here, but some of
18 the analysis included the four billion dollar disputed
19 deposits?

20 A Some of the analysis included the deposits, that is
21 correct.

22 Q Okay. And also some of the analysis included the
23 potential claims for the trust preferred securities with a
24 value of four billion dollars?

25 A That is correct.

1 Q Okay. And some of the analysis also included whether or
2 not WMI was entitled to and the associated value of the tax
3 refunds and net operating losses as set forth in subparagraph
4 F, did it not?

5 A That is correct.

6 Q Okay. And that analysis was done in conjunction with
7 counsel, wasn't it?

8 MR. JOHNSON: Objection, asked and answered.

9 THE COURT: Overrule.

10 THE WITNESS: As I stated earlier, there was
11 independent analysis done by FTI and counsel on the assets that
12 we're talking about, including the tax assets.

13 BY MR. BROWN:

14 Q And I want to go ahead and flip to paragraph eight.

15 A Okay.

16 Q Which deals with the potential challenge of the OTS
17 seizure of WMB.

18 A Yes.

19 Q And the last sentence -- I'm sorry, the second-to-last
20 sentence on the page says, "The creditors' committee also
21 considered litigation risk, appellate risk, and the time and
22 expense of litigation."

23 Did I read that accurately?

24 A That is correct.

25 Q And the litigation risk and appellate risk, the analysis

1 related to those was done by counsel; was it not?

2 A Counsel certainly looked at that, but we considered it as
3 well. Obviously, this was a major takeover, to challenge the
4 federal government or the OTS on the takeover, we knew would be
5 -- I knew would be expensive, time consuming, and there would
6 be a lot of litigation surrounding it. So we were aware of
7 that. We'd heard it from the FDIC previously, we'd heard other
8 people state it, so we were aware of it, but counsel clearly
9 was involved in looking at those components.

10 Q And whether or not it would be successful, that
11 determination, was determined or was -- strike that.

12 Let me ask a different question or a slightly better
13 question. When you were determining whether or not it would be
14 worthwhile to do that, did you consider whether or not it would
15 succeed?

16 A There was consideration of whether or not it would
17 succeed. We factored in many things when looking at that.
18 Okay. There was extensive review of items, such as the
19 history, the capital contributions that had been made, what had
20 been going on in the industry, the financial crisis that was
21 going on at that time, the risks inherent with challenging it,
22 the threats on Section 9.5 of the asset purchase agreement of
23 offsetting against deposits, the reaction that we would get
24 from the FDIC.

25 So those were all things that were considered as part of

1 that, and the merits of success, yes, those were part of it,
2 but there were a whole host of issues that were looked at.

3 Q Okay. And were any of those issues looked at by counsel?

4 A Some of the issues were looked at by counsel.

5 Q And that went into the overall determination of whether or
6 not it would be successful was what your counsel told you,
7 didn't it?

8 A Counsel's input on whether or not we would succeed in that
9 litigation was a part of it. But as I said, the other things
10 that I factored in were also independent of counsel.

11 Q Let's go ahead and look at paragraph 11.

12 A Okay.

13 Q Paragraph 11 deals with the disputes related to the
14 deposits, the trust preferred securities, goodwill litigation
15 proceeds, and some of the other disputed assets; is that fair?

16 A I'd like to read it, please.

17 Q Sure, go ahead.

18 (Pause)

19 A That is correct.

20 Q Okay. And you state in this paragraph that "The
21 creditors' committee carefully and thoroughly examined and
22 analyzed JPM's claims, and consulted extensively with the
23 debtors regarding their answering counterclaims." Do you see
24 that near the end of the paragraph?

25 A Yes, I do.

1 Q Okay. And in analyzing and examining JPMC's claims, you
2 conferred with counsel, didn't you?

3 A As I stated a couple of times, we conferred with counsel
4 on numerous aspects. We looked at things independently. We,
5 FTI, looked at things independently on numerous things, and go
6 from the top. The deposits, as I said earlier, we looked at
7 extensive amount of historical records from the company.

8 On the taxes, we looked at extensive amount of
9 information, historical records. We looked at information on
10 where losses were generated. We had a good understanding from
11 the company on intercompany transactions and where they were.
12 We did an extensive amount of work on those items, and we can
13 go through others, where that was the case as well, but we did
14 talk with counsel on them, and they were important in the
15 conclusion, but we did plenty of independent work on that.

16 Q Okay. And the conclusion, you say, is privileged.

17 MR. JOHNSON: Objection, ambiguous.

18 THE COURT: Overrule.

19 THE WITNESS: Can you restate the question?

20 BY MR. BROWN:

21 Q Sure. Is the conclusion that you said you reached, with
22 respect to at least the merits of these claims, that is
23 privileged; is it not?

24 MR. JOHNSON: Objection, ambiguous.

25 THE COURT: Overrule.

1 THE WITNESS: The conclusion of our likelihood of
2 success on these claims is something that we have asserted
3 privilege on, yes. But I do think that the merits of the
4 claims and the items that I talked about earlier and some of
5 the important analysis that went into it, so the analysis that
6 went underlying that, as we talked about, I don't think -- I
7 think that we've talked about work that we've done previously
8 on that.

9 BY MR. BROWN:

10 Q Okay. Paragraph 17 --

11 A Uh-huh.

12 Q -- begins -- I'll give you a second to get there.

13 A Okay.

14 Q Begins, "The creditors' committee conducted an independent
15 legal and financial analysis of one, the merits of potential
16 claims against JPMorgan Chase."

17 Now, the independent legal analysis with regards to the
18 potential claims against JPMC was done by counsel, wasn't it?

19 A If it says independent legal, that would be the case, but
20 it's legal and financial. I think they were combined. So
21 there was legal work and financial work done on all of these
22 claims. That's the and.

23 Q All right. And the creditors' committee -- the creditors'
24 committees, excuse me, independent legal and financial analysis
25 with respect to number two, possible defenses available to JPMC

1 was done by counsel; is that correct?

2 A Again, I'll go back to the lead-in sentence, legal and
3 financial work, so it was both legal and financial.

4 Q Right. But specifically, the legal work was done by your
5 counsel, not the financial work?

6 A There was legal work done by counsel, that is correct.

7 Q Okay. And just to go ahead and finish up in this
8 paragraph, number three, there was independent legal analysis
9 conducted with respect to the debtor's solvency and WMB's
10 solvency at times prior to the seizure of WMB, and that was
11 done by legal counsel, wasn't it?

12 MR. JOHNSON: Objection, misquoting the document.

13 THE WITNESS: Yeah. I don't see the words
14 independent. It's -- again, independent legal and financial
15 analysis. There was work done by counsel, there was work done
16 by financial advisors on these points.

17 BY MR. BROWN:

18 Q Okay. And your analysis with respect to the financial
19 issues encompassed both of them. Is that your testimony?

20 A I'm sorry, can you repeat that.

21 Q Well, the analysis that was conducted, the independent
22 analysis --

23 A Uh-huh.

24 Q -- with respect to all three of these issues in this
25 paragraph encompass both legal and financial analysis. Is that

1 your testimony?

2 MR. SACKS: Objection, vague, analysis of whom, he's
3 testified to both legal analysis and financial analysis by
4 different people.

5 THE COURT: Overrule. You can answer.

6 THE WITNESS: Could you repeat the question?

7 BY MR. BROWN:

8 Q All right. Let me ask it a little bit differently. We
9 have three points here --

10 A Uh-huh.

11 Q -- the merits of the potential claims against JPMC is
12 point one, do you see that?

13 A Yes, I do.

14 Q Okay. And the possible defenses available to JPMC is
15 point two. Do you see that?

16 A Yes, I do.

17 Q And point number three deals with financial issues related
18 to the claims against JPMC including, among other things, the
19 debtor's solvency and WMB's solvency. Do you see that?

20 A Yes.

21 Q And I'm asking you, is it your testimony that with respect
22 to those three issues, legal analysis was encompassed in the
23 entire analysis?

24 MR. JOHNSON: Objection.

25 THE COURT: Overrule.

1 THE WITNESS: Legal analysis was encompassed in
2 reaching conclusions on many of these analyses on these
3 outcomes, but there was independent financial analysis done in
4 each of these areas.

5 BY MR. BROWN:

6 Q Okay. And just one last question. In reaching your
7 business judgment, as is set forth in paragraph 23, give you a
8 second to get there.

9 A Yes.

10 Q The creditors' committee supposedly carefully considered
11 the relative merits of each of the claims. Do you see that in
12 the middle of the paragraph?

13 A Yes.

14 Q And the analysis with respect to the merits of the claims
15 was done by your counsel, wasn't it?

16 A No. As I stated earlier, there was work done by financial
17 work and legal work, and it's a combination of the two. The
18 conclusions reached encompassed counsel's advice, so that was
19 included, but the different work that was done, there was work
20 done from the financial side, and there was work done from the
21 legal side --

22 Q All right.

23 A -- from both ends.

24 Q I'm sorry, I didn't mean to interrupt you. I want to just
25 turn you just to page 96 again of your deposition.

1 A Okay.

2 Q And I just want to remind you of your testimony there,
3 line 18.

4 A Uh-huh.

5 Q "As we have talked about previously, specific conclusions
6 that were reached were based on advice of counsel on merits of
7 claims." Was that an accurate statement in your deposition two
8 weeks ago?

9 MR. SACKS: Objection to the form, Your Honor.

10 THE COURT: Overrule.

11 THE WITNESS: Yes, it was.

12 MR. BROWN: Okay. Thank you. I have no further
13 questions.

14 MR. SARGENT: Good afternoon, Your Honor. I'm Edgar
15 Sargent, also with Sussman Godfrey, representing the equity
16 committee.

17 THE COURT: Yes.

18 MR. SARGENT: Your Honor, may I go ahead?

19 THE COURT: You may.

20 CROSS-EXAMINATION

21 BY MR. SARGENT:

22 Q Good afternoon, Mr. Simms.

23 A Good afternoon.

24 Q There are four seats on the creditors' committee; is that
25 correct?

1 A That is correct.

2 Q And the seats are held by the indentured trustees for four
3 different series of securities that were issued by the debtor?

4 A That is correct.

5 Q And those four securities issuances are the senior notes,
6 the senior subordinated notes, the peers, and a CCB 1 and 2; is
7 that accurate?

8 A That is correct.

9 Q So the indentured trustee for each of these four series
10 holds a seat on the creditors' committee, just to tighten it
11 up?

12 A There are four members on the creditors' committee, one
13 representing the notes that you just referenced, yes.

14 UNIDENTIFIED SPEAKER: I didn't hear you.

15 THE WITNESS: There are four members on the creditors'
16 committee and they represent the indentured trustees for those
17 different strips of that which you referenced.

18 BY MR. SARGENT:

19 Q And, Mr. Simms, you weren't here yesterday, but there was
20 some testimony about what percentage of various classes of
21 securities are held by the settlement noteholders. First, are
22 you aware that the settlement noteholders are the four hedge
23 funds, each of whom has significant investments in WMI
24 securities. You're aware of that, right?

25 A I am aware that the settlement noteholders are four funds.

1 I don't know if they're technically considered hedge funds, or
2 what kind of funds you'd consider them, but there are four
3 holders that signed the settlement agreement.

4 Q I appreciate the clarification, thanks. Those four are
5 Appaloosa, Centerbridge, Owl Creek and Aurelius, correct?

6 A That is correct.

7 MR. SARGENT: May I approach the witness and the
8 bench?

9 THE WITNESS: It may be through some of their sub
10 funds, just so it's clear, but you're using the generalization
11 of their names, that's correct.

12 MR. SARGENT: Okay. May I approach the witness and
13 the bench?

14 THE COURT: You may.

15 THE WITNESS: Thank you.

16 THE COURT: Is this an equity committee exhibit?

17 MR. SARGENT: It is.

18 THE COURT: A new one?

19 MR. SARGENT: A new one. I think we are going to move
20 for its admission into evidence after I question the witness
21 about the information on it.

22 MR. JOHNSON: I have an objection at this time as to
23 foundation, but I'll allow him to begin his questioning.

24 THE COURT: All right. Well, just tell me the number
25 we're up to for the equity committee.

1 MR. JOHNSON: That I would need to look to my co-
2 counsel for.

3 MR. NELSON: I believe it's 54.

4 THE COURT: All right. I'll mark it 54 and let you
5 ask questions and let's see if it can be admitted.
6 (Equity Committee's Exhibit No. 54 was marked.)

7 BY MR. SARGENT:

8 Q This is a table that we've created that summarizes
9 information and exhibits to the settlement agreement and to the
10 plan. Do you see that the four categories of securities --
11 here, I can put it on the elmo for everybody else.

12 Four categories of securities that sit on the creditors'
13 committee that we just went over are listed in the column
14 across the top, senior notes, senior subordinated notes, peers
15 and CCB?

16 A Yes. I apologize, that's (indiscernible) making me dizzy,
17 the screen, yes.

18 THE COURT: You have to speak up.

19 THE WITNESS: Yes, I apologize. I'm just -- the
20 screen itself is distracting. Yes, I do see that.

21 Q And then down the left-hand side are the four funds that
22 we just mentioned, Appaloosa, Centerbridge, Owl Creek, and
23 Aurelius?

24 A That is correct.

25 Q Could you please get the third binder of Equity Committee

1 exhibits and go to Exhibit 53?

2 A There are only two binders up here.

3 Q Okay. Sorry, we'll get one for you.

4 MR. SARGENT: May I approach the witness, Your Honor?

5 THE COURT: You may.

6 MR. SARGENT: Thank you.

7 THE WITNESS: Thank you. You said 53?

8 BY MR. SARGENT:

9 Q 53.

10 A Okay.

11 Q Are you familiar with this document?

12 A As a standalone document, I believe it was attached to,
13 potentially attached to the global settlement agreement,
14 another part, but I don't know for sure, it's just an exhibit.

15 Q It's Exhibit C to the general settlement agreement.

16 A Yeah, I believe so, but it's just standing -- stand alone,
17 so I'm not positive.

18 Q You've seen something -- at least something like this
19 before?

20 A Yes.

21 MR. JOHNSON: Objection.

22 THE COURT: Overrule. Well --

23 Q This shows the claims held by the four settling
24 noteholders; is that correct?

25 A That's what this is intended to show, that is correct.

1 Q And can you please turn to page C-1?

2 A Okay.

3 Q And do you see there that we've -- if you look at the
4 table that I've handed you, Exhibit 54, and compare the entries
5 under senior notes, senior subordinated notes, and peers for
6 Appaloosa, we've just copied the numbers over, with some
7 rounding.

8 A That is correct.

9 Q Now, I'm not going to run through the other three, but
10 we've added up those columns to the bottom, so the totals --
11 the total of the senior notes held by the four settling
12 noteholders is 371. The total senior subordinated notes is
13 1,341 million and 819 million of the peers. Do you see that on
14 the table?

15 A Yes, I do.

16 Q And then if you could grab binder two, Exhibit 37.

17 A Okay.

18 Q It's a liquidation analysis.

19 THE COURT: Which number, 47?

20 MR. SARGENT: 37, I'm sorry, Your Honor.

21 THE COURT: Thank you.

22 THE WITNESS: Okay.

23 BY MR. SARGENT:

24 Q That's the liquidation analysis, which is attached as an
25 exhibit to the plan, I believe. Are you familiar with that

1 document?

2 A Yes, I am.

3 Q And if you look back at our table, do you see that the
4 outstanding principle at the bottom, we've copied the number
5 over from the -- you know, the face amount of the pre -- not
6 counting any post petition interest of the debt in each of
7 these three categories, the senior notes, the senior
8 subordinated notes, and peers.

9 A Okay.

10 Q And I guess my question for you would be, were you aware
11 that the settlement noteholders held approximately nine percent
12 of the total outstanding principal and senior notes?

13 A We were aware of the numbers, I don't recall the specific
14 percentage, but yes, we were aware of that.

15 Q And were you aware that settlement noteholders held
16 approximately 80 percent of the outstanding principle on the
17 senior subordinated notes?

18 A We were aware of the numbers, I don't remember the exact
19 percent, but that number seems approximately correct.

20 Q And on this chart, it looks like it's actually -- it's
21 over a hundred percent of the peers. I believe that that's
22 because the outstanding principle on the liquidation analysis
23 has been reduced to reflect a reduction that the Court ordered.
24 But again, the settlement noteholders, total holdings and peers
25 is over 75 percent; is that fair?

1 MR. JOHNSON: Objection to the characterization with
2 respect to the peers' face value.

3 THE WITNESS: Yeah. I think you may be looking at and
4 I'm not sure, an OID issue versus, you know, the face value
5 versus the allowed claim amount. So I don't know how to,
6 sitting here right now, to equate the 819 to what that exact
7 number is, but that's I think is the difference that you're
8 looking at.

9 BY MR. SARGENT:

10 Q Would you agree that the holdings are greater than 75
11 percent?

12 A I won't agree without doing the math, but I would agree
13 it's a significant percentage.

14 MR. SARGENT: We move for the admission of the
15 exhibit. Any objections?

16 MR. SACKS: Objection, Your Honor, there's no
17 foundation for the admission of this from this witness.

18 THE COURT: Well, can we agree it's a demonstrative
19 and the numbers were from --

20 MR. SARGENT: Well, we can just use as it as a
21 demonstrative.

22 THE COURT: -- other exhibits?

23 MR. SARGENT: I'm actually done with it.

24 MR. SACKS: Sure, we can use -- well, I'm not sure all
25 the other exhibits have been moved in at this point, but we can

1 agree it's a demonstrative where he's taken numbers from other
2 documents, yes.

3 THE COURT: Okay.

4 BY MR. SARGENT:

5 Q Mr. Simms, your declaration describes the investigation
6 that the creditors' committee and its professionals conducted
7 into the cases and the litigation claims held by the debtors;
8 isn't that right?

9 A Can I ask you a question? Are we done with these?

10 Q We're done with those.

11 A I was just going to move them if I could for a second.

12 Q Sure. Take your time.

13 A Thank you. Could you repeat your question?

14 Q Yeah, I'm not going to rehash everything that Mr. Brown
15 covered with you, but your declaration describes the
16 investigation that the creditors' committee and its
17 professionals conducted into the cases and the litigation
18 claims held by the debtors, correct?

19 A Correct.

20 Q And that investigation was conducted in conjunction with
21 creditors' committee counsel, correct?

22 A As I've stated earlier --

23 MR. JOHNSON: Objection, Your Honor, this is
24 repetitive, repetitive.

25 THE COURT: We're repeating.

1 MR. SARGENT: Well, I'm just trying to get on the same
2 page, I'll skip ahead.

3 THE COURT: Okay.

4 BY MR. SARGENT:

5 Q Are you aware that the equity committee has also retained
6 a financial consultant?

7 A I am.

8 Q Peter J. Solomon?

9 A Correct.

10 Q And representatives of Peter J. Solomon contacted FTI and
11 asked that FTI provide their analysis of the settlement, are
12 you aware of that?

13 A I'm not aware that they asked for that specifically.

14 Q You're not aware that FTI refused to provide it?

15 A I'm aware that FTI spoke to Peter J. Solomon. I don't --
16 I am not aware of a request for specific documents regarding
17 that.

18 Q Do you know someone at FTI named Andrew Scruton (ph)?

19 A Very well.

20 Q Did he ever ask you about requests from Peter J. Solomon
21 for information related to this case?

22 A No. Andy, as I said, has spoken to Peter J. Solomon, I'm
23 aware of that. If they had a specific request like that, I'm
24 sure he would've spoken with counsel about it, but I'm not
25 aware specifically what they asked for.

1 Q Are you aware of any analysis of the claims that was
2 privileged or not that's been provided to any other party in
3 the bankruptcy from FTI?

4 MR. JOHNSON: Objection, vague.

5 THE COURT: Overrule.

6 THE WITNESS: I don't recall specifically if there was
7 an analysis of claims. There may have some claims objections
8 that we had helped review, but I don't recall specifically.

9 BY MR. SARGENT:

10 Q The evaluation that the creditors' committee conducted
11 included evaluations of claims against JPMorgan Chase, correct?

12 A Correct.

13 Q Those -- when did the debtors file their litigation
14 against JPMC; do you recall?

15 A There was a D.C. action against the FDIC, the debtors, JPM
16 filed one shortly after there, and there was a counterclaim
17 filed in 2009, I believe.

18 Q Do you know what month?

19 A May, I believe.

20 Q Your declaration is in our binder, the third binder
21 number, I think it's No. 44.

22 A Okay. I have it. I have it separately.

23 Q Okay. Look at paragraph ten.

24 A Uh-huh.

25 Q I think it was March.

1 A That was the DCA.

2 Q And the adversary proceeding was filed in May?

3 MR. JOHNSON: Objection, mischaracterizes his prior
4 testimony. He said that the complaint was filed in March.

5 MR. SARGENT: Okay. Maybe I misunderstood him. I'm
6 sorry. I thought he said May.

7 MR. JOHNSON: I think he was talking about the
8 counterclaim.

9 THE WITNESS: Can you repeat the question?

10 BY MR. SARGENT:

11 Q My question is when did the debtors file the litigation
12 against JPMC, which month in 2009?

13 MR. JOHNSON: Objection, vague. Which litigation
14 against JPMC?

15 Q Start with the D.C. litigation.

16 A The debtors filed the D.C. complaint in March of 2009.

17 Q And the adversary proceeding was filed in what month?
18 March, correct?

19 MR. SACKS: Objection, Your Honor, which adversary
20 proceeding?

21 THE COURT: The JPMC adversary.

22 MR. SACKS: The one we brought or the debtors?

23 THE COURT: Do you want to clarify?

24 MR. SARGENT: The one filed by the debtors.

25 MR. JOHNSON: Objection, vague.

1 MR. SARGENT: Let's move on.

2 MR. JOHNSON: There's still more than one.

3 MR. SARGENT: That's fine, let's just move on.

4 BY MR. SARGENT:

5 Q Please turn to Exhibit 43 in that binder.

6 A Okay.

7 Q It's an e-mail -- you see it's an e-mail from Bill
8 Kosturos to John Masal (ph).

9 A Yes.

10 THE COURT: What's the number of this?

11 MR. SARGENT: Well, actually I'm sorry --

12 THE COURT: What's the number?

13 MR. SARGENT: It's No. 43, Your Honor, sorry. It's an
14 e-mail that's got sort of an unusual format, so I read the
15 addressee backwards. It's from John Goulding to Bill Kosturos,
16 with a cc to John Masal.

17 THE WITNESS: Okay.

18 BY MR. SARGENT:

19 Q Do you see the second sentence? I'll just read it into
20 the record, "FTI Akin want to be prepared to put a global
21 settlement on the table on that date." Do you see that?

22 A Yes, I do.

23 Q And the date he's referring to is the 23rd, in the first
24 sentence.

25 A Correct.

1 Q And the date of this e-mail is 2/6, 2009, correct?

2 A That is correct.

3 Q So he's talking about FTI Akin want to be prepared to put
4 a global settlement on the table on the 23rd of February,
5 correct?

6 A Correct.

7 Q And FTI Akin, that's you, that's the creditors' committee,
8 isn't it?

9 A FTI, I am a representative for FTI, Akin is counsel for
10 the creditors' committee, that's correct.

11 Q And is it accurate that you were wanting to put or the
12 creditors' committee was wanting to put a global settlement on
13 the table with the FDIC and JPMC as far back as February of
14 2009?

15 A I didn't write this e-mail, so I'm not even a party to it
16 from what I see, so I don't recall specifically that. I do
17 recall that we thought it was important to be in a position to
18 understand what potential settlement we would be looking for,
19 and a global settlement in case it came up at a meeting on the
20 23rd, that is correct.

21 Q Do you recall being involved in preparing a global
22 settlement proposal for the meeting on the 23rd?

23 A I don't believe there was a proposal for the meeting on
24 the 23rd, if I recall.

25 MR. SARGENT: Those are all the questions I have, Your

1 Honor.

2 CROSS-EXAMINATION

3 BY MR. STEINBERG:

4 Q Good afternoon, Mr. Simms. I'm Arthur Steinberg from King
5 and Spalding on behalf of the Dime warrant holders.

6 I think you went -- you were asked a series of questions
7 about the membership of the creditors' committee. Who is the
8 chairperson of the committee?

9 A I don't -- I'm not sure that we have a chairperson.

10 Q Okay. But the four members of the committee are all
11 indentured trustees; is that correct?

12 A Yes, they are.

13 Q And you've been practicing in the restructuring area for
14 21 years, according to your declaration, correct?

15 A My declaration says I've been in restructuring and other
16 things for 21 years.

17 Q Okay.

18 A And my restructuring has probably been around 15 of those
19 21 years.

20 Q Does the -- are you familiar with the fiduciary duty that
21 an indentured trustee has to its constituents and what the
22 fiduciary duty that a creditors' committee has to its
23 constituents? Have you ever participated in discussions or had
24 a thought process about that?

25 MR. JOHNSON: Objection.

1 UNIDENTIFIED SPEAKER: Objection to form.

2 THE COURT: Yeah, sustained.

3 BY MR. STEINBERG:

4 Q Would it be fair to say that the creditors' committee has
5 a fiduciary duty only to the unsecured creditors and no other
6 constituency in -- of a bankruptcy estate?

7 A The creditors' committee has a fiduciary duty to
8 creditors, unsecured creditors, that is correct.

9 Q Only the unsecured creditors, not the full bankruptcy
10 estate; isn't that correct?

11 A Our fiduciary duty is only to the unsecured creditors, but
12 obviously, making sure that the bankruptcy -- maximizing value,
13 which maximizes the unsecured creditors, that's correct.

14 Q Well, let's take the last statement that you made. Max --
15 they need to make sure you maximize value. If the proposal was
16 to pay unsecured creditors a hundred cents on the dollar --

17 A Uh-huh.

18 Q -- you'd still hold out to try to get more value of the
19 estate if you were representative of the unsecured creditors'
20 committee? That's where you think your responsibility is?

21 MR. JOHNSON: Objection, Your Honor, speculative.

22 UNIDENTIFIED SPEAKER: Objection, argumentative.

23 THE COURT: Sustained.

24 BY MR. STEINBERG:

25 Q Now, you're here today testifying, but I'm not exactly

1 sure on behalf of who. Are you testifying on behalf of the
2 creditors' committee itself?

3 A I'm a creditors' committee representative. I'm here
4 testifying on behalf of the creditors' committee.

5 Q You're not on the creditors' committee, right?

6 A I am the financial advisor to the creditors' committee.

7 Q You're a consultant to the creditors' committee, but
8 you're not on the creditors' committee itself, right?

9 A I'm financial advisor to the creditors' committee, I'm not
10 a member of the creditors' committee.

11 Q Right. And is there a reason why there's not a member of
12 the creditors' committee testifying as to what their thought
13 process was in evaluating the settlement, and it's you instead,
14 a consultant to the committee?

15 MR. JOHNSON: Objection.

16 THE COURT: Sustained.

17 Q In your declaration when you talk about the creditors'
18 committee thought this or did this, are you speaking from your
19 own personal knowledge?

20 A Yes.

21 Q And so when you testify that or when you put in your
22 declaration that you're going to discuss the creditors'
23 committee, and this is on paragraph three on page two, "In this
24 declaration, I will discuss the creditors' committee's
25 financial and legal investigation and analysis of the assets

1 and liabilities of the debtors, the litigations involving the
2 debtors, and the claims made against the debtors."

3 You're discussing then on behalf of the creditors'
4 committee or what FTI's participation in that is?

5 A I'm discussing it on behalf of the creditors' committee.

6 Q Okay. So -- but if anybody asks you a question about the
7 legal advice or the legal investigation that the creditors'
8 committee had, you're refusing to answer those questions; isn't
9 that correct?

10 A Would you repeat the question, please?

11 Q If anybody asks you today whether you are going to testify
12 about the actual legal investigation done for the creditors'
13 committee, you're going to refuse to answer that question on
14 the grounds of attorney/client privilege; isn't that right?

15 MR. JOHNSON: Objection, mischaracterizes his
16 testimony.

17 THE WITNESS: As far as legal conclusions, I've said I
18 can't give legal conclusions, as they are based on counsel
19 advice, that is correct.

20 Q Well, are you going to be able to say what the strengths
21 or weaknesses of any particular legal issue is?

22 A How do you define legal issue?

23 Q Well, let's talk about the Anchor litigation, it's an
24 asset that's being transferred as part of the global
25 settlement. What legal investigation did the creditors'

1 committee do?

2 A The creditors' committee looked at the historic ownership
3 of the entities that were subject to it, the Anchor American
4 Savings Bank, that was some legal analysis that was done. The
5 creditors' committee looked at --

6 Q Let me pause you with that for a second, because I want to
7 ask that. Who did the legal analysis?

8 A I believe Akin Gump.

9 Q And what did they conclude?

10 MR. JOHNSON: Objection, attorney/client privilege.

11 Q So you're not prepared to talk about the legal
12 investigation, are you?

13 MR. JOHNSON: Objection, mischaracterizes his
14 testimony. He can talk about --

15 MR. STEINBERG: I'm not --

16 THE COURT: Let's not argue. Sustained.

17 BY MR. STEINBERG:

18 Q So go on, what did Akin Gump do?

19 MR. JOHNSON: Objection, privilege. I'm sorry.

20 THE COURT: Overrule.

21 MR. JOHNSON: Withdrawn, withdrawn.

22 Q What did Akin Gump do?

23 A As I said, they looked at the historical transaction
24 ownership of the institutions, who owned them, where the banks
25 were acquired, where they sat on the initial ownership chain,

1 what historic litigation had been out there for these different
2 types of litigation, Anchor and American Savings, just goodwill
3 litigation in general, and getting an understanding of that,
4 Akin Gump was involved heavily in that part.

5 Q How many hours did they spend doing that kind of work?

6 A I do not know.

7 Q What did they look at?

8 A I believe they looked at other goodwill litigation. I
9 believe they looked at information from the company on the --
10 some of the acquisitions, but I don't know specifically more
11 than that.

12 Q What other goodwill litigations did they look at?

13 A I do not know.

14 Q Did they look at the GlenFed (ph) litigation tracking
15 warrant and the litigation involving that GlenFed bank?

16 A I just stated earlier, I don't know which one they looked
17 at, I don't know about that.

18 Q Well, okay. And did the creditors' committee participate
19 in the JPMorgan adversary, the litigation that the debtor
20 commenced against JPMorgan?

21 A I think we tried to join in the complaint, that is
22 correct.

23 Q And did they review the answer and counterclaims prepared
24 by the company in the JPMorgan adversary proceeding?

25 A The creditors' committee reviewed it, that's correct.

1 Q Right. And did they support the debtor's conclusion and
2 the debtor's pleading in that case?

3 MR. JOHNSON: Objection, vague.

4 THE COURT: Overrule.

5 THE WITNESS: I think the creditors' committee had
6 reviewed the information and we intervened on the action, but
7 that's -- I believe that is the case.

8 BY MR. STEINBERG:

9 Q Right. And what did the -- what was the debtor's view as
10 to who owned the Anchor litigation, Washington Mutual, Inc. or
11 Washington Mutual Bank? Do you remember?

12 A I don't recall.

13 Q Oh. So -- but if -- let me give you -- try to help you
14 along here. If the debtor's position was that Washington
15 Mutual, Inc. owned the Anchor litigation, and the creditors'
16 committee had reviewed that pleading and supported the
17 position, would it be your view that the creditors' committee
18 also believed that Washington Mutual, Inc. owned the Anchor
19 litigation?

20 MR. JOHNSON: Objection, Your Honor, hypothetical and
21 speculation.

22 THE COURT: Yeah, sustained. I mean, it's just -- you
23 can -- you're not going to get this out of this fact witness,
24 are you?

25 MR. STEINBERG: Well, I don't know. I don't know, if

1 I ask it a couple of more times I may actually get an answer.

2 BY MR. STEINBERG:

3 Q Well, let's continue on. So there was this investigation,
4 but you don't recall what the conclusion was, right? You
5 couldn't recall whether Washington Mutual, Inc. owns it or
6 Washington Mutual Bank owns it?

7 MR. JOHNSON: Objection, mischaracterizes his
8 testimony. He didn't say he didn't recall.

9 MR. STEINBERG: I -- please don't tell him what he
10 said or didn't say.

11 THE COURT: Yeah, sustained.

12 THE WITNESS: Yeah, I did not state that. I said that
13 I didn't recall if they looked at certain goodwill litigations
14 that you referenced. I said I cannot state what the conclusion
15 was out of -- that counsel came to. That I said I could not
16 state a conclusion to.

17 BY MR. STEINBERG:

18 Q Okay. Do you know whether counsel looked at anything
19 related to the litigation tracking warrants and the amended
20 agreement?

21 A I believe counsel looked at the litigation tracking
22 warrants, that is correct.

23 Q And did they look at Article 4 of the amended agreement?

24 A I do not know if they looked at Article 4 of the amended
25 agreement.

1 Q Do you know anything specifically of what they looked at
2 with regard to the agreement? Do you know any -- do you
3 remember any discussion about any of the specific provisions of
4 the agreement?

5 A I remember discussions on -- with counsel on the merits of
6 arguments on ownership of the different goodwill litigations.
7 I don't remember specifically the Article 4 that you're
8 referencing.

9 Q Okay. Did you -- you were involved in the global
10 settlement discussions?

11 A Yes, I was.

12 Q And you were involved with the allocation of the disputed
13 assets as to which ones JPMorgan would take and which one would
14 be left with the debtor, right?

15 A I wouldn't characterize it that way. I was involved in
16 the global settlement agreement, which had assets going to
17 different parties, yes, but I was involved in the global
18 settlement.

19 Q Okay. So were you also involved in the structure of the
20 global settlement as to why there's a sale of the assets from
21 the debtor to JPMorgan, which is going to be deemed retroactive
22 to 2008? You're familiar with why this thing is being
23 retroactive for two years?

24 A I don't recall the specifics on that, no.

25 Q Were you involved with which assets were going to -- which

1 liabilities were going to be assumed by JPMorgan and which
2 liabilities were not going to be assumed by JPMorgan?

3 A That was a component of the global settlement agreement,
4 which liabilities would be assumed and others, so yes, I was
5 involved.

6 Q Were you involved in the negotiations in trying to decide
7 which liabilities of Washington Mutual, Inc. that JPMorgan was
8 going to assume and which ones they weren't, were you part of
9 that back and forth negotiation?

10 A I was in meetings where items like that were discussed,
11 yes.

12 Q And at any of these meetings, was there a discussion as to
13 whether JPMorgan should assume the Litigation Tracking warrant
14 obligation?

15 A Not that I recall in the meeting I was at.

16 Q You didn't suggest that as a committee representative, did
17 you?

18 A That they assume the Litigation Tracking warrants?

19 Q Yeah.

20 A I don't recall suggesting that.

21 Q Okay. You recall that at some point in time in the
22 litigation, that the debtor made a concession that the Anchor
23 litigation should go onto the JPMorgan ledger, while they would
24 continue to hold the American Savings goodwill litigation,
25 correct?

1 A You said during the litigation.

2 Q During the negotiation?

3 A Okay.

4 Q Do you remember that happening?

5 A I don't think you can piece it that way, sir. I think
6 that there were a number of items. There were all the
7 different assets and different liabilities that are on there.
8 Some assets were going to be retained by the debtor, some were
9 going to be retained by JPM and those assets were split up the
10 way they were in the global settlement agreement.

11 Q Okay. So do you remember the opening salvo from the
12 company's side, the debtor's side to JPMorgan vis à vis who
13 should take control of the goodwill litigations, did the debtor
14 say, both of them belong to me?

15 A If I recall, the initial discussions were to -- for the
16 estate to retain all, if not almost all of the goodwill
17 litigation.

18 Q And the creditors' committee agreed with that, right? The
19 creditors' committee said, those belong to the estate, correct?

20 A The creditors' committee said, the more money we can get,
21 the better, that's correct.

22 Q No. But the creditors' committee said -- I mean, did the
23 creditors' committee try to argue this in terms of money, or
24 did they try to argue this in terms of the merits of particular
25 claims when they were sitting at the negotiating table? Didn't

1 they say, that Anchor litigation belongs the Washington Mutual
2 estate or it wasn't negotiated like that?

3 A We negotiated that we wanted to maintain as many assets as
4 we could. The negotiation was, we should maintain items like
5 the deposits, goodwill litigation, taxes, it was a negotiation.
6 So, yes, we said, we should maintain the goodwill litigation.

7 Q Okay. So at some point in time, the Anchor litigation
8 fell off the side of the debtor and was pushed towards the
9 JPMorgan side, correct?

10 MR. JOHNSON: Objection --

11 THE WITNESS: I would not characterize it that way.

12 Q How would you characterize it? How would you say it?

13 A I would --

14 Q They ended up with the litigation, right, under the global
15 settlement, they got to keep the Anchor litigation, right?

16 A Under the global settlement agreement, they are going to
17 keep the Anchor litigation; however, I wouldn't say it fell off
18 the side, it was a global settlement agreement, which
19 encompassed a lot of assets, and a lot of value, and that value
20 is going to JPM, and a lot of value is going to the estate of
21 WMI.

22 Q Okay. So how did that asset, that particular asset, how
23 did that shift columns to go to the JPMorgan side? Tell me the
24 back and forth. Who did what to who?

25 A The back and forth, it was part of a global settlement.

1 There was negotiations actively going on on various assets.
2 That was one of the assets that was in play, but it was part of
3 an entirety. There was not a discussion, hey, let's just talk
4 about the goodwill, you take this, I'll take that, and then
5 we'll just do that as a one-off settlement. It was part of a
6 global settlement.

7 Q They looked at it in a holistic way? Well, looking at the
8 entire package, that's how this global settlement was
9 negotiated?

10 A That's how we negotiated the global settlement.

11 Q Okay. Did you look at the list, Anchor litigation was
12 being negotiated, did you have a sense as to what you thought
13 the asset was worth?

14 A Yes. There was discussion about that.

15 Q Well, what did you think the asset was worth at the time?

16 A If I recall, there was an estimated value of -- there was
17 a judgment issued, I think it was being challenged, for 350 to
18 390 I think was the number.

19 Q So that was the asset -- that was the value that you put
20 on -- the creditors' committee put on of the Anchor litigation
21 as they were trying to drive towards a holistic settlement?

22 A That is the value that people thought of with regard to
23 the Anchor litigation. There was potentially some incremental
24 opportunity for it, if I recall, but that was the number that
25 people were using, was in the 350 to 400. And the term

1 holistic, I know you've used that term in a -- raising your
2 hands and characterizing it in some other way, I think we did a
3 global settlement in looking at it. I don't want to make light
4 of it with holistic and --

5 Q No, no, I read it in a declaration, that's where I got the
6 word from. I had to look it up in a dictionary.

7 A Okay. Thank you.

8 Q But you said there was some adjustments, it was 350 to
9 400. How -- what was the upper range of what you thought this
10 Anchor litigation was worth?

11 A I don't recall. I think we were using 380 to -- 380 or
12 390.

13 Q Did you also forget about the 144 million dollar gross-up
14 number which takes the judgment up to 550 million dollar?

15 A I don't think we --

16 MR. JOHNSON: Objection.

17 THE WITNESS: I don't think we forgot about it. I
18 believe that there's been something filed by JPM that talks
19 about a tax gross-up, but I was not aware of that at that time.

20 Q Okay.

21 A Nor am I sure that that is the right number, or nor am I
22 sure that that would be the benefit that would be paid to WMI,
23 I just haven't looked at it.

24 Q Okay. But you're aware that they had filed an estimation
25 motion in this case to put a cap on the LTW claim?

1 A I'm aware that they did.

2 Q Do you know that they put a -- they changed their number
3 in the disclosure statement from 184 million dollars and now
4 say it's 250 million dollars? Are you aware of that?

5 A I know it's been changed. I don't know the specific
6 number of it.

7 Q Do you know how they got to the 250 million dollar number,
8 or you didn't study that?

9 A Others at my firm did, I was not involved.

10 Q But you didn't have personal knowledge?

11 A I'm not aware of that, no.

12 Q Okay. I just have just a couple of more questions.

13 (Pause)

14 MR. STEINBERG: No, Your Honor, I don't have any more
15 questions. Thank you.

16 THE COURT: All right. Thank you. Anybody else? Any
17 redirect by the committee?

18 MR. JOHNSON: Your Honor, could we take a very fast
19 break before we resume?

20 THE COURT: Yes.

21 MR. JOHNSON: Thank you.

22 (Recessed at 3:45 p.m.; reconvened at 4:03 p.m.)

23 MR. SARGENT: Your Honor, Edgar Sargent with Sussman
24 and Godfrey for the equity committee. I just have a brief
25 request of the Court before we start.

1 We've noticed several times during this last witness's
2 testimony, signals going from the counsel table to the witness,
3 including slow down at the very end of the last testimony, and
4 we overheard an actual communication, please slow down during
5 the break, and we'd ask that the Court instruct counsel not to
6 coach the witness while the witness is testifying.

7 THE COURT: All right. Well, it's not a jury and I
8 think that maybe the court reporter would appreciate that, but
9 thank you. Go ahead with redirect.

10 THE WITNESS: Duly noted.

11 MR. JOHNSON: Your Honor, Robert Johnson for the
12 creditors' committee.

13 REDIRECT EXAMINATION

14 BY MR. JOHNSON:

15 Q Mr. Simms, you were asked some questions about your
16 affidavit. Could you get a copy of it in front of you?

17 A I have it.

18 Q Would you please --

19 A My declaration, correct?

20 Q Your declaration, yes, thank you. Paragraph six. In
21 paragraph six you were asked some questions about some parts of
22 the work that was done by the creditors' committee. Could you
23 please tell us what work it was that FTI did with respect to
24 the books and records of the company?

25 A Yes. We received extensive amounts of information, as I

1 mentioned earlier, on historic deposit transactions and flow of
2 funds from WMI to WMB, account information, extensive account
3 information on varying bank accounts. We received tremendous
4 amount of papers on taxes, various tax flows, various tax
5 payments, intercompany accounting, BOLI COLI assets, pension
6 plan information. We reviewed significant amount of
7 information from the company on their consolidating balance
8 sheets, historic information on the company's 10K's and 10Q's,
9 cash flow forecasts, information of that nature. We received
10 information on their venture funds, their insurance entities,
11 Wimrick and Marion, we received information on venture capital
12 entities that they had, where they had to put some capital
13 calls going on, historic information of that type.

14 Q Could you describe for me how FTI staffed this particular
15 project?

16 A Sure. Myself and Andy Scruton were the lead day-to-day
17 partners, senior managing directors handling the transaction.
18 We had numerous people from different areas involved.
19 Initially, there was a lot of information that was needed, as
20 far as information access with JPM. We had people from our
21 forensic consulting group involved for that to get involved and
22 make sure that we got the right information, went about
23 preserving the right information.

24 We had professionals from our forensic litigation group
25 that were involved, looking at different areas, whether it be

1 solvency, whether it be data gathering. We had myself, as I
2 mentioned, we had a number of other professionals in our
3 restructuring group involved. We had, probably at any given
4 time, at least ten to twelve different professionals involved
5 throughout the case. We also had one of our tax professionals
6 involved looking at tax information.

7 Q Could you take a look at page four of your declaration,
8 and I'll direct your attention to subparagraph G regarding
9 fraudulent transfers or preferences. Could you describe what
10 work FTI did in connection with that topic?

11 A Yes. We looked at historical transfers that had been made
12 into -- from WMI to WMB, also understood what transfers had
13 been made from WMB to WMI. We also looked at the company's
14 historical performance. We looked at market performance. We
15 looked at balance sheets at different dates. We looked at
16 market at different dates. We looked at the information on the
17 general market conditions of those dates, information of that
18 nature.

19 We also got involved in understanding, as it related to
20 third party preferences and transfers as well, understanding
21 payments that were made to third parties, of WMI and WMB.

22 Q Did you do any work regarding solvency?

23 A Yes, we did work with regard to solvency on those matters,
24 where we looked at the payments that were made in, as I
25 mentioned transfers to and from, checking the termination of

1 solvency on different dates to analyze what -- how the company
2 was performing, what the changes were, how their market
3 performance or what the assets were, looking at their loan
4 book, and information of that nature.

5 MR. STOLL: Your Honor, I'm going to ask to move to
6 strike these answers. None of this information was in his
7 declaration as his direct testimony. He's now been crossed, so
8 now we're going through and doing what looks like to be
9 additional direct testimony, having nothing to do with the
10 cross-examination. If they wanted this information in, they
11 should've put it in the declaration to begin with. They chose
12 to submit witnesses by declaration. They shouldn't be allowed
13 to introduce new direct testimony that was not part of the
14 cross-examination.

15 THE COURT: Well, I'm going to overrule it, but I
16 don't know how much I'm going to let you go into the detail of
17 this.

18 MR. JOHNSON: I'll keep it brief, Your Honor.

19 THE COURT: Thank you.

20 BY MR. JOHNSON:

21 Q Could you please take a look at subparagraph H, there's a
22 reference there to Wimrick.

23 A Uh-huh.

24 Q Can you tell me what work FTI did as opposed to lawyers
25 with respect to Wimrick?

1 A Sure. We -- with Wimrick throughout, there were multiple
2 trusts, I think there were seven or eight different trusts that
3 were part of the Wimrick entity. There were determinations
4 that needed to be made throughout the case on whether or not
5 they contributed additional capital in to those trusts that
6 were required in order to make payments, so those trusts would
7 stay viable, stay alive, or otherwise they would need to be
8 commuted effectively.

9 So we looked at each of the different trusts throughout
10 the case. Early on in the case, there were a number of
11 potential capital calls. I believe one, Triad, was actually
12 commuted, because it was determined that it wasn't prudent to
13 make an incremental capital contribution to it.

14 So we looked at the different needs of those entities. We
15 looked at Milliman (ph) reports that were provided, which were
16 showing the loss reserves. We looked at information as it
17 related to potential value of Wimrick, so we performed some
18 analysis on that, and throughout the entire case, Wimrick was a
19 continuing item, just because they had these potential capital
20 needs, the value changed at various points.

21 There was also a potential marketing of that entity at one
22 point as well, so we became familiar with it for those reasons.

23 Q Moving on to a new topic, you were asked many questions
24 about settlement negotiations. Could you describe generally
25 what was the course of settlement negotiations in this case?

1 A Sure. I'll define settlement negotiations as having
2 started almost immediately from the standpoint of individual
3 settlements. We met with JPM and FDIC very early on in the
4 case and said, we want our deposits. That was, if you want to
5 call that a settlement negotiation, I would say it was a demand
6 on one of their deposits.

7 We tried extremely hard to get those deposits immediately.
8 There were turnover actions that were threatened regularly, and
9 we tried to get those assets. That was unsuccessful on our
10 part.

11 We then had a number of meetings, I would say starting in
12 February, late February, give or take February 23rd I think was
13 the date that was referenced earlier in D.C. with the FDIC and
14 various other parties, JPM, and we started laying out the
15 foundation of different people's positions on assets and
16 liabilities.

17 There were then discussions of potential settlements,
18 starting in March of '09 I believe. That probably continued
19 for a couple of months, some back and forth on that, and then
20 there was a period of somewhat of a hiatus where litigation
21 started ensuing, there couldn't be a meeting of the minds on
22 how to get to a reasonable settlement, and then activities
23 begin to pick up again, I would say in late 2009 through March
24 2010, and then the continuation of where it became with
25 multiple plans being filed and multiple negotiations. But the

1 settlement negotiations were active, contentious, and we were
2 heavily involved in the negotiations.

3 Q You made reference to a meeting February 23rd of 2009 at
4 the FDIC. Who called for that meeting?

5 A I believe it was the FDIC.

6 Q Did you attend the meeting?

7 A Yes, I did.

8 Q Who else attended?

9 A From the creditors' committee, it was counsel for the
10 creditors' committee, myself, there were members of the
11 creditors' committee there, I believe two, maybe three, of the
12 members of the creditors' committee, there was the debtors.
13 There were principals of -- there were employees of the
14 debtors, I believe, Robert Williams and Chad Smith may have
15 been there, debtor's counsel and Alvarez and Marsal were there.
16 The FDIC was there. They had counsel, DLA Piper. JPM was
17 there, they had business people there, as well as their
18 counsel, Sullivan and Cromwell. There were lawyers from White
19 and Case, who were representing an ad hoc senior noteholder
20 group, and there were lawyers from Fried Frank who were
21 representing an ad hoc settlement noteholder group, what's
22 known as the settlement noteholders.

23 Q At that meeting, did FDIC say anything about the merits of
24 its claims against the estates?

25 A The FDIC, you know, was fairly strong and threatening

1 certain activities. They said that they felt that many of
2 their claims were -- they felt they had a lot of strength in
3 their claims. They felt that items, such as the retrust
4 preferred were precedential in nature, they would take any
5 challenges to the Supreme Court. They had pushed heavily on
6 their rights under Section 9.5, so they were laying out the
7 difficult challenges that we may find faced with challenging
8 them.

9 Q Do you know the amount of the claim that the FDIC filed
10 against the estates?

11 A It was in the billions. I think theirs was the 12 billion
12 dollar range, 12 or 20. There was one of 21 of 12, they were
13 both big numbers.

14 Q And at that meeting, who was present from the FDIC?

15 A I believe it was Tom Reeves of the FDIC. It was
16 definitely an FDIC individual, and it was DLA Piper as well.

17 Q And as to JPM, who was present for JPM?

18 A They had a number -- they had a few business people. I
19 think maybe Don McCree (ph), they had someone from their
20 general counsel's office, and there were three business people
21 at JPM, I don't recall specifically their names.

22 MR. SARGENT: Your Honor, this is Edgar Sargent from
23 Sussman and Godfrey. Again, I object to this line of
24 questions. I'd asked a question about the preparation for this
25 meeting, I didn't ask a single question about the meeting.

1 We're going into great detail about who attended and --

2 THE COURT: How much longer are we going to go?

3 MR. JOHNSON: I can wrap it up in a couple of minutes.

4 THE COURT: Well, do so.

5 MR. JOHNSON: Okay.

6 BY MR. JOHNSON:

7 Q You were asked some questions about a document which I
8 believe had been misidentified earlier, it's Equity Committee
9 25 for the record. But it was an e-mail that discussed FTI
10 Akin want to be prepared to put a global settlement on the
11 table on that date. Do you recall that testimony?

12 A Yes, I do.

13 Q Why was it that you wanted to be prepared for a global
14 settlement at that meeting?

15 A We were getting in the room with different parties, a
16 meeting called by FDIC to try and get people to agree. It
17 seemed like there could be some motivation. We were aware of
18 the significant claims that the various parties had against the
19 estate. We had analyzed a number of the merits by that point.
20 We felt it was important to get as much information as possible
21 before that.

22 I believe the genesis of that e-mail, if I recall it was
23 on a Friday -- the e-mail stated it was on a Friday, we had
24 weekly calls with the debtor throughout this case every Friday.
25 We regularly tried to get information and push information. At

1 that point, it was very important that we get as much
2 information from the company, be as prepared as possible, so we
3 can react to whatever was proposed.

4 I think it's prudent for the estate, for the creditors as
5 well to be prepared and understand when there's a meeting being
6 called by such significant parties, and that's why we thought
7 it was imperative that we at least be prepared to react for a
8 global settlement.

9 Q And what were the factors that you considered in pushing
10 for a global settlement?

11 A Items as I've mentioned such as there were significant
12 claims being asserted, there was risk every day of this -- you
13 know, we're going to offset against the accounts, we're going
14 to use Section 9.5 of the APA. There was substantial threats
15 of prolonged litigation, extremely prolonged litigation, where
16 people kept saying, this is precedential, it's going to go to
17 the Supreme Court.

18 So we saw the time delay here as being extensive. We also
19 were aware of the merits of some of the different positions by
20 that point. We had looked into many of the positions, many key
21 assets, and had a sense of where they were, and we thought it
22 was important to try and push forward.

23 Q Was exclusivity a concern?

24 A Exclusivity was on the table, exclusivity was going to be
25 coming up. It was early on, relatively speaking. You know, it

1 was six months into it, there was obviously more time. But
2 this was going to be a complex case and a complex situation, so
3 we knew it would take some time, which it obviously did, and we
4 thought that was something that needed to be factored in as
5 well.

6 Q And from your --

7 A And there was also incremental costs. I mean, the estate
8 was incurring substantial amounts of costs every month, whether
9 it be professional fees, whether it be the incremental cost of
10 post petition interest, it was extremely expensive to run this
11 estate, and it would've continued to be had we gone on for
12 years and years.

13 Q And moving on to the time of the execution of the global
14 settlement agreement, was exclusivity a concern at that time?

15 A Yes. Execution of the global settlement agreement clearly
16 was a concern, exclusivity was expiring. I think the debtor
17 filed a plan right before the end of March 2010, when their
18 exclusivity finally expired or was getting close on the 18
19 months, so yes, that was obviously a concern.

20 MR. JOHNSON: I have nothing further.

21 THE COURT: All right. Thank you. Anybody wish to
22 cross?

23 UNIDENTIFIED SPEAKER: No, Your Honor.

24 UNIDENTIFIED SPEAKER: No, Your Honor.

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

1 THE WITNESS: Thank you.

2 THE COURT: It looks like a good time to break.

3 MR. ROSEN: Your Honor, again, Brian Rosen, Weil
4 Gotshal. I definitely agree with that, and I just wanted to
5 try and understand the schedule as we go forward for Monday.

6 Your Honor, the debtors have, as part of their
7 presentation, two additional witnesses, Mr. Chad Smith and Mr.
8 Steve Zelin. Based upon depositions that have taken place and
9 the way things have been conducted the first two days of this,
10 I anticipate that while Mr. Zelin might be a relatively quick
11 witness, that people may want to take some additional time with
12 Mr. Smith, and that may take most of the day.

13 And I was trying to deal with people's expectations
14 and also as to when you might want to open the floor, as you
15 said you would, for other people to say what they wanted to
16 say, shareholders included, and so -- and to permit people to
17 gather all of their thoughts and review the transcripts for
18 purposes of closing arguments, if we could arrange, Your Honor,
19 to go through those witnesses on Monday, and perhaps deal with
20 remaining objections and closings then on Tuesday, if the
21 Court's calendar permits that.

22 THE COURT: Does that work for everybody?

23 MR. STARK: Your Honor, from the trust preferreds,
24 Robert Stark, that would be fine for us, but we're happy to do
25 whatever accommodates the Court. We'll do it Monday, too, if

1 you prefer.

2 MR. NELSON: Likewise, Your Honor, we're at the
3 Court's pleasure on this. The only thing I would add is that I
4 think we're going to be done with testimony certainly by the
5 morning is my guess with the rest of the two witnesses on
6 Monday. So we're at the Court's pleasure about how to proceed.

7 MS. FRIEDMAN: Your Honor, same for JPMorgan Chase,
8 and we would be happy to finish up on Monday if it works out
9 that way, or continue to Tuesday.

10 THE COURT: Well, let's see how it goes on Monday. I
11 don't know about any of you, but taking a break might help us
12 all organize our thoughts and maybe be shorter, but I'll leave
13 it up to the parties too.

14 MR. ROSEN: Thank you, Your Honor. I understand that
15 we will now be moving back to your courtroom?

16 THE COURT: Yes, and IT will be coming up at 4:30 so
17 that you can be wired.

18 MR. ROSEN: And what time will we be starting on
19 Monday?

20 THE COURT: We'll start at 9:30.

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

22 THE COURT: And if you want to move your stuff to my
23 courtroom and leave it for the weekend, you can. If you want
24 to take it with you, you're welcome to take it with you.

25 MR. STEINBERG: Your Honor, Arthur Steinberg, since I

1 think you ended off and you've at least confused me. Will
2 closing be on Tuesday or is there a possibility that it might
3 be Monday afternoon, because I guess that matters what I do
4 over the weekend?

5 THE COURT: I'd prefer Tuesday if the parties --

6 MR. STEINBERG: If everybody's agreeable to do it on
7 Tuesday then I understand that.

8 MR. NELSON: No objection, Your Honor.

9 THE COURT: Okay.

10 MR. STOLL: Your Honor, one --

11 THE COURT: Do it Tuesday morning at 9:30?

12 MR. NELSON: That's fine.

13 MR. STOLL: One last housekeeping matter, Your Honor.
14 We have been sending back and forth an order trying to have an
15 agreed order on the examiner motion. It seems like we're
16 having a raging disagreement, it looks unlikely that we will
17 reach agreement on it. Can we submit our respective orders and
18 have you decide which one to sign, Your Honor? Thank you.

19 THE COURT: Good idea.

20 MR. ROSEN: Thank you, Your Honor.

21 (Adjourned at 4:23 p.m.)

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I N D E X

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

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

KAREN SCHIFFMILLER

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: December 6, 2010