UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., ET AL.,	Case No.
Debtors.	08-12229 (MFW)

- -x

BLACK HORSE CAPITAL LP, ET AL., Plaintiffs,	ADV. Proceeding
- against -	No. 10-51387 (MFW)

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

- -x

BROADBILL INVESTMENT CORP., Plaintiff,	ADV. Proceeding
- against -	No. 10-50911 (MFW)

WASHINGTON MUTUAL, INC., Defendant.

- -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

December 7, 2010

9:38 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

Debtors' Motion for an Order Authorizing the Debtors to File Under Seal Exhibits 1, 2, and 3 to the Declaration of Charles Edward Smith in Support of Entry of an Order Confirming the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to C11of the United States Bankruptcy Code

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

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

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

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

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

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

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

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

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

Motion of the Official Committee of Equity Security Holders for an Order Authorizing it to (I) Unseal and Publicly File its Motion to Strike Declarations and Arguments Relying on Examiner's Report or, in the Alternative, to Compel Production of All Debtors' Work Product and Communications Related to the Examiner's Report, and (II) Use Confidential Information at the 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: Dena Page

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P R O C E E D I N G S

THE CLERK: Please be seated.

THE COURT: Are technical difficulties solved, I think? I hope.

All right. You may proceed.

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

Couple of quick housekeeping things if I may, Your Honor. I would like to, if I may approach, hand up a copy of the debtors' admitted confirmation exhibit list --

THE COURT: Okay.

MR. MASTANDO: -- per our discussion yesterday, and also, we would like to add one document to the list as confirmation Debtors' Exhibit 252. It's an amendment to the amended and restated settlement agreement dated as of today, and it has certain signature pages attached, but not all of them yet. We're in the process of getting those together. May I approach?

THE COURT: You may.

UNIDENTIFIED SPEAKER: Your Honor, if I may interrupt on the phone? We are getting a lot of feedback on our telephone line. Everything that's being said is being repeated.

THE COURT: Yeah, I'm getting an echo in here, too.

MR. STARK: Your Honor, if I may. Robert Stark on

behalf of the TPS constituent. We haven't seen the settlement agreement. We just got it now. We just learned about it. So whatever purpose that is in terms of admitting it into evidence, I think we need at least an opportunity --

THE COURT: All right, before we go any further, we're going to have to solve this problem with the sound system.

Circulate the settlement agreement among the parties, and then we'll take a short break and come back and decide whether we're going to -- how we can proceed.

MR. NELSON: Your Honor, Justin Nelson for the equity committee. Would the debtors' mind giving us a redline copy of this?

MR. ROSEN: Your Honor, Brian Rosen. There is no redline against the global settlement agreement, but I'm happy to explain it to each of them. It is just merely changing a few items on the schedules. I can walk through.

THE COURT: All right, do that.

Let's take a break.

(Recess from 9:40 a.m. until 9:49 a.m.)

THE CLERK: All rise. You may be seated.

THE COURT: Let's see if that's better. Sound so. All right.

MR. MASTANDO: Your Honor, John Mastando from Weil, Gotshal on behalf of debtors, again. If I may approach, Your Honor, I have three more of the signature pages that I've just

received for Exhibit 252 that I handed to Your Honor. May I approach?

THE COURT: Thank you.

MR. MASTANDO: Your Honor, would you like me to just go through the brief exhibit issues that remain, or would you like Mr. Rosen to address the amended settlement agreement first?

THE COURT: Let's talk about the exhibits.

MR. MASTANDO: Okay. I've handed Your Honor Debtors' admitted confirmation exhibits. We received lists from the creditors' committee to which we have no objection, the WMI noteholders, to which we have no objection, and the TPS group, also, to which we have no objection. There are just three documents on the equity committee's confirmation hearing exhibit list that we object to. I note that the equity committee added approximately thirty-seven pleadings and other types of documents, as we discussed yesterday. But there are also three exhibits that have not been shown before or admitted, and those are Exhibits 7, 8, and 9 on the equity committee's confirmation hearing exhibit list.

MR. NELSON: Your Honor, these were in our original notebooks. The underlying testimony was clearly referred to in Kosturos, in his testimony. Over the weekend, on Sunday night, the debtors didn't object to any of these documents. And we could have put them in through a witness yesterday. In going

through the transcript last night, we realized that these three were not actually in the record but were referred to in the actual testimony, so we would respectfully request that these three get in. They, again, they were already in our first notebook and the debtors have never raised an objection to this.

THE COURT: Well, what are they? Does anybody want to let me know?

MR. NELSON: Yes, they are -- Exhibit 28 --

THE COURT: In your original binder?

MR. NELSON: Yes, Your Honor. In the original binder. We can put it on the ELMO if that's easier.

THE COURT: Okay.

MR. NELSON: Okay. Exhibit 28 on -- and if Your Honor goes to the second page, it's an e-mail from Fried Frank to the lawyers for the debtors and Mr. Kosturos, in the beginning of the second paragraph, discusses testimony regarding creditors and term sheets with Mr. Kosturos clearly discussed. I'm on 117396 --

THE COURT: I have it.

MR. NELSON: -- in the second paragraph there. It was clearly referred to at least in general in Mr. Kosturos' testimony.

MR. MASTANDO: And Your Honor, we just didn't believe that was the purpose for which the record was kept open

yesterday. The document itself has just not been used or admitted before.

MR. NELSON: Well, again, the debtors didn't --

THE COURT: You say it was referred to in testimony, not this document?

MR. NELSON: No, the underlying -- it was not used as impeachment because he stated what was on the record, but again, the debtors did not object to this on Sunday night, so we're putting it in to make sure the Court has an underlying document, as well.

MR. MASTANDO: Your Honor, no one had objected to our original exhibit list that we filed last week. Obviously, that didn't mean everything on it came in.

THE COURT: Tell me again how it was referred to in testimony.

MR. NELSON: Mr. Kosturos was asked whether the creditors were involved in presenting the term sheet, which is the first sentence of the second paragraph. And he answered yes. Then we moved in.

THE COURT: Then why do you want this in? Is it necessary?

MR. NELSON: No, Your Honor, we're just trying to have a complete record for Your Honor.

MR. MASTANDO: And Your Honor, we did object two nights ago when we sent them our updated objections. I believe

this was objected to.

MR. NELSON: I don't think it was.

THE COURT: Sunday?

MR. MASTANDO: I believe it was. I believe it was in an e-mail.

THE COURT: Well, where is the e-mail? And what was the basis of the objection?

MR. MASTANDO: Well, the basis now, Your Honor, is, as I said, I didn't think the record had been kept open for this purpose.

THE COURT: What was the basis that you objected to it two days ago?

MR. MASTANDO: I believe it was foundation and hearsay, Your Honor.

MR. NELSON: Let's -- I'm pretty sure it wasn't; we're trying to get the e-mail, Your Honor. But regardless, if those are the two objections, it's -- foundation clearly has been established, and it's not hearsay; it's a party admission.

(Pause)

MR. MASTANDO: Your Honor, I believe it was not on our objection that we sent on Sunday night. I withdraw that.

THE COURT: All right, then I'm going to allow it because I agree, it's not hearsay, and if the debtor didn't express an objection to it, it could have -- or, had the debtor expressed an objection to it, it could have been brought in

through Mr. Kosturos or another witness.

(E-mail from Fried Frank to the lawyers for the debtors was hereby received into evidence as Equity Committee's Exhibit 7, as of this date.)

MR. MASTANDO: Okay.

MR. NELSON: The same applies equally to the other two exhibits, Your Honor.

MR. MASTANDO: And as I stated, Your Honor, I believe that the objection was that the record had been kept open to add pleadings and other things in response to what the debtors were adding yesterday, not to supplement with additional exhibits that the parties wanted to add. And so that was the main basis for the objection.

THE COURT: All right, then I'll overrule that.

(Various documents were hereby received into evidence as Equity Committee's Exhibit 8, 9, as of this date.)

MR. NELSON: There's also, Your Honor, the summary exhibit that we discussed last night that's not in the binder because it has not been admitted yet. It would be EC-92. We haven't heard anything from any of the parties one way or another on it, and --

THE COURT: What is it?

MR. NELSON: It's a summary exhibit, a demonstrative.

MR. MASTANDO: Yeah.

MR. NELSON: May I approach, Your Honor?

THE COURT: Oh, yeah, I remember this. I think you -- did you hand it up?

MR. NELSON: I don't think I did, actually.

THE COURT: Okay, thank you.

And what's the debtors' objection to using it as a demonstrative?

MR. MASTANDO: No, I think the objection is to having it admitted into evidence. I don't know if there's any foundation that's been established for any of the items on the exhibit.

MR. NELSON: Well, I think the point is the foundation has been established for every item on the exhibit and that it's a summary exhibit giving the total potential assets of the estate and showing the summary of what it is; it's no different than some of the other exhibits that were admitted on Thursday showing the summary of the claims, for example, that I think JPMorgan asked to have introduced into evidence. And so we would just respectfully request that this one be admitted as a summary exhibit.

MR. SACKS: Your Honor, we object to the admission of this. This is a summary of counsel's argument. It's a demonstrative for counsel to make an argument during the closing. This is not evidence. Nobody used this, no witness testified to this, no witness testified as to any of the facts on it. This is simply counsel's argument. I'm sure you're

going to see multiple similar types of things in the course of the morning and afternoon, but it's not evidence. It's a demonstrative. And that's what it is, and counsel can use it to argue, but it shouldn't go into evidence.

MR. NELSON: Again, the underlying factual basis has been established with Mr. Kosturos and other witnesses about the value of every single thing on the left-hand column.

THE COURT: But that doesn't make it admissible, does it?

MR. NELSON: Yes, Your Honor, that's absolutely true. It's a summary exhibit, so for example, for the same reason that the JPMorgan document that was from their pleadings that stated what they thought the value was, which was clearly from their brief and counsel's argument, this is the same thing.

MR. SACKS: The difference, Your Honor, is that I used it with a witness and got the witness to provide the foundation for it, that he thought that that reflected, accurately, his assessment and his understanding of something. They didn't use this with a witness; they didn't try to put a foundation for this. This is simply Mr. Nelson's argument that he's going to use with Your Honor as to what these things mean. Potential assets to the estate, dollar sign, question mark, with a whole bunch of things. He has dollar values for things. I don't know where those dollar values come from. They're not entirely accurate. He has a number of things to which there's been no

testimony from the witnesses, here, and I think this is for argument, and that's what it is.

THE COURT: I agree. I agree.

MR. NELSON: Thank you, Your Honor.

THE COURT: I will not allow it into evidence, then.

MR. MASTANDO: One last issue on exhibits, Your Honor. We received a notice of filing of confirmation hearing exhibit list from Broadbill last night, and there are two items on there that we object to. It's items 4 and 22 on the Broadbill notice that was filed last night.

THE COURT: Does Broadbill want to hand up the notice so I know what we're talking about?

MR. STEINBERG: Your Honor, I can describe it. There's actually a third one. One is that we will concede that there -- we will strike number 4 which are the minutes of the SEC meeting, and we don't think it's necessary for the confirmation hearing. The other two pleadings relate to SEC filings, and I thought the agreement that we had yesterday was that if it was on the public record in the SEC filing, that they would be admitted. The first SEC filing was a 10-Q from Citicorp dated November 7, 2002, related to the Golden State litigation tracking warrant and indicated that by virtue of the Citicorp-Golden State merger, the Section 4.2(b) clause, which is exactly the same clause as we have here, was going to be amended so that the litigation tracking warrant would be paid

partially in cash. And they have raised the issue about our claim in this case, they have --

THE COURT: All right.

MR. STEINBERG: The second one is the September 18th, 1998 10-K of Golden State which was when they issued the litigation tracking warrant. The debtors have made a serious error in their presentation to Your Honor in that they attached to papers the draft of the litigation tracking warrant which had the word, in Section 4.4, "shall". And they made a big deal in their summary judgment papers that "shall" should have been the way ours were drafted, and if only --

THE COURT: I understand the argument. What is the actual one?

MR. STEINBERG: The actual one says exactly what we have, "may make without the consent of the LTW holders".

MR. MASTANDO: Your Honor --

MR. STEINBERG: And it's in 4.5. And therefore, we think that they should be submitting --

THE COURT: All right, I understand your argument.

MR. MASTANDO: Your Honor, I believe both documents -- as to the first one, it clearly goes to summary judgment and not confirmation. But I also believe it's -- there's no foundation and it's hearsay. I don't think the agreement was, yesterday, that any SEC filing or 10-K or 10-Q that anyone wants to put into the record can be admitted. And the second

one, I just received an e-mail this morning -- I don't even know what the document is, but I received an e-mail this morning that this was the document they wanted to add. We would object on the same grounds: no foundation, hearsay, and it doesn't go to confirmation.

MR. STEINBERG: I did speak to Mr. Smith about the Golden State litigation tracking warrant. I showed it to him. His answer to the interrogatory which said that the Dime warrant was based on it, if you read the objections to the confirmation, half of what they say is a recitation which is a repeat of the summary judgment motion where they say that the Dime warrants don't have claim, that the classification is appropriate. Why they don't want to correct a record where they submitted an incorrect statement, I, for the life of me, don't know. I would be sitting there saying I'm sorry, I would like to correct it.

THE COURT: Well --

MR. STEINBERG: The first one was clearly talked about.

THE COURT: Well, I will allow it to the extent that the debtor can -- has no objection that it is, in fact, a public document, I will admit it and consider it as part of either the confirmation or the summary judgment.

(SEC filings from Golden State re: litigation tracking Warrant was hereby received into evidence as Broadbill's Exhibit 4 and

22, as of this date.)

MR. MASTANDO: Okay, and I assume they won't be for the truth of everything asserted in the documents, as we discussed yesterday?

THE COURT: Same as with respect to your SEC filing.

MR. MASTANDO: Yeah, okay, thank you, Your Honor.

MR. STARNER: Your Honor, Greg Starner on behalf of the WMI noteholders. As the debtors mentioned, we circulated four proposed exhibits to the parties, have not received any objections. The four exhibits are four indentures that relate to our limited objection which, pursuant to our discussion yesterday, we have agreed to defer, subject to preserving all our rights to pursue it, if and when it's appropriate. But we believe it's appropriate to submit these indentures now, these four exhibits into evidence, and so we would submit to move to submit those documents into evidence.

THE COURT: All right, they will be admitted.

(Four indentures was hereby received into evidence as WMI Noteholders' Exhibit N/A, as of this date.)

MR. STARNER: Thank you, Your Honor.

MR. JOHNSON: Good morning, Your Honor. Robert Johnson for the creditors' committee. Your Honor, we submitted and filed last night a notice for the four exhibits that we seek to introduce, and I've been in touch with most of the counsel here; I believe there have been no objections. The

four exhibits are marked CC-1 through CC-4, and they're four orders that come from the court's own docket. I have a copy here available for the Court if you'd like. May I approach?

THE COURT: You may hand it up. And they'll be admitted without objection.

(Four orders from court docket were hereby received into evidence as Creditors' Committee's Exhibit 1 through 4, as of this date.)

MR. JOHNSON: Thank you, Your Honor.

MR. ROSEN: Your Honor, with respect to the exhibit that Mr. Mastando started the day out, Mr. Stark and others have asked me just to walk through for the Court exactly what it is and why it was done, and I'm happy to do that. It'll take me about a minute, Your Honor.

Specifically, Your Honor, as the process unfolded from May 21st when the original settlement agreement had been executed to the October 6th amended and restated agreement, some things had changed, including some things changed subsequently on October 29th when we filed the first modification.

The exhibit does just a few items. One, in Section 1.1, it extends the period in which the debtors can file an objection to certain claims, or any claims, actually, and what it does is it extends the information act, this agreement with JPMorgan to allow us to get information associated with that

for another five months.

Section 1.2, Your Honor, deals only with bringing the settlement agreement up to speed with the reproposal that was included in the October 6th plan, and we never updated the plan to reflect it. It's just the calculation, and it is, I would say, verbatim but for I think a definitional change in order to correspond to one document versus the other, but it's exactly what was in the plan on the retreatment.

With respect to 1.3, Your Honor, it deals with section 3.7 of the agreement, which I think Mr. Roquemore, actually asked some questions about yesterday. The bar orders -- and it merely says that except as otherwise agreed to by the parties, because 3.7 of the settlement agreement dealt with that, the form of the order, the confirmation order, and the bar order provisions within that confirmation order had to be in a certain form. And so this just says, except as otherwise agreed to so that it will allow the parties and the Court and the parties to react to the Court with respect to today's hearing.

Your Honor, the balance of the changes, again, were merely catching up. Specifically, when we modified section 2.4 of the settlement agreement to reflect the changes in the respective takes of the second tax refund, they had a corresponding percentage change. Exhibit G to the agreement had that reflected in there as a plan contribution asset, and

we failed to make the change to correspond to 2.4 which was already in on October 6th.

Exhibits L, U, and then the schedules that were referred to, Your Honor, these were just, again, to catch up. Specifically on L, JPMorgan and the debtors discussed additional claims that JPMorgan would assume and take off the debtors' ledger, so those are added to Exhibit L. Exhibit U, there was one contract that we were not going to be assuming and assigning, and instead, we actually rejected, Your Honor. And in the schedules, 2.9(a)(C), 2.10, and 2.21, they were merely just catching up to add the claims, additional claims that JPMorgan would take, but with respect to 2.21, we had inadvertently, in the -- in I guess the May agreement, included some loans which were supposed to be on Exhibit Z. And so we just deleted those to clear it up. It doesn't affect any of the insurance policies which are the subject of the BKK dispute; it just took off loans which had nothing to do with it.

THE COURT: Okay.

MR. ROSEN: Those are the only changes, Your Honor. Oh, and one other thing, Your Honor, as Mr. Mastando had said, we had been collecting signature pages for these changes, for this little change. At this point in time, Your Honor, it has been agreed to and we've collected virtually all of the signature pages. I think we're waiting for one from the

settlement noteholders. The FDIC, however, because of a change in the general counsel's office, needed to get the execution of the new general counsel, rather than the one who was there, and I believe that change occurred on December 1st, but the FDIC is here and can represent that it has no dispute with respect to the amendment.

MR. CALIFANO: Your Honor, I've confirmed with my client that we have no dispute with the amendment, that we deem itself -- the FDIC deems itself bound by it. Just the process of getting the signature page. My client just doesn't move as fast as some of the other people involved.

THE COURT: Okay, thank you.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: Any objection to that settlement stipulation, then, by any of the parties?

All right, then that will be admitted.

(Amended settlement agreement stipulation dated as of 12/7/2010 was hereby received into evidence as Debtors' Exhibit 252, as of this date.)

MR. ROSEN: Thank you, Your Honor.

MR. STOLL: Good morning, Your Honor. James Stoll on behalf of the trust preferred security holders. When we closed yesterday, Your Honor, we had handed up a supplement to our original motion in limine now styled as a motion to strike testimony, and you had instructed us that you would consider

whether you would take argument this morning, so before I begin, I'll ask the Court's pleasure as to oral argument.

THE COURT: Well, let me hear the debtors' response to your motion.

MR. ELSBERG: Your Honor, before I get started, I'll ask for just a little bit of latitude. I'm hoping to speak about privilege only once today and not get up and speak about it again in closing. So I'll be addressing the motion; I may be a little bit more expansive, also. But I hope to be done in about twelve minutes in any event.

THE COURT: Okay.

MR. ELSBERG: Your Honor, in this case, there's one and only one issue that matters in this proceeding, and it's whether the settlement is objectively reasonable. That's it. That is the entire ball game. But that is not the issue that the TPS group and the equity committee and the other objectors have been focusing on. Instead, what they've been focusing on is what's in this motion. What they've been doing is trying to divert attention from the main issue by ginning up a sideshow on privilege. And that's what I'm going to talk about today, this sideshow that they've been trying to gin up to avoid dealing with the actual merits.

Now, let me start by saying something about the case that the equity committee and the other objectors have not been trying to build in this case. This proceeding was supposed to

be about comparing the value of the global settlement against the prospects of continuing to litigate. That's what this whole thing was supposed to center around. And if you look at -- I'm just going to hand up some sections from some case law --

UNIDENTIFIED SPEAKER: Your Honor, may I approach?

THE COURT: Yes.

MR. ELSBERG: If you look at what the Third Circuit has said, which is quoted on the board, you can see, when comparing the reasonableness of the settlement, considering the reasonableness of the settlement, the Court must assess and balance the value of the claim that's being compromised against the value of the estate of the acceptance of the compromise proposal. And Your Honor, under the case law, it is not enough, it is simply not enough for the objectors to just assert the empty conclusion that the debtors supposedly could have done better. What they're required to do -- and this is what their own cases say --

THE COURT: Are we talking about the motion in limine now?

MR. ELSBERG: Yes, Your Honor, yes. If you just give me a little latitude again, I won't need to get up again.

THE COURT: Well, I'm not going to hear it again in your

MR. ELSBERG: Fair enough.

THE COURT: -- argument.

MR. ELSBERG: Fair enough.

THE COURT: Okay.

MR. ELSBERG: Your Honor, what they're required to do counter the evidence that we've put in is, we have the initial burden, but then they need to counter our showing by demonstrating. They need to demonstrate with testimony and with documents, how and why continuing to litigate would supposedly result in a better outcome. How and why the objective evidence that we've adduced and that co-counsel will be addressing at closing, is supposedly insufficient for the Court to conclude that the settlement is reasonable. And now, Your Honor, talking specifically about their motion, if you have it in front of you, Your Honor, if you look at paragraph 6 of the motion that they filed last night, or we can hand up a copy, if you don't have one in front of you.

THE COURT: My J.A. is bringing it in.

MR. ELSBERG: Okay, thank you, Your Honor. If you look at paragraph 6 of their own motion, they cite the Spansion case.

THE COURT: Um-hum.

MR. ELSBERG: They cite the Spansion case. Now, in Spansion let's look at what happened. The objectors had two patent law and merger experts come in and testify at the hearing, and those experts testified that there was a specific

method that the Court needs to apply, in order to properly assess the value of the patent claims in the underlying transaction that was being covered by the settlement. And they testified that in order to do that valuation, there were specific types, very specific types of evidence that were necessary for the Court to do an objective evaluation. And the experts pointed out that this type of evidence, multiple types evidence were missing from the record. But here Your Honor, here Your Honor, we have the exact opposite. The objectors did not --

THE COURT: Thank you.

MR. ELSBERG: -- put on any experts. Your Honor, it's at paragraph 6 that I'm pointing to now, from the one from --

THE COURT: I recall it.

MR. ELSBERG: -- last night. The objectors didn't put on any experts or any other witnesses or anybody to identify any alternative independent method. They never said, Judge, here is the person, who's going to describe how these claims should be assessed and valued and here is the problem with the way the debtors are doing it. In fact, they've admitted, they've admitted that they're not going to do this and they haven't done this. If you look on the screen you'll see, this is the equity committee counsel. Remember, we were going to put some direct testimony on from Chad Smith and they didn't like it and they got up and they objected, we're so surprised

you might want to put direct testimony on him. One of the things that they've said is, the objectors have not put on an affirmative defense; we've simply crossed. So that's how they've tried to play this entire proceeding. Not actually demonstrating, in any way, how continuing to litigate could possibly reach a better outcome. And, Your Honor, they stayed a million miles away from the main issue in this case; instead, they tried to point to privilege because they know, if you focus on it, it doesn't end well and they've done this --

THE COURT: You're really far afield from whether --

MR. ELSBERG: Yes, Your Honor.

THE COURT: -- evidence you specifically offered implicates the attorney-client privilege.

MR. ELSBERG: Yes, again, I won't plan to talk again in closing, if I get another couple minutes and --

THE COURT: All right.

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

THE COURT: Tie it up.

MR. ELSBERG: I'll tie it up and then I get right to their sword/shield argument.

So, Your Honor, they've stayed away from the main issue; they admit that they've stayed away from the main issue. They did not want to actually address how litigating could possibly reach a better outcome. And they've done this, even though they had all the tools to build their case, if they only

had a case to build. Now remember, we produced nearly two million documents in the document depository. We gave the equity committee our privileged and work product documents. They had Quinn Emanuel's memos, they had Weil Gotshal's memos, so they had all that at their disposal to help analyze the claims. In addition, and I won't mention the content but it's public record, the examiner gave them a report and, what I can say is that Your Honor noted, the other day, that the examiner report could have been used by the parties as a useful road map to try to build a case. But instead of using the report as a road map, they moved to strike it as part of their overall effort to divert attention from that main issue, where they admit they haven't even tried to put on a case to counter the evidence that we've put in to satisfy our burden of persuasion. And the reason is obvious: they know that if you look at the hard evidence, they're going to lose.

So, what did they do instead? They raised this privilege sideshow. That's what they want this case to be about. Not the real issue, because they don't like the real issue. So let's get to what they're claiming about privilege.

They say that we blocked our witnesses from talking about analyses that the lawyers did to assess the claims being settled. And they say the problem is we're also trying to use parts of the same privileged analyses in order to try to prove our case. That's their position, sword and shield. But the

truth, Your Honor, is we are not trying to do that at all. We're simply not asking the Court to approve the settlement on the grounds that the debtors' lawyers did an analysis saying that it is reasonable, and their argument completely misses the point. In fact, it rests on two premises, Your Honor, that are completely false.

Let's look at the first premise that their entire motion rests on. Their first premise is that we supposedly must, we must rely on our privileged information in order to prove that the settlement is reasonable. In fact, Your Honor, last night, the motion that they filed, if you look again, it's my favorite paragraph, paragraph 6, you see they say, "The debtors must now use the sword of the attorney-client privilege as their only possible way to prove the reasonableness of the settlement." They say that's it. It's mandatory; to prove it we have to waive privilege. Your Honor, that's simply not true. I don't know where they get that from, but it's not true. It's just common sense that it's not true.

Your Honor, this is the key. Either the value we're getting under the settlement is reasonable or it isn't. And the answer to that question simply does not depend on what outside counsel was thinking and saying behind closed doors. Our privileged opinions, Quinn Emanuel's, Weil Gotshal's, outside counsels' privileged opinions are just that, they're just our opinions. The TPS group can look at the evidence and

they can form their own privileged opinions, and the equity committee can do the same thing and have their own privileged opinions about the likelihood of success. But the subjective internal opinions of counsel is not what matters here, and the case law shows this. The answer to the question of whether the settlement is reasonable depends on this Court's impartial assessment of the objective evidence. And if you look at slide 2, which is up on the screen, we cite the case law. And you can see the case law is overwhelmingly clear on this point. The courts have consistently recognized that settlements can be proved objectively based on hard evidence, without prying into counsels' privileged files. In fact, this is confirmed --

THE COURT: Are we there yet?

MR. ELSBERG: We're getting there, Your Honor.

THE COURT: I mean, the issue is whether the evidence that they object to is objective evidence or whether it's attorney-client privilege.

MR. ELSBERG: So let's get there.

THE COURT: Okay.

MR. ELSBERG: Let's get to -- clearly, we're not required to disclose our privileged information. So now let's get to they're saying that the parts of the declarations that we asserted, in fact, include our privileged information. But they're just wrong, they're completely wrong. Now, Your Honor, it is true that we did invoke privilege to shield what's

actually privileged. But that doesn't get them anywhere. If you ask, tell me about your privileged legal analyses, of course, we're going to assert privilege. That's just how privilege works.

But now let's look at where they say -- I'll skip ahead because Your Honor is asking specifically --

THE COURT: Um-hum.

MR. ELSBERG: -- the stuff we're trying to put in, are we using privilege. Let's start with the Kosturos declaration. By the way, I'm going to focus mainly on the Kosturos and the other declarations today, because the declarations are really the heart of what's at issue here. Remember, we put our direct case in mostly by declaration. So to the extent that they're also seeking to strike testimony elicited live at trial, it looks like they're trying to strike what they got on their own cross-examinations. So that's not really the ball game. The real ball game here is they want to get rid of the declarations. So let's start with the Kosturos declaration, Your Honor, if you have that in front of you?

THE COURT: I have it.

MR. ELSBERG: They say that just about the whole thing should be stricken. They want to strike paragraphs 30 through 90. But let's look at that. Let's look at the heart of that declaration, and we'll see it simply does not reveal any privileged information as a sword. What it does is it sets

forth nonprivileged, objective information, mostly based on public documents. So, Your Honor, if you would look at page 28, you see the heading. The heading says, "Absent to global settlement agreement known value is at risk". Do you see that heading, Your Honor?

THE COURT: Yes.

MR. ELSBERG: Okay. So you can see based on the heading, this is the part of the declaration that sets forth material that the Court can consider in comparing the settlement against the prospects of continuing to litigate. And now, let's look at what's there. Let's see, is this private, privileged, confidential material, or is it objective nonprivileged material? And what you see is paragraphs 53 through 63 discuss the deposits, and it goes through risks and hurdles to recovering the deposits in the event the litigation were to continue. And paragraphs 53 and 54 specifically, they point out that JPMorgan has argued that the deposits are really capital contributions and that JPMorgan has pointed to specific evidence, certain banking records that mention the word contribution in them. And it points out that JPMorgan has also advanced various fraud claims with respect to the deposits. Nothing privileged there. Everyone in this courtroom, anybody who could access the docket, has that information available to them. That's public information, can't be privileged.

Paragraphs 57 through 63 then points out that the FDIC

and JPMorgan, both made the argument that they're entitled to the deposits for set-off. And they point out that the FDIC in particular has invoked a section of the P&A agreement, section 9.5, where they say they have the right, contractually, to yank the deposits and use them and hold them for purposes of set-off. So these are just a couple of representative examples, Your Honor, where there are risks and obstacles that have been outlined for Your Honor to consider, to see, if we continue to litigate hurdles, documents, legal theories that we would face as risks, if we tried to litigate and get a recovery. And if you look at the end of almost every single sentence in those paragraphs, there are references to specific public filings that are out there. And I won't belabor it, Your Honor, if you flip through the pages, the reason I handed up the Kosturos affidavit and the Goulding and I think, Chad Smith's also is, if you flip through them, the heart of these affidavits are to the same effect. They are nonprivileged arguments pointing mainly to documents that have been produced and are available in the public record to everybody: our main assets, the business torts , the taxes, the TruPS -- all of them. And there's no way that anybody can seriously say that this is privileged. Your Honor, if it would be helpful, I could take you through a little bit of Goulding also.

THE COURT: It's not necessary.

MR. ELSBERG: Okay. Well, what I would ask Your Honor

is, if you peruse through the guts of these declarations that's what you'll see. Now, they may say, they may say, well, this showing isn't enough. I'm sure they'll get up and argue, well, that can't get you there, you lose. How can the judge decide based on that? That's a different story. They're also wrong about that. But the idea that this is privileged -- it can't be. These are not Quinn Emanuel's memos being put forward; these are people saying, I looked at the pleadings, I heard what the other sides said, Judge, these are the arguments, counterarguments, and you can line up the evidence that have been pointed to by all sides, and looking at the objective evidence, you can conclude that this is reasonable.

And by the way, the same thing happened in the depositions. We, in our previous brief in response to the original motion in limine, we attached a chart showing that when our witnesses were asked about nonprivileged bases, they spoke and they spoke at length, just in the way that they are being -- testifying in the declarations. The problem is that what counsel repeatedly decided to do and wanted to do to try to set up the sideshow, is to ask the wrong question. They would repeatedly ask the question -- they would repeatedly ask the question, tell me the internal analysis, private analysis that you did. And it was done with lawyers, right? And so they were try to ask the question designed to get a proper invocation of privilege. A proper invocation of privilege.

What they stayed away from -- and they would often, frankly, interrupt the witness -- is asking, okay tell me, what are the nonprivileged bases on which you think that this Court can conclude it's reasonable? And when that type of question was asked, they were free to answer, they did answer, it's in their directs and there is no possible basis -- there's no possible basis to exclude it.

And before I sit down, I would just point to some bedrock law that they're trying to get around. Basically, what they're trying to do -- basically, what they're trying to do is say, if you admit, if you admit that you relied on counsel in connection with the litigation or in connection with the settlement -- if in a deposition that comes up or if in a trial it comes up and someone says in deciding to settle this case or in deciding what claims to assert, did you rely on counsel? If you say yes, bam -- privilege is gone. That's their position here. They say, once you admit that you relied on counsel, you cannot testify as to nonprivileged information concerning the same subject. That can't possibly be the case. Otherwise the privilege would never work. Every litigant who's represented by counsel has consulted with their counsel and their thinking about the claims and how likely they are to win. Same thing for every settlement, it happens every day. And if you look -- if you look at this slide, this is just a reminder that even though this happens all the time, you have counsel representing

clients, nobody ever has to waive their privilege. It's extraordinarily rare; 9019 reasonableness hearing happen all the time and nobody is required to waive privilege. In fact that Key3Media case is a case they cite which actually shows you don't have to waive your privilege. And again, they cite Spansion. In Spansion the privilege issue the Court said the problem was that the debtor said, no, no, we didn't rely on counsel at all. This is the 180 degree opposite of Spansion. Spansion, the judge said, are you seriously telling me, you did this without consulting counsel? That was the problem. Here, of course we consulted counsel, just like you do in every, or almost every 9019 case, at least the ones were you have counsel.

And by the way, these 9019 hearings there is nothing unusual. Class action fairness hearings, too. They're proved all the time, everyday and you don't have to show your internal files. And the reason is, our private, subjective, internal opinions -- everyone can have one -- that is not what can possibly decide this case. As the case law that I put up earlier shows, what matters is Your Honor's objective view of the facts and that's exactly put forward in the declarations. Now, they can try to niggle around with -- they pointed yesterday to a line in Chad's affidavit that talked about a legal standard, but that's not really what they're after here. They're trying to point to that and say, well, that looks like,

like, you know, that looks legal; and they're trying to use that as a hook to really get to the guts of what's in these declarations. But the gut is what I just showed you. And I ask Your Honor, if you peruse them you'll see, what I went through is representative of what they're trying to exclude. The reason they want to exclude it is that, if they know it comes in, they have a big problem on the merits, which they've been trying to divert from with this privilege sideshow.

THE COURT: Thank you.

MR. ELSBERG: Thank you.

MR. JOHNSON: Good morning, Your Honor. Robert Johnson for the creditors' committee.

Your Honor, this is not a case of the planned proponents and the creditors' committee playing a game of hide the ball. The creditors' committee consistently took the following positions: Extensive legal analysis was indeed done by counsel. But also extensive financial and factual analysis was done by FTI. We will tell you what was the extent of the analysis. We will tell you what the issues were. We will tell you what were the factors that were considered. We will tell you about all of the nonprivileged communications with those adverse parties. The only area in which we invoked privilege was revealing a lawyer's candid conclusion, as to whether or not we were likely to win or lose each particular specific item within the broad range of contested issues. That's a specific

legal conclusion on the likelihood to prevail on the merits of each claim, and we did stay away from that. Now, the reason for that is that it's important to put it in the context of Rule 9019, to seek the Court's approval of the settlement agreement. We have to be confronted with what will happen if the Court does not approve the settlement agreement. And if that happens, we'll be right back in litigation. We cannot be put in a position of having to publicly disclose our candid view as to whether or not we're going to lose a particular claim, when our witness is describing the scope of the work that was done and the various factors that were considered before the witness, in this case Mr. Simms, testified as to how he and the creditors' committee came to the conclusion that this is a reasonable settlement. There is an important distinction here from the cases in which a party places an attorney's advice at issue. The at-issue doctrine is to be narrowly construed. The Third Circuit instructs us that it applies only where the client asserts a claim or defense and attempts to prove that claim or defense by disclosing or describing an attorney-client communication. That's the Rhone-Poulenc case. And simply because the information is relevant to the testimony does not mean that the privilege has been waived. By contrast, what the objectors are doing here is unfairly arguing that anything even remotely connected to an attorney, anything happening, even when a lawyer is in the

room, is barred. And here is an example that comes from the motion to strike that I'd like to show you, Your Honor.

This is an example of the testimony of Mr. Simms, in which he was describing a meeting that he attended with the FDIC and JPMC. Clearly, this was a nonprivileged context and he was testifying as a perceptive witness -- who he saw, what he saw, what he heard, what he observed -- and he relayed those things as a perceiving witness. He said: "At that meeting, did FDIC say anything about the merits of its claims against the estates?"

"A. The FDIC was fairly strong and threatening certain activities. They said, they felt that many of their claims were -- they felt, they had a lot of strength in their claims. They felt that items such as the REIT trust preferred were precedential in nature; they would take any challenges to the Supreme Court. They had pushed heavily on their rights under Section 9.5. So they were laying out the difficult challenges that we may find, faced with challenging them.

"Q. Do you know the amount of the claims that the FDIC filed against the estates?

"A. Within the billions. I think theirs was the twelve billion dollar range, twelve or twenty."

And then I asked questions and elicited answers regarding who was actually at that meeting. Your Honor, this is an example of what it is that the objectors seek to strike

from the trial testimony. And there is absolutely nothing in this testimony that relays to advice of counsel or to any privileged communications from counsel.

Similarly, here we have an example -- oh, and for the record, the prior section was from page 907 of the trial transcript. This excerpt is from page 840.

And here the witness was asked about what it was that FTI did as opposed to what it was that counsel did. And Mr. Simms explained.

"A. Merits of potential legal claims. But analysis that we did throughout the case, where counsel was involved, there were parts of it that were fairly done independently by FTI, as an example. To use an example of the deposit accounts, where we looked at issues related to the inflows and outflows of various deposit accounts where the accounts were, where the money from -- where the money came from, what was the back and forth between WMI and WMB and the different deposit accounts, analysis at the end that included counsel with regard to the merits of winning arguments. But there was extensive analysis done by FTI independently."

Your Honor, this is another example of Mr. Simms describing exactly what it was that FTI did. And he is not disclosing any privileged attorney-client communications here. This was not something that we ever sought to bar during the depositions. In the depositions we only invoked privilege with

respect to a final conclusion. If Mr. Simms was asked, did Mr. Johnson tell you whether or not you're going to win on the deposits or did he ever say whether or not you would win on the TPS. Now I have to say that, as a lawyer, I probably was pretty unlikely to give him an absolute assurance as to whether or not he was going to win or lose on any particular line item of the settlement. But Mr. Simms did not testify as to specifically what the lawyers' conclusions were. He did testify, though, about what it was that the lawyers did, what it was the FTI did and then to talk about the scope of the work that was done.

I think that what's very important to see here is that the key distinction between the testimony that we sought to invoke attorney-client privilege for and what it was that Mr. Simms did testify to, is the distinction between the existence of analysis and the final conclusions of that analysis from a legal perspective. Here, Mr. Simms testified extensively about the existence of analysis done by counsel and the scope of that work, on the one hand, and then the final candid conclusion regarding each specific item in the settlement. Mr. Simms explained this distinction in his deposition, this was from page 94. He said, "I think the analysis, just so it is clear, we talked about the type of work. You said the substance of the analysis. I think I've given some of the substance of the analysis. You've asked me for conclusions and what the

conclusion on each of the individual line items so sort of speak were. I do not believe we talked about conclusions of those line items but the substance of the analysis. I consider the substance to be things like we evaluated."

THE COURT: Is this the deposition or the trial transcript?

MR. JOHNSON: This now is from the deposition. But this is --

THE COURT: Is this being asked to be stricken or this isn't?

MR. JOHNSON: This portion is not, but in fairness to respond to the motion, I wanted to show --

THE COURT: Oh --

MR. JOHNSON: -- that in the deposition what it was that he did say and how it was that he did try to answer those questions. He was being perfectly candid in his deposition. He was not invoking privilege and hiding behind privilege and saying, none of this analysis happened.

THE COURT: All right.

MR. JOHNSON: I think that Mr. Simms was quite candid in explaining what it was that the creditors' committee had done and explaining all of the work that had been done by lawyers without going to the final conclusions. Your Honor, we contend that on 9019 this is an appropriate use of privilege and that there was nothing Mr. Simms did in terms of invoking

privilege or that I did at his deposition in terms of invoking privilege or at his trial testimony that would bar him from testifying as a perceptive witness as to what he had observed about the claims that were at issue.

THE COURT: Okay.

MR. JOHNSON: Thank you, Your Honor.

MR. SACKS: I'll be very brief, Your Honor. Because most of what I have to say was covered already by Mr. Elsberg.

THE COURT: All right.

MR. SACKS: This is an unprecedented theory that the objectors are proposing here, which is essentially if any witness consulted with counsel about claims, they are forever barred from testifying about those claims unless they reveal the privileged information that they have with their counsel. And it's clear here that no witness testified as to what legal advice was given to that witness. And no witness asked the Court to rely upon the legal advice he received from his counsel. He merely testified, as one would expect, that people operating in the commercial sphere and making judgments consulted with counsel along the way. And the law is extremely clear that that is not a waiver of privilege. And Mr. Elsberg discussed the fact that settlements are approved every day in bankruptcy courts, in class actions without a waiver of the privilege based upon on an objective assessment of what is being given and what is being gotten in the settlement. And

that's what's occurring here.

Your Honor, some law was cited, but let me reference one case, which is the Third Circuit case, which I think makes clear exactly what's wrong with what's being proposed in this motion, the Rhone-Poulenc case. Advice is not an issue merely because it is relevant and does not necessarily become an issue merely because the attorney's advice might affect the client's state of mind in a relevant matter. The advice of counsel is placed an issue where the client asserts a claim or defense and attempts to prove that claim or defense by disclosing or describing an attorney-client communication. And in this case there has -- and the other case cited is the Teleglobe case, which is Your Honor's decision, which has been mentioned. In this case there has been no effort to ask this Court or to disclose what the advice was that was provided to these individuals. Of course, as the Third Circuit acknowledged and as Your Honor recognized in Teleglobe, people have advice of counsel and that affects their views of things. But when they don't ask you to rely upon the advice, they're not waiving their attorney-client privilege. And indeed, as Mr. Elsberg indicated, it's not relevant what Quinn Emanuel or what Sullivan & Cromwell or what Susman Godfrey individually assesses these claims. You need to make an assessment of those claims and whether the compromise is within the range of reasonableness.

I'd like, finally, to point out to Your Honor that the information they're seeking to strike is already before the Court. it's -- came in through declarations -- through testimony in these people as to facts that are facts of record that they considered that weren't privileged. But Your Honor already has a lot of that in the record and this is what I'm going to refer to something that's in the record as -- from McIntosh, Exhibit 14F from a declaration filed on November the 2nd, 2010.

And, again, it's in the record of this proceeding. And this was a presentation that the debtors made to Your Honor in connection with the motion to appoint the equity committee. And if you look at this -- I'm sorry, a motion to appointment the examiner. And this was a presentation they made at the hearing on July the 20th, 2010 and I believe that the equity committee has designated the transcript of that hearing as an exhibit for Your Honor. But, let's see if I can --

The debtor at that point in time, Your Honor, went through the same type of issues which Your Honor has to consider in assessing the reasonableness of the settlement and which these are facts that the witnesses have testified to. While it might inform an attorney's judgment, they didn't testify to it. So all of these facts that they're now moving to strike, which the witnesses have explained informed their judgment, are already before Your Honor in a different form. They were identified.

So, they've indicated to Your Honor that in connection with the business tort claims, here are all the types of arguments that go to the weaknesses in those claims that JPMC has or may make; that WMI doesn't have standing, that other forces caused Washington Mutual's demise, that there is an inspector general report that gave other reasons for Washington Mutual's demise, that there are jurisdictional bars to the claims, et cetera. And this goes on, Your Honor, for multiple pages.

This is exactly the sort of objective evidence, not privileged evidence, but this is the sort of objective evidence that supports the reasonableness of the compromise in this case that is before Your Honor. It was testified to by the witnesses as things that informed their judgment that this was reasonable. It is not the advice of their counsel and the motion is misguided and should be denied, Your Honor.

THE COURT: Thank you.

MR. STOLL: Thank you, Your Honor. Your Honor, before I begin I'm going to make reference to the original motion as well and with all the paper that's going back and forth, I can imagine that you may not have that on your desk. I can hand up a copy of what was originally filed at the outset of trial with Your Honor. The original motion --

THE COURT: Why do I need that?

MR. STOLL: Because it's incorporated by reference into the original motion and there's certain things that we had

quoted in that or cited in that motion that I'm going to refer to.

THE COURT: All right. You may hand it up.

MR. STOLL: So, Your Honor, I appreciate my opponent's recharacterizing my arguments for me. But let me see if I can actually characterize the argument as I made it and then you can rule on it accordingly.

The issue that we're dealing with is the so-called sword and shield doctrine. A party cannot shield evidence in discovery through the use of the attorney-client privilege and then turn around and use it as a sword. Now here, what we've seen, as I call it -- and I've got to give -- tip my hat to him, a very clever way of doing it, because what they did during discovery is told us that there was no analysis whatsoever of any likelihood of success of any claim in this case except that done by counsel and that was privileged. And then they turn around at court and say in their various declarations and testimony, after careful review of the merits and risks of this case -- of all the risks of the -- presented to the debtor, we've reached this settlement.

So let's think what they said. No analysis whatsoever was done by anybody other than counsel. Now, we've done all sorts of analysis. The depositions were taken November 16th, 17th and 18th, two weeks ago. And if I could just read to you -- this is why I gave you the original motion, Your Honor,

because I excerpted this -- in the motion, I excerpted this deposition testimony, it's all since been read into the record on cross-examination. And let me just read to you if I could, Your Honor, from Mr. Kosturos' deposition. And I'm going to have to take my glasses off, I'm a little blind to do this so hopefully I won't obscure the microphone.

"Q. What analysis" --

THE COURT: What page are you on?

MR. STOLL: I'm on page 6 of the motion, the original motion, Your Honor.

"Q. What analysis was performed with respect to the strength and weaknesses of WMI's claims against JPMorgan?"

"Mr. Mastando:" --

THE COURT: Okay.

MR. STOLL: -- "Objection. Again, instruct the witness not to reveal privileged communications. The witness has already answered the question as well."

"Q. Those discussions were privileged?"

Excuse me,

"A. Those discussions were privileged.

"Q. And where -- and was there any analysis conducted by WMI with respect to the strengths and weaknesses of WMI's claims against the FDIC receiver and FICS Corporate that did not involve counsel?

"A. I think all the analysis that we prepared was at the

direction of counsel.

"Q. And are you refusing" --

THE COURT: We don't have to go through all this.

MR. STOLL: All right.

THE COURT: All right. Where in the testimony did they talk about the strengths and weaknesses of the claims?

MR. STOLL: Your Honor, in every declaration --

THE COURT: Where?

MR. STOLL: -- and I, again, I excerpt --

THE COURT: Point out one.

MR. STOLL: -- I excerpted here from the declarations, beginning at paragraph 44 of Mr. Kosturos' declaration as follows -- let me just get the right page here. I'm one page too far.

"Based upon careful review and consideration of all of the asserted claims, counterclaims and potential claims, in all asserted defenses and responses thereto, as well as consideration of the strengths and weaknesses of both their own claims and those asserted against them" -- that's where they say it, Your Honor.

THE COURT: Yeah. Yeah, but they're saying based on that, they determined it's reasonable. Where do they --

MR. STOLL: No --

THE COURT: Where do they ask -- tell me what the strengths and weaknesses are so that I can determine if it's

reasonable.

MR. STOLL: Two things, Your Honor. Two things, if I could just back it up one step. First of all, during discovery, they testified that they did no analysis independent of counsel. They did no analysis independent of counsel.

THE COURT: Okay.

MR. STOLL: Two weeks later, they tell you that they did all of this analysis, all right? Now, no --

THE COURT: No.

MR. STOLL: Remember --

THE COURT: No, they don't say that. They say they reviewed and considered the analysis and they determine it's reasonable.

MR. STOLL: All right.

THE COURT: There's nothing wrong with that. Where do they use the analysis and ask me to decide it's reasonable, based on that analysis?

MR. STOLL: Excuse me, Your Honor. Your Honor, the -- if the careful review of an analysis, if that is of counsel's view and they're putting forth the integrity of that analysis in order to prove the reasonableness -- because -- back it up. What does Spansion tell us? Spansion tells us that the - -you have to evaluate the relative strengths and weaknesses of the claims, effectively put some sort of empirical valuation, some range on it so you can compare the settlement that you

received. Because the dollar amounts --

THE COURT: I understand --

MR. STOLL: All right?

THE COURT: -- the analysis.

MR. STOLL: Okay. So what they're saying is they did no analysis other than that which is in front of -- was done by counsel.

THE COURT: You know --

MR. STOLL: And they're saying we relied on that analysis in order to prove the reasonableness of this case.

THE COURT: Where do they use it for me to rely on it to prove their case?

MR. STOLL: They use it repeatedl -- every time --

THE COURT: They say they thought it was reasonable. That doesn't prove their case. So what, they think --

MR. STOLL: Understood.

THE COURT: -- it's reasonable.

MR. STOLL: Understood, but --

THE COURT: They have to present evidence. So where in the evidence they presented supporting the settlement did they use the attorney's analysis?

MR. STOLL: Again, Your Honor --

THE COURT: That's the issue.

MR. STOLL: Your Honor, we cited to you before the cases which talk about implied reliance on advice of counsel.

When you affirmatively assert the reliance on the analysis done by counsel but you refuse to disclose the underlying analysis, you are implicitly putting that into evidence. That was the Human case, that was the Gab case that we cited in our original motions.

THE COURT: Yeah, and I denied your motion because --

MR. STOLL: I understand.

THE COURT: -- I don't think it's meritorious. Where in the trial now did they present attorney-client privileged information and ask me to rely on it? That I think is the issue.

MR. STOLL: Okay. I will concede, Your Honor, that they haven't said what the counsel's actual analysis was. We don't know what it was, whether it was done, what the -- results were reached. But we do know that they say they relied on it to assess the risk.

Remember what Mr. Goulding said? He said anybody could have sat in the room with all these pleadings. And then I asked him did you do that. And he said no. He didn't do it.

THE COURT: But --

MR. STOLL: They're not --

THE COURT: -- they are not precluded from relying on attorney-client privilege.

MR. STOLL: Understood.

THE COURT: But when they seek to use that attorney-

client information and present it to the Court, only then can you get it.

MR. STOLL: I understand --

THE COURT: Where did they use it?

MR. STOLL: So maybe I'm wrong about this, Your Honor. I'll just take one last shot at it.

If they tell me in their deposition that they did no analysis whatsoever, other than counsel --

THE COURT: All the strengths and weaknesses of their claims --

MR. STOLL: Yes, just --

THE COURT: They did all their analysis.

MR. STOLL: Right. Just that one element. That's all I'm focusing on, Your Honor. All the stuff about how much it cost and how much -- all that, forget that. I'm just focusing on likelihood of success of the merits, right. They've told me in deposition after deposition after deposition, no analysis other than counsel. Right? Mr. Goulding sits here and says anybody could do it, but nobody did. He didn't do it; he didn't sit in the room and look at anything. So -- but all of their affidavits say after careful assessments of the risks of the case and the relative merits and the counterclaims -- he didn't do it, only counsel did it. So how can they sit here and put into evidence even the conclusion, even the superficial conclusion --

THE COURT: The conclusion is not the objective evidence that I'm going to rely on, I gotta tell you (sic). That proves nothing.

MR. STOLL: Okay. All right, Your Honor.

THE COURT: SO the fact that they think it's reasonable proves nothing and the fact that they relied on attorney-client privilege is irrelevant in my consideration.

MR. STOLL: All right, Your Honor. Very good. I think with that I'll sit down.

THE COURT: Equity committee want to try?

MR. NELSON: Well, Your Honor -- thank you, Your Honor. Justin Nelson for the equity committee. But we actually have a slightly different point of view from the TPS holders on this. And I actually think Your Honor just got it exactly right, which is why we just made an oral motion, didn't submit it on the briefs.

We think that with respect to the motion in limine, the issue is relatively narrow which is whether this Court can rely on the conclusion that -- of the debtors that the settlement is fair and reasonable. That's what we move to strike because that conclusion is based on the testimony of counsel. And that is -- we think, Your Honor, even if it comes in as completely conclusory et cetera, et cetera, et cetera, but we also think that it should not come in at all about what the debtors' opinion is. Your Honor asked wherein the record

is this. Let me just go through a couple things in the record that discuss this. And, again, the issue is we are seeking to strike the creditors' committee and the debtors' conclusion that the settlement is fair and reasonable, due to that counsel's advice.

And by the way, Your Honor, I'm going to reserve my -- the case law discussion for the closing argument.

This is the testimony of Goulding. "In your deposition" -- and this is key.

"Q. In your deposition, this is page 142 of your deposition, you said that the factual basis for your determination that the settlement is fair and reasonable is privilege, correct?

"A. That's what it says here.

"Q. When you were asked about -- at your deposition whether you did any analysis and to the fairness and reasonableness of this settlement without input from counsel, your answer was no, you did not. Correct?

"A. Right. You're asking me if I did anything without counsel and I didn't. That's why we're seeking to exclude it."

This is, again, from Goulding.

"Q. All the analysis that you and WMI performed was done in connection with counsel, correct?

"A. Again, it's the same issue. We would have -- with all these being legal disputes with respect to ownership of assets for different outcomes, we would have discussed them with

counsel as is prudent."

This is what Mr. Kosturos had to say at trial:

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

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

Mr. Kosturos.

"Q. And we've heard testimony about that today and again, I just want you to confirm that nowhere in this section of your declaration do you provide any testimony to the likelihood of success in those claims, is that fair?

"A. That's fair, yes.

"Q. And you don't put any sort of range of assessment of risk on any particular claim, is that right?

"A. It's difficult to put an attorney work product privileged into a public document. So I'm following it because we didn't put work product in here."

With respect to Mr. Sims and the creditors' committee:

"Q. Okay, in the analysis that was performed with counsel, was that with respect to the merits of the legal claims involved in these Chapter 11 cases?

"A. Merits of potential legal claims but analysis we did throughout the case where counsel was involved."

And I actually think Mr. Johnson got it exactly right when

he said that the conclusions are privileged. And that's what the equity committee is trying to strike; the conclusion that the settlement is fair and reasonable. He used Mr. Sims' deposition. Let me just show you the next question in Mr. Sims' deposition that he did not show you.

"Q. What was the basis for concluding" --

Can you see that, Your Honor?

THE COURT: Yes.

MR. NELSON: Okay.

"Q. -- for concluding that the debtors should contribute the TPS securities to JPMorgan?

"Objection, attorney-client privilege.

"Q. Are you going to follow your attorney's presumed instruction not to answer?

"A. I will follow my attorney's instruction."

So -- and it goes on for every single claim we can go through it, Your Honor, if Your Honor likes. Every single one, BOLI/COLI, IP, assets, TPS. The conclusion that the settlement is fair and reasonable is based upon that counsel's advice.

THE COURT: Well, again, none of that is evidence that I'm going to consider. I consider that argument and the fact that the debtor stands up and says they -- debtors' counsel says this is fair and reasonable is just that, argument.

MR. NELSON: And that's only what we seek, Your Honor.

THE COURT: All right. I'm going to deny the motion

to the extent it seeks to strike any specific testimony but, again, I think it's a conundrum. The debtors' walking a fine line. They have to preserve the attorney-client privilege in case I deny the settlement, while presenting enough information on which I can rely for me to make the ultimate conclusion whether it's fair and reasonable.

But any testimony by any of the witnesses that they felt it was fair and reasonable, whether that was based on attorney-client privilege or not, is not evidence in my opinion. I don't think it's relevant whether the debtor thought it was fair and reasonable or the creditors' committee thought it was fair and reasonable. That's not objective evidence; that's argument. So, even though the witness cannot erase attorney-client privilege from it's mind, I think that where the witness has testified to financial analysis they did or they testified to the review of pleadings or the positions the parties took in the negotiations, that may all be presented even though attorneys were present or even though they'd later discussed those positions with counsel. I think they've walked the fine line sufficiently to permit that testimony to be presented.

MR. NELSON: Absolutely, Your Honor. Thank you.

THE COURT: Okay. Do we want to take a short break before we start argument, then?

MR. ROSEN: I would appreciate that, Your Honor.

(Recess from 11:02 a.m. until 11:12 a.m.)

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

Your Honor, after over two years of grappling with the 2008 economic disaster that caused the downfall of many a financial institution, including the seizure of Washington Mutual Bank by the OTS and the FDIC, the debtors are here today on the verge of emerging from Chapter 11 with a plan of reorganization, and a foundational compromise and settlement that affords the debtors creditors with an opportunity to have their claims paid in full. It even allows for the possibility that some value may trickle down to certain holders of equity interest. And to achieve this, it has not been a simple task. Rather it has been one of the most arduous tasks that have ever been navigated in Chapter 11.

To do this, Your Honor, the Court has led all of the parties-in-interest from the debtors down through the creditor constituencies to the smallest holder of a common stock interest, through a maze of litigation, through omnibus claims objections which have reduced the claims filed in these Chapter 11 cases, through an investigation by, as some people would like to say, an examiner who shall not be named.

But while some parties were successful, Your Honor, in throwing a vanishing cloak over Mr. Hochbergs report, and the

extremely well constructed and detailed investigation which he oversaw, they cannot point the wand -- they cannot dismiss, excuse me, the mounds of evidence before the Court, through testimony, by declaration, direct and cross examination, and the multitudes of exhibits concerning the plan and the global settlement agreement.

No matter how cute the effort, Your Honor, objecting parties cannot cause the facts in the law that demand confirmation of the plan, to disappear.

There is no doubt that the debtors have been required to fight for every cent of recovery for their estates. There have been litigations in multiple jurisdictions, against both JPMorgan Chase and the FDIC. The debtors have been forced to seek what is theirs through affirmative recoveries, and defend what is theirs by trying to reclaim what has been taken, or not returned, following the seizure. They have successfully negotiated settlements with their creditors, and people hoping to be their creditors, like the WMB senior note holders.

Now, through their efforts, and the stewardship of this Court, the debtors have garnered for their estates over seven billion dollars for distributions, and we stand ready to distribute such value, and we await this Court's authorization to do so.

But how did we get here, Your Honor?

Your Honor, may I approach?

THE COURT: You may.

MR. ROSEN: Your Honor, Bankruptcy Rule 9019. As you know, Your Honor, that provides that on motion by the trustee and after notice in a hearing, the bankruptcy court may approve a compromise or a settlement, and the decision to approve a particular settlement, Your Honor, lies within the sound discretion of this Court. And that of course, Your Honor, as you can see from this slide, has been the statement made by many a bankruptcy court in the district of Delaware. In fact, in Marvel, the courts said the ultimate inquiry is whether the compromise is fair, reasonable and in the interest of the estate. And the court does not have to -- excuse me. A court does not have to be convinced that the settlement is the best possible compromise, but must only conclude that the settlement falls within the reasonable range of litigation possibilities. And I think, Your Honor, those were your words.

The global settlement, and for Mr. Steinberg, its holistic settlement, is well above the lowest point in the range of reasonableness.

The debtors' burden, Your Honor, is to satisfy that standard. The Court should, as you said again, in quorum, the court should canvass the issues and determine whether the settlement is above that lowest point in the range of reasonableness. The court does not have to try the underlying disputes. Rather, as was noticed before the Key3Media case,

the quote there Your Honor is, "It is not necessary for a bankruptcy court to conclusively determine claims subject to a compromise, nor must the court have all of the information necessary to resolve the factual dispute, whereby doing so, there would be no need of settlement. Nor is the court required to make a determination that the settlement is the best possible compromise, in determining whether to approve a settlement, the court is not supposed to have a mini trial on the merits, but should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness."

Your Honor, the debtors submit that we have clearly satisfied this standard.

Mr. Kosturos said, on December 2nd, "We exercised our business judgment in evaluating the asserted claims, counterclaims and potential claims, and came to our conclusion as our business judgment, that this was a fair and reasonable global settlement agreement."

He went on to say that the debtors' goal is to maximize the value of the estates. Specifically he stated, "as it relates to WMI as the debtor, our goal is singularly to maximize the value of the estates. There was no goal to say when was enough. We tried to get as much as we could, and I think that's what we accomplished in this deal."

Your Honor, as we have said several times, the

debtors' business judgment, in pursuing uncertain and lengthy litigations, was just too risky. As Mr. Kosturos noted in his declaration, the global settlement agreement represents immediate known and certain value, estimated at approximately 6.1 to 6.8 billion dollars. Absent the global settlement agreement, such known and certain value would be at risk. Specifically, the debtors estimate that final resolution of the actions, through all appeals, may last approximately three to four years, although others consider such time frame to be expedited. During such period, the debtors will continue to accrue substantial litigation and administrative expenses, and the debtors unsecured claims will continue to accrue post-petition interest at a rate of approximately 30 million dollars per month, or 360 million dollars per year, all of which in the aggregate will erode the value of any litigation recoveries.

Mr. Goulding similarly testified. In the context of settlement negotiation, I believe we got the best result that we could. And in looking at the other option of litigating all of these issues, and the post-petition interest of thirty million a month, plus eight to ten million a month of professional fees that continue to run in this case, the bar would keep getting higher on a month by month basis. In order to get a result that would be in excess of the settlement agreement that we're putting forward.

But let's look at what we have, Your Honor. Let's

look at the assets.

As, Your Honor, it's already in evidence in the debtors Exhibit 130, there's approximately 900 million dollars of undisputed assets in this estate, and there's approximately 77 billion dollars of claims and liabilities, not including unliquidated ones. There are numerous competing claims asserted among the debtors JPMorgan and the FDI receiver to these same assets. And materially significant reserves, required on account of those disputed claims, would result in significant delays in meaningful distributions to creditors. And as we've already cited, there is the burn rate of thirty plus ten, and approximately three to four more years of litigation.

Your Honor, going back to that 900 million dollar number, as of the commencement date, there was only a limited portion of the assets that were not in dispute. And Your Honor, we can break these down on this chart into four specific groupings. There was cash of the two debtors, of approximately 837 million dollars. There was some subsidiary cash accounts of approximately 38, assured trust of approximately 16.7 million, and all other assets of about 7.5 million dollars, rounding it out, Your Honor, to approximately 900 million dollars. But I will note, Your Honor, on this chart you will see the footnote that that does not include the 157.5 million dollars, the value of the reorganized debtor that Mr. Zellin

testified to.

But Your Honor, let's take a look at this now, the debtors assets, on a pre- and a post-global settlement basis. Right now, Your Honor, you see on this chart that there are the nondisputed assets in the left column; and on the right column, Your Honor, you have the cash accounts of 892 million, other assets, and we even, for purposes of this demonstrative, showed the approximate 158 million dollars of the value.

But now let's start to add to it what we are getting as part of the global settlement agreement. Specifically, we add the disputed cash accounts, of approximately 3.8 million dollars. We then put on top of that, Your Honor, the tax refunds that we are getting, pursuant to the global settlement agreement, of approximately 2.5 billion dollars. We add the value of the intercompany notes, Your Honor, 180 million dollars. The BOLI/COLI assets that are coming our way, 98 million dollars. The American Savings good will litigation, 95 million dollars. The Ahmanson Rabbi Trust, 76 million dollars. And lastly, Your Honor, the Visa Class B shares, approximately 25 million dollars.

Let's look at it now from the other side, Your Honor. This -- or the liabilities that we're focused on. And pursuant to the global settlement agreement, there is a significant reduction of those liabilities, and as Mr. Kosturos said, all of that would maximize the value of the debtors' estate, and

provide it immediate and substantial recovery.

But how did we get there, Your Honor? First, as you can see, Your Honor, there are the WMB bond holder liabilities that are on the estate, of approximately five and a half billion dollars. Global settlement agreement, plan support agreement, they're gone.

Next, Your Honor, we have the FDIC claim. 27.9 billion dollars. Global settlement agreement, release, gone.

Next, the JPMorgan claims, twenty-seven billion dollars. Global settlement agreement, gone.

Next we have the liabilities that are being assumed by JPMorgan as part of a global settlement agreement. You can see there, Your Honor, pension related liabilities, the Visa claim, medical plan and OPEB liabilities, vendor claims, the BKK liability, the surety bond, all of which, Your Honor, are significant in dollars and you can see are well in excess of a billion dollars. Those are gone.

The interchange litigation, Your Honor, was a five billion dollar liability, and at the time that we entered into this transaction it was to be assumed by JPMorgan. The debtors did however, Your Honor, file an objection to that claim, and luckily for the debtors, we already took care of it. Because as a result of the objection that we filed, the interchange litigation people went away.

But, Your Honor, there is still, as we noted before,

ongoing responsibility of JPMorgan in connection with that, as part -- as it relates to the Visa shares.

So, Your Honor, as I said, that leaves us with the claims that we've always thought about, approximately seven billion dollars.

The global settlement agreement, Your Honor, provides approximately 6.1 to 6.8 billion dollars in direct and immediate value to the debtors' estates. As I've mentioned already, the deposits of approximately 3.8 billion, the refunds of 2.5 billion, the intercompany notes 177 plus post-petition interests of approximately 180 million dollars. And as we just saw on the prior slide, there are the withdrawal of significant claims to the estate -- the twenty-seven of JPM, the twenty-seven billion of the FDIC and the five billion of the WMB bond holders. The debtors, JPMorgan and the FDIC, Your Honor, asserted claims against one another and for assets claimed by the other. Specifically, as we set forth on this slide, the deposits, the tax refunds, business torts, good will litigation, avoidance actions, Rabbi trust, intellectual property, BOLI/COLI, trust-preferred shares and the Visa shares. All of which amount were in the billions of dollars and clearly in dispute.

So let's look at whether or not there really was a risk to this, Your Honor. The debtors are receiving approximately four billion dollars immediately. The debtors

will release these deposits minus the agreed upon holdback set forth in the settlement agreement, for monies that they otherwise would receive as part of the tax refunds.

This was in Mr. Kosturos' transcript -- excuse me, his testimony. Absent the settlement, as Mr. Kosturos declared, the debtors may never recover the deposits, or at least not for three to four years, while the estate suffers significant expense.

But, as we've talked about, Your Honor, what were the countervailing claims? What were people stating?

Well, JPMorgan said, those are mine. Those are capital contributions. They pointed to notations on accounting entries that could be interpreted to evince and intent, to contribute the majority of the deposits to WMB FSB. Mr. Kosturos included that in his declaration, and you can see, Your Honor, that there are references to various exhibits. JPMorgan also claimed that they were subject to setoffs, specifically they said, even if they were yours, we have that right to set off. Again, we had that in various exhibits, and the Kosturos declaration.

They've also said that even if the deposits were determined to be WMI's, they were forcibly transferred to WMB FSB, and so they should still be JPMorgan's. Again, Mr. Kosturos' declaration.

On the flipside, Your Honor, the FDIC -- what's their

claim? They say, geez, I have an assertion of rights to those setoffs. And what's worse, and as you know, Your Honor, from the motion to relief from stay, they have always asserted that they had a right to call back, even if they were deposits, pursuant to Section 9.5 of the purchase and assumption agreement. And they have stated that this was a precedential issue for them, and they would "take that to the supreme court." And I think even Mr. Sims testified as to that.

With respect to the tax refunds, Your Honor, prior to the settlement, there was a dispute as to the ownership of those refunds under the tax sharing agreement. WMI's position was that the refunds were property of the estate, and the tax sharing agreement merely created a debtor/creditor relationship, giving rise to corresponding claims on behalf of either JPMorgan, the receivership, WMB, or any of those. Specifically, Your Honor, as you heard from the -- Mr. Kosturos' deposition -- excuse me, Mr. Kosturos' testimony, that the receiver would have a claim under the tax -- or JPMorgan would have a claim under the tax sharing agreement for the vast majority of the tax refunds, as those were allocable to WMB.

JPMorgan, on the flipside, said no, it's not a debtor/creditor relationship. WMI merely acts as agent for the group, such that all -- or virtually all of the tax refunds should be paid directly to JPMC, or the FDI receiver. And this

was included in Mr. Carrion's (ph.) declaration.

Regardless of the outcome, Your Honor, even if it was the debtor/creditor relationship or theirs, it was going to -- excuse me. The global settlement results in significantly more value for the debtors estates.

Mr. Kosturos also said that in the litigation, what he said was specifically we are the consolidated payer of the tax refund. We believe that what we should be entitled to receive, be ent -- excuse me. That we should be entitled to receive the entire tax refund -- then the tax sharing agreement governs that, and then you have to allocate the tax refunds to who generated those tax attributes or tax losses. In almost every respect, the WMB was the generator of those losses. Therefore, it is entitled to the majority of the tax refunds, whether that was JPM, or FDIC.

So if we're going to talk about the five and a half billion dollars of tax refunds, and what potentially WMI owned, we can talk about that, but certainly the vast majority of those tax refunds belong through the tax share agreement to WMB, not WMI.

So, Your Honor, the next slide is a demonstrative that we put together to show exactly that, specifically the left column says, well what if WMI wins? So we get the full 5.8 billion dollar of tax refunds, they're property of the estate, but JPMorgan get's a 5.5 -- of the FDIC receiver gets a 5.5

billion dollar general unsecured claim as a result of the debtor/creditor relationship. Leaving 352 million dollars for distribution to the debtors other stakeholders. Coincidentally, Your Honor, that's the exact testimony that was in Mr. Carrion's declaration, and as he said on the witness stand.

Let's go to the middle column. JPMC and the FDIC win. Okay? They have the direct ownership; they get the 5.8 billion dollars. They get to keep 5.5 billion of it. They're obligated, pursuant to the tax sharing agreement, to pay the estate 352 million dollars. The same amount Mr. Carrion has testified to.

Let's look at the green column, Your Honor, the global settlement agreement. 5.8 billion dollars, what's allocated to JPMorgan and the FDIC? Only 3.66 billion dollars. Instead, 2.2 billion dollars is allocated to the debtors estates. The delta, Your Honor, is specifically for the 2.5 to 2.2, relates to what the WMB senior note holders are receiving, pursuant to the plan. The 335 million dollars.

Let's move on to the trust-preferred securities, Your Honor. WMI expressly agreed to contribute these securities to WMI -- excuse me. WMI agreed to give them to WMB. That's in the exhibit. The memorandum of understanding, limiting -- limited payment of dividends, September 7, 2008, an exhibit in evidence. The OTS directed conditional exchange on September

25, 2008, the Smith declaration -- another exhibit.

On site, the OTS personnel directed WMI to execute an assignment agreement. This is in Mr. Smith's declaration. The result? At the petition date, all WMI's rights to the TPS have been assigned to WMB. What were the obstacles to us getting them back, Your Honor? Well, first we had 365(o), the capital maintenance agreement under the Bankruptcy Code. We had 507(a)(9), a potential priority admin claim. We had a fraudulent transfer issue, if we win under 548, the satisfaction of the debt, the downstream guarantee as a defense. 547, we had a preference with an offsetting claim.

The BOLI/COLI policies, Your Honor. Pursuant to the global settlement agreement, WMB and WMI are getting exactly what they're entitled to, what is reflected on the books and records. As set forth in the exhibit, which we include in the box there, it's a "As between WMI and WMB, these BOLI policies are included on WMB's books and records, and owned by WMB. WMB acquired the policies from a banking institution that merged with WMB, and these policies were on the books of that institution at the time of the merger."

Mr. Goulding said "With respect to BOLI/COLI, initially as I said, we were doing asset identification. So looking at what was on our books, what was on WMB's book to see what assets might be WMI's. In that context, we met with a number of then JPMorgan, but legacy WaMu people, who had

overseen that program. And we got records from them that supported what was on the books and records from an accounting perspective. It showed ninety million dollars on the books of WMI, and approximately five billion on the books of WMB."

There are specific questions then, Your Honor.

"Q. In going back to BOLI/COLI for a minute, can you also tell me what the parties resolved in the global settlement agreement?

"A. Sure. In the global settlement agreement, we've got the BOLI/COLI that was listed on WMI's books, plus the two pack life, less bills that were not on WMI's books, and the balance of them went to JPMorgan.

"Q. And in the context of the settlement discussions, did you and JPMorgan agree on the ownership of the policies?

"A. We agreed on everything, but for those two pack life policies, which we ended up getting, pursuant to the settlement agreement."

With respect to the intellectual property, Your Honor, Mr. Goulding testified, "We're looking to what's been asserted with respect to ownership by JPMorgan. What defenses do they have, with respect to whether or not WMB own the intellectual property. We're looking at what are the merits of the arguments that WMI has with respect to ownership of intellectual property. We're looking at what the assets are that we're having. How can you monetize those assets, would

you need to win on litigation for an intellectual property infringement? If won that the IP was ours, but if there was no infringement, what would you do with those assets? Would you sell those assets, who would you sell them to? There's a range like all of these outcomes. You're trying to pin down a point estimate. There's a range of possible outcomes here for any number of these assets. You have to look at what's the -- what could happen. Could we win on IP that is ours? Would JP win that it's theirs? All of those types of issues."

Indeed, Your Honor, and Mr. Gouldings declaration is set forth in Exhibit 41, JPMorgan asserted that it is right title and interest in the WaMu IP, pursuant to the purchase and assumption agreement. And in fact, Your Honor, what we have here in these boxes, are the allegations made by JPMorgan in its complaint filed in this court. In Paragraph 172, JPMorgan said, "Prior to the receivership, WMB was the primary operating subsidiary of WMI, and both WMI and WMB have registered the trademarks Washington Mutual, and the W logo trademarks, and utilized the marks interchangeably in their operations, agreements and transactions."

Paragraph 175; "While the vendor stipulation resolved a number of the outstanding issues, and protected the estates against administrative liability, the vendor stipulation did not resolve issues regarding ownership of the intangible assets. There are a number of intangible assets which JPMorgan

Chase believes were property -- property assets of WMB, not WMI, and which have not been resolved to date."

Lastly, they say in Paragraph 176, "Any interest of WMI in these intangible assets consist of nothing more than bare legal title, and all beneficial and equitable rights thereunder were WMB's, and now belong to JPMorgan Chase, as the successor to the receiver under the P&A and Title 12."

But what also do we need to think about, with respect to the intellectual property, Your Honor? Specifically, one; damaged goods. Even assuming that WMI were to prevail with respect to ownership, it's uncertain whether there will be a market for trademarks and copyrights that say WaMu or Washington Mutual as the value of the intellectual property may have been harmed by the seizure of WMB. This, Your Honor, is in the Goulding declaration, and Exhibit 41.

The defenses to the infringement. JPMorgan has asserted that it's numerous defenses to our claim of infringement, including the defense that it had a license to use the intellectual property. As far as expenses, the debtors would need to expend sizable resources in uncertain and costly litigation, in order to adjudicate the true ownership of the disputed IP. And then of course, Your Honor, Mr. Goulding declared that there are risks and uncertainties associated with protracted litigation.

As to the goodwill litigation, JPMC has asserted

rights to both the Anchor Savings and the American Savings claims, and the debtors, Your Honor, as you heard from the testimony and in the exhibits, the debtors have disputed the -- and claimed an ownership -- and asserted ownership of those, and in fact, as Mr. Goulding testified, there was give and take with respect to both of those, in the respective term sheets.

But let's look at the Anchor Savings, first. Right now, there's an original judgment of 356 million, there's a potential upward adjustment of 63 million, and there is an asserted right, although it is disputed, to 104 million for taxes that may be paid.

On the American Savings side, Your Honor, there's already a judgment with fifty-five million dollars in the registry of this court. There are pending claims and an existing escrow for additional funds, so that is approximately fifty-five plus million dollars.

As to Anchor Savings, Your Honor, that was merged into Dime Savings Bank, which merged into WMB. And that's set forth in Exhibit 41. Section 6.3 of the amended warrant agreement states that WMB is entitled to control of, and the proceeds from the Anchor Savings litigation. And it says, quote -- excuse me, not quote, but the bank will retain sole and exclusive control of the litigation, and will retain one hundred percent of any recovery from that litigation. Exhibit 229.

On the flipside, on American Savings, Your Honor, both WMI and WMB are predecess -- are plaintiffs in the action. And pursuant to the merger agreement, WMI's challenge of the Keystone Entities, who were the prior owners of American Savings, to continue to prosecute the case. And as set forth, Your Honor, in prior orders of the court, the federal court, which led to the registry deposit here, the payment was made directly to WMI and as a result, people claimed an interest in that, and that is why we put the money in the registry of the Court, Your Honor, until this litigation had been resolved.

Let's flip to the Visa shares, Your Honor. The dispute there, the debtors asserted sole ownership of the Visa shares, because, A, Visa issued the Class B shares to WMI, B, those shares are registered in WMI's name, and C, Visa always has distributed quarterly dividends to WMI and in WMI's name. As noted in the Goulding declaration, in Paragraph 71, JPM asserts that WMI owns only legal title to the shares, and that JPMC acquired from WMB all beneficial interest in the shares, and in any dividend payments pursuant to the purchase and assumption agreement.

So, when testifying, Mr. Goulding said that there were risks of ownership dispute. And the uncertainty in the value of the Visa shares is important.

"Q. Okay. With respect to the Visa shares, JPM --JPMorgan is buying those for twenty-five million. Isn't that right?

"A. It's -- I wouldn't characterize it that way. The Visa line item pursuant to the settlement agreement contemplate that JPMorgan pays twenty-five million, assumes liability under the loss-sharing agreement, and assumes liability with respect to the plaintiffs in the interchange litigation group of claims filed against the estate. You also can't look at any line item within the context of the settlement agreement, and look and see if that treatment is fair and reasonable, unless looking at it as a whole.

"Q. You have to look at it in items of the total value of all the assets being transferred, correct?

"A. You have to look at it in the context of the overall agreement. That's correct."

There is a corresponding strategic agreement, Your Honor, and I would note that that in fact has been rejected by the debtors. But Visa USA filed a claim against the debtors for all the previously paid account subsidies, which allegedly aggregate at least 9.1 million dollars, and have provided for use in WMB's Visa Card business, which WMI no longer controlled. And JPM filed a claim against the estate for the unpaid account subsidies, which allegedly aggregate at least 4.6 million dollars. And as part of the settlement, the debtors and JPM agreed that JPM will defend the estate with respect to the claim -- the 9.1 million dollar claim -- will satisfy that to the extent that it ultimately becomes an

allowed claim, and WMI will be deemed to have transferred to JPM all of its rights and interest in the strategic agreement that it already has rejected.

Why is that a fair and reasonable compromise, Your Honor? Because it eliminates the claim and the JPM accounts subsidiaries claim will benefit the debtors' estates.

Let's turn from JPM now over to the FDIC, and specifically the DC action.

Your Honor, if you'll recall, the DC action was commenced by the debtors estates. And it was commenced as a result of the FDIC's rejection of the proof of claim that WMI had filed in the receivership itself. And we filed it in March. And that gave rise, of course, to the subsequent litigation that we've been embroiled in for the last year and a half to two years.

There is no potential for meaningful recovery unfortunately, Your Honor, in that litigation. Any potential recovery on those claims faces collectability problems, because the FDIC's known liabilities far outweigh the known assets. Mr. Kosturos included this in his declaration, and on testimony he said "Obviously if the FDIC is going to pay it out of their receivership, their liabilities are significantly greater than their assets. So that would not be necessarily a dollar for dollar payment, if we had to go through the FDIC receivership process."

Of course, Your Honor, there are procedural and constitutional problems. With respect to the dissipation claim, the FDIC has asserted that the debtors possess no private right of action with which to advance their claim of dissipation of WMB's assets. On the taking claim, they've asserted that the FDIC's seizure and the sale of WMB does not constitute a taking. And on the conversion claim, they stated that the district court does not have jurisdiction against the FDIC and the FDIC is not a proper party; rather the proper party is alleged to be the United States. And all of these are in evidence by way of the Kosturos declaration and other exhibits.

People have talked about the constructive fraud claims, Your Honor. What are those issues? How can we prove them, what will be the problems with collecting on them?

First, we must prove the insolvency of WMI and WMB, which is in conflict with proving the damages in the business torts claims, as Mr. Kosturos said in his declaration. What's one of the problems with that? Sophisticated investors considered WMB solvent. Let's look back that TPG made a 7.2 billion dollar equity investment and JPMC submitted a bit to purchase WMI, all in the April 2008 time frame, as Mr. Kosturos testified.

Also, he declared, and as we had in a hearing transcript before this Court on January 28th, "The evidence

that the debt and equity in this case are still trading at any number, establishes that at least the market thinks that the debtor is not hopelessly insolvent." Your Honor said that in connection with the debtors' motion to disband the equity committee.

JPMC also argues that it can avoid liability because it took WMB in good faith, for value and without knowledge of the avoidability of the capital contributions. That's included in their submission, and in Mr. Kosturos' declaration.

So if the debtors prove insolvency of course, Your Honor, the FDIC and certain note holders may be able to assert avoidance claims, or corresponding avoidance claims, against the debtors. Again, in Mr. Kosturos' declaration.

What about preferences, Your Honor? Before the receivership date, before September 25, 2008, WMI transferred three billion dollars in tax refunds, 125 -- excuse me, 152 million in intercompany payments, and 192 million dollars in indemnity payments to WMB. In order to avoid those transfers as preferences under the Code, WMI must have been insolvent at the time of the transfers. JPMC has asserted that the debtors were not insolvent in the year preceding the petition. Again, we look at a very easily recognizable point that TPG made a 7.2 billion dollar equity investment, and JPMC submitted a bid to purchase WMI for as much as eight dollar a share, in the spring of 2008. All of these, in the Kosturos declaration.

Your Honor, even though -- excuse me. Even if the debtors were to prevail on one or more of the preference claims, the avoidance would give rise to an unsecured claim against the estates for the corresponding amount.

Let's talk about the much talked about business tort claims, Your Honor. Specifically, the potential business tort claims, breach of contract, tortious interference, and an anti-trust claim. The debtors investigated these through 2004 discovery, and released highly disputed claims subject to significant jurisdictional, legal and factual hurdles, in exchange for the aggregate consideration of 6.1 to 6.8 billion dollars.

Even if we were to have these, and move forward, what would the arguments be on the flipside, Your Honor? On lost causation, JPMorgan had alleged, that either WMI's allegedly risky business practices, or the global financial crisis caused WMB's failure, not any conduct by JPMorgan Chase. They also point out that no federal entity that has investigated the collapse of WMB even suggested that JPMorgan played any role in the bank's collapse. This is all in the Kosturos declaration. It's also in their submission to the Court.

On proximate causation, Your Honor, JPM would argue that the OTS caused WMI's losses by placing WMB in receivership. Again, in Mr. Kosturos' declaration and their submission. And as to standing, JPMorgan claims that WMB owns

any potential contract claim, and any recovery on such claim must first satisfy WMB's funded indebtedness.

With respect to the anti-trust claim, Your Honor, as we say very clearly here, it makes no sense. JPMorgan argues that an agreement solely between JPMorgan and a single European bank, Banco Santander, makes absolutely "no economic sense, as it would do nothing to limit any other bidder anywhere else in the world interested in WMB from submitting a bid, rendering any such agreement wholly futile."

We also note, Your Honor, the FIRREA jurisdictional challenges. Both JPMorgan and the FDIC have argued that FIRREA deprives this Court of jurisdiction, and any claim against JPMorgan had to be asserted against the FDIC receivership.

But most importantly, Your Honor, as we have noted and some others have noted, those who shall not be named, the theories underlying the business tort claims, are intention with potential constructive fraudulent transfer claims. That is in Mr. Kosturos' declaration and on his -- excuse me. And during his testimony, he said "One of the things about the fraudulent conveyance is that it is real tension with the business torts. In the fraudulent conveyance, you're trying to prove insolvency as you look back to try and recover potential capital contributions. In the business torts, we would be trying to do the opposite. So there's natural tension between these two, and it makes it very difficult to really proceed

with both of them. Likelihood, if we were to proceed with litigation, we would have to choose one of them."

The BKK litigation. Something clearly on the right side of the ledger for the debtors, Your Honor. As the Court knows, based upon the statements made by various parties here, the total BKK liabilities are very significant, somewhere in the three to five hundred million dollar range, and it's a joint and several liability. When you put together the global settlement agreement, JPM agreed that it would assume significant liabilities. In fact, the California Department of Toxic Substances Control proof of claim alleges that response costs could aggregate over 600 million dollars, as noted by Mr. Goulding. The elimination of these potential liabilities is, of course, beneficial to the debtors' estates, as it would increase distributions.

Your Honor, as we filed in a certification of counsel, and we'll take it up later today, I assume, at the time that we're dealing with objections that have been resolved or remain outstanding, we now have agreed, JPMorgan, the debtors, and all of the parties to the BKK issue, that JPMorgan will pay all liability for the WMI entities for "response costs related to the BKK facility, in excess of applicable and recoverable insurance, including the derivative liabilities of WMI for such costs."

With respect to the direct liability of WMI Rainier,

for those response costs, JPMC's liability will be limited to 1.4 million in excess of any applicable insurance, and in response to that, WMI will transfer from -- excuse me, WMI Rainier will transfer over to JPMorgan the amount that is in their funds, which is the 1.49 million dollars.

And as a result, Your Honor, of this settlement, all of the proofs of claim against the estate, filed by the CDTSC, the BKK joint defense group and various claimants will be withdrawn, and they will not assert any additional claims related to the facility, or the BKK litigation, against the debtors estates.

So where does that put us, Your Honor? It puts us that none of the objectors have put forth any competing evidence of what the assets or claims are worth. None of the objectors have put forth any evidence regarding the likelihood of success on any of the litigations.

The equity committee has not set forth any independent analysis, notwithstanding opportunities to do so. The debtors have provided the equity committee with all information obtained from JPMorgan, including additional Rule 2004 documents, and books and records. The equity committee continues to have access to the debtors' work product. The equity committee had the ability to take depositions, speak to people, request and review books, records, and the pleadings, and conduct its own analysis.

So what do we have from the equity committee? Well, they attempted to put in an exhibit, and as the Court ruled earlier today, it's going to be used merely as a demonstrative. So we decided, Your Honor, let's take a look at that demonstrative. We call it the Tower of Babel.

Take a look at it, Your Honor, and see what it really means. What they have said is that these are the assets of the estate, and we believe that they're in excess of thirty-three billion dollars. Well, as we noted before, Your Honor, and as you can see in the side, that these are made up of claims that may exist, they may not exist. But you really need to dissect it. So let's try and do that.

So what we've done, Your Honor, is we've put the Tower of Babel on the left here, and we've tried to see what the liabilities would be if, in fact, this came to be.

First, Your Honor, you have in the bottom portion there the seven billion dollars of funded indebtedness, which has been allowed pursuant to stipulations approved by this Court.

The next liability that you would add, or, certainly, you would take into account at the time that the settlement agreement was entered into, was the interchange liability that was assumed by JPMorgan; five billion dollars.

Next, you have several components, the Visa claim; nine million. The medical plan, the OPEB of eighty-two.

Vendor claims of fifty million dollars.

Let's put on top of that, Your Honor, the twenty-seven billion dollar JPMorgan claim that would exist. It's not going away because we're going to continue to litigate against JPMorgan.

Let's throw on top of that the additional twenty-seven billion of the FDIC. But in reality, Your Honor, we're not -- we're not going to say that that's true; we're going to say that you're going to have to deduct something from it. Specifically, Your Honor, as the FDIC in the JPMorgan claims are somewhat overlapping we'll add just ten billion dollars to that.

Next, you would add the five and half billion dollars of WMB bondholder claims, Your Honor.

And then you throw on that unliqiudated claims, yet again.

Your Honor, so it's clear that while the equity committee is trying to posit that there are billions and billions of assets available -- dollars of assets, they take -- they do not take into account any of the corresponding liabilities that would be associated with those assets. Nor do they take into account, obviously, any fraudulent conveyance claims that might give rise to general unsecured claims.

But you distill all of that, Your Honor; you pull up on the side, what we think it is. Total proceeds of seven and

a half billion dollars. Total liabilities of seven billion dollars. That's where we are today. That's what the debtors want to distribute to their creditors and anyone else entitled to a recovery.

Which brings us to 1129, Your Honor. As Mr. Kosturos went through, the requirements of Section 1129 are satisfied. In fact, most of the provisions of 1129 were not even contested by anybody here. Very few objections to very few provisions of 1129 were raised. But as to those there was an argument about the plan not being proposed in good faith. And as you can see, Your Honor, we have the various cites to the Kosturos and Goulding declarations concerning that good faith.

There was an allegation about 1129(a)(7), because the holder might receive more in a Chapter 7. We don't believe so, Your Honor, we have the Goulding declaration and the Kosturos declaration to show.

We also believe, Your Honor, that we've satisfied the cramdown provisions of Section 1129. But let's break that down, Your Honor.

As to the good faith. As Mr. Kosturos noted, there are two years of analysis, investigation, litigation and arm's length negotiations among the debtors, the committee, JPMorgan, the FDIC entities, the settlement noteholders and the WMB senior noteholders, among others.

There was an adversarial process, where the

negotiations were heavily contested, complex, arm's length intense, active, contentious and full of acrimony. That was not only in Mr. Kosturos' transcript, but the testimony of Mr. Simms.

The plan maximizes the value of the estate's assets, and properly distributes such value to stakeholders based upon priorities, including through enforcement of the parties contractual subordination rights, and implementation of elections with respect to distributions. The debtors negotiated this global settlement agreement and proposed the plan with the legitimate and honest purpose of maximizing the value of the debtors' estates, and to maximize the distributions to all creditors.

Yesterday, Your Honor, there was testimony regarding the releases. Specifically, it was Mr. Smith was asked over and over, and over and over again what do the releases mean, what did you intend. But we have the plan into evidence, Your Honor, and the plan clearly speaks for itself.

So let's go through what does the plan say. The release parties; WMI entities, the debtors' estates, and the reorganized debtors, the committee and each of its members with respect to exculpation, certain trustees, the liquidating trust and the liquidating trustee, exculpation going forward. JPMorgan entities, the settlement noteholders, the FDIC entities, WMB. And each of those parties related persons. And

for purposes of 43.6(a) of the plan, related persons only includes related persons of the JPM -- of JPMC, officers and directors of the debtors during the post-petition period, and the debtors' present affiliates.

Who's not granting the release, Your Honor? Anyone not entitled to receive a distribution. Anyone who decides they don't want to take a distribution. They had the opportunity to elect out, and they decided I'd rather not take a distribution from the estate, I want to preserve my claims. Clearly, specifically set forth.

The Texas Group; Mr. Roquemore stood up here for awhile yesterday, he asked many questions. But, Your Honor, that one's a clear and an easy one. If the claims are found to be derivative they are foreclosed. If they are direct claims, they're not a creditor of the estate, they received no ballot, they have granted no -- they've not opted into anything, no release, Your Honor. Mr. Roquemore can continue to appeal this litigation which has been dismissed.

THE COURT: Well, is that clear from the stipulation that you're going to file?

MR. ROSEN: Excuse me?

THE COURT: Is that clear from the stipulation that the debtors obligated to file dismissing the Texas litigation? It says any and all claims, it doesn't say any and all claims owned by the debtor, does it.

MR. ROSEN: Your Honor, may I get it?

THE COURT: Yep.

(Pause)

MR. ROSEN: Your Honor, I think you have to do two things here, or three maybe even.

One, obviously the Court has seen Section 2.7 of the global settlement agreement.

Two, and let me flip to the exhibit. Your Honor, the stipulation does say "Will stipulate and agree that all claims, causes of action and objections of any sort asserted in this shall be and hereby are dismissed with prejudice, to refiling the same or any part thereof."

Why? The only claims that they asserted were derivative claims.

THE COURT: Well, who's decided that?

MR. ROSEN: That's all -- Your Honor, that's what their document says. But if Judge Collier terms that they are not derivative, and that they are, we will be limited.

Likewise, 2.7 only fo --

THE COURT: But will you be limited? Because it says you're dismissing -- pursuant to an order of this Court and under Section 105 you're dismissing any and all claims.

MR. ROSEN: Your Honor, what it says in 2.7, however, we made the effort here in 2.7 to state that, in fact, they are derivative. But if, in fact, the Court says that they are not

derivative, it is not a breach of this agreement. We still go forward with the settlement agreement. And whatever it is it is, Your Honor. We only focus on the derivative claims.

Your Honor, the next slide shows the actual language from the various document -- excuse me, from the plan, itself, Section 43.6. It shows exactly what I just went through.

THE COURT: Is it the sixth amended, or as modified?

MR. ROSEN: Your Honor, it is as modified twice. People were asking have you put all this together, Your Honor. Because Mr. Sargent had a good time asking questions about the releases from the original document, he chose not to focus on the as modified version.

So may I approach, Your Honor?

THE COURT: You may. Tell me what you're handing.

MR. ROSEN: Your Honor, what I've given you is a composite plan, which includes the October 6th plan as modified by the two modifications of -- excuse me, October 29th and November 24th. It's merely the incorporation of the two.

And as we indicated here, Your Honor, on this slide; slide 39, it has the respective provisions that I've previously said. Who's getting released, who's not, and why not?

THE COURT: Do you have a blackline version?

MR. ROSEN: Your Honor, I do not, I apologize.

THE COURT: Okay.

MR. ROSEN: The way we did this, Your Honor, as set

forth in the second modification, and it would have appeared in any blackline as a totally new section --

Your Honor, when we did the second modification because of the changes that we made and how we restructured it to, and I know that we'll get a laugh or two from the crowd here, so start now, to make it easier to read, okay, we decided to change -- take out the document in its entirety -- excuse me, the provision in its entirety and reinsert it. But Mr. Sacks was helpful here and he just handed me what is a blackline of only 43.6.

May I approach?

THE COURT: You may.

MR. ROSEN: Specifically, what we've tried to do, Your Honor, we've tried to carve-out of the A section the various things where we have agreed or where the Court had already directed specifically; like the BKK exception. That there would be an exception to the global release. So we set those forth in B and C of 43.6. And 43 -- and also, Your Honor, what we tried to do then was to say that it was one, as you can see by the first deletion, only applicable to holders of claims, not applicable to holders of equity interest.

THE COURT: Where are you looking?

MR. ROSEN: In the blackline that you have, Your Honor --

THE COURT: I have it.

MR. ROSEN: -- 43.6, right across, you'll see at the top the deletion and equity interest.

THE COURT: Okay.

MR. ROSEN: It's only applicable to holders of claims. We're not looking to influence anyone on the equity interest side, Your Honor. To the extent that a distribution is available and someone decides they don't want to take it, they have the opportunity to continue with that third party litigation. But to the extent that they would like to take advantage of the money that is being contributed to the estate by many different parties, and, specifically, the JPMorgan entities, we're merely asking -- they're merely asking that there be a third party release being extended to those parties.

That is the release that we focused on, Your Honor.

Your Honor, there was a --

THE COURT: Well, let's go back on that.

MR. ROSEN: Sure.

THE COURT: It is "Accept as provided in the global settlement," isn't it, and doesn't the global settlement have releases?

MR. ROSEN: It does, Your Honor. But those releases are debtor to JPMorgan, debtor to the FDIC.

THE COURT: There are no third party releases in the --

MR. ROSEN: No.

THE COURT: -- global settlement agreement?

MR. ROSEN: We don't interpret it as such, Your Honor.

(Laughter)

MR. ROSEN: View the laughter.

THE COURT: Okay.

MR. ROSEN: No, Your Honor. That's not the way we perceive it.

THE COURT: Okay. Does JPMorgan agree with you on that?

MR. SACKS: The global settlement, itself, contains no third party releases. There is a form of the plan that would be required to be confirmed that contained third party releases.

So if Your Honor declined to provide third party release it would be a failure of a condition to the settlement agreement, and the settlement agreement wouldn't proceed. But the only place the third party releases are present is in the plan.

MR. ROSEN: And, Your Honor, if you will recall, when I started off today's dialogue about the amendment to the global settlement agreement, I noted, Your Honor, Section 3.7, which was entitled "The Bar Order." And as I said, Your Honor, at the outset here, that the parties had agreed to a modification of that specifically and to take into account the very comment that Mr. Sacks just made, because it was a

condition precedent.

We inserted at the outset of Section 3.7, "Except as otherwise agreed to by the parties," so that we can take into account the views of the Court and if the Court says that there might have to be a modification of that the parties will be able to address that. And there wouldn't be an absolute bar that would be required as part of the settlement agreement, and the corresponding plan.

Your Honor, with respect to the best interest test and these release claims, as the Court found in Dow Corning, only amounts that a creditor received from the Chapter 7 estate are considered when determining whether a plan satisfies that best interest test in 1129(a)(7).

Also, Your Honor, as decided in Dow Corning, courts construing -- well, it goes on -- it's focused there. The next piece, Your Honor, was in a Chapter 13 case and the Court said "Construing this Chapter 13 provision uniformly hold that amounts obtaining from other sources, such as guarantors are irrelevant when performing that section's best interest of creditor's test."

Potential claims that --

THE COURT: Well, isn't it true, though, that in Chapter 13 there's no third party releases?

MR. ROSEN: Correct, Your Honor.

THE COURT: Okay.

MR. ROSEN: Your Honor, here potential claims that might be asserted in the future against nondebtors that are released pursuant to the plan, should not be value, and considered when determining whether the best interest test is satisfied because such claims do not constitute assets of the debtor that creditors will receive from a Chapter 7 trustee. Rather, they're their own independent direct claims.

Your Honor, there's been a lot of talk about the PIERS, a lot of arrows slung their way. But what we'd like to show here, Your Honor, is that the treatment of the PIERS is consistent and complies with the Bankruptcy Code.

The holders of the PIERS' claims own the PIERS. Simple. We had Mr. Goulding testify as to that. He explained the debt structure with respect to that.

Based upon the trust agreement and the related guarantee, each holder of a PIERS claim holds a claim against WMI for the amount of this indebtedness. And, in fact, Your Honor, the Court already entered a stipulation and order with respect to the allowed amount of the PIERS indebtedness.

The rights offering was available only to the PIERS, as an arm's length negotiated part of the global settlement agreement. And Mr. Kosturos has testified to that.

And as Mr. Zelin and Mr. Kosturos noted, the subscription rights, themselves, however, have no value. And, therefore, the distribution of such rights to only certain

members of the PIERS class does not provide for any differential treatment. And if they did have value, your Honor, the plan expressly provided for a constant reduction in the recoveries to exercising holders of the PIERS claims.

Your Honor, there's been some --

THE COURT: Could you go back to that last one?

MR. ROSEN: Sure.

THE COURT: Okay, thank you.

MR. ROSEN: Your Honor, there's been some discussion before the Court with respect to post-petition interest, general unsecured creditors, and I know that not only I but Mr. Hodara's going to be addressing this point.

Your Honor, pursuant to 726(a) of the code, it establishes the order in which property of the estate is to be distributed in a Chapter 7 liquidation, including post-petition interest.

And as the Court is well aware, 726 specifically carves-out Section 510. In fact, it starts that way.

Case law similarly recognizes this qualification. And, Your Honor, we've cited on this slide the Air Safety case for you, and a quote stating "That a bankruptcy court should follow the priority scheme established by 726 unless there's a valid ground for subordination under 510."

We also cite the Rago case or Rago case, and have a quote from there.

Notably, Your Honor, courts have confirmed plans that provide for payment of post-petition interest prior to payments being made pursuant to Section 510 creditors. And we've cited here, Your Honor, the In re: Dana Corp. case, which is a case out of the Southern District of New York, that confirmed a plan that provided that holders of 510(b) securities claims in Class 6D will receive in full satisfaction of such an allowed claim a contingent residual right in the disputed unsecured claims reserve assets that will entitle each holder of an allowed claim in Class 6D to receive to the extent holders of allowed claims in Class 5B have been paid in full, plus post-petition interest, and post-effective date interest its pro rata share of any remaining disputed unsecured claims reserve assets.

Notwithstanding the foregoing, because the debtors do not currently anticipate that holders of Class 6D claims will receive any distribution pursuant to the plan and consistent with the language of -- on and on, it says that they will be deemed to have rejected the plan.

Your Honor, we believe that there is a valid argument that post-petition interest can be paid prior to the distribution being made to the 510 creditors. We believe that 726 and 510 support this.

Your Honor, with that, I believe that I have taken up certainly enough time of the Court, but would like to reserve whatever time I could have later on in response to any

objections that are interposed and to, certainly, inform the Court with respect to those that have been resolved and those that remain outstanding.

THE COURT: Well, you've exceeded your estimate by about twenty minutes but --

MR. ROSEN: I cut out two people, though, I said three yesterday, I went by one.

THE COURT: Okay. All right.

MR. ROSEN: Thank you, Your Honor.

THE COURT: Let me hear from the committee.

MR. HODARA: Good morning, Your Honor. Fred Hodara of Akin Gump Strauss Hauer & Feld for the official committee of unsecured creditors.

Your Honor, I'm going to talk only to two specific legal issues relating to the entitlements of creditors to interest. I'll digress for just thirty seconds to say what should be the obvious from the role that the committee has played throughout this hearing and the testimony of Mr. Simms, and the role that Your Honor or has seen the committee play alongside the debtor and the other parties in fashioning this settlement agreement.

And that is to say that the committee believes that this settlement agreement and this plan of reorganization are excellent results for this estate. Excellent results and the best results that could be achieved for the creditors of this

estate. And when we say for the creditors we are, of course, mindful as counsel to this creditors' committee, of our duty as fiduciaries to all unsecured creditors including, to the extent that there are 510(b) claims arising in whatever manner.

And so the committee approached all of the issues that Mr. Rosen has addressed, and then these two specific issues relating to interest entitlements of creditors from that perspective. And with respect to these interest issues, has been looking at them for many months now. Alongside our analysis of subordination rights among the various creditors in this case, and the rights of 510(b) putative creditors as well.

In that analysis, our starting point is the best interests of creditor's test under Section 1129(a)(7) of the Bankruptcy Code, which, of course, provides "A plan of reorganization must assure that each holder of a claim in an impaired class will receive property of a value that is not less than the amount that such holder would so receive if the debtor were liquidated under Chapter 7."

And so that's why we go to Section 726 of the Bankruptcy Code. Under Chapter 7, what is the waterfall of payments that come to the various parties in the case, including, if theoretically possible, all the way down in Section 6 of the waterfall to equity. But you don't get to equity until you deal with Section 5, or the fifth portion of the waterfall, which provides that if you've paid all unsecured

creditors in full then you deal with interest; you pay all interest that has accrued post-petition to each of the tranches of unsecured creditors listed in portions 1 through 4 of the waterfall.

Well, all unsecured creditors could or would include 510(b) creditors unless, of course, you read in the all important proviso at the very beginning of Section 726. So the entire litany of payments is prefaced with Congress' note "That except as provided in Section 510 of this title property of the estate shall be distributed."

And, of course, Section 510 lists the three different forms of subordination dealt with by Congress in the Bankruptcy Code, including 510(b) among those three forms of subordination.

So the waterfall and each level of the waterfall, must be read with reference first to except as provided in Section 510, except with respect to subordination. And so specifically relevant to this case, because of the arguments asserted by the putative 510(b) parties, we look to the question of the payment of interest prior to any entitlements of 510(b) creditors.

And we find that you must pay interest under the fifth level of the waterfall to each of those forms of unsecured creditors in 1 through 4 before you can start to pay anything to subordinated creditors. And why is that? Because if you read the provision in any other way you would render that

proviso "except as provided in Section 510" you would render it meaningless.

Now, no other reading of Section 510 makes sense. First, -- I'm sorry, no other reading of Section 726 in the proviso could make sense.

You have basic concepts of subordination that a subordinated creditor is not to receive any payments until the parties ahead of it have been paid in full. That's what the proviso means. You have the policy underlying Section 510(b) as highlighted in case law that post-petition interest must be paid so as to avoid a windfall to junior parties.

The Dow Corning case in each of its iterations stands for that proposition. Now, a lot of that case law relates to equity holders not being entitled to receive a distribution until interest has been paid in full.

And the case law references specifically that it would be a windfall to equity if they were to receive any payments, in essence, at the expense of unsecured creditors who have carried the case on their backs and suffered the diminution in value of their interests over the time that the case has been pending.

The same obtains with respect to subordinated creditors. And, again, that's what that proviso means. You cannot make payments to 510(b) creditors any differently than you can make payments to equity holders without disregarding

the proviso.

Now, cases talk about the phrase solvency. And we'll probably hear from the 510(b) creditors that you don't pay interest to any creditors unless the estate is solvent. And they will say that to calculate solvency you need to include the 510(b) creditors in that analysis. I don't believe they'll be able to point to any case that says that. And I know they won't be able to point to anything in the Bankruptcy Code that says that you need to look to solvency. What you have in 726 is a litany of payments, all of which have to be made to unsecured creditors before you can have a payment to equity.

And so the courts have taken up the shorthand phrase of solvency in talking about a financial state that you need to have before interest can be paid under Section 5 of 726(a). But no place does it say in that section that the debtor must be solvent, so, of course, it doesn't give a definition of what's meant by solvency.

The only definition, again, that can make sense in this context is that the debtor have value left over after the payment of each level of creditors in (a)(1) through (4) of 726 before it can make the interest payments in (a)(5). But then it must make those interest payments. No place does it say anything about solvency with respect to 510(b) claims being added into that calculus.

And that's the situation that we have in our case

where there is considerable value available after the payment of the various levels of unsecured creditors down to level (a)(5). And so that cash must go to the payment of interest on each level of unsecured creditors.

Now, --

THE COURT: At what rate?

MR. HODARA: At what rate? And what the statute says in (a)(5) is the legal rate. Yet another phrase in the Bankruptcy Code that's not specifically defined. And here the case law says that the Court has discretion in determining whether the legal rate should be the contract rate, should be the federal judgment rate, or should be, perhaps, the various state rates that might obtain under different relevant contracts in the case.

When the committee reviewed this issue, going back many months, every way we looked at it we came to the conclusion that it needs to be the contract rate.

First, there's a principle that unless Congress has something specifically to the contrary in the Bankruptcy Code, that pre-1978 principles of bankruptcy should continue to be respected and recognized. And the pre-1978 case law was clear that where interest was to be paid it should be paid at the contract rate, not at some other rate.

THE COURT: Was that with respect to unsecured claims?

MR. HODARA: I believe it is, Your Honor.

Second, Your Honor, cases distinguish between Chapter 11 situations and Chapter 7 situations. In the Dow Corning case, specifically, the court walked through several rationales why it is that in a Chapter 11 case contract rate of interest is the appropriate rate to apply. And that includes the fact that these are reorganization proceedings which tend to take longer than a Chapter 7 case. So, again, you have the issue of time value to your creditors. And so Dow goes through a specific analysis reaching the conclusion that contract rate, rather than some other rate, is the appropriate rate to be paid.

Third, Your Honor, the case law talks about whether there's complexity attended to calculating various contract rates, such that it might be easier or more fair in a particular case to default to the federal judgment rate. In our case every way you look at the issue of complexity and fairness we believe that the result has to be to apply the contract rate.

First, Your Honor, there are only five tranches of debt. And the contract rate on those tranches is well known. There are only a handful of vendor claims we believe where there are relevant contracts. So the existence of a handful of vendor claims where a contract rate might be relevant doesn't add to the complexity of the analysis.

To the contrary, each of the financial advisors

involved in this case has run sophisticated models for years now in the case. And those models have used the contract rate. So the estate is well set up to deal with the contract rate. And from the issue of complexity or burden, that factor weighs heavily towards using the contract rate.

Indeed, the liquidating trustee will be Alvarez & Marsal, and they are one of the parties who we believe has used the contract rate in all of their models of considering the appropriate rate.

The marketplace has relied on the contract rates of the funded debt instruments in the trading for many, many months of those securities.

The settling parties have clearly consistently used the contract rate in their assumptions in considering the merits of the settlement.

Now, if the -- and, Your Honor, I should make reference, of course, to your own decision in the Coram case, where it was determined not to use the contract rate. But our understanding of that decision is that there was specific inequitable conduct of the creditor, or would be inequitable with respect to that creditor if contract rate was awarded. So here, in this case, quite to the contrary, the parties who would get the benefit of the contract rate of interest have been heavily involved in bringing, what we believe, is this extremely positive settlement to the estate. And so we don't

think that there is any issue of the conduct of a beneficiary of the interest that's to be paid, that would militate against contract rate.

Now, another important factor is the detriment that would be caused to one particular class of creditors if the federal judgment rate was used rather than the contract rate. And, Your Honor, that's the PIERS creditors.

The PIERS, pursuant to their subordination in their contract, must make all creditors above them whole on interest at their respective contract rates. So the parties above the PIERS will ultimately get their interest at contract rate, and if it doesn't come from the estate it will come out of the hides of the PIERS holders.

Now, one might say okay, but then you gore the PIERS, somebody else is going to benefit. But that somebody else would be the 510(b) parties, presumably, who are fully subordinated. So that would fly in the face, not only of the proviso of 726, but in the face of principles of subordination, generally, and in the principles enunciated in Section 510 if you were to benefit the junior party at the considerable expense to the senior party.

So, Your Honor, the analysis of the creditors' committee that has been done over these many months with respect to the interest issues, and with respect, specifically, to the rate at which interest should be paid, we believe

supports, on a sound legal basis, why it is that the interest should be paid at the contract rate.

THE COURT: Yeah.

MR. HODARA: Thank you.

THE COURT: Thank you.

MR. SACKS: Your Honor, I wonder if you want to break for lunch now. I can probably cut out three quarters of what I was going to say that Mr. Rosen covered, and I will promise to be less than fifteen minutes if you want to do it now, or I can proceed. But it's going to be a little less orderly.

THE COURT: Well, I am going to break for lunch, and the only question is whether I hear all those in support of the plan first, or not.

MR. SACKS: I'd be happy to wait and deal with issues that are raised on rebuttal. Because I do believe Mr. Rosen's presentation was fairly comprehensive. I would address some release issues and the ANICO issues, and a few other little things. But I'll defer to your preference, Your Honor.

THE COURT: Well, we can break now and then I'll hear you immediately after lunch if you want.

MR. SACKS: Okay, very well, Your Honor.

MR. ROSEN: What time, Your Honor?

THE COURT: Come back at 1:30.

MR. ROSEN: Thank you.

(Recess from 12:31 p.m. until 1:36 p.m.)

THE CLERK: All rise. You may be seated.

THE COURT: All right, you may proceed.

MR. SACKS: Good afternoon, Your Honor. Robert Sacks for JPMorgan Chase.

As promised, I will be brief. And if I could have some time to deal in rebuttal to any objections that pertain to us, I would much appreciate it. But I do expect to be relatively brief, because I believe Mr. Rosen hit most of the salient points, and I don't want to be repetitive, recognizing we've all been here a long time.

Let me just -- if I could, Your Honor, hit a few high points. And I want to just touch on a few very specific issues to supplement what Mr. Rosen may have said.

As has been made clear, this was an arm's length settlement that was negotiated in a very complicated situation. There was a lot of give and take involving a lot of people.

One of the issues that came out in cross-examination was an attempt to suggest that there was some bias involved in this process. That A&M had some relationship with JPMorgan Chase, that Weil Gotshal had some -- a relationship with JPMorgan Chase unspecified. The facts which are before Your Honor, though, make very clear that there was no bias, that this was an arm's length process, an extremely arm's length process in which people engaged in a longstanding acrimonious negotiation in which people other than Weil Gotshal and A&M

were involved.

The Court approved the retention of A&M and the retention of Weil Gotshal with disclosure of the limited contracts that they had with JPMorgan Chase. And, indeed, there was also the retention of independent counsel. And there's no evidence, whatsoever, that the product of this settlement was influenced in any way, shape or form by bias or a failure of the people acting on behalf of the debtors to be other than extraordinarily zealous advocates for the interests of the debtors and to attempt to maximize the estate of the debtors.

Now, the product of this extremely complex long negotiation -- arduous negotiation, which the evidence reveals, is that JPMC is providing billions of dollars in actual value to the debtors' estates in order to achieve a prompt resolution of what is difficult, complicated litigation.

The facts are that more than ninety percent of the assets that are going to be distributed under the plan, if it's approved by Your Honor, are being contributed by JPMorgan Chase's compromise of its claims in this case. Contributing 6.6 billion dollars in value through those compromises, plus assuming, as Mr. Rosen explained, very, very significant WMI liiabilities that, but for the global settlement, would not be JPMorgan Chase's liability. You heard extensive conversation about the BKK liabilities, there are many more of them.

They're very big.

The value, Your Honor, if you look at the evidence, and the evidence, again, I'm not going to repeat it, is in the record in the form of what Mr. Rosen cited, through the testimony and the declarations that came in, and the exhibits. But also in the record of the proceedings that have occurred before Your Honor in the course of these proceedings as to the relative arguments of the parties on many of these contested issues.

If you evaluate the strength of JPMorgan Chase's claims as they've been articulated, JPMorgan Chase on a relative basis I think an independent person would suggest, is giving a lot more value than is warranted by the strength of its positions on these contested claims. Claims, that in many instances, are not really contested, but reflect what I would suggest, and what I think the testimony reveals, for example, on BOLI/COLI, were basically precautionary claims to assets that, in fact, are the assets of Washington Mutual Bank, were always the assets of Washington Mutual Bank and passed to JPMorgan Chase under the P&A agreement.

So while those disputes are being resolved, I think the evidence before Your Honor of the parties' relative positions and arguments, would reveal quite clearly that JPMorgan Chase has the better of the argument and, indeed, on many of the issues, has clear legal defenses to claims, and

clear legal entitlement to various of the assets. And they are giving up far more value than would be otherwise determined based upon an assessment of those claims.

The settlement, as has been clear, enables WMI to get money that would otherwise be the product of years of litigation. And I mentioned that Mr. Kosturos, in his testimony, I think said that they estimated litigation would be three to four more years. My personal estimate is that's optimistic, Your Honor. But for a settlement, I think the issues being litigated would be much longer. We're dealing with issues in this Court, where there are issues about jurisdiction. We're dealing with appeals to the district court. Appeals from that court, a companion litigation in the District of Columbia. We are dealing with many years of litigation, but for the settlement of this. And that, clearly, is a motivating factor and that's of significant interest to the estate in this case.

With respect to the specific assets, again, I'm not going to go through them. But I do want to just touch upon two of them, if I could, or three of them, if I could. Because the first one reveals exactly why it is that JPMorgan Chase is -- the manner in which JPMorgan Chase is giving enormous value here. And if I could -- and that's the tax refund.

You've heard Mr. Rosen explain that, essentially, all of the tax refunds that are due; first and second tranches of

tax refunds, are due to the operations of Washington Mutual Bank. And whether JPMorgan Chase is correct in its argument that those refunds come to it and that Washington Mutual Inc. is simply an agent for it, or even if they're correct, that it comes to the estate and JPMorgan Chase has a claim for the value of those. In either case JPMorgan Chase is going to get out of that approximately 5.5 billion dollars in a tax claim.

So either way that case comes out the equity holders of Washington Mutual, Inc. are not going to be benefited because JPMorgan Chase is going to get that money before them.

And what do we have in this case? JPMorgan Chase it's not disputed, and the evidence reveals, that 5.5 of the -- approximately, and these are all approximations. Approximately 5.5 of the 5.8 billion dollars in total tax refunds are attributable to Washington Mutual Bank and would belong to JPMorgan Chase directly or through a claim against the estate.

And how is that being compromised in this settlement agreement? What value is being provided by JPMorgan Chase?

Well, JPMorgan Chase is getting 2.4 billion dollars of that. But they're giving up the remainder, which is almost 3.6 billion dollars -- 3.4 billion dollars, excuse my math.

And who did that go to in the first instance? That provided while the debtors ultimately are only going to retain 2.3 billion, in fact, they got the entire 3.6 billion or so for their use. JPMorgan Chase gave it up. So the debtors are

getting releases by giving up some portion of that to the bank bondholders for releases of claims against them. And to the FDIC for releases of claims. So what JPMorgan Chase is doing in this is facilitating this by transferring something north of three and half billion dollars in value to facilitate the settlement agreement.

And I think under the circumstances, it's very clear on the record, that JPMorgan Chase is, in essence, funding the settlement in this case. And funding the plan in this case.

Let me -- I'm not going to go through the supposed business tort claims again. But I do want to just raise two points that Mr. Rosen did not make. And these are additional reasons why -- and Mr. Rosen did a very good job of summarizing all the reasons why these claims are not substantial claims, and that, in fact, these claims have pure legal defenses to them; many, many legal defenses. And those are all before Your Honor in the pleadings. The one I referenced this morning, which was presented in connection with the examiner motion, among other things. It's in the record before Your Honor multiple times.

But in addition to that, there's one other argument that Mr. Rosen did not hit on this morning. And that's that passing the fact that there's no evidence that's been presented before the Court to support any of these hypothetical claims, passing the fact that there is no evidence that there was

anyone else who would have been in a position to make a better bid for the bank in September of 2008. There is no evidence of any of that, this is all speculation, but forget that for a minute. And forgetting the jurisdictional defenses, and everything else, there's no evidence that WMI suffered any injury in fact, or could conceivably show that it suffered any injury in fact. Because the question is what would somebody have paid for WMB. And, indeed, the WMB estate has bondholders; senior and subordinated bondholders, that -- whose interest are total approximately fourteen billion dollars. And the estate has less than two billion dollars in assets in it, at the moment, based upon JPMorgan Chase's bid. So somebody would have had to bid, right, the supposed claim, for there to be a penny that would got the WMI in its position as a shareholder of WMB, somebody would have had to pay twelve billion dollars more for this institution. In light of all the facts before Your Honor, having to do with the timing of this, the circumstances that existed and all the other findings that have been made that claim, I would suggest to Your Honor, is facially implausible.

The trust preferred claim, and I'm not going to dwell on that again either, Your Honor. But I think it's a perfect example following through on what we talked about this morning with respect to the evidence before Your Honor that supports confirmation.

You've heard summary judgment in that case. You have witnessed and seen all of the documentary evidence, probably to nauseating detail, you probably will never want to see us darken your doorstep with that claim again. But you heard extensive argument and have extensive briefing on the parties' positions as to what happened, how it happened. Mr. Smith supplemented by testifying what, in fact, happened on that dark day in September of 2008 when representatives of the OTS came in and said we're declaring the conditional exchange. You have all that before you. You don't need some lawyer; whether it be me or Mr. Rosen, or Mr. Elsberg, or counsel for the creditors' committee, or counsel for the TPS plaintiffs, their advice on that claim. You have that all before you. And it's all there and that's indicative of what you have in every claim in this case. You have those facts and you can assess those claims as you evaluate whether this settlement provides -- which provides enormous value, provides sufficient value to be within the realm of reasonableness as opposed to no settlement and no payment and no distributions to the debtors' estate, and years and years of continued complicated litigation.

That brings me to the releases, and I want to talk very briefly about releases, if I could.

Release were an essential part of the settlement agreement. They were essential for my client, that's what my client was getting, in part, out of this -- substantial part

out of this settlement, which was peace-ending and moving on with life.

I think Mr. Goulding said it best at trial, so no releases, no settlement, no value. Right. That's what the alternative is, Your Honor, in this case. And the releases are important and essential, and I believe that the releases that have been presented now through the revisions are not just appropriate, but eminently reasonable.

The essence of this was that as between -- and I'm just going to give an overview for you and I'd be happy to answer any specific questions Your Honor has about them, but as between the parties to the settlement agreement themselves, the debtors, JPMorgan Chase, FDIC, full releases other than there's a preservation of the FDIC and JPMorgan Chase's rights against one another under the P&A agreement. That wasn't resolved under this settlement. But, otherwise, full releases.

And I know yesterday there was some questioning of Mr. Smith, and perhaps some confusion, but derivative claims are claims owned by the debtors, and those are released. All of the debtors' claims; whether asserted by the debtors, whether asserted by a stockholder on behalf of the debtors, are to be released under this settlement. But there's nothing wrong with that, there's nothing unusual about that, those are the debtors claim, those are the debtors' property.

The release do not release claims of equity. They are

not getting a distribution, they are releasing nothing. If they believe they have claims, we believe they have no claims against us, they might have claims against somebody, but they are not releasing those claims. They're not affected.

If you don't get a distribution you are not giving a release. But if you do get a distribution you are giving a release.

And why is that? And why should that happen? Well, it should because, Your Honor, we are providing the funding to support the distributions to those people. And it's appropriate for those individuals who are being paid, in essence, through our contribution of billions of dollars to this plan, to release us from claims they have against us, whatever those may be. And there are none of those that are asserted that are being released. But whatever those might or might not be those should be released, because they are taking the funding. But we gave them a choice.

And, Your Honor that was one of the changes here. There were some objections that parties were going to be forced to give third party releases. And so we negotiated an amendment to this plan which said if you don't want to give a release, you can keep your claims, you just can't take the money that is being provided, essentially, by JPMorgan Chase under the plan, and continue to sue us.

THE COURT: And how did they exercise that right?

MR. SACKS: Well, people were given the option to opt-out of those releases.

THE COURT: Through the ballot?

MR. SACKS: Through the --

THE COURT: Did all ballots have that?

MR. SACKS: Through the ballots.

THE COURT: Okay.

MR. SACKS: And, Your Honor, there's been some question about since the change came at a different point in time, if there are people from the ballots who opted to opt-out and not get a distribution who wanted a distribution. I'm not talking about the TPS issue, which is a different issue in a different provision of the plan, but generally, if the people who opted out wanted to change their mind and opt back in, on our behalf we'd have no objection to that. I think there might be a small number of people, and that would take care of any of their objections that somehow they weren't given the opportunity to make an informed and appropriate choice on that issue.

But it's a choice. And it's not an unreasonable choice, or an unfair choice, or a coercive choice. If you want to keep your claims, if you think you have claims -- and, again, I don't know what claims these are, I don't know what claims have been asserted. But if you think you have individual claims, again, not derivative claims, but individual

claims, keep them. Just don't expect to be paid for the privilege of keeping your claims to bring a subsequent lawsuit later. And there's nothing wrong with that, Your Honor. It seems, not only eminently reasonable, but fair.

Last point I'm going to address, Your Honor, at this point, and then I'll sit down and I'll address any issues in rebuttal. And I -- again, I'm not sure -- Your Honor asked some questions about it this morning, and I just want to be sure that they're answered properly, and it has to do with ANICO.

THE COURT: Uh-huh.

MR. SACKS: And I continue to not understand what the issue is from them, but let me try to address it and answer any questions or concerns Your Honor might have.

ANICO has not filed a proof of claim in this case, and nothing in the settlement agreement and the plan in this case, releases any direct claim that the ANICO plaintiffs believe they have against my client, or to my knowledge, any other third party in this case.

Individual claims. They asserted claims in Texas removed to the Southern District, transferred to Washington D.C., that are classically derivative claims, owned by, in part, the debtor and in part by the FDIC. Because when they brought that lawsuit originally they claimed to be bringing it in their capacity as, both a noteholder and a shareholder of

WMI, and also a bondholder -- a noteholder or a bondholder of WMB. So they were bringing two different types of derivative claims. But their claims were for classically derivative. Harm to the institution due to the alleged conduct of JPMorgan Chase.

Forget all the legal defenses, which are the same problems, plus that the debtors have with trying to bring a business tort claim in this case, the ANICO plaintiffs dismissed with prejudice all of their claims in their capacity as a WMI shareholder, or a WMI bondholder. Therefore, as to that, there's nothing the debtors need to do under Section 2.7 because they've dismissed those claims.

But 2.7 is not limited to the debtors' actions in that case, it indeed, covers the actions of the FDIC as well as the debtor, and it's not limited to that case, or to ANICO. It provides, in essence, that if anyone else tries to bring ANICO-like claims, i.e., derivative claims against JPMorgan Chase attempting to recover for damage to WMI, i.e., the claims that WMI is releasing under the terms of the global settlement and plan, that WMI will take steps to make clear that those are its claims and that those have been released. That's what Section 2.7 does. It doesn't mean that WMI is going to go in there and seek to get dismissal of ANICO's individual claims.

Now, the only -- that case, as Your Honor is aware, was dismissed, it was dismissed on jurisdictional grounds by

Judge Collier, it's on appeal. So nobody's going in anywhere at this point in time doing anything in that case. But since they are still maintaining those claims in their capacity as WMB bondholders, if in the unlikely event that case were ever to be reversed then the FDIC might have to take steps to say it's our claim not your individual claim. But there's been this -- to the extent there is a suggestion that WMI needs to do something and it's going to interfere with the individual claims of ANICO plaintiffs in their individual capacity, there's nothing in Section 2.7 that requires that or contemplates that, and that's not what is going to occur in this particular case.

And with that, I would just like to be afforded the opportunity to address any claims that are raised that relate to us, on rebuttal.

THE COURT: Thank you.

MR. SACKS: Thank you, Your Honor.

MR. CALIFANO: Excuse me. Tom Califano, DLA Piper on behalf of the FDIC.

Your Honor, what I'd like to do is just give the FDIC's perspective on the settlement and on the claims that are being settled. Especially since people have referred to our resolve in this litigation, and also certain of our statutory protections.

And I would just ask the Court to remember that even

though every -- I believe that everything I'm going to say is true and correct, you don't have to agree with me to realize that this settlement is the right thing to do here.

I think the fact that people might disagree with what I'm about to say is all the more reason why it should get settled. The disagreement, Your Honor, is why this thing is being settled.

Now, the FDIC is different than all the other participants in this case, Your Honor. The FDIC is an independent agency of the United States Government, charged with acting as the insurer of deposits as a regulator of banking institutions and as the receiver of failed banks and thrifts.

During the period from January 1, 2008 to July 30th, 2010, 273 banks or thrifts failed. The FDIC has been appointed as a receiver in each such case. And in every such case all insured deposits have been honored.

Because of the important function that the FDIC plays in our monetary system, Congress has limited the right to judicial review of the exercise of its functions. Now, prior to the filing of this Chapter 11 case, the debtor; WMI, had a wholly-owned subsidiary, Washington Mutual Bank; WMB. Which in turn had its own wholly-owned subsidiary; Washington Mutual Bank FSB.

During the period from September 15th, 2008 to

September 25th, 2008, the date it was closed by the Office of Thrift Supervision, Washington Mutual Bank had net deposit outflows of 16.7 billion dollars.

Based on that fact, and WMB's liquidity issues, the OTS closed WMB and appointed the FDIC as receiver. Thereupon the FDIC sold the assets of WMB to JPMorgan Chase, pursuant to a purchase and assumption agreement, for 1.88 million and the assumption of certain liabilities, including the outstanding deposit liabilities of WMB. And just to put that in perspective; that sale, the Court should note that the FDIC's inspector general estimated the loss to the deposit insurance fund if Washington Mutual Bank was liquidated, at approximately 41.5 billion dollars.

MR. STARK: Your Honor, I have to object, I'm not sure that any of that extra --

THE COURT: Is part of the record.

MR. STARK: -- is part of the record.

MR. CALIFANO: It is, Your Honor. The -- actually, what I've cited to; the inspector general report, that is part of the public record, it's been in this case before.

THE COURT: But it's not been introduced --

MR. CALIFANO: But -- and, Your Honor --

THE COURT: -- in the record of the confirmation hearing.

MR. CALIFANO: And how I started this is you just need

to see our perspective to see why settlement is a good idea.

Whether or not it's true, the fact that the FDIC saw this potential loss --

THE COURT: All right. But please limit your comments to what is in the record before me at the confirmation.

MR. CALIFANO: I will, Your Honor.

WMI filed a proof of claim in the WMB receivership for the following items. Intercompany promissory notes, intercompany receivables, taxes paid by WMI on WMB's behalf, 6.5 billion dollars of capital contributions, a claim to the trust preferred securities, certain vendor contracts and unspecified unauthorized asset sales.

On March 30th, 2009, the FDIC receiver filed its proofs of claim in this case. First, for the entitlement of tax refunds, which at that time, were estimated to be 4.2 billion dollars. An administrative claim under Section 507(a)(9), to the extent that the debtors are found to have a claim to the trust preferred securities. Intercompany claims of 310 million. A claim to setoff the WMI deposits, Your Honor, with respect to any claims that may be found value. Fifteen billion in cash dividends paid by Washington Mutual Bank to Washington Mutual Inc. for the period from September 2003 to September 2008. And a claim to the proceeds of the American Savings Bank and Anchor Savings litigation. And an unliqiudated claim to the extent that WMB was harmed by the

actions of the officers and directors of WMI.

Your Honor, as Mr. Rosen stated, we disallowed under the receivership process WMI's claim and litigations sued in the district court. That was the posture, and it's been the posture of the two, sort of parallel insolvency proceedings; the FDIC receivership and this case.

Now, against that we've had some unspecified claims that have been asserted by the equity committee and brought up throughout. And the reason I want to discuss them, Your Honor, is, as the examiner found in his report, there were -- let me just --

MR. MASTANDO: Objection, Your Honor.

MR. CALIFANO: I'm just --

MR. MASTANDO: Reference to the examiner's report?

THE COURT: Yes, we cannot refer to the examiner.

MR. CALIFANO: I'm referring it, Your Honor, strictly, not for a finding, but for a fact; a legal bases. This is strictly the law that I'm going to cite, not a --

THE COURT: No. Tell me what you think the law is, not what somebody else might.

MR. CALIFANO: Okay. You can't sue the FDIC for a tort, that's just the facts, it's the Federal Tort Claims Act, Your Honor. You don't sue a federal agency, you sue the government. That's 28 U.S.C. 2679(c).

You can only sue the U.S. Government to the extent

sovereign immunity has been raised. That's 28 U.S.C. 1346(b)(1). And under 28 U.S.C. 2680(a) there is no waiver of sovereign immunity for the exercise of an agency in its discretion. So exercising a discretionary function, whether it's in good faith or bad faith, or whether it's exercised or not.

Now, we've seen other claims. We've seen claims challenging the closing of WMB. Those have been raised. They've made allegations regarding the closing of WMB. The FDIC did not close WMB, Your Honor. The Office of Thrift Supervision did. And the only remedy that is allowed through an improper closing of a bank is to challenge the appointment of the receiver, and under the receivership. And that has to occur within thirty days of the appointment of the receiver. And that's 12 U.S.C. 1464(d)(2)(B).

Now, they also raise claims that WMB's assets were sold for too low of a price. There's a number of reasons why that claim has to fail, Your Honor.

First, their sole remedy for their claim would be a claim in the receivership. The district court decided that in the American National case, it's pretty straightforward law. And as you heard before, the WMB receivership has less than two billion in assets, and approximately seventeen billion dollars in claims. So any -- the value of any of those claims has to be discounted by that fact. But that's, once again, in 12

U.S.C. 1821(d)(3).

Second, the FDIC has complete discretion to undertake the purchase and assumption as opposed to a liquidation, so long as the purchase and assumption is determined to be less costly than a liquidation. Here, the FDIC determined it was less costly to the insurance fund to have these deposits assumed than to go through a liquidation. Your Honor, that's 12 U.S.C., Section 1823(c)(4)(A).

Third, the FDIC is by statute expressly prohibited from choosing a resolution method that would increase losses or even risk the increase of losses to the Deposit Insurance Fund in order to protect the interests of any other party. It's 12 U.S.C. Section 1823(c)(4)(E).

Fourth, there is no private right of action against the FDIC for failure to maximize the value of receivership assets; Hines v. FDIC 137 F. 3d, 148 (3rd. Cir. 1998).

And fifth, the sole remedy in any event for the receivership claimants would be to claim the difference between what they would have gotten in the liquidation and what they would have gotten under the resolution.

And, once again, I think as Mr. Sacks said previously, to think about the value you have, the equity in this holding company, which is structurally subordinated, to the equity -- I'm sorry; to the creditors in the operating company. It's a significant hurdle they would have to overcome, Your Honor.

Your Honor, the claims, we've seen a chart of what they think are the potential assets of the estate. And we saw that -- came in last night and I welcome that because up until that point, I had no idea what we were talking about and what -- no idea where the equity committee was trying to go with this case. But to give you our perspective on these claims, Your Honor, and our claims to these -- our claims with respect to these assets are in the record.

THE COURT: All right. Please move the microphone towards your face if you're going to bend down.

MR. CALIFANO: Sure.

THE COURT: Good.

MR. CALIFANO: Your Honor, FDIC tort claims, they don't exist, okay. I think I've talked about that.

With respect to the D&O claims, Your Honor, the Court should note that it's our position that by statute the FDIC receiver succeeds to all derivative claims. That's 12 U.S.C. 1281(d)(2)(A). So, we can cross that off, Your Honor.

With respect to the tax refund claim, Your Honor, as we've heard before, that produces a increase in the claims against the estate but what I want the Court to note is that would also trigger, in our belief, our claim to a setoff under Section 9.5 of the purchase and assumption agreement.

What else is important about Section 9.5 and some of the testimony went around that, Section 9.5 is in each and

every purchase and assumption agreement that the FDIC has entered into. If we're going to litigate --

MR. STARK: Objection, Your Honor. Outside of the scope of the record.

THE COURT: Overrule. I'm --

MR. STARK: He's talking about other deals about what the FDIC does in connection with --

THE COURT: No. He's talking about his position. I'll overrule.

MR. CALIFANO: And I'm also talking about the precedential value, Your Honor, and why it wasn't an empty threat that Mr. Simms testified to. It's not an empty threat that we would go to the Supreme Court. The FDIC if its rights under Section 9.5 are challenged because it is in each and every one of the purchase and assumption agreements, the FDIC would be compelled to litigate this issue to the highest court. So, regardless of the access that they may believe they have to the deposits, Your Honor, that's not getting resolved and this case is not getting resolved for years and years of litigation.

You know, there's issues with respect to almost every asset on this list and I don't want to go through them one by one but I will say that I laughed when I saw the BOLI/COLI in the estate pile. BOLI means bank owned life insurance, Your Honor. I don't know how they get it. I don't know what they thought BOLI meant.

Your Honor, I don't want to belab -- I don't want to take too much of the Court's time, but I think it's clear that what we're having resolved here is very significant, very complicated, precedential litigation that could have gone any number of ways. And what you're hearing from the equity committee is not that they have a better plan, this isn't a debtor that's going to be operating and the equity committee is saying we're entitled to some value. What they're saying is toss out this deal that resolves all this litigation and try and swing for the fences and get us into the money and we don't care what happens to everyone else. That's what is going on here, Your Honor.

Your Honor, I would also, just briefly on the releases, it is essential to the FDIC and it was part of our deal that we get these third-party releases because we're compromising very significant statutory rights. We're not doing that. The FDIC is not in this for the money, Your Honor. We're in there for the resolution. We're not doing that so that some of these people on the other side of the room can think of another wacky theory and come out against us. So, to the extent that those releases, those third-party releases are being delivered under the settlement agreement, they're essential to our agreement to the bar. Thank you, Your Honor.

THE COURT: What third-party releases is the FDIC getting?

MR. CALIFANO: The only ones that we're getting are -- well, we're getting -- you have the 43.6 with you?

THE COURT: You're getting releases from the debtor.

MR. CALIFANO: We're getting releases from the debtor.

THE COURT: What pressure --

MR. CALIFANO: We're getting releases from the WMB Bank bondholders.

THE COURT: But that's by agreement.

MR. CALIFANO: Yes. That's by -- no, not by -- that's them agreeing to receive a distribution, the same effect.

THE COURT: Okay. Thank you.

MR. SCHELER: Good afternoon, Your Honor. Brad Scheler, Fried, Frank, Harris, Schriver & Jacobson.

Your Honor, my firm represents four independent and separate clients; Appaloosa, Centerbridge, Owl Creek and Aurelius. Collectively, they've been referred to in these cases as the settlement noteholders. Our clients have requested, Your Honor, that I address the Court today. And in doing so, I am speaking on behalf of my Fried Frank colleagues, Ms. Nagle, Mr. de Leeuw, Professor Resnick. The four of us and our colleagues at Fried Frank participated as co-architects of the integrated plan and global settlement agreement with our fellow professionals in these Chapter 11 cases.

Your Honor, I stand today in support of approval of the global settlement agreement and confirmation of a plan.

These cases, as you know, started back in September 2008, almost twenty-seven months ago. This has been a long complicated and expensive journey. We stand on the threshold of confirmation of a plan that incorporates a complex and hard fought global settlement agreement, both of which are supported by the overwhelming majority of parties-in-interest in these cases and most especially by those that are in the money.

This accomplishment is a testament to the hard work of Your Honor, the Court as well as many talented advisors, business principals and attorneys here today. The Court has before it a plan that contains and expressly incorporates the global settlement agreement. This is one integrated transaction. Neither the plan nor the global settlement agreement stand on their own separately. In fact, confirmation of a plan is a conditional precedent to the closing of the global settlement agreement.

It was no easy fete to bring these agreements before this Court today. As the testimony showed, negotiations happened in fits and starts filled with several pauses when parties turned to litigation to resolve their disputes. No one should suggest that this case has been without acrimony. These negotiations included many parties; the debtors, JPMC, the FDIC, the creditors' committee, the WMI noteholders, the settlement noteholders and the settlement WMB noteholders. Each of them have their own separate interest and desired

outcomes.

As described during the testimony of Mr. Kosturos, Mr. Goulding and Mr. Smith, negotiations of the plan and global settlement agreement were complex, intense, very difficult and truly arm's length. If they are anything but, we would have been before this Court with a comprehensive and integrated deal long before today.

Make no mistake the global settlement agreement and the plan cannot and do not exist without each other. This Court should and must approve the global settlement and the plan in their entirety.

The parties to the global settlement agreement agreed to the funding and distribution as exactly as they are set forth in the global settlement agreement and plan. That's how they voted. Deny approval of the global settlement agreement or the plan now would set these Chapter 11 cases back into a litigation abyss, one that will take years and many millions of dollars to reverse. It will send all parties back to the drawing board and we will start this two year journey perhaps from scratch. This would not be a good result for anybody in this courtroom. However, for reasons counter to their own interests, the equity committee among other out of the money constituents urge this Court to do just that.

One thing is for sure, denying approval of the global settlement agreement and the plan now will ensure only one

thing; diminish recoveries for all creditors of the debtors' estates. That is not the goal or purpose of Chapter 11. For these reasons and the fact that no credible evidence has been presented that when taken as a whole, the settlement agreement is not fair and equitable supports approval of a settlement agreement and the plan pursuant to Rule 9019.

The debtors and the creditors' committee have argued the legal basis as to why the plan meets the requirements of Section 1129 and otherwise complies with the Bankruptcy Code. I could not and will not improve upon their remarks except to stress that the plan and settlement agreement comply in all respects with the Bankruptcy Code and rules especially in light of the comprehensive resolution created by the parties thereto.

Accordingly, Your Honor, and with reservation of right for rebuttal, I conclude by urging this Court to approve the global settlement and the plan. Thank you, Your Honor.

THE COURT: Thank you.

MR. ANDRIOLA: Good afternoon, Your Honor. James Andriola from Reed Smith. I represent two clients and I will be extremely brief.

The first client we represent is an ad hoc committee of Dime Savings trust beneficiaries. These beneficiaries support confirmation of the plan and reserve their right with respect to implementation of the settlement agreement as it affects their rights.

The second client I represent today is the Bank of New York Mellon as trustee of the American Savings Bank Trust. While Bank of New York takes no position as to confirmation of a plan, they asked me to come here today, Your Honor, and advise the Court and the parties that if the plan is confirmed, they intend to work with the parties to implement the settlement of the American Savings Bank Trust. And finally, they ask me to state for the record that as per the controlling trust agreement governing that trust, this may require the parties to obtain an appropriate order from the DC District Court, but the Bank of New York will work with the parties to obtain such an order. Thank you, Your Honor.

THE COURT: Thank you.

Anybody else in support of the plan wish to be heard? All right. I'll hear those opposing. Do you want to take a five minute break before we do?

UNIDENTIFIED SPEAKER: Yes, Your Honor. Thank you.

(Recess from 2:19 p.m. until 2:33 p.m.)

THE CLERK: All rise. You may be seated.

THE COURT: All right. Good afternoon.

MR. NELSON: Good afternoon, Your Honor. Justin Nelson, may it please the Court, from Susman Godfrey on behalf of the equity committee. I have two copies of slide presentation. May I approach to give a copy to the Court?

THE COURT: You may. Thank you.

(Pause)

MR. NELSON: Your Honor, I rise today to object to confirmation of this plan and proposed settlement. The plan is unconfirmable on both the facts and the law. This afternoon, I'm going to discuss three different independent reasons why this Court should not confirm the plan and I'm going to go into the record at trial which the debtors and JPMorgan and the FDIC have not done except for their conclusory statements that the debtors think that the plan is fair and reasonable.

First, the debtors failed to consider the interest of all stakeholders. The facts have shown that the proposed settlement has been a setup from the very beginning. The debtors only cared about trying to recover a sufficient recovery to pay off creditors regardless of the underlying strength and valuation of the various assets. That was their plan from as early as Mr. Kosturos could remember. It is what the proposed settlement looks like now. There has been no thought given to equity interests.

We know that the debtors in good faith have brought claims against known assets worth more than thirty-three billion dollars. We know that other claims exist that also have the potential for a large recovery. The debtors have admitted that for many of these claims they did no analysis before proposing a term sheet. Yet we also know that the debtors have chosen to settle all these assets for almost the

entire amount due to creditors leaving shareholders nothing more than memories of once was Washington Mutual.

Second, the debtors have not met their burden to prove that the settlement is fair because there has been an insufficient showing of the likelihood of success and the failure to meet the standards as articulated in Spansion and other cases. Because they have consistently maintained the privilege, they have not introduced sufficient evidence about why the plan and settlement should be confirmed. The debtors have studiously avoided expressing any opinion on the underlying value of these claims. Claims that, in this court, at least, have survived a motion to dismiss on some of these same legal arguments but has yet to see a single activity with respect to discovery. They have consistently told this Court that the settlement is fair and reasonable but refuse to provide any analysis themselves about why it is fair and reasonable. They admit that they believe in good faith, that they will prevail on these claims. They say that they are risks and point to the pleadings and statements of JPMorgan and the FDIC. They refuse, however, to say whether these claims have any merit. The fact that a settlement is substantial in the abstract does not resolve the question whether it is fair as compared to the claims being compromised.

Over and over again, the debtors have stated that any reliance on the underlying value of the claims is privileged.

Despite what they have said on the stand, the facts have shown that it is impossible to separate the debtors' business judgment on whether to settle these claims from the legal advice they received.

Third, at a minimum, major issues in the plan prevent confirmation. These include the release provisions, the accounting of post-petition interest and the construction of the liquidating trust which at a minimum should give shareholders the right to take over the trust once all proceeds from the proposed settlement have been distributed.

First, the debtors have failed to consider the interest of all stakeholders. And in other words, as a threshold matter, this Court need not consider whether the debtors can prove their case without relying on counsel because the settlement is fundamentally unfair and does not properly consider the potential interests of equity holders.

On the screen right now, is the fair and equitable standard. The Court must decide whether the compromise is fair, reasonable, and in the best interest of the estate. The fair and equitable standard is fairness of the settlement to the other persons, i.e., the parties who did not settle.

The burden of proof; the debtors carry the burden of persuading the Court that the compromise follows within the reasonable range of litigation possibilities. What have we learned from the facts as developed here? We know that from

the very first time the debtors began thinking about confirmation, they have tried for a settlement that in their words "resolves things cleanly". The goal was not to figure out the actual worth and value of the claims, but rather to propose a settlement that pays off creditors virtually in full. Exhibit 27 is an e-mail from the settling noteholders to Bill Kosturos proposing this clean distribution.

On the next slide, Mr. Kosturos responds back saying, "It's about time the seniors figured this out." We asked Mr. Kosturos what he meant with this and how long he thought it was about time the seniors figured this out. Here's what he said.

"Q. You say it's about time. How long?

"A. I don't know.

"Q. How much prior before March 2009?

"A. I don't know.

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

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

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

"A. I don't know."

And as Mr. Kosturos admits, he consulted with these seniors and his other creditors before making his first proposal to JPMorgan in March 2009. Of course, like many other times, he did not even bother to consider equity's interests or consult with their representatives.

This proposal, as Mr. Kosturos also admits, was essentially equivalent to the proposed settlement. Question and answer.

"Q. It seems to be from the numbers you described.

"A. You know, they seem to be close but I couldn't give you an exact answer.

"Q. And I believe after going through that entire term sheet you agreed with Mr. Nelson that the economic result are culmination of the negotiations between March 2009 and what was ultimately submitted by the parties as a proposed settlement that the economic impact remain the same essentially. Do you remember that?

"A. Yeah."

To put this in perspective at this point in March 2009, WMI had not even hired litigation counsel. We asked him,

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

"A. Yes.

"Q. So, in other words, it would have been after April 2009?

"A. I would agree.

"Q. By April 2009, had your attorneys provided you any work product with respect to the business tort claims against JPMorgan?

"A. No."

He conceded that as of that date he had not received any legal analysis of the fraudulent conveyance claims, the intellectual property assets, the threshold issue of solvency or these business tort claims. During the same early period, the creditors' committee also wanted to put a global deal on the table. Exhibit 44 is the FTI Akin e-mail that was shown to Mr. Simms. At this point, February 2009, they were ready to put a global settlement on the table without having conducted the analysis. At that point, however, the parties could not close on a deal because they were too far apart. Soon thereafter, when rumors of a second tax refund became more concrete, the negotiations were, in Mr. Kosturos' words "reinvigorated". But who caused this reinvigoration? The creditors.

"Q. I think you testified previously that the negotiations were being reinvigorated by a possibility of a second tax element, correct?

"A. Yes.

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

"A. Yes.

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

"A. Yes. It was, actually."

This second tax refund of approximately 2.7 billion

dollars was slipped into a bill innocuously called the "Worker Home Ownership and Business Act" that was passed with little public notice or debate. This left approximately 5.5 billion dollars in tax refunds. And who is splitting up this 5.5 billion dollars? Like vultures circling WMI's carcass JPMorgan received about 2.16 billion while the estate and its controlling creditors receive another 2.2 billion dollars. This is despite the fact, of course, that the worker and homeowner bill was designed specifically to prevent any bank who receives bail out money, like JPMorgan did, from benefitting from this tax break. Yet, simply by juggling the amounts between the first and second refunds, the proposed settlement attempts to avoid this problem. The fundamental fact remains, however, JPMorgan, WMI, the settling noteholders, and the other settling parties are taking advantage of a loss specifically designed to prevent JPMorgan from taking advantages of these provisions.

During this negotiation period, equity's interest apparently never were considered. The creditors' role in proposing the settlement raises an obvious but vitally important point. These creditors have absolutely zero incentive to look out for equity's interests. This is Equity Committee Exhibit 28.

Out clients believe this is from the settlement noteholders. Our clients believe that the structure presented

in the term sheet provides the debtors with a fair and efficient means to distribute value and proceeds to creditors. In fact, if anything, the creditors committee and the settling noteholders have a fiduciary duty to go for this quick and clean settlement that pays off creditors but leaves equity with nothing. The debtors' duty, however, is not so limited. Yet the evidence shows that throughout the entire time frame of these negotiations, the debtors essentially turned over the negotiations to the creditors and especially the settling noteholders. This Court just heard from the settling noteholders' lawyers who candidly admits that they were, quote, "the co-architects of this plan." In fact, the debtors argued to this Court just a couple months after the second tax refund became law that the company was hopelessly insolvent. And this is their motion. By all measures, the debtors are insolvent.

It is difficult to imagine a stronger evidence of the debtors' utter disregard for equity. At the same time it was negotiating a deal to pay off creditors virtually in full. It argued that the equity committee should be disbanded because there was no way the debtors would recover sufficient assets. And after this Court rejected this motion to disband, the debtors refused to invite the equity committee to the table to participate in settlement negotiations.

"Q. In the negotiations that lead to the global settlement, you did not invite or include the equity committee in those

negotiations, did you?

"A. That's correct."

Propelled by the second tax credits the parties first announced the proposed settlement in March 2010. Soon thereafter, the parties had to renegotiate the deal because the FDIC raised the potential TARP sensitivity. This change resulted in the net benefit to the estate of between 270 million to 300 million. The estate was perfectly content with the March settlement and presumably would have argued that that settlement also maximized the value of the estate. Here's what Mr. Kosturos said.

"Q. To be clear, you believe that the March settlement also maximized the value of the estate, correct?

"A. I think the March settlement was a very good settlement.

"Q. The May settlement was a better settlement?

"A. Yes."

I submit that the debtors were perfectly happy with the March settlement because they knew that the PIERS, or the fulcrum security under the plan, would still be paid in full due to its equity interests and the reorganized WMI and the large NOL associated with it.

Here is the current source of assets under the proposed settlement. This data which comes from the recovery analysis and the backup to it shows that 4.2 billion is in cash currently on WMB's books and held by JPMorgan, 2.195 billion

was in tax refunds, 900 million is in preexisting cash, and the remaining money is composed of disputed assets that WMI will keep under the proposed settlement. JPMorgan is paying out of pocket only twenty-five million dollars in this deal. Mr. Kosturos hemmed and hawed when confronted with this fact but the numbers speak for themselves and his attempts to deny it is simply not credible. And what disputed assets does JPMorgan receive? This chart shows for this additional 25 million dollars, JPMorgan will receive approximately 12.36 billion dollars in known assets not including the potentially billions of dollars in value from the intellectual property and the release of the business tort claims. And, of course, this does not conclude any of the assets that JPMorgan admittedly purchased in September 2008, who has admitted in public filings and statements that it has since made billions of dollars from the purchase of these assets.

The debtors maintain that its approximately 7.5 billion dollars in recovery is fair because the price is substantial but it is important to have a context for this number. And we've spent some time on this chart throughout the day. Here are the potential assets of the estate which I don't think anybody has disputed add up on the left-hand column to thirty-three billion in known assets plus the unknown assets and the unknown value of these other significant claims.

I want to address the debtors' slide that -- as their

attempt to rebut this, and that slide the claims of the FDIC and JPMorgan are tied up in the analysis of the underlying claims. With respect to the WMB bondholders they have not put in a single shred of evidence on the actual liability of the claim and indeed it's being settled for 350 million dollars today, the proposal. They don't even justify that number, however, or why WMI is liable for the WMB bonds. The other numbers -- can we change to the ELMO real quickly -- we discussed the FDIC, JPMC and the WMB bondholders. The other numbers simply show how the debtors are manipulating the numbers. The Visa claim that they say is a 9 million dollar liability is actually valued in the market for 140 to 150 million dollar net benefit to the estate as we explored with Mr. Goulding. That's how Visa values its assets under its 10K and 10Q with escrow set aside for the very litigation that the debtors say that they are overvaluing and that might be a liability.

While there might be a fifty million dollar liability of vendor claims, JPMorgan is also getting the huge benefit of continuing with some of these same vendors. I'll note that just this Sunday the New York Times magazine said that JPMorgan is saving 1 million dollars each at 5,300 branches in overhead and technology for the integration of WMB --

MR. SCHELER: Your Honor, I object to the inclusion of this into this oral argument.

MR. NELSON: It's simply a point of fact to say in rebuttal that fifty million dollar in vendor claims as a minus on the balance sheet doesn't include the benefit that JPMorgan gets as argument.

THE COURT: Well, you can say that but I don't think I can refer to news articles as evidence of --

MR. NELSON: Fair enough.

THE COURT: -- what that might be valued at.

MR. NELSON: Can we go back to the --

The bottom number is the 5.5 billion dollar NOL that will accrue to the reorganized WMI. The debtors make the argument that despite this large NOL, the value of the reorganized WMI is only 157.5 million. But the assumptions on which this valuation rests are severely flawed and, in fact, are contrary to the facts in the record in this case. For example, Blackstone assumed that the worthless stock deduction would occur on December 24th, 2010 and that the value of the unlimited NOL would be only a hundred million dollars. If it happens in January, however, that deduction will be close to the full amount of 5.5 billion dollars. More fundamentally, Blackstone based its valuation on the assumption that WMMRRC would have no new business. Indeed the debtors themselves gave Blackstone that assumption. Here's what Mr. Goulding said. "Q. You gave Blackstone the assumption that reorganized WMI would not take on new business.

"A. We gave Blackstone a set of financial projections."

Skipping down to the next question.

"Q. These assumptions and projections did not consider whether WMMRRC would take on new business, correct?

"A. We did not project new business.

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

"A. That's right."

This excuse that we don't know who the owners of the reorganized WMI will be also is not credible. The debtors have now filed a notice making clear that the settling noteholders, the four hedge funds who also control the PIERS, will control reorganized WMI. And these board members are senior members of these funds. It is no large leap to think that these most sophisticated of investors will try to extract maximum value from this company. Indeed, the evidence shows that the creditors specifically have discussed taking a large NOL and putting new business into the company. The testimony of Mr. Kosturos.

"Q. Creditors' committee had an idea that the going forward business of reorganized WMI will have the benefit of the large NOL based on the company's ability to claim a worthless stock deduction?

"A. Yes.

"Q. Is it true that in the final settlement there is a reorganized WMI that may have the large NOL?

"A. That's correct.

"Q. These hedge funds urge you to create a reorganized company to take advantage of the debtors' NOL. Isn't that right?

"A. We had several discussions with them about that. Sure. Yes.

"Q. Their plan is to capitalize WMMRRC and expand its business, correct?

"A. That's what the term sheet says."

This is Equity Committee Exhibit 27. This is from the creditors' committee memo we saw at the beginning of this presentation and this is their words, "At some point in the future, the going forward business of reorganized WMI will have the benefit of a large NOL based on the company's ability to claim a worthless stock deduction relating to its WMB stock."

The settlement noteholders who also control the vast majority of PIERS will control this reorganized WMI. The plan only allows PIERS holders with more than two million dollars to participate in this subscription. This inequitable treatment and the PIERS case should prevent confirmation by itself. The debtors' excuse for this inequitable treatment again is not credible. They deny that there is any disparate treatment who are also claiming that the subscription rights are worthless so therefore it doesn't matter. And this question and answer with

Mr. Kosturos on page 187 of the transcript goes into that. And their excuse, I think, is that well, it would deducted based upon this value of 157.5 million dollars. So, of course, that doesn't capture any of the upside of what they are trying to do by potentially expanding their new business by having the subscription rights and getting the upside of the new company.

If the reorganized WMI is even marginally more successful than the analysis with the assumptions and the Blackstone reports the PIERS and other subscribers will be paid off in full and then some. The debtors hardly mentioned WMMRRC in their presentation and completely ignored what would happen if the NOL were much larger or the reorganized company had new business.

This slide shows how close equity is to being in the money and how a slight change in the settlement or the valuation of the reorganized WMI changes the entire complexion of the plan. On the left hand is the claim amount and that recovery, known value of disputed assets, and then amount required to be in the money, and then the WMMRRC NOL.

The treatment of PIERS also raises a larger issue of the amount of deference the debtors have paid to the settlement noteholders at the expense of everyone else. Not only do the settling noteholders get paid in full, not only do they receive post-petition interest at the contractual rate, but they get to participate in any upside of the reorganized WMI. Equity on

the other hand receives nothing. This treatment continues in the proposed plan even in some of its provisions going forward.

While the creditors' committee stays alive should the plan be confirmed, the equity committee immediately ceases to exist even for the limited purpose of pursuing an appeal. This is symptomatic of the debtors' disregard of any other interest but the creditors don't care about it.

This slide, for example, Equity Committee 34, states -- it's from the committee's -- excuse me; the debtors' lawyer to the settling noteholders lawyer and to Mr. Kosturos. "Your client said they did not care about that long ago and what if JPM give is all away?"

JPMorgan and the FDIC now say the settlement really is fair because they have substantial defenses. Notably, and as discussed in more detail below, the debtors never take a position on whether these arguments have any merits. In fact, the Court denied JPMorgan's motion to dismiss the adversary proceedings. This is the order in September. This is the order dismissing the second motion to dismiss -- or denying the second motion to dismiss. And the Court, referring to the August 24th transcript, starts the questioning by saying, "Tell me why this isn't Ground Hog day?" And then concluding at the end, "That based upon the law in the Third Circuit, that the motion to dismiss should be denied."

Since that time, the debtors have taken no discovery on

this case, no document requests, no depositions. And Mr. Kosturos says himself "That in the negotiation, the other side -- any negotiation -- the other side is simply not going to lay down its arms and conceive the strength of the argument." This is his testimony on that point.

More fundamentally, however, this argument that a careful analysis of the claims led to a settlement is completely contradicted by the record. Here is what Mr. Kosturos said. "Q. Well, did you discuss the merits of the litigation positions with your counterparts at JPMorgan?

"A. I don't remember discussing our merits with JPMorgan. Certainly, they would be in conversation as we were negotiating what potential positions could be -- what potential positions could be -- but I don't remember having a very detailed discussion about merits."

It goes on.

"Q. You did not have any discussion in detail with JPMorgan about the business tort claims, did you?

"A. I don't know."

And I think he took a while to answer that.

"A. If you want to point me to the deposition, that would be great."

Going down to the next question.

"Q. And just to confirm here, you, in fact, in your deposition questioned during settlement discussions did you discuss the

business tort claim with JPMC?

"A. Not in any detail. No."

This is, and it's a long side Your Honor, but I think very important, this is JPMorgan's corporate testimony binding here about what actually occurred in the settlement negotiations.

"Q. What was Washington Mutual's position with respect to the tax assets -- tax refunds?

"A. I'd have to refer back to the initial term sheet that there was a percentage split of the taxes.

"Q. I should characterize that very little of the term sheet discussion related to the merits of the individual assets but rather it was an effort, certainly on the part of a lot of funds that were trying to be part of the settlement, to achieve certain hurdles of return.

"A. No. It was Appaloosa, Centerbridge, Owl Creek, Aurelius."

And now at the next answer.

"A. There was an entire other group of bank bondholders that were looking. Everyone had their hand out there looking for some money from that pot of assets that constituted what we at JPMorgan Chase purchased pursuant to the P&A agreement. So, there were many discussions about the split of assets that were more tilted towards how much and who gets what rather than the underlying -- you asked about a position with respect to taxes. Taxes were really almost a currency by which various parties could be allocated value to reach a settlement.

"Q. Okay. And that was the tenure of the discussion relating the taxes for the whole period?

"A. I think there was probably some merit-based discussions between counsel thrown in as well.

"Q. But you don't recall any of those?

"A. Not specifically.

"Q. You weren't present during any of those?

"A. No."

This is JPMorgan's binding corporate testimony here.

MR. SACKS: Your Honor, let me just object. You can take this for what it's worth, but this is not in the record before Your Honor. They didn't put this into the record.

MR. NELSON: Well, that's actually not true. It was used with Mr. Kosturos, so --

MR. SACKS: But they didn't put his --

THE COURT: All right.

MR. SACKS: -- deposition into the record, Your Honor.

THE COURT: I'll allow argument.

MR. NELSON: And I do believe we did submit it as a notice, Your Honor.

THE COURT: Okay.

MR. NELSON: Indeed, Mr. Kosturos did not even have a ballpark value for the value JPMorgan is getting from this settlement. This is the question and answer about that.

The debtors also admit that they are taking a holistic

view of the settlement. In other words, it doesn't matter whether they underpay for one asset because they'll make it up in another asset. But they've never identified which assets they are underpaying for and which ones they are overpaying for except perhaps the Visa shares, they're even under the parsimonious analysis done by Mr. Goulding, JPMorgan is underpaying for these shares.

The debtors also admit, as they must, that when the price JPMorgan paid for the Visa shares declined from fifty million dollars to twenty-five million dollars between the first settlement and now, it had nothing to do with the underlying value of those shares. The settling parties, in essence, are asking this Court to conduct the analysis that never occurred between the parties when they were deciding the settlement. And it is ironic that the debtors were relying so heavily on JPMorgan and the FDIC to support the settlement. These other settling parties presumably have a strong interest in settling and stopping this litigation dead in its tracks to cap their liability. Moreover, as part of JPMorgan's purchase of the assets, the FDIC agreed to a 500 million dollar indemnification provision for JPMorgan's liability to WMI resulting from that purchase. From the very beginning, the other settling parties were aware of their exposure.

And this is what Mr. Califano said at the June 3rd hearing about why they were settling. This is to the Court, "Yes, we

were motivated to settle these cases. That's why we settled them. I can stipulate to that now."

The debtors have come up with all these post-talk justification about how potential problems exist with these claims, about how they've always had equity's interest at heart, about how the settlement is fair and reasonable. But when it looks like a duck and quacks like a duck, a Court can reasonably conclude it's a duck. All available evidence shows here that the debtors designed this settlement solely for the benefit of creditors without any consideration of equity's interest. This plan is therefore unconfirmable regardless of any proper justification from the debtors. When boiled down to its nub, the debtors' argument is actually quite simple. Trust us and that's about it.

Second is insufficient showing of the likelihood of success. They have intentionally hidden behind the privilege log here. They have chosen not to introduce any expert or fact witness who can testify about an analysis of these claims. And they cannot claim to have been caught by surprise on this issue. This Court had expressed skepticism to the debtors in June and later about the ability to prove its case without reliance on counsel. The Martin standards lay out the debtors' burden here; the probability of success, likely difficulties of collection, complexity of the litigation and the paramount interest of creditors.

And these are quotes from the Spansion decision, Your Honor, "When considering the best interest of the estate, the Court must, quote, 'asses and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromised proposal,'" quoting Martin.

The other two cases, of course, Spansion which goes through these factors and does not approve a settlement based upon the sparse evidentiary record. Any fair reading of that case shows exactly why the settlement here should not be confirmed. Another quote from Spansion. "It appears from the record made that the debtors' motivation for entering into the settlement agreement was based less on an evaluation of the merits of the action than due to a desire to negotiate a quick settlement. Incredibly, the consultant testified that in reviewing the settlement agreement and making his proposal to the board, he did not rely on advice received from counsel."

The first factor, probability of success, we talked about some of this earlier today. I do want to talk about some of the individual claims that have come up.

The debtors, I think, still maintain that the settlement is a fair and reasonable exercise of business judgment. But that judgment is privileged. While the settling parties now claim that the board itself --

MR. ELSBERG: Your Honor, objection. I thought we got a ruling on this issue this morning and now he's saying the

opposite of what the ruling was.

MR. NELSON: I'm not sure -- I'm happy to have it clarified, Your Honor. I thought that whether there were particular reliance on business judgment, for example, that that's still an open issue. If it's not an open issue and there's no reliance at all on the debtors' business judgment at all, then I'm happy to skip this issue.

THE COURT: Well, no, I -- there is an argument that the debtors in their business judgment -- I think what I said was I was not relying at all on the debtors' statement that they reli -- that they considered the attorney's evaluation and/or would not consider anything more than argument if they said that they thought it was fair and reasonable.

MR. NELSON: Okay. Well, there's -- I just have a couple more slides on it and one document. And I think I'm trying to address Your Honor's point that still remains to make clear, I think, that in the analysis that they did, is built into it the privilege relationship. But -- and we'll also talk about some of the underlying merits of the claims. I will be very brief on this part, Your Honor.

MR. ELSBERG: Your Honor, we've argued this issue twice during this hearing. Two or three times previously.

THE COURT: Yes, I think that's not appropriate for our hearing.

MR. NELSON: Okay. So, let's talk about BOLI/COLI.

There is a comment where the BOLI/COLI policies are -- the B stands for "bank". This is from the WMI proof of claim against the FDIC where it says "Despite the fact that they might be owned by WMB, WMI may have an ownership interest in the BOLI/COLI policies reflected on WMB's books and records."

And can we go to the ELMO one more time, please?

This is the purchase and assumption agreement, Your Honor, Schedule 3.5. And you'll see in 2, it actually exempts any other insurance policy of the failed bank. Whether the BOLI/COLI policies are properly included as part of the assets, is a legal question that I think the debtors have discussed is privileged.

MR. ELSBERG: Your Honor, Your Honor has ruled that to the extent these are conclusions that are relevant, so, I don't know why we need to cover a relevant matter. To the extent he keeps on repeating --

THE COURT: Please, let him finish his argument.

MR. NELSON: Response, Your Honor, or no?

THE COURT: No.

MR. NELSON: Okay.

With respect to the business tort claims, the debtor just got up and stated that I didn't think the business tort claims have any value. This is from Kosturos' testimony at trial, page 141. This is -- debtors' argument now is completely contradictory to Mr. Kosturos' testimony at trial.

In question,

"Q. Okay. Isn't it true that you absolutely think that the business tort claim or the claims against JPMorgan have value?

"A. I stated that I believe they have value."

And then as you go down, that's when we get the privileged conversation he won't testify as to whether it's one billion or a hundred billion dollars. But as to whether it has value, the debtor has actually admitted that or Mr. Kosturos has.

Can we go back to the slides?

Briefly, with respect to intellectual property, again, there is a range, it could be as much as billions of dollars here and there's no testimony as to what the range is.

And with respect to the tax refund team and the tax refund claim, we've heard dispute and debate about that. Mr. Kosturos originally said to his financial team, Mr. Carrion, that they just discussed talked about this 352 million dollars. But they're trying, I think, even with their argument now have tried to scoop more than that in when he specifically said that beyond the 352 million dollars, the legal ownership of that is an issue with respect to counsel. And then Mr. Smith, of course, admitted that that was true, that counsel was involved in that.

With respect to the board, I'll skip this. Clearly, the minutes are redacted. This is in our slides.

Going back to the Spansion case, "Under these

circumstances, it seems unlikely that a reasonable evaluation of the merits of the litigation of this nature and extent could have been made without taking into account the advice of patent litigation counsel." Substitute that for a sophisticated commercial litigation counsel and that's exactly what we have here.

The second is the likely difficulties in collection. With respect to JPMorgan, of course, regardless of any issue with the FDIC that they just raised, JPMorgan has imminent resources here.

With respect to the complexity of the litigation as Spansion recognized, the first and third factors are intertwined. This is a quote, "There is insufficient information upon which to make a reasoned decision as to the likelihood of success of the action. This, likewise, makes it difficult to conclude that the settlement was preferable to the expense and convenience and delay of litigation." And, in fact, as the TMT decision from the Supreme Court has stated, "Litigation and delay are always the alternative to settlement and whether the alternative is worth pursuing necessarily depends upon a reasoned judgment as to the probable outcome of the litigation."

The fourth is of paramount interest of creditors. And on its face, of course, that doesn't apply here except for the fact that the TMT decision does discuss -- is actually more of

a catch-all provision and where there is potentially equity in the money, there does have to be adequate consideration of that affect. And to say that in any case where equity is in the money, potentially could be in the money that this number four trumps everything else would not give due deference to the ability to actually reach a reasoned conclusion.

On this point, the debtors' cases are all in a posit. They all involve cases where the debtor actually took a position on the underlying dispute. The debtors did cite a few more cases in their slides that we haven't had a chance to review but they don't appear to be bankruptcy cases. But in the cases they cited in their brief, in Key3Media, for example, the question was whether the debtors had paid market value for an asset. And the debtors actually took the position that, quote, "Debtors claim that the 4.375 million dollar purchase price received was a market price for the assets. In In re Northwestern, the Court rejected the creditor's argument that the claim was worth more than the settlement by looking only at the summary judgment papers. Instead, the Court upheld a settlement that fifty to sixty percent of the value of the claim because it was less than the amount of the reserve for that claim. Home Indemnity, another case, was not even a bankruptcy case and in any event the case discussed the value that the settling party placed on the claim.

While not cited by the debtors on this point, this Court's

decision in In re: Coram is instructive. There the Court noted that quote, "The trustee contends that the probability of succeeding on the claims against Foothill and Goldman is low." The debtors here, of course make no such assessment. Instead, they are asking the Court to decide what it cannot decide for itself. The debtors have placed no evidence about what that value is or what that comparison should be.

With respect to the 350 million dollars going to bank bondholders, there is no evidence about why that part of the settlement is reasonable. Moreover, it is especially inappropriate to try to attempt a valuation at this stage where the motion to dismiss has been denied in the adversary proceeding and where there has been no substantive discovery into the underlying merits of the claims. And just to be clear, we are not saying that the debtors must rely on counsel but they must present some evidence of the risks as compared to the strengths.

In the bankruptcy context, for example -- excuse me; in the class action context, for example, settling parties often proffer an expert to testify about this and there are experts on this side. They did not do that here. Like Spansion, the record here is devoid of evidence that would justify approval of a settlement under Rule 9019.

Third, I'd like to discuss some of the other major issues remaining. Regardless of the first two issues at a minimum,

the other significant issues prevent confirmation here. Most notably, the releases, the post-petition interest, and the liquidating trust.

The releases are yet another example where the proposed settlement completely overlooks equity's interests. And while the releases are somewhat improved from their early October version, they still fall short of the requirements for confirmation. And because the settling parties claim that these releases are integral to plan confirmation, that everything stands or falls together, this Court should not hesitate to strike down the entire settlement as unfair and unreasonable if the releases are unreasonable. Not only would the shareholders take nothing in the estate and in the settlement and have their stock extinguished, many of their claims against third parties, direct or derivative, would be forcibly released, enjoined or both, including claims currently proceeding before other courts.

If the debtors are correct and WMI is insolvent, these lawsuits represent the shareholders only possibility for obtaining any recovery at all on their investments. And yet, the debtors exercise their fiduciary responsibility to shareholders by agreeing to release these claims. They are released without the shareholders receiving a dime in compensation. They are released without the individual shareholder's consent. They are released if you didn't return

a ballot. They are released without knowing whether there will be participation in the funding of the estate. They are released even though they were not asserted against the debtors and had no potential impact on the estate but were against nondebtor third parties.

After receiving a slew of objections based upon these draconian releases, the debtors modified their terms, supposedly to respond to the concerns expressed by shareholders. But these revised provisions are hardly an improvement. The revisions rendered the releases more confusing and most if not all of the problems in the original release provisions are still an issue in the current version. The debtors' general counsel was designated to testify about the scope of the releases and claims to have been involved in drafting them. When he took the stand, however, he couldn't interpret them. And he gave different answers to whether they were or were not released. For example, he couldn't figure out if certain releases would apply to preferred shareholders and couldn't remember if the preferred shareholders were sent ballots that would allow them to opt out of the releases. He failed to consider whether the releases provided by the debtors would also release derivative claims and could not answer questions about that on the stand. He acknowledged that several of the release provisions did seem to say what we were saying and did not seem to say what the debtor claims and

should be resolved.

And so, I will invite Mr. Rosen or Mr. Sacks to come up here and explain to this Court again why the new 43.2(c) does not release all shareholder claims against JPMorgan direct or derivative.

The claims against directors and officers who oversaw this bankruptcy, who have never been replaced, and who approved the settlement also are being released. Certainly, Mr. Smith's testimony that the releases are fair and reasonable with respect to these is in question. Debtors have no other record evidence to support their claim that these releases and injunctions are fair and reasonable. As the Court well knows, the debtors have a much greater burden to meet the releases that run in favor on nondebtor third parties and the release and injunction provisions set out in this plan purport to grant such releases to a slew of third parties including the debtors' officers and directors, JPMorgan, and the settlement noteholders.

Third-party releases can only be improved in cases where the affected class has demonstrated overwhelming support for the plan. Case after case has held that the third-party releases cannot be granted by parties who are not receiving substantial recovery and who have not consented. Here, of course, either the preferred more common equity is assured of receiving anything under the plan and common equity is assured

of receiving nothing and neither class has consented to the plan of the releases. In such the situation as this Court found at a hearing on confirmation earlier this year, In re Magna, the Court likely lacks jurisdiction to enforce enforceable -- to enter enforceable releases against parties who have not consented.

With respect to post-petition interest, we believe that no post-petition interest is appropriate. Moreover, if the debtors are hopelessly insolvent as they say, there is no post-petition interest or shouldn't be. They can't have it both ways. But even assuming that post-petition interest applies as this Court has recognized previously, this Court has wide discretion in determining interest. And In re Coram, I think, discusses this issue.

Most courts conclude that the term "interest" the "legal rate" means the federal judgment rate, contractual rate of interest is only appropriate where it's fair and equitable and in that case the court set post-petition interest at the federal rate.

Here, allowing the contractual rate of interest would not be fair and equitable. Given the rule played by the settling noteholders, the fact that all their attorney's fees would be reimbursed under the plan and the tremendous upside of the reorganized WMI that could exceed the PIERS claims, post-petition interest should only be at the federal rate.

Moreover, although this is a Chapter 11 plan, the reality is the fact that a reorganized entity is emerging has not been responsible at all for the complexity of this case aside from being another asset that's being distributed.

This chart shows the breakdown currently in the claim amount between the pre-petition amount separated out between everybody else and the PIERS and the post-petition amount; 7.03 billion to about 775 million. This is from the recovery and liquidation analysis that's an exhibit.

Using the recovery rate, by contrast if you look here at the federal post-petition rate, the claim amount would be, again, 7.03 billion pre-petition and post-petition interest at the federal rate would be about 49 million dollars. The net recovery would be 7.459 billion and there would be a distribution to equity of about 378 million dollars.

If this Court is inclined to confirm the plan in some form or fashion, we respectfully request that the equity committee continue to exist at least for the limited purpose of participating in the appeal and the liquidating trust.

The liquidating trust provision should be revised because currently, the liquidating trust calls for Mr. Kosturos and Weil to remain in charge and the creditors' committee to play an active role despite the fact that the only entity or class not receiving full recovery is PIERS and they have the upside of the reorganized WMI. Given that equity's hope of any

recovery depends on the viability of these claims and that the same incentives will remain for the debtors not to pursue some of these claims, the preferred shareholders, at least, should participate and be able to guide the trust.

This is especially true because of the potential of the reorganized WMI to pay off the remaining claims completely. And, in fact, Blackstone's valuation analysis assumes that reorganized WMI, that all of the debt is paid off. And the report assumes because the debtor told them to assume that. In other words, the debtors by their own admission to their experts said there will be no debt cancelled.

In conclusion, and this is Mr. Zelin's testimony.

"Q. You assume a November report there will be a zero dollar cancellation of debt. Is that correct?

"A. That's my understanding, yes.

"Q. And that's based upon the debtors -- what the debtors told you?

"A. Yes. That's correct."

In conclusion, while the issues in the underlying litigation are complex, the reasons why this plan should not be confirmed are quite simple. The debtors never adequately considered the claims or the potential for a recovery by equity. And the debtors have not provided any analysis regarding the likelihood of success on these claims.

To broadly paraphrase Winston Churchill here, "Never has

such a large dispute been settled with such little evidence on the record." Under these facts, the plan and settlement cannot be approved. Thank you, Your Honor.

THE COURT: Thank you.

(Pause)

Let's take a five minute break, okay?

(Recess from 3:27 p.m. until 3:35 p.m.)

THE CLERK: All rise. You may be seated.

THE COURT: Good afternoon.

MR. STARK: Afternoon, Your Honor, Robert Stark from Brown Rudnick appearing on behalf of the TPS consortium. I just had a nice little exchange with Mr. Sacks. I will not be doing PowerPoint or any other sort of electronic presentation. I'll stick to my blue-collar roots.

Your Honor, we're going to break it down the same way everybody else did talking about the settlement and then the plan itself, the legal issues. First and foremost, this settlement cannot be sustained by the Court. Now, to appropriately frame the presentation, I have to recap the law. I know you've heard a fair amount of law today and I know it's getting repetitive, but there's some things that were missed and I do need to frame the presentation appropriately.

Mr. Elsberg was wrong this morning when he told you that there are objector burdens of proof. This is a plan confirmation hearing. The debtor bears the burden of proof and

persuasion on all aspects of 1129 and as that otherwise implicates the rest of the Bankruptcy Code, in case after case in Colliers and legislative history says that time and time again, they bear the burden of proof regarding all aspects of confirmation including especially the settlement. And this burden is described in the case law time and time again as a heavy burden that they have to carry.

To prove this settlement, the debtor must prove and otherwise persuade the Court that the settlement is, quote, "fair, reasonable and in the best interest of the estate," close quote. No disagreement amongst any of the parties on that. But this is an objective test. This is not business judgment deference to what management's subjective desires are. You're not looking over management's shoulders and saying, did you make an appropriate business decision? This is have they given you sufficient information for Your Honor to make the decision yourself. And fairness is examined not from those of the perspective of those who are sitting on this side of the room who support the deal, but those who are sitting there who don't and all the moms and pops who are listening to me speak right now from the fairness of the perspective of those, like my clients, like the Dime warrants, and like equity. And to aid in this analysis, the Third Circuit gave us the Martin factors; probability of success in litigation, the likely difficulties in collection, the complexity of a litigation

involved, and the paramount interest of creditors and we'll talk about each of those in turn. But what's really important here, what the Supreme Court demanded decades ago in TMT Traylor is that the debtor gave the Court -- is that the debtor must give the Court substantial evidence enabling the Court to make, quote, "detailed findings with regard to each and every one of the four Martin elements so that a potential appellate court," and that's what the Supreme Court used as the lynchpin, "so that a potential appellate court could see clearly, quote, 'how the strengths and weaknesses of the debtors' causes of action were evaluated or upon what grounds it was concluded that a settlement was fair and equitable'." In other words, the debtor needs to help you for you to help the debtor. For fun, let's call it a conditional exchange. And the debtors' exchange obligations to this Court are not insignificant, Your Honor. They are material significance; substantial. And if it doesn't live up to its end of the bargain that we're having right here, then Your Honor can't approve the plan. The conditional exchange fails. Now, this debtor has utterly, utterly failed to prove its case.

Regarding the first element; probability of success in litigation. It is not a rhetorical flourish, Your Honor. I do a lot of that but this one isn't. You have absolutely nothing, not a stitch of analysis, not a single legal memorandum from Weil or Quinn evaluating the strengths and weaknesses of the

claims. No other lawyer. No law school professor evaluating claims for you, not a single expert opinion, not a single expert report, no risk or profiling, no monitoring, no risk adjusted decision tree based on potential litigation outcomes, we do this all the time. We do 9019 settlements all the time. There is a gaping evidentiary hole in their case. They failed to put it on. Oh, it's true, they gave you pleadings. Lots and lots and lots and lots of pleadings. Filed a multiple flora by parties with conflicting interests covering broad swaths of American law. And thank you Mr. Califano for giving us a primer on the banking regulations today. Your Honor, I gather, is now an expert on that. And if Your Honor had no other cases, the patience of Job, four or five law clerks with nothing else to do in about a year, maybe you could quasi-adjudicate all of these pleadings for them and do them the favor of filling their gaping evidentiary hole. But I've yet to see a single case, a single authority, a single lecture that I've ever attended supporting the notion that bombarding a Court with pleadings filed in multiple different jurisdictions, consummates -- is equivalent to carrying a burden of proof. I respectfully submit, Your Honor, it isn't. But they claim that they have closed this gaping evidentiary hole with the testimony of Mr. Kosturos and his associate Mr. Goulding. But this doesn't work. And it doesn't work for three reasons.

The first reason is that they are not competent

witnesses. Neither is a lawyer. They are turnaround management with financing and accounting backgrounds. Their testimony reveals absolutely no expertise on any of the legal points at issue in any of the litigation matters as they have been described for you by the defendants. In fact, both admitted on cross-examination that they're not here to offer any opinion at all on the probability of success in the merits on any of those issues. And both admitted that they did not do an issue by issue analysis, rather they took the so-called holistic approach without the advice of counsel, without the advice of counsel, simply reading the pleadings, listening to opposing counsel vent and threaten in a negotiating room and from that they would have Your Honor believe, they would have everyone in this room believe that not really that the settlement is fair, but that settlement in general is good. But these are hard and complex cases. That the quantum we're talking about is a lot. And can't we just make it all go away. Your Honor, that is woefully insufficient under the law.

Second, the Court may not base approval of a complex litigation simply on a CRO's business judgment unassisted by counsel. That's Judge Carey's holding in Spansion. And forgive me, Your Honor, this is a little self-centered but I'm having a little bit of a -- you know, it's deja vu all over again. I litigated Spansion on behalf of that ad hoc noteholders committee. I objected to that settlement and tried

that case next door before Judge Carey and Mr. Elsberg is wrong this morning when he said that we put up experts and it was our -- you know, the objector's party proving the case. Quite the contrary. That wasn't what happened at all.

The issue in Spansion was a very complicated, years in the making, incredibly expensive litigation that was initiated by the company pre-petition against Samsung related to IP piracy. It was initiated in the Federal District Court here in Delaware before Judge Robinson, it was initiated before the ITC and it was initiated in Germany. And in that case, there was a settlement that was achieved; settlement was a very thin agreement. And it had two particular issues about it. One was the settlement quantum, seventy million dollars but when you did all the netting back-and-forth it was fifty-five million. And the second, and the driving factor from my client's perspective, is that it was the, quote/unquote, "poison pill". It had provisions in it that disabled the company from being able to sell itself in bankruptcy without undoing, in effect, the settlement agreement that had been achieved.

We did put on witnesses. We put on two witnesses. One witness who was an IP expert who did not talk about the quantum at all; he talked about the agreement and what the risks were that the estates were assuming. And we put on the testimony of Mr. DeNair (ph.), who is a financial advisor from Houlihan Lokey, who talked about the fact that this was an

eminently sellable company; that the M&A alternatives were important in that case.

We left it to the debtors to carry their burden of proof respecting the quantum. And they put on their CRO who took the stand, much like Mr. Kosturos did, and said quite arrogantly, I didn't rely upon the advice of counsel. I know an awful lot about litigation, because of the surrounding circumstances. Seventy million dollars feels like an awful lot of money to me. That's all I need to know. This quantum is sufficient.

To Judge Carey, that was woefully insufficient. A CRO's business judgment, without -- unsupported by the advice of counsel, even if it's based on fact and a knowledge of litigation in general, is insufficient for the purposes in the eyes of the law.

There's a third reason why Mr. Kosturos' and Mr. Goulding's testimony does not fill the gaping evidentiary hole that the debtors have created here. And it lacks credibility for another very important reason that Mr. Nelson did not touch upon. That's conflicts of interest.

It is an admitted fact that Alvarez & Marsal is burdened with conflicts of interest. Mr. Kosturos admitted that JPMorgan is a client of his firm. JPMorgan has been a client of his firm for the entirety of this case. Mr. Kosturos admitted that JPMorgan is a source of work for his firm. And

we all know how this works when a defaulting borrower calls up the agent and says let me use cash collateral, please. The bank says well, what are you going to do about the default. And the CFO says I don't know, I've never been here before. All of a sudden a CRO is proposed and the name of somebody at Alvarez & Marsal is pulled -- is exchanged and a call is made.

And let's not forget that Mr. Kosturos has been named as the liquidation trustee with an undisclosed compensation arrangement. If Your Honor will take a look at the liquidation trust agreement, at 7.7, page 28, there was an obligation for the debtor to file a compensation schedule, which has never been filed, at least as far as we're aware. And so we don't know what his compensation is going to be. Perhaps it's going to be negotiated after the case ends.

And Mr. Kosturos, as liquidation trustee, has an unfettered right in the litigation trust agreement to hire his firm to orchestrate the wind-down of this estate, if this case ends now and under this plan. His right to hire his own firm and any professionals he likes is in 6.7(a) on page 22 of the liquidation trust agreement.

Your Honor, Alvarez & Marsal has made tens of millions of dollars in this case, and if it secures this plan, he may have an annuity for tens of millions more. We just don't know.

And let's not forget that this deal was negotiated in March 2009, before Quinn was retained as conflicts counsel;

before the big litigation blast that everybody talks about; when Weil not -- Weil, then JPMorgan's counsel, now JPMorgan's counsel, was the only lawyer on the job advising Alvarez & Marsal. And despite the subsequent year of so-called intense litigation -- let's test intense: not a single deposition was taken. And at the end of the year, admittedly, by the witnesses on the stand, the deal terms largely remain the same as they existed before the litigation, before Quinn got on the job, before they became the window dressing.

The deal then burdened by conflicts of interest remains burdened by conflicts of interest today. And that deal resolves complex claims at essentially a buck below equity being in the money. Almost as if they took the balance sheet, they put their hand over equity, they determined that everybody above your hand gets paid in full and everyone beneath the hand gets nothing. Almost as if that was their analysis, completely end-results oriented; the secret analysis that they guard like the secret formula for Coke, so in-depth, so persuasive, they can't let any of us see it, claiming attorney-client privilege.

With all of these lawyers and advisors and people here watching what's going on right now, they couldn't put an expert on the stand to tell us what this secret sauce was; because there is no analysis. There is no analysis. Just find a way to get the creditors paid off in full, give the rest to JPMorgan, and we'll use this massive litigation machinery we

have at our disposal to steamroll over the objectors. That's what's happening here. Their argument does say "trust me", Your Honor. And the evidence says you can't.

The second element of the Martin test, Your Honor, is likely difficulties in collection. And I most assuredly agree with Mr. Nelson. There is most assuredly no difficulty in collecting from the primary focus of litigation attack. That's JPMorgan. And it's ridiculous for anyone to suggest otherwise. And certainly, there isn't any evidence to prove otherwise. Here too, the debtor utterly failed to prove its case.

Third element, the complexity of litigation involved. Now, Judge Carey's Spansion decision is particularly instructive on this element. And I know that Mr. Nelson quoted it, and I'd like to do the same. I'll move quickly. Judge Carey quoted the Third Circuit Court of Appeals decision in NutraQuest, and he said, "It's axiomatic that settlement will almost always reduce the complexity and inconvenience of litigation. The balancing of the complexity and delay of litigation with the benefits of settlement is related to the likelihood of success in that litigation. NutraQuest, 434 F.3d 646. There is insufficient information upon which to make a reasoned decision as to the likelihood of success of the actions. This likewise makes it difficult to conclude that the settlement is preferable to the expense, inconvenience and delay of litigation."

Same problem in Spansion. Same trial strategy here. Same CRO evidence or lack thereof. Here too, the debtor has failed to give Your Honor any evidence to know if the merits of settlement outweigh the expense, inconvenience and delay of litigation. Here too, the debtor has utterly failed to prove its case.

That leaves the fourth and final element, the paramount interests of creditors. Well, creditors here like the settlement. It's obvious. It pays them in full, minus about a buck. The stockholders here hate the settlement, because it trades their value entitlement for immediate payoff to the creditors. That's the trade. That's a different conditional exchange.

Now, we all know about the absolute priority rule. But the law has never interpreted the absolute priority to mean that equity is not entitled to a fair shake in Chapter 11. Quite the contrary. The Second Circuit seminal decision in Lionel Corp., 722 F.2d 1063, is an important bankruptcy lodestar and principle. What the Second Circuit said famously, "In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceedings and accordingly act to further the diverse interests of the debtor, creditors, and equity holders alike."

Following this judicial philosophy, Judge Sontchi recently found in In re RNI Wind Down Corp., 348 B.R. 286, that the fourth element of the Martin test should, in fact, consider the views of equity where equity could, in fact, be in the money.

Here the debtor, as plan proponent, has failed to prove an appropriate value of estate causes of action against JPMorgan and others. It has failed to prove that equity is not in the money. It has failed to approve that this settlement is appropriate vis-a-vis equity. So even though the Martin test says, on its face, to focus on the paramount interests of creditors, as the case law interprets it, what's fair to everyone? They haven't proven their case. It's not fair to equity. They failed to carry this test as well. This settlement cannot be approved.

Your Honor, Mr. Nelson covered the other major legal infirmities of the plan. And I know you have an awful lot of briefing, and you've been very patient with all of us. So I'm not going to belabor it. I'm going to try to stay at a higher level.

The first point -- and it is a carryover from last Wednesday -- is Bankruptcy Code 365(c)(2). We briefed and argued this on Wednesday, and our view is that title to the trust securities did not pass pre-petition to the company, did not pass then to JPMorgan, and that their plan's appropriate

attempt to complete that transaction post-petition is essentially assumption of an executory contract.

And that executory contract calls for the issuance of securities of the debtor. And this cannot be assumed, per Bankruptcy Code 365(c)(2). Therefore, this plan fails under 1129(a)(1).

The second point is releases. And we can go around and around and back and forth all day long. Mr. Rosen tells us; Mr. Sacks tells us; we put on some witnesses. You know, if you're not getting any value under the plan, you're not giving a release. And they've got this tortured paragraph that now I think is probably five pages long, that none of us can figure out what it means. And you've got five other provisions that seem to say, notwithstanding that tortured paragraph, that we are giving releases. We're giving releases to JPMorgan, to JPMorgan entities, including the issuer of the trust-preferred securities, who we're suing right now for fraud in the very adversary proceeding in the latter counts that's supposed to pick up after plan confirmation is over, against Ds and Os, against the FDIC, against the professionals to the underwriters, including Sullivan & Cromwell, anybody and everyone involved in the TPS. We're told that we're not giving you the release.

But as we read these plan provisions: 43.1, 43.2(b), 43.5, 46.2(a) and 43.7, we get the clear impression that that

slippery language is being used to, in fact, release, enjoin, block, our direct claims against these third parties. We voted against the plan. We checked the box. We're not getting anything under this plan. We should not be getting releases. And it should be as clear as day, if their philosophy, as they report it to the Court, is truthful -- it should be clear as day -- you can get rid of all of this verbiage and maybe we just clarify it in the order, that there is no releases being given.

Best interests test. The debtor has two fundamental problems with 1129(a)(7). And the first one -- and Your Honor signposts these at an early -- my apologies, I'd forgotten who you'd asked these questions of -- but they were particularly salient and I made notes of them. The first relates to the implications --

THE COURT: I don't remember either, so.

MR. STARK: -- I know. But I'll address it anyway. The first relates to the implication of third-party releases. In re Quigley Company is a case that just came out, 437 B.R. 102 (Bankr. S.D.N.Y. 2010). This is Judge Stuart Bernstein's decision. Very interesting decision. He denied confirmation of the debtors' plan and he ruled that the plan failed the best interests test. And that ruling was predicated, in part, on the fact that the plan included involuntary releases of creditor claims against third parties.

And Judge Bernstein ruled that in conducting a best interests analysis in Chapter 7 liquidation, third-party creditor claims have to be added if they're being involuntarily released. To the extent we're not involuntarily releasing under this plan, okay, then this issue -- we move on quickly. But again, as we read the plan, it doesn't seem that way to us. It seems as though they've got some traps for the unwary. And then there should have been a line item evaluating what my adversary proceeding is against the issuer of my securities as well as others. So says Judge Bernstein.

Post-petition interest. And I know you did ask questions of this with Mr. Hodara. The briefs discuss whether a solvent debtor -- in a solvent debtor case, creditors receive post-petition interest, and then of course, for best interests purposes as well, we have to consider post-petition interest. I disagree with Mr. Hodara about his interpretation of 726(a)(5). Your Honor said in Coram, "most courts conclude that the term means federal judgment rate." And most courts have reset determination based upon things like uniformity of creditor treatment, uniformity within the federal legal system. It's supported by the legislative history. There was a prior version that sort of seemed as though it was more like contract rate. And the final version says at the legal rate. And also in terms of statutory construction, the choosing of those sort of words reflects a more objective viewpoint of interest, as

opposed to particularized creditor entitlements.

But Your Honor is right. Equitable principles do get involved in this sort of analysis, and the Court does have discretion. So what would equity principles say here? Here you have a settlement that proposes to trade equity value for near-term cash in an amount to pay off creditors in full, minus a buck. People don't pay today 99.9 in ready cash, unless they think it's worth an awful lot more. That's basic economic philosophy.

So in other words, the stockholders are being asked to pay for this settlement. And equitable principles would suggest, if the creditors are getting paid in full on our backs by realizing of a discount value in a preferred currency that pays them off in full, well then you should share some of the largesse. Equitable principles would suggest that contract rates should not be utilized, but federal judgment rates should be utilized.

We actually have a different modeling in terms of the value add, but our calculation shows as much as 700 million flows down the waterfall from this simple change, clearly yielding significant value to preferred equity holders.

To sum up, Your Honor, the debtor has utterly failed to prove its case, utterly failed to prove that this settlement is objectively fair and equitable. They have utterly failed their obligations in your conditional exchange. They haven't

given you the evidence to make a detailed finding from a reviewing court's perspective, that this settlement is fair and appropriate.

The quantum and structure of the plan, the utter lack of evidence, strongly suggests that there was no analysis behind this plan. They all got together in the proverbial smoking room and put their hand over equity, and everybody above got, and everybody below the hand got nothing. And since equity was not at the bargaining table -- they were around, but they weren't allowed in the room -- and the people who are running the ship have conflicts of interest, the deal seems perfectly appropriate to them as a business judgment matter. But that's not the law.

Fortunately the law is more exacting. The plan has the other legal infirmities that we've talked about. And for these reasons we respectfully urge Your Honor to deny confirmation.

THE COURT: Thank you.

MS. LEAMY: Good afternoon, Your Honor. Jane Leamy for the United States Trustee. I'd like to be heard very briefly.

The United States Trustee had filed an objection on the release provision in the plan -- the third-party release, Section 43.6. The debtors had addressed it in their omnibus response to the objection saying that most of it was moot. And

that's correct due to the revisions that were made.

However, the U.S. Trustee still objects to the revised provision with respect to the opt outs, and specifically not providing a distribution to those who opted out. As indicated by others, this change was made after the vote deadline. I think it was confusing, at a minimum, to creditors. The attorneys here can't figure it out. You know, it's not clear really what the intent is.

Counsel for JPMorgan seemed to acknowledge this. He suggested that if people want to change their mind, they don't have to opt out anymore. Well, how are people going to know to do that? Are they going to get a notice? I think the question arises, you know, is this a material modification that would require resolicitation.

Particularly, the provision violates Section 1123(a)(4), which requires equal treatment of creditors within a class unless they agree to a lesser treatment. So the debtors will say, well, if they're opting out they're agreeing to a lesser treatment; they're not going to get a distribution. But I don't know that it's true that we can say all the creditors did agree, that opted out, because it wasn't clear on the ballot they got that they weren't getting a distribution, because that's not the language that was given to them at the time; the language in this second modification, that is.

The debtors cite a couple cases in their omnibus

response: Dow Corning and Resorts International, that suggest that creditors providing different consideration, some that give up their claims and do give a release voluntarily, can get a different recovery, and this is okay, because it's a lesser treatment. But those cases don't talk about getting nothing. They talk about different recoveries in exchange for different considerations. But they don't say it's okay to give the creditors absolutely nothing.

In summary, Your Honor, the revised opt-out language should not be approved as part of the plan, and Your Honor should require that it be stricken. Thank you.

MR. SILVERSTEIN: Good afternoon, Your Honor. Paul Silverstein, Andrews Kurth, for Broadbill Investments as class plaintiff. My co-counsel to the class plaintiffs and I will, together --

THE COURT: How are you going to split this up?

MR. SILVERSTEIN: Yes, we are. Without duplication.

THE COURT: Why are we going to split it up?

MR. SILVERSTEIN: Because that's what we've prepared, and I think it's easier to do it that way.

THE COURT: Any objection?

MR. SACKS: They're not going to be duplicative, Your Honor. But I imagine, given the history, we're going to hear the same thing twice.

MR. SILVERSTEIN: I don't think so, Your Honor.

THE COURT: All right. No duplication.

MR. SILVERSTEIN: Yes.

THE COURT: I'll shut off the second person -- Mr. Steinberg, if he starts repeating what you're saying.

MR. SILVERSTEIN: I appreciate that, Your Honor.

THE COURT: I know you do.

MR. SILVERSTEIN: On to our confirmation objections, Your Honor. The LTW's confirmation objections do not block confirmation, as such, but rather require modification and clarification and clear language in either the confirmation order or modifications to the plan itself.

As we've indicated before, there are fundamentally four confirmation objections. First, the reserve amount and classification; second, 510(b) and best interests test; third, nonconsensual releases; and fourth, Section 363(f), sale free and clear. I'm going to address a portion of the reserve amount and a portion of the 510(b), and Mr. Steinberg will do the rest.

Although the plan classifies LTWs as equity interests, pending resolution of the Broadbill adversary proceeding, the plan treats -- and that needs to be made crystal clear in the confirmation order -- the plan treats LTWs as disputed claims for which reserves must be established. So the record is crystal clear, under state law, New York law here, LTWs have a contractual claim for eighty-five percent of the net proceeds

of the Anchor litigation.

LTW holders are, under the contract, that is the warrant agreement, creditors, because the issuer, WMI, is obligated to give them that value. Whether the WMI stock is trading at one cent on the dollar or at ten dollars per share, the LTW holder is entitled to the same value.

LTW holders agreed to take value as long as such value could be delivered in stock. It could be payable in stock. The agreement provides a mechanism, Article 4, for conveying such value if stock doesn't exist or if such value cannot be conveyed in the stock. Under no circumstances did LTW holders agree to take stock "no matter what".

Therefore the price -- I'm sorry. Therefore the price of WMI's common stock is not relevant. The intrinsic value of the company is irrelevant to the LTWs. And what shares are worth today or at any time is likewise irrelevant. It is about the net value of eighty-five percent of the Anchor litigation under the contract. That was the intent of the agreement which must govern this controversy.

As Your Honor is aware, there is presently a dispute as to such intent which must properly and appropriately be resolved in the Broadbill adversary proceeding through to judgment or by settlement or otherwise. The confirmation issue here is the amount to be reserved for the LTWs as disputed claims. The disclosure statement says 183 million dollars.

The debtor corrected that in its motion to set reserves at 250. We believe and we'll demonstrate in connection with the estimation reserve motion, that the number should be approximately 340 million dollars.

The debtors say that Section 2 point -- I'm sorry -- that Section 27.3 of the plan makes it clear that the LTWs are treated as disputed claims and there'll be a reserve. The confirmation order, however, must make crystal clear that they are being so treated as disputed claims, subject only to the precise amount of the reserve, at minimum 250 or such other higher amount, as this Court sets. And as we indicated, we believe it's 340.

Second issue is the 510(b) issue. As claims under state law, the only provisions of the Bankruptcy Code that can conceivably affect the treatment of the LTWs are Sections 510(b) or Section 510(c) of the Code. Section 510(c) has not been alleged here. Even though it is entirely duplicative of their LTWs or equity argument, Section 510(b), with respect to the LTWs has been raised in the Broadbill adversary proceeding by the debtor. In connection with the summary judgment motion, we briefed and argued why 501(b) didn't apply here, because the LTWs did not have any equity risk, neither upside nor downside.

We discussed Mobile Tool, 306 B.R. 778. We discussed Raven Media, 2004 WL 302303, which basically says that Section 510(b) was designed to address equity interests that "reap the

benefit of unlimited profit while also fully accepting the risks of ownership, namely loss of investment." The LTW claims do not arise from the purchase or sale of anything.

If, however, the argument -- if, however, for argument's sake, 510(b) was applicable, the plan is not confirmable because it pays post-petition interest prior to paying allowed claims under Section 510(b). That would be a confirmation defect under the Code, and the confirmation order must address that.

I think Mr. Steinberg wanted to address the best interests test as well as some of the other issues, and as I promised, Your Honor, we're not going to duplicate each other.

THE COURT: Okay.

MR. STEINBERG: Good afternoon, Your Honor. Arthur Steinberg from King & Spalding, also on behalf of the Dime warrant holders. Throughout the trial, Your Honor had said, when I asked witnesses various questions, that I should save something for argument. So I have now saved something for argument.

THE COURT: Good.

MR. STEINBERG: The second thing which was continually repeated was the term that I harped on at the trial, which is the holistic view as to how the debtor has taken the settlement. And there, at trial, I was talking about holistic meaning that they looked at it on a macro level, as to what was

being achieved, versus what they were giving up. And that was the way they approached it, as compared to looking at individually the Anchor litigation, which was what I was most interested in, representing the litigation tracking warrant holders.

And the problem -- as I will use holistic now, and I will not dwell on it like I did at trial -- the problem is, is that when you say holistic in this confirmation context, you're basically saying, Judge, we have a general momentum to confirm a plan, and let's see if we can continue to say it so that the little person's rights, the small parties who have not been properly dealt with, both on a procedural and substantive basis, we can basically ignore.

And what sounds like me shouting sometimes to say, Judge, you can't let them do that; you can't let them get away with an erroneous presentation of facts; you can't let them get away with trying to do something that is contrary to law; that is because while in the context of this case the Dime warrants are not a major creditor constituency, the arguments I'm making is (sic) very critical for the recovery for the Dime warrant holders, many of them who have been involved in connection with the investment in the Anchor litigation for more than ten years.

And with that, then, Mr. Silverstein's comments, which we've echoed a number of occasions, we are not the plan show

stopper in that the resolution of our claim can be resolved post-confirmation, as many other disputed claims are resolved. But our objections to confirmation are tailored to making sure that the confirmation itself does not jeopardize our rights that we want to be able to assert in the adversary proceeding.

And towards that end, there were two particular topics that we think had been presented which could jeopardize the rights. One is the third-party release. And the second is the best interests test. On the third-party release, we have continuously stated that we believe that the board has violated its duties under Section 4.4 of the amended agreement; that the board was required to act in good faith to protect the rights of the LTW holders, in accordance with the intent and principles of the amended agreement. The board had an express contractual duty to the LTW holders, and that this duty was mandatory, and the board could not act arbitrarily.

Now, I think that the language that they always try to say is the board had a permissive right to either act or not act --

THE COURT: I know the argument. So you're saying don't give third-party releases of the debtors' directors and officers?

MR. STEINBERG: That's correct. For their post --

THE COURT: For their post activity?

MR. STEINBERG: -- petition acts. And, Your Honor, I

think the testimony of Charles Smith, where he said the board never even considered the Section 4.4 issue; the testimony of Mr. Goulding, that the company was the one who was in effect sacrificed the Anchor litigation; and the thing the with -- the exhibit that we talked about this morning at the start of the trial, which is that the debtor presented to Your Honor a draft of the Golden State warrant agreement, which was the predicate upon which they said was the foundation of their "may-shall" argument. They said Golden State had the word "shall", and if we were smart, we should have used the same drafting as they were.

Unfortunately, if they were smart, they would have presented the right draft to Your Honor, instead of the -- the final draft instead of the preliminary draft. And the final draft had the exact same language that we had.

We also clearly argue that we have a claim. And in addition to how Mr. Silverstein has articulated the claim, we have a claim because we tried to introduce to Your Honor that this Golden State warrant actually had a history with the same language as we did, where CitiGroup acquired Golden State. CitiGroup paid partially cash for Golden State. The litigation tracking warrant was paid in cash. That doesn't make us an equity holder. They can't keep on saying the same thing, which is, look at this agreement and ignore Article 4, when we keep on saying Article 4 is an integral part. And when you do have

a combination, the world changed.

So item 1 was do not give the exculpation to this board, who we believe violated their duties to the litigation tracking warrant holders.

And, Your Honor, the second thing is, do not give a release to JPMorgan unless we get our payment on our litigation tracking warrant claim. Because what has happened here is that the parties at the table, of which we were not, worked together to strip the value of the Anchor litigation from the litigation tracking warrant holders when it was absolutely clear and undeniable that the intent and principles of the litigation tracking warrant was to give eighty-five percent of the net recovery.

Now, I asked, on maybe -- I must have filed five objections to the disclosure statement. And each time, I asked the same five questions. And each time I did, they ignored the request to have more information in the disclosure statement. And on the last one, when Your Honor was approving it, you said you'll get it at the confirmation hearing. So I want to be able to talk about those questions which I thought were integral to demonstrate how they improperly acted to strip the value of the Anchor litigation, and get the sterling responses that they had five months to prepare, in order to answer the questions.

The global settlement provides that JPMorgan is taking

the Anchor litigation free and clear of the LTW holders. So I disagree with -- the answer to Your Honor's question was, is there anything in the global settlement that takes away rights to creditors or to holders of this estate. And I -- you know, page 41 of the global settlement -- I think it's page 41 -- clearly provides that the transfer, pursuant to 363, is going to be taken free and clear of any liens, claims, interests and encumbrances of any person, including, without limitation, any liens, claims, interests and encumbrances of the holders of the litigation tracking warrants.

Now, Mr. Rosen could say he doesn't believe that's a release. Well, it's a good thing I don't take his view towards things. I think that is a release. I think that is exactly what they're asking. I think, in fact, the witness, Mr. Smith, who they proffered, said that that was, in effect, a release.

So when they introduce 43.6 and they say "except as provided in the plan, confirmation order, or the global settlement", then these rights follows, that exception, with regard to the global settlement agreement, is the release. And I don't think we should give it, because as we articulated at trial, and I was preserved for argument, Section 4.2(d) of the agreement says, that if you have a combination, then the debtor is supposed to get the successor company to assume the litigation tracking warrant obligation. In this particular case the amended agreement defines combination as a sale of

substantially all of the assets of the debtor. The global settlement is defined as a sale. The value that you've heard testify is a shift of over 6 billion dollars of assets, while the debtor retains less than 200 million. That seems to me to be a sale of substantially all the assets. That's a breach of the 4.2(d) obligations.

If this debtor is going to construct a plan and try to strip that value towards us, then we want to be able to preserve our rights against JPMorgan. No one mentions -- I mean, everybody says in lip service that no one is trying to give -- compel a release on --

THE COURT: I understand your argument.

MR. STEINBERG: Okay. So let me move on to the best interests test. By the way, Your Honor, just for the sake of completeness, I did want to go through the five questions that I never got an answer to, based on the testimony here, because it does relate to what I believe is the shabby way in which the litigation tracking warrant holders have been treated in this case.

JPMorgan assumed, according to the testimony today, more than a billion dollars worth of debt. Under the global settlement agreement, in almost all circumstances, the debt that was assumed was related to the asset being transferred. The Anchor litigation gets transferred, and the Dime warrant is the only exception where the underlying debt did not travel

with the assets transferred.

There were two goodwill litigations. Under the global settlement, JPMorgan is getting the Anchor litigation. The debtor is supposed to keep the American Savings litigation, which does not have a litigation tracking warrant obligation. The debtor claimed to own both.

Now, Mr. Rosen, in his presentation this morning, referenced Section 6.3 of the amended agreement and said aha, look at that language; that means it must be the bank's obligation. Well, the day before we started this confirmation hearing, that was also what Mr. Strochak said, which is clear that the litigation belonged to the bank because of Section 6.3. And the fact that they asserted in the JPMorgan adversary proceeding that they own the litigation; the fact that they filed an SEC filing that they said the owned the litigation; the fact that they structured a plan for a sale of the debtors' interest in the litigation; that all seems to be forgotten.

It appears that whatever their argument was, is that they didn't think Section 6.3 was in any way binding on them. There must have been an overall intent that required them to believe that the litigation belonged to Washington Mutual Inc. The debtor admitted that during the negotiation -- I'm sorry -- that there was no witness who understood the business reason for backdating this transaction by over two years. And shockingly, no one thought that this was an extraordinary

request.

Now, they didn't like the word that I was using, the word "backdating". They wanted to say things like "dated as of". And I think that that is an example that they were -- they're trying to hide something from not only me, but from this Court. Because I asked the same question to every three witnesses -- the three witnesses, and no one knew the answer. And I had previewed that I was asking that question on my objection to the disclosure statement for five times.

The witness did not know that the Anchor litigation was at least 150 million dollars more because of the gross-up when they were negotiating the global settlement. Mr. Goulding said that that was a clear mistake. Even when Mr. Rosen presented today what the value of the Anchor litigation is, he couldn't get it right. He said the value was up to 104 million dollars more, while the pleadings by JPMorgan say it's 104 to 144 million dollars. And JPMorgan calculated its gross-up based on a thirty-eight percent tax rate, while the debtor uses a forty-five percent tax rate, which Mr. Goulding said would jack up the number by a considerable amount more.

The amount of this Anchor litigation is over 600 million dollars if the gross-up is calculated according to the debtors' valuation. But we got something that had a range with a much lower number.

Let me turn to the best interests test, because I did

not understand Mr. Hodara's argument. And it really relates to two different things. And let me say something that's just straight out. We heard the whole thing about 510(b) et cetera. But I didn't hear anybody say, does late filed claims in this case get paid ahead of post-petition interest. 726 is clear on that. You can't point to 510. And what I object to is that in the context of my adversary proceeding, one of the multitude of affirmative defenses that my caretaker debtor has ascribed is that he wants to tell those people who didn't get notice of the bankruptcy filing and didn't know that it existed, he wants to be able to say they're barred by the fact that they didn't file a claim by a bar date when they were never told what was going on.

Now, I have lots of arguments why that wasn't true. But on its most basic level, if you're going to press that claim in my litigation, and then try to pay post-petition interest without regard to late-filed claims, I think that that is outrageous and symptomatic of the outrageous conduct that I think has happened here.

Now, let's turn to the subordination. The language of 510 -- 726, rather, says, "except as provided in Section 510 of this title." It doesn't say 510(b); it says 510. So 510 has three sections: 510(a), which is contractual subordination; 510(b), which is the subordination based on damages relating to a purchase and sale of security; and 510(c), which is equitable

subordination.

The fact that it references 510 doesn't mean that 510 claims disappear and fall below post-petition interest. I mean, if that was the case, merely by referencing 510, PIERS claims should get nothing, because they're contractually subordinated under 510(a) to somebody else. And the plan is directed to enforce that provision. So why don't we just cross out "510" under the -- PIERS under the best interests test.

The reason why 510 is referenced in this section is that if you have a contractual subordination, notwithstanding the distribution formula under Section 726, you're going to enforce that. If you have an equitable subordination to some claims but not all claims, you're going to enforce that type of remedy. And if you have a 510(b) equity subordination, you're not going to try to promote that into the debt claim, and that's the way it is.

But if you have a debt subordination, there is nothing that suggests that that claim, a debt subordination, falls below the last level before you return something to the debtor, which is the payment of post-petition interest on an unsecured claim. And for the life of me, I couldn't figure out the argument, other than it's in the Court's discretion, as to how the contract rate versus the federal judgment rate should be applied.

Do we actually think that because the marketplace

relied on the fact that the club who negotiated this plan was going to get a contractual rate of interest, that that should be binding on this Court to strip 5- to 700 million dollars of value that otherwise would go to the other tiers? That the parties who voted on this, voted on this with the hope and expectation that people would ignore the otherwise provisions of the Bankruptcy Code, which does not use the word "contractual rate", it uses the word "legal rate".

And in 506(b), they use a different terminology when they want to say "contractual rate". And I'm familiar with the cases. But this is not the case to pay post-petition interest on unsecured claims at a contractual rate. The difference is dramatic. And why is it that a 510(b) creditor, which the committee said that they are so likely to endorse and protect -- why is it that he wants to satisfy the subordinated -- the contractually subordinated creditor instead of the debt subordinated creditor? Why does he think that that's fair?

You know, you've heard a lot of arguments, including from myself at the trial, that this was a club deal. And I think in this case, Your Honor, unfortunately, you haven't been given the best opportunity to sift through what has been presented. You have an unsecured creditors' committee that does not function as a watchdog. And it's composed of four indenture trustees who have their own special duty to

bondholders. And it's not surprising that they decided together that the most fair thing to do is to pay their constituencies contractual interest. That's who Akin Gump represents.

They don't -- that's the sum total that you get when you have four indenture trustees trying to protect their own constituencies say this is what we should have. And that was the plan that was proffered.

And you heard the testimony that the plan was done with the substantial contribution of the settling noteholders, who basically was a primary force to bargain for principal -- for the most part they got principal interest on their unsecured claims at a contractual rate, not a legal rate; attorneys' fees without telling anybody really what it is other than Mr. Kosturos; and the special rights to become the stockholders to the debtors. They're focused on the benefits of the NOL. And other people, including my clients, who are at this point in time are disputed creditors, don't get that benefit. I don't think that that's fair.

And, Your Honor, I know that the criticism of me is that I complain a lot. And the reason why I complain a lot is that there's a lot to complain about. And if you listen to what I have to say about how unfair this has been to the litigation tracking warrant holders, how they've tried to trample on them and how you have to take that into account when

you're trying to judge this plan, I think I'd like to have a few more minutes to just recap.

We start with the notion that when we first complained at the disclosure statement that we wanted to have a reserve for our disputed claim, the debtors' brilliant solution, which was joined by the creditors' committee, was that we'll give it to just Broadbill, nobody else, because Broadbill filed an adversary proceeding. When we left court I turned to Silverstein: I'm intervening in your proceeding so that I can get the benefit of a reserve. He says, fine --

MR. SILVERSTEIN: I don't complain.

MR. STEINBERG: -- but on the other hand, he said, does it make any sense to you that everybody else is not protected? I said no, it doesn't. Maybe Mr. Rosen is trying to isolate us so he can settle with us. He says, do you ever think we're going to get away with that? I said, no. So he says, but why do you think Mr. Rosen thinks he can get away with it? I said, he can't. So what happened that evolved is that he ultimately agreed that this reserve concept will be for the benefit of all creditors -- LTW holders.

Your Honor, when we had our summary judgment motion, they filed an affidavit of an expert which we had precluded at the beginning of this hearing. Your Honor had said that this was a back-door effort, when you heard Weil's argument. They were basically saying we feel compelled to be able to give a

generous distribution to our holders, and that's why we need to have an immediate reason.

The constant drone of thirty million dollars of interest, if you apply the federal judgment rate instead of the contractual rate, it would be a substantially different number, and you wouldn't feel the pressure to make a decision on a case where otherwise your rights are being trampled upon.

Your Honor, I said before that they mis-cited to the Glen Fair (ph.) document on the may-shall issue. At summary judgment, they argued that the Anchor litigation belonged to JPMorgan. But they clearly filed a bunch of pleadings on judicial estoppel notions. And even Mr. Smith, he was forced to say that yeah, when I approved the filing of the counterclaim in the JPMorgan adversary proceeding, which said that we, Washington Mutual Inc. now WaMu Bank, owned it, it was a valid pleading, and I did file it in good faith. So there had to be a basis for that.

At confirmation it came out that this unambiguous amended agreement, for which they sought summary judgment on, was so unclear that they had to go to Sullivan & Cromwell for guidance as to how to interpret their document in order to be able to try to do it. And Mr. Smith testified and realized that Mr. Goulding testified that the PIERS document had a warrant attached to it, which was part of the valuation of the OID to get to the 789 million dollar figure, which is how their

claim is based. So that there's been a totally different set of rules that apply to us.

The original releases that were filed in this case is an example of let's run it up the flagpole and see how much we can get away with. There was never a basis in law to do what they wanted to do. They forced a ton of people, including shareholders individually, to file responses, only to change it after the objection date, as if it was an epiphany that what they had done was something wrong; and that they have gathered the assets according to Mr. Kosturos, and they have done a good job.

But they had never done the other part of their obligation, which is to try to get a fully consensual allocation of those assets. And in fact, what they have done is try to proffer a plan that tramples on the rights of those people that they're seeking to disadvantage.

Your Honor, when you heard the NOL testimony of Mr. Zelin, he said essentially that if this plan confirms after the year, you'll have a better utilization of the non-restricted NOLs. So there is no real rush to get this thing done immediately without carefully considering the rights of the parties and giving the debtor an opportunity to do what was right.

Your Honor, unfortunately, there is nobody for us to turn to other than yourself. We don't -- we claim we're

creditors, but we're disavowed by the creditors' committee. We're not equity holders, we believe, so we don't have an equity committee constituency. Lord knows we don't get any kind of sympathy from the debtor at this point in time. And so that our arguments come to you.

And our complaints about procedures where counsel stands up and says, "We gave them documents," when he files 65,000 pages on the day he files a summary judgment position; "we gave them access to a deposition," when he wanted us to take a deposition at his pleasure, which was one person, and we had noticed ten; the second one was after we had to file our response to confirmation. Those are not fair remarks.

And I'll just say it one more time. It sounds like I'm complaining, but I'm complaining for a reason. And I'm beseeching Your Honor to give us our day to establish our claim, and do not let this plan jeopardize the basis upon which we want to establish our claim. Thank you.

MR. SILVERSTEIN: Thank you, Your Honor.

THE COURT: Just because you're paranoid, doesn't mean they're not out to get you.

MR. STEINBERG: I understand that, Your Honor.

MR. ROSEN: Your Honor, I believe Mr. Scott is going to be the third person talking about this very issue. So if we could have the same non-duplication argument, that would be fine with us.

MR. SCOTT: Yes. Your Honor --

THE COURT: I hope you're not going to repeat.

MR. SCOTT: -- Your Honor, I will not. I will make points that might be related to the previous argument, but I will be brief.

THE COURT: Okay.

MR. SCOTT: I have a short demonstrative that I'd like to share with the Court, if I may hook it up here to the laptop. Okay. Thank you, Your Honor.

THE COURT: Okay.

(Pause)

MR. SCOTT: Your Honor, the Dime warrant holders are uniquely situated here in this confirmation proceeding, because unlike many of the other constituents, we actually have an asset. We're not seeking a claim to the residual value of the waterfall. We actually have an asset.

And we object to the plan's equity classification for the Dime warrant holders, because the debtors' classification is based on the misplaced assumption that the Dime litigation tracking warrants are no more than -- no more than a right to buy stock and hence equity. And that's incorrect for at least two reasons. First, the plan misapprehends the distinction between the Dime warrants and the traditional equity warrant. And second, the plan, in classifying us as equity, misapprehends and misconstrues the warrant agreement, which has

been introduced in evidence in this confirmation and has been discussed at length during cross-examination of the witnesses.

I'd like to briefly frame the discussion with a short reference -- with a brief reference to the facts, Your Honor. If I can get my laptop going, and if not, then I'm not going to have the demonstrative for you.

THE COURT: Okay.

MR. SCOTT: Which would be a shame. Bear with me for one minute. Well, Your Honor, we may not have that demonstrative, but that's okay, I'll just read -- I can just make the argument to you, and maybe that would even shorten it a little further.

THE COURT: Okay.

MR. SCOTT: Your Honor, the distinction between the Dime litigation tracking warrants and the equity is this. The litigation tracking warrants are a property right with a claim to the value that is exclusively derived from this Anchor litigation -- exclusively derived. The equity warrant -- the typical equity warrant is a claim to the enterprise value generated from the issuer's business operations entirely.

And it's that distinction that is very, very important. Traditional equity warrant is leveraged to business risk. I had hoped to show you a prospectus -- and I may be able to put it up here on the ELMO actually --

THE COURT: Isn't this what I heard at the summary

judgment argument?

MR. ROSEN: That's exactly why I rise, Your Honor.

THE COURT: All right.

MR. SCOTT: It's a little bit -- you know, Your Honor, I will briefly go through this. It's come up in the confirmation discussion. I'll move through it.

But basically, Your Honor, if I were able to show you -- I'm not sure this is going to be able to come up here. But if you look at a typical equity prospectus, the risks that the equity holder is taking are drawn entirely to the business operations of the company -- entirely to the business operations of the company. Now, so that misconstrues and misapprehends the nature of what we've got.

All right. We essentially have no right to a specific number of shares and no fixed expiration date on our warrant. Our shares, Your Honor -- the error in this plan is that the plan is assuming that we are no more than a right to stock. But the reality, Your Honor, is that our warrant agreement provides for a specific value and not a specific number of shares. And this value is protected in the warrant agreement itself.

As counsel has noted, there are a number of provisions in Section 4 -- in Article 4, which are adjustment provisions that are designed to preserve the value that accrues to the warrants. And this is the important distinction. We have a

right to value, because we have an asset. A typical equity warrant is a claim on prospective business operations. In the warrant agreement itself, it provides for certain circumstances where there can be an adjustment made for typical business operations.

THE COURT: I know. I heard this at the summary judgment motion, didn't I003

MR. SCOTT: Yes.

UNIDENTIFIED SPEAKER: You did.

MR. SCOTT: Well, I'd like to make one additional point about 4.4, Your Honor. And then I can wrap it up.

MR. ROSEN: Your Honor, I appreciate that perhaps Mr. Scott wants to amend his prior presentation on Wednesday, but I think, as Your Honor has correctly noted, we've done that argument. We're now onto a different phase of this. And this is just a rehashing of the old arguments.

MR. SCOTT: Well, Your Honor, I can wrap this up very briefly. If I may just --

THE COURT: Yes, but isn't it just a rehash?

MR. SCOTT: Well, no, it's not. Because I'm going to make a very different point now, which is that the error in the plan is that the plan assumes that the board of Washington Mutual can simply eviscerate the value of our warrant rights -- of our value to the Anchor damages. And if you read Section 4.4, that cannot be the case.

Because under contract law, all the provisions of a contract are presumed to have purpose and effect. And by the way the plan proceeds here by classifying us as equity, is to assume that under 4.4, the Washington Mutual board can simply, at its whim, eviscerate our rights to value. And that can't be the case under contract interpretation.

Second, Your Honor, when these warrants were issued, they were issued when issued at a value substantially higher than the zero value that the Washington Mutual and the debtor now claim that these warrants are owed. Okay. What the debtor is saying is that because the board can eviscerate your warrants, they have no value.

Well, if that's the case, then the market would have assume that from day one, when these warrants were first issued. And when these warrants were first issued, they traded at a much higher value. So the market could not have believed that, and it's not correct to even assume that now.

So lastly, Your Honor, with respect to the risk factors in the warrant agreement, nowhere was this discussed that the board could possibly eviscerate the warrant rights. And if you read this document holistically, to use Mr. Steinberg's -- refer to what Mr. Steinberg was saying -- if you look at these provisions taken as a whole, this agreement must be read for its purpose and effect. And the assumptions made by the plan and the debtor in this case cannot be correct.

They're illogical and nonsensical.

Now, lastly, Your Honor, the bank gave away the value of these warrants. They stripped the value away. They gave the asset to the bank and they now claim they have a liability that's worth nothing. But if you view the warrant right in this agreement as a right to value, as a separate asset, then it is improper and impermissible and unfair and inequitable for the bank to simply have transferred a hundred percent of the value of this litigation to JPMorgan and now claim that we have no value at all, when on the face of the document, it is so clear that what we have is a right to value.

I really have nothing else to add at this point, Your Honor, other than to just emphasize that we are uniquely situated here. We, among -- we have a claim on an asset. The other entities here and constituents here are fighting over residual value to the waterfall. We're not trying to take away anything from anyone. We want simply our asset to be recognized by this Court for what it is, which is a right to value that survives the demise of Washington Mutual and provides continuing value, attributed and derived solely from the Anchor litigation. Thank you.

THE COURT: Okay. Thank you. Thank you.

(Pause)

MR. ROQUEMORE: Good afternoon, Your Honor. Your Honor, James Roquemore. I represent -- Greer, Herz and Adams.

We represent American National, known as the Texas Group in this case.

American National and other insurance companies are the plaintiffs in American National v. JPMorgan, as Your Honor knows. And I thank you for the opportunity to rise and be heard in our objection to the plan and the global settlement agreement that's incorporated into the plan.

Your Honor, the Texas litigation does not belong in this bankruptcy plan. It does not belong in the global settlement agreement. Your Honor, none of the Texas Group has filed a claim against the debtors. And there's absolutely no connection between the claims asserted in the Texas litigation and the debtors or the debtors' property, other than the fact that a defendant in the Texas litigation, JPMorgan, and an intervener, FDIC, also had litigation with the debtors. And they found it convenient to wrap up the Texas litigation in the plan of confirmation, a global settlement agreement, to attempt to extinguish the Texas litigation.

THE COURT: Well, if the release language is as they describe it, that is, they are not waiving any direct claim the Texas plaintiffs may have, and the debtor is only waiving any derivative claims it may have against JPMorgan, how does the plan affect you at all?

MR. ROQUEMORE: Well, there's two things. Number one, the plan language is not clear -- it is clear, according to the

plan and to the statements of counsel and according to the pleadings filed by counsel, that there are no releases that affect the Texas litigation. However, they don't say that there's no injunctions that apply to the Texas litigation.

Mr. Smith was on the stand. He was hedging and did not commit that the plan does not --

THE COURT: All right. If that's clarified, if none of the language of the plan has any effect in releasing or enjoining your direct claim, but is only dealing with the derivative claim, how are you harmed by the plan?

MR. ROQUEMORE: We're harmed by this residual obligation that the debtors are assuming under Section 2.7. We believe that under 2.7, it requires a reasonable best efforts on the behalf of the debtors.

If the debtors do not own the Texas litigation claims, which Your Honor, I'm going to circle back to that point, because it's our contention that the debtors have committed themselves to a position where they do not own the Texas litigation claims, there is no releases that -- or injunctions that could apply through the bankruptcy court, and therefore there are no obligations that the debtors could have to make any efforts in seeking dismissal of the Texas litigation in the District of Columbia court.

THE COURT: Well, again, when I questioned them, I think JPMC's counsel made it clear that that obligation only

relates to dismissal with respect to any claim that the debtor or conversely the FDIC may have. So if it's limited -- the 2.7 obligation is limited to that, again, how are you harmed?

MR. ROQUEMORE: We are concerned that the plan language and the global settlement language are unclear, and that when we return to the District of Columbia, that the parties with a -- unless there is language in the confirmation order that makes it clear that there are no releases, injunctions, or bars that apply to the Texas litigation or the Texas litigation plaintiffs, and that there has been no determination regarding the debtors' ownership of the Texas litigation claims --

THE COURT: By me? Okay.

MR. ROQUEMORE: Excuse me?

THE COURT: By me.

MR. ROQUEMORE: By --

THE COURT: A determination by me.

MR. ROQUEMORE: -- by you. And if Your Honor accepts my argument that I'm going to present that the debtors do not own the claims, we'd also ask for a ruling of the Court that the debtors have no obligation under Section 2.7 to file any kind of -- any stipulation in the District of Columbia court.

THE COURT: Well, just as I don't think I'm prepared to make a determination that the debtor owns your claim, I don't think I'm prepared to make a determination that the

debtor does not own your claim. Shouldn't that be determined by the court who hears the ANICO claim?

MR. ROQUEMORE: Your Honor, that would certainly be appropriate. However, the debtors here -- the evidence before the Court, I believe, is sufficient for you to rule that the debtors do not own the claim. The only plaintiffs in the Texas litigation are WMB bondholders. The clear testimony of Mr. Kosturos was that the debtors do not own the claims against JPMorgan by WMB noteholders.

In addition, the debtors have stated unequivocally that there are no releases that apply to the Texas litigation. Whether or not through 43.2(c), which are claims of -- release of claims owned by the debtors; or of the -- I think it's 43.6, the subsequent amendment.

THE COURT: No, I think they are saying that the debtor is releasing claims it has against JPMorgan.

MR. ROQUEMORE: Yes. But they don't say -- they're saying that there are no claims that we have asserted in the -- there are no claims in the Texas litigation that are released against JPMorgan.

THE COURT: I'm not sure they're saying that. They're saying that any claims you own that are direct claims are not being released.

MR. ROQUEMORE: Um --

THE COURT: So why can't we work out language that

says that?

MR. ROQUEMORE: We could, Your Honor.

THE COURT: To protect you.

MR. ROQUEMORE: We've discussed with the debtors in that regard. Our concern is that -- our concern is that we do receive specific language in the order that protects our rights to pursue the Texas litigation. And to the extent that Your Honor is not ready to make a ruling, we'll not press that issue.

THE COURT: Okay.

MR. ROQUEMORE: I would just conclude that to the -- well, no, I'm going to close it up right here. I appreciate it. We've gotten everything that we asked for here. Thank you.

THE COURT: Okay. Thank you.

MR. JARVIS: Good afternoon, Your Honor. Geoff Jarvis, Grant & Eisenhofer, on behalf of the WMB noteholders. I'm here for the first time, I guess, in many months.

As Your Honor will recall, the WMB noteholders are a subgroup of some noteholders that were originally represented by Mr. Flaschen. We represent only with respect to certain misrepresentation claims that are being pursued against WMI. And we're here to address the classification of those claims in the event that Your Honor does not -- in a hearing that is being held, I believe next week -- order that these are

subordinated under Section 510(b).

The plan provides -- as you'll recall, we are insurance companies and investors who purchased WMB, both junior and senior notes, prior -- well prior to the plan filing. We've alleged that we have violation of the Federal Securities Laws, fraud laws, and that we should be able to pursue those claims against WMI.

The plan provides that if we are subordinated under Section 510(b), we end up in Section 18. And if Your Honor were to determine that next week, which I don't -- hope that Your Honor will not, but if you do, we don't have any plan objection. Okay? If we're in 18, we're in 18. If Your Honor, on the other hand determines that we are not in Section 518 (sic), that our claims are not subordinated, next week, then right now we're in Class 17(a) for the senior and 17(b) for the subordinated WMB noteholders.

And what is the impact of that with respect to these claims? If we're in 17(b), which is where the subordinated noteholders go, then under Section 21(c) of the plan, our claims are deemed denied. In other words, we go to Your Honor, we prove that they're not subordinated. Before we get a chance to even prove that they're a valid claim, they just say nope, they are rejected, disallowed in the parlance -- I'm more of a securities lawyer, so, I may get the parlance a little off.

With respect to the senior noteholders what happens?

They are put in Class 17(a); 17(a) splits 315 million dollars among all senior noteholders, depending not upon when you bought, what kind of claims you may have, but merely on the fact as to whether you own the bonds at this particular time. And I believe they are shared pro rata.

So to the extent that I have some of my senior noteholders who, for example, have sold their bonds, they're in 17(a), they get no distribution whatsoever. To the extent that they hold some bonds, they're required to give up all of their potential misrepresentation claims, and they get nothing at all for those misrepresentation claims that they don't simply get as a holder of the notes -- what I would call the derivative claims.

Well, how have the debtors responded to what I consider to be -- what is wrong with this? I mean, I think two things. First of all, the plan itself cannot disallow a claim. And what's that they purport to do in Class 17(b). They just say you're disallowed. I mean, the exact language is, the plan states: "All WMB subordinated claims, to the extent that they are not Section 510(b) subordinated WMB note claims," in other words, we're not subordinated, "shall be deemed disallowed." If that's not a plan disallowing and adjudicating a claim, I don't know what is.

Second, with respect to my senior noteholders, as I alluded to just a second ago, they're being placed into a class

primarily with people who just hold notes and have straight derivative claims that are being settled for 350- or 335 million, whatever that number is.

My guys have -- some of them have those claim, some of them don't. But they're being required, effectively, in order to obtain the derivative claims, to give up direct claims. And that is an impermissible classification. They're being treated differently. Some people are getting the exact same distribution. They own a hundred bucks worth of notes. They don't have a direct claim. They get whatever the proportionate pro rata share is. They do have a direct claim, they have to give it up and they get the same pro rata portion direct share.

In effect what they're doing in 17(a) is disallowing my claims without paying me for them. And we've raised these, obviously, objections. And what have they said? Well, they sort of ran three arguments that I must tell you, I mean, to me, range from the disingenuous to the downright misleading.

First they say well, let the claims process run its course. And I say yeah, that's great. I let the claims process run its course, particularly with respect to my junior noteholders, and I beat subordination, I prove my claim. What happens? Oh, it's disallowed. So in other words, it's great. Let the plan run its course. Heads I win, tails you lose. I have no place to get money there. Anything I do, however it comes out, they win, I lose. So I don't think there's a lot to

letting the claims process run its course. It doesn't really answer the objections I'm bringing.

Well, then they say okay, fine. The senior noteholders negotiated this deal and you should rely on them. Well, I can tell you that the noteholders who negotiated this deal aren't me. I was never in any way contacted nor were any of my clients. It was, in fact, primarily a group of senior noteholders that simply do not have, for the most part, misrepresentation claims. I mean, I think there was a -- as you recall the whole brouhaha over 2019, some people didn't want to file and say exactly what they owned. We did. Why? Because we knew we bought well before the plan.

Well, a lot of people didn't. I think a lot of them were in that particular group that was represented by Mr. Anker at the time. And that was who negotiated this deal. Well, that's not us. You can't say because they decided to give away your rights, you don't have any rights. It doesn't work like that either.

So what's the third and what I think the crux of their response? They say well, you know, really your misrepresentation claims are derivative claims. To which I said gosh, I thought I stood up here in August -- in April and we argued this out and Your Honor found just the opposite.

So they present three arguments. And I'm going to read one of them, just because frankly, this is where I think

it's misleading, I mean in a real sense. This is in a section of their objection dealing with the claims brought by my group. And they say: "Class 17(b) is not receiving a distribution pursuant to the plan because by admission the claims in 17(b) are derivative claims. In fact, counsel for the Washington Mutual Bank noteholders group has stated, 'we didn't hide in our proof of claim that recoveries should be on behalf of the bank'."

Well, that's a nice quite, I guess, if I made it. Except I didn't. No one representing my clients made that quote. In fact, I believe it was made by Mr. Flaschen who represented at one time my clients, but as of the time of this particular hearing that they're quoting from, did not.

But what is really misleading is the way they quoted it. Because here's what Mr. Flaschen really said. He said: "We didn't hide in our proof of claim that recovery should be on behalf of the bank. We put it right in footnote 1. We put it in each count other than the count on misrepresentation which separate counsel will address." They neglected to include that part of the quote in their objection to my particular thing. So that's their first argument as to why we are a derivative claim. You know, that's just not accurate. I don't quote things like that by dropping off the part that says "yes, except but".

Now, they also take the position that in April when

Your Honor basically said that we had standing to bring these claims, that you did not determine that the misrepresentation claim was a direct claim.

Now, I know Your Honor knows what Your Honor thinks, and I'm not going to dare tell Your Honor what Your Honor thinks on this issue, but I knew though, what Your Honor said at the time. And at the hearing, you said, I think that the essence of their claim is a direct claim, and not a derivative claim, and I think Hayes makes that clear. This was in the colloquy that we had on this issue. So for them to come before you and say well, the reason I can't get treated the way I am is because I'm a derivative claim, flies, frankly, in the face of everything that this Court has said on this matter; which, albeit, to date, isn't all that much, but it was fairly dispositive. I mean, they made this derivative argument, it was the centerpiece of the argument they made back in April, and Your Honor rejected it. And now here we are again, same thing -- and nothing else, I might add; that's what they've got.

And what is really bad about what they've done, is in their claim for adversary proceeding, to subordinate my senior guys. With respect to my junior note holders, they've done it through a plan -- through an obj -- claim objection that we're going to argue next week, they filed a complaint with respect to my senior guys. They did it differently -- I don't know, I

think -- frankly our argument next week on the junior guys will probably resolve the issue, one way or the other, because Your Honor will say what you think.

But what do they say about this direct derivative in their complaint? Same people; different -- different draftsmen. They said, in the amended complaint, paragraph 3; indeed, the Court's holding that the WMB note holders and marathon creditors have standing to assert direct misrepresentation and other securities fraud claims, dependant on the Court's conclusion now. Then they quote Your Honor. So, they specifically note their direct claims, in their own complaint against me, then have the audacity, in their objection, to my client objection, to say they're derivative claims.

Your Honor, you should take my direct misrepresentation claims, I argue, put them in Class 12. Class 12 is unsecured creditors -- in the event that Your Honor chooses not to subordinate them. Your Honor subordinates them, they're in 18; if not, they're in 12. And to the extent that some of my senior note holders have, in order to obtain a recovery with respect to their derivative claims, been forced to effectively, waive their misrep claims, I would ask Your Honor to undo that, and to allow the misrep claims asserted by everyone to go into 12 or 18, depending upon whether, in fact, Your Honor decides to subordinate them.

And with that, Your Honor, I will be brief, and done.

THE COURT: So, say it again, you think that you're entitled to both a derivative and a direct claim?

MR. JARVIS: I think that there -- yes. Because they're totally different claims, Your Honor. I mean, derivative claims are -- that were brought on behalf of WMB against WMI, against JPMorgan, against the FDIC, they were related to things that we've been talking about here for days; the tax return, et cetera, et cetera. That's one credit recovery. My guys are different from virtually anyone else who has come before you with respect to these claims and said, look, we brought a claim, saying that under the federal securities laws, we were misrepped. We wouldn't have bought these -- I mean, Your Honor is aware of the arguments; and that they should be entitled to pursue those claims, that because they took one cent or two cents on the dollar, which specs their derivative claims, that they should be precluded from bringing these much more potentially valuable direct claims. I mean the alternative is to say, I'm going to give up anything at all on the hope over here, and I don't think that's a choice they should be forced to make.

Thank you very much, Your Honor.

(Pause)

MS. SPIGEL: Good evening, Your Honor, Robin Spigel, Willkie Farr & Gallagher, counsel for Truck Insurance Exchange

and Fire Insurance Exchange.

Your Honor, my clients filed the limited objection to the plan, based on the third-party releases in the plan. My clients are insurers that are owned by their policy holders. The debt -- they hold debt issued by Washington Mutual Bank, on behalf of those policyholders. They also hold debt on behalf of those policyholders that have been issued by Washington Mutual's special purpose entities, as well as JPMorgan. They are -- they're provided operational services by a company called Farmers Group, Inc., which is related to Zurich Financial Services, which is also an insurer, and based on the way the releases are currently drafted, it's unclear as to what exactly has been released; I know other people have said this. We have a slightly different twist here, because my clients would actually be willing to give releases, if they were more narrowly tailored to just related to my clients' claims, and not on behalf of all affiliates -- and not on behalf of -- and not on behalf of all affiliates, and to be clear as to what claims are being released, and that they're not being released on behalf of their insurance claims.

Applicable law in this circuit requires that the third-party releases be granted in -- or they can be granted in extraordinary cases but it needs to be fair and necessary to the reorganization and supported by factual findings, including that there was fair consideration. As other people have said,

there can't possibly be -- the debtors couldn't have possibly met this burden in -- because we don't know who's being released. We don't know exactly what claims are being released. The fact that released -- related parties are being released, or affiliates are being released, but we don't know exactly who they are, we can't possibly -- they can't possibly meet their burden of proof. Their factual support for this expansiveness of the releases is that they're imminently reasonable, as well as the fact that they're -- that it's integral to -- it's an integral component of the global settlement agreement.

When you look at Section 2.24 of the global settlement agreement, and it talked about planned release matters, it's narrowly tailored; it talks about "the plan shall provide to the fullest extent legally permissible that any person" -- not any person and their affiliates, but any person -- "shall provide releases to certain parties, JPMorgan entities, et cetera, and all release claims and other claims such person may have arising from, or relating to, the claims or interest for which such party is receiving such distribution". In other words, it doesn't require -- the plan does not require these broad releases in order to comply with the global settlement agreement.

Further, with respect to whether it's reasonable or not, it just -- to us, it makes no sense that it can possibly

reasonable if you don't know who you're releasing.

So I'll keep that brief, and --

THE COURT: Okay.

MS. SPIGEL: -- we would ask that Your Honor deny confirmation until the releases are modified.

Thanks.

THE COURT: Thank you.

MR. MILLER: Good afternoon, Your Honor. Curtis Miller from Morris, Nichols, Arsht & Tunnell, on behalf of Tranquility Master Fund. Tranquility filed an objection to the plan, and as Mr. Rosen stated on Friday, Tranquility and the debtors had agreed upon language that resolved Tranquility's objection.

I'm only rising because the confirmation order we received this morning, that language was changed; in between this morning and now, I believe that we have an agreement on some language, but I haven't had a chance to speak with Mr. Rosen since the last break, so I just rise as to reserve our rights and hopefully I'll be able to reach an agreement in between -- in the next break, and I'll rise again, Your Honor, I guess, if I need to.

THE COURT: Thank you.

MR. MILLER: Thank you, Your Honor.

MR. TANCREDI: Good afternoon, Your Honor. James Tancredi, Day Pitney, I represent Keystone Partners, LP and Escrow Partners, LP, referred to as the Keystone Entities,

counterparties on litigation escrows, relating to the American Savings litigation.

I rise only to reserve my rights. We have worked out a stipulation with Mr. Rosen; I would reserve any concerns or issues that the Court has to when you hear that stipulation. Thank you, Your Honor.

MR. ETKIN: Good afternoon, Your Honor, Michael Etkin, Lowenstein Sandler, on behalf of the lead plaintiffs in three pending securities class actions that are pending out in Washington State.

Similar to the folks who just stood up to address the Court, we have reached an agreement with respect to the objections -- the confirmation objections that we filed on behalf of each of these lead plaintiffs and the classes that they represent.

Two of them are going to be the subject of separate stipulations which are -- which we've been drafting, needs some -- a bit of further wordsmithing as I advise Mr. Rosen, but in reviewing the document that was filed with respect to the status of objections, I think for the most part, it sets forth the agreement in principle, but for some further discussion, we have to have on some of the language, I don't think it's going to be a problem.

The third objection filed, in connection with the South Ferry litigation, is not going to be the subject of a

separate stipulation, but simply language that will -- we've agreed to, again, with some further wordsmithing, in the confirmation order itself. Obviously the confirmation order, all 105 pages of it, which we got this morning, we haven't had a chance to review yet, so, it obviously remains subject to a review of the confirmation order and some of these details that I've been discussing, but, with all of that taken care of, our objections should be taken care of as well.

THE COURT: Thank you. Anybody still opposing the confirmation that wishes to be heard?

MS. HARRIS: Your Honor, Donna Harris, on behalf of Tricadia Capital. We either have a resolution, or are very close, and if Your Honor would like to take a five-minute break so we can resolve the very last issue, we will know at the end of that break whether we or not we are completed.

THE COURT: Well, let me see if there's anybody else wishes to be heard.

MS. HARRIS: Thank you, Your Honor.

THE COURT: Anybody else?

MR. ROSEN: Your Honor, what I was going to suggest, is if we could take a brief break to determine if there's a need for us to respond in any way to any of the objections that have been voiced, and also, Your Honor, we would have to come back and just present those certification of counsels, or the stipulations that we filed last evening. So if we could just

have a few minutes to --

THE COURT: All right.

MR. ROSEN: -- discuss the issues.

THE COURT: All right.

(Recess from 5:10 p.m. until 5:33 p.m.)

THE CLERK: All rise.

MR. NELSON: Your Honor -- I'm sorry.

MR. ROSEN: I was just going to say -- Your Honor, one of the things I addressed with your earlier today was in what order you wanted to do the statements by any individual shareholders and the question is, would you like to address those now, or after we would respond to what we've already heard?

THE COURT: I'd like to hear from any individual shareholders who wish to be heard.

MR. ROSEN: Okay.

MS. SLATKO: Your Honor?

THE COURT: Yes.

MS. SLATKO: My name is Ilene Slatko, and with your permission, I'd like to be able to make my statement without interruptions?

THE COURT: Okay.

MS. SLATKO: As an individual shareholder and single parent, there's no doubt I'd like to see justice done and equity get paid. Counsel for WMI has expressly disavowed that

it represents equity and disclaims any fiduciary duty to equity whatsoever. Moreover, though equity has the equity committee, it cannot do certain things like seek the unsealing Dan Hoffman has requested, given its execution of confidentiality agreements.

Moreover, the objection argument I am making does not appear in the EC's objection to confirmation, but I believe it has strong legal validity. Therefore, there are some things that can, and should be, brought to this Court's attention, on behalf of the equity classes and only an individual shareholder, or group of shareholders, can do so.

At the outset, I'd like to say that I support, and reiterate, Dan Hoffman's objection to any provisions in the global settlement agreement, or plan, that provide for the abandonment of 1, WMI's lawsuit against the FDIC, or 2, abandonment of WMI's equity in WMB. Section 554 of the Bankruptcy Code, requires that property can't be abandoned unless it is shown to be of inconsequential value and benefit to the estate, and Mr. KosturoS' inability to state the value of the FDIC claims, urges that the motion to abandon should be denied.

And the balance of my statement refers to the treatment of WMB noteholders under the plan.

Your Honor, on April 6, 2010, this Court held a hearing on whether the holders of debt securities, issued under

WMB's global note program -- the WMB noteholders, had standing to assert the claims alleged in their respective proofs of claim. At that hearing, the Court said that "the essence of the claim is that the debtor misrepresented the financial condition of itself and WMB, and I think they've stated a claim for that. I think the essence of the claim is a direct claim and not a derivative claim." The Court also said that even if the claims were derivative, the WMB noteholders' claims would not be dismissed, saying "at this stage, I'm not going to dismiss them, because in the event the FDIC does not pursue them, the noteholders may be given the right to pursue them. Even if it is a derivative claim, if the FDIC does not pursue it, the noteholders may ask for standing to bring it on behalf of all creditors. If the FDIC does pursue it, and either wins the litigation or settles it, then the noteholders would not have separate standing to bring it"; and that's from page 130 of the transcript of the April 6th hearing.

Under the GSA, the FDIC has settled its claims against WMI, so under the Court's April 6th ruling, the WMB noteholders would not seem to have separate standing to bring their claims if the claims were derivative. However, because this Court has not ruled that the claims are direct, rather than derivative, the status of the claims is uncertain, and therefore it is unknown whether the WMB noteholders have standing to assert their claims against WMI. Nevertheless, WMI's plan proposes to

pay certain WMB noteholders 335 million dollars to extinguish their claims. And WMI has allowed WMB noteholders to vote on the plan as Classes 17A and 17B. With only Class 17A, the WMB senior notes claims, receiving any distribution under the plan. It is my information that Class 17A has voted to approve the plan and Class 17B, the -- WMB's subordinated notes claims, is deemed to have rejected it.

The FDIC, per the GSA, declined to sue and elected to settle with WMI. But whether the claimant against WMI is the FDIC or the WMB noteholders, either WMI is liable for a claim against it, or it is not. No hearings have been held to determine if the claims set forth in the WMB noteholders' respective proofs of claim have validity. For example, proof of claim number 2480, alleges breach of fiduciary duty and misrepresentation by WMI, but no hearings have been held to determine if WMI had a fiduciary duty to WMB noteholders, much less breached it, and no hearings have been held on the misrepresentation alleged either.

The WMB noteholders' claims are claims that should have been fully litigated to determine their validity, but this has not occurred. Instead, WMI proposes to give 335 million dollars on account of some of the WMB noteholder claims, and allow the claims to vote without any declaration of standing of the claims or vetting of the merits of the claims. By offering compensation for these claims, WMI acknowledges the allegations

underlying them have validity, which begs the question why WMI is willing to take the WMB noteholders' claims at face value.

Furthermore, if WMB noteholders' claims are allowed, and only after full vetting upon notice and hearing, why should they not be included in the claims of unsecured creditors? What makes the WMB noteholders so distinct from general unsecured creditors that they need to be classified in a separate class under Section 1122. Doubtless there are myriad litigation claims among the unsecured creditors substantially similar to the noteholders' claims. So Section 1122(a) would indicate that the WMB noteholders' claims should be placed among the general unsecured claims.

WMI has provided no evidence that the WMB note holders' claims are either valid or if so, are such that they should be in a class separate from the general unsecured creditors. Without a showing that the WMB note holders' claims belong in a separate class, WMI unfairly discriminates against the WMB note holders' claims by placing them in an impaired class below the unsecured creditors.

By placing the WMB note holders in a separate class and inducing them to vote for the plan through some compensation, those receiving a distribution will vote for the plan, as indeed Class 17A did, as an impaired class. And that will allow the debtor to satisfy Section 1129(a)(10).

It is my position that WMI has agreed to pay the WMB

note holders in order to secure their approval of the plan as an impaired class to satisfy 1129(a)(10) which is gerrymandering the voting process. As the Third Circuit held in In re: Machne Menachem, Inc. 2007 U.S. Appeals Lexus 9067, "we have previously stated vote manipulation by the gerrymandering of classes seriously undermines the critical confirmation requirements set out in Section 1129(a)(8) and Section 1129(a)(10)."

With these considerations in mind, the Third Circuit held in matter of Jersey City Medical Center, 817 F.2d 1055, 1061 Third Circuit 1987 that the classification of the claims or interests must be reasonable. Quoting the Fifth Circuit in In re: U.S. Truck Company, Inc. 800 F.2d 581, 586 Sixth Circuit 1986, the Third Circuit said, "There must be some limit on a debtors' power to classify creditors in such a manner to assure that at least one class of impaired creditors will vote for the plan and make it eligible for a cram-down consideration by the Court. The potential for abuse would be significant otherwise. Unless there is some requirement of keeping similar claims together, nothing would stay in the way of a debtor seeking out a few impaired creditors or even one such creditor who will vote for the plan and placing them in their own class."

In John Hancock Mutual Life Insurance Company v. Route 37 Business Park Associates, et el., 987 F.2d 154 Third Circuit 1992, the Third Circuit said, "Whereas in this case the sole

purpose and effect of creating multiple classes is to mold the outcome of the voting, it follows that the classification scheme must provide a reasonable method for counting votes. In a cram-down case, this means that each class must represent a voting interest that is sufficiently distinct and weighty to merit a separate voice in the decision, whether the proposed reorganization should proceed. Otherwise, the classification scheme would simply constitute a method for circumventing the requirement set out in 11 U.S.C. Section 1129(a)(10) 1988."

Finally, the John Hancock Court quoted the Fifth Circuit for the proposition that the one clear rule that emerges from otherwise muddled case law on 1122 claims classification "is that thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan". In the instant case, the WMB note holders' claims do not deserve to be placed in a class separate and apart from the general unsecured creditors because there are many unliquidated claims among the general unsecured class that allege substantially similar basis, sounding and contract or tort.

it is my contention that WMI has gerrymandered the voting process by putting the WMB note holders in a separate class and bribing them with 335 million dollars to vote for the plan as an impaired class. On October 21, 2010, WMI instituted an adversary proceeding for a declaratory judgment that the WMB

note holders' claims be subordinated to general unsecured claims pursuant to Section 510(b) of the Bankruptcy Code. In the complaint instituting that adversary proceeding, WMI said that it believes the WMB note holders' claims "are meritless". If the WMB note holders' claims are not valid either because of a lack of standing or because of the merits of the claims themselves, then the WMB note holders are not entitled to any distribution from WMI's estate. WMI's proposal to pay the WMB note holders 335 million dollars without any evaluation of the validity of the underlying claims is neither fair nor equitable under Section 1129(b)(1) of the Bankruptcy Code.

As a final point, of all of the disturbing revelations during these confirmation hearings, the one that shocked me the most was WMI's admission that without this Court's permission it transferred five billion dollars in estate property, the BOLI/COLI policies, to JPM for zero consideration and without this Court's knowledge or approval. But for the EC's cross-examination, this covert transfer of estate property would arguably -- that would arguably put some, at least some equity in the money, excuse me, would not have come to this Court's attention as the debtor obviously sought to evade judicial review through deception by silence.

This act of treachery against the estate and equity in particular, if undiscovered, would have strengthened the debtors' unrelenting mantra that equity is out of the money.

And therefore the company belongs to David Tepper and the other bondholders. But for the EC, this deception by silence might have served with the other evidence submitted by WMI through the GSA plan and testimony of WMI witnesses to induce the Court to enter an order confirming WMI's plan.

This illegal sub rosa gift to WJM was a fraudulent conveyance, a fraud on the Court by debtors' management and possibly its' counsel and without more, is enough for this Court to appoint a Chapter 11 trustee pursuant to Section 1104 of the Bankruptcy Code. Accordingly, in addition to requesting denial of confirmation, I hereby request that this Court enters orders, one, requiring immediate turnover of the BOLI/COLI property under Section 542 of the Bankruptcy Code and two, appointing a Chapter 11 trustee to manage WMI's affairs. Thank you, Your Honor.

THE COURT: Thank you.

MR. MAGNUSON: Hello, Your Honor. My name is Dave Magnuson and I'd like to make a few brief comments.

THE COURT: Okay.

MR. MAGNUSON: And, first of all, I understand common sense and logic better than bankruptcy law so I have to ask you, first of all, if what -- if I can give opinions -- you know, I want to make a few points. It'll probably take about three minutes.

THE COURT: Well, let me hear what your argument is.

MR. MAGNUSON: Okay. I've witnessed several things that defy common sense and logic. Many share holders from all over the world have sent in letters that have been filed in the court docket that have pointed out various issues with the global settlement agreement and the plan of reorganization. SO I'll not dwell on those, but -- and many of which I agree with. I would like to address a couple of my concerns.

Earlier this year Mr. Rosen stated that shareholders were attempting to milk money from JPM.

THE COURT: Um-hum.

MR. MAGNUSON: I know I've heard a lot of discussion about, you know, the words adversarial and conflict of interest and I believe that statement shows arrogance. Second point, earlier today Mr. Califanos (sic) stated that 16.7 billion of net deposit outflows occurred between 9/15/08 and 9/25/08. The connection -- I would like to make a connection with that and a letter that Cary Killinger (sic) wrote to Christopher Cox on July 17th of 2008 requesting that Washington Mutual, the sixth largest banking institution in the United States, be added to the do not short list. In my opinion, the connection is there that because they were not added to that list, the resulting panic, you know, drove the price down and actually caused the net outflows of the deposits.

On the debtors' response to objections to the plan of reorganization, they state that they can't disclose valuation

in case they need it to support their position if they lose at confirmation and they hide between work product on that point. This seems like circular reasoning to me because I believe proper valuation is needed to evaluate the plan of reorganization. I also believe that the purchase and assumption agreement with JPM isn't finalized and can still be amended by the FDIC, as we speak today.

Lastly, debtors' lawyers many times have mentioned how much legal fees were costing the estate. If they were actually -- if they were actually acting in bad faith, logic dictates that they should have to return the money to the estate. It seemed like a lot of time and money was wasted on the delay in document production to opponents, including arguments about the method, scope and contents of these documents.

To sum up, in my opinion, it's not about the money. It's about right and wrong. Because as we all know, there were people who will profit and people who will lose from this case regardless of the outcome. Asking a shareholder such as myself would he or she stands to make or lose from this is not relevant and I've been asked that by the media. It kind of irritated to. What is relevant, however, is whether there are individuals who will profit from wielding their power to influence the outcome in their favor by corrupting the process. Thank you.

THE COURT: Thank you. Does anybody else --

MR. THOMAS: Good evening, Your Honor. I did file an objection; it was number 6068, if I'm not mistaken.

THE COURT: And you're --

MR. THOMAS: Sorry.

THE COURT: Your name is?

MR. THOMAS: Nate Thomas, sorry, shareholder.

THE COURT: Okay.

MR. THOMAS: The objection was 6058 and briefly, a lot of the points that I wanted to go into have actually been touched upon. At the time of my filing, I hadn't seen much attention paid to what I saw as a pretty serious and glaring issue here. So, I'm going to try to, on the fly, cut out all the stuff that might be duplicative of earlier presentations.

I stand before you as a member of the PIERS contingency. They are the -- a junior subordinated debentures of Washington Mutual Incorporated. Basically, the trustee for them is Tom Kuzman (ph.) from Wells Fargo. And in conversations with him regarding the rights offering for the PIERS units, he indicated initially that he felt that was prejudicial in nature. He didn't see any sound business reason for allowing only holders of two million or more of worth of H's to have a chance at the rights offering for the new equity. And, you know, I spoke with him; a lot of the PIERS holders spoke with him and he actually -- according to him, he

contacted the debtors and tried to get clarification on what the reasoning was behind that. And upon following up with him, he responded that basically there was no real response given to him and that he was going to file an objection, which he subsequently did.

After that objection was filed, we followed up with him again and he, I think, dictated back the argument of the debtors that basically apples and oranges in the form of liquidation trust interests, creditor cash on the one hand and rights offering and equity in the new company on the other. As long as there was some equivalent value there that they were the same vehicle and thus, nobody was being discriminated against.

So, at that point, he indicated that if anybody in the PIERS class had any further issues with the plan that they would have to file an objection themselves. So I stand before you today.

THE COURT: Okay.

MR. THOMAS: Let's see. What I find really king of surprising about all this is it seems to me like all this is really going on in plain sight and I'm going to be focusing mainly on the 2010 statements and trading data for the H series, PIERS units over the past two years since filing for a bankruptcy.

And I want to say, I filed my objection -- I can go

through the, kind of, the legal points of all that. I'm not extremely well-versed in the legal matters, being a relatively recent initiate to the bankruptcy process. But this narrative form, I think, will explain the overall gist of what I see as occurring here and goes some way to explain the -- all the attachments and appendices in my objection.

So, at the October 18th hearing, Shannon Lowry Nagle of Fried Frank on behalf of the settlement note holders stood up in open court and stated, "Mr. Rosen referred to our lowest rung in the chain, basically. And we are them, we are approximately seventy percent of the PIERS." This is wholly disingenuous, Your Honor. The settlement note holders represent significant portions of all the upper echelons of debt in this case. Roughly ten percent of the senior notes, seventy-four percent of the senior subordinated notes and sixty-nine percent of the PIERS units. All this is according to the amended 2019 filing, filed on May 17th of 2010.

It could be argued, based on this, that they are the entire chain or ladder or whatever metaphor is most appropriate here. What's highly striking about this statement, however, is the admission that their clients own seventy percent of the PIERS units. From my understanding, this should be an impossibility. While it's true that 23 million PIERS units exist, initially only 10.7 million of these PIERS were registered and tradable on the exchange. Conversations with

debtors confirmed this and that an additional four to five million were sold to qualified institutional investors as restricted, nontradable securities. No explanation could be found for the balance of these twenty-three million shares.

So only about 46.5 percent of these 23 million units were available to be purchased, as evidenced in the trading data attached to my objection in Appendix F. I don't know if you have a copy --

THE COURT: I don't have it, but --

MR. THOMAS: Can I give you --

THE COURT: You may. Okay. Do you need this back?

MR. THOMAS: Not at all. I've got my --

THE COURT: All right, thank you.

MR. THOMAS: So, basically, this is an overlay among other things of the trading data behind the PIERS units from a period just -- actually, the end of 2007 all the way to present, roughly. And you'll see there's three sections. The top is the actual price per share. There's a calendar demarcation with the years and the months. Below that is accumulation distribution and below that is volume.

So basically, if you note on the left -- bottom left-hand side of that, those two lower quadrants --

THE COURT: Um-hum.

MR. THOMAS: -- there's a box indicating from the time of seizure which is marked September 25th, 2008. There's a

nadir in the accumulation. And from that point forward, up until March of 2009, the accumulation increases and peaks out at about ten million shares, which is -- correlates with the information that I had received at that time. Once that point was reached was when I contacted the debtors, tried to get clarification on this issue of tradable securities and so on and so forth.

So, in any case, so I have -- I'd like to know how they managed to get 70 percent of these units when only 4.5 percent were ostensibly available to be purchased. What's really interesting about that chart, though, is that the accumulation remains stagnant for the remainder of 2009 during the summer and it wasn't until the announcement of the federal -- the Worker Homeownership and Business Assistance Act which began -- actually, there's a better appendix for detail on that in Appendix I. And black and white, it doesn't really show up extremely well, but you can see the left, lighter shaded area indicates the announcement of that bill on September 10th, 2008. The border between the light and dark area indicate when the bill was actually passed. And then afterwards, I just shaded in the area of high activity.

So you can see, there's a little to no activity all summer long and as soon as that bill was announced, all of a sudden, volume and accumulation started back up. And somewhat miraculously, the accumulation peaked above ten million shares,

almost immediately, two million shares were bought in late October immediately proceeding the passage of this act.

So I'm intensely curious as to how they managed to do all this, knowing -- not only did they, you know, claim to hold a significant portion of these shares, but myself and many other retail PIERS share holders held, and not insignificant amount of these securities as well.

Ms. Nagle continued on in that hearing to state "the delays that everyone has discussed and is aware of in this case directly affect our clients. The cost of the consent of solicitation for the plan came out of our client's recovery." And the use of the word recovery here appears to be without irony which is similarly disingenuous as none of the four entities that Fried Frank represents held any of the PIERS securities until after the seizure.

You can see that in appendix D. There's a graphical breakdown above of the holdings per class of Washington Mutual, Incorporated debt by the settling noteholders, dark are denoting their ownership portion of this total class. And down below, you can see, according to their 2019 statements -- and their 2019 statements were obviously, purposefully vague. Other creditors in this case gave extremely detailed data of when they bought and sold securities, actual amounts, so on and so forth. This contingent obviously did not want to comply with that directive.

So, you can see, under the PIERS junior subordinated debt, there's the initial purchase price and the initial purchase date and the final purchase price and the final purchase date for all these entities for the PIERS notes. And the earliest of these was Appaloosa. They purchased their first tranche of the PIERS securities on September 29th as low as four-hundredths of a cent on the dollar. And I want to stress that. No four cents on the dollars. Four one one-hundredths of a cent. Owl Creek and Centerbridge didn't first purchase PIERS units until over a month late in November of 2008 at roughly two cents on the dollar. Aurelius didn't purchase the PIERS units until January of 2009 at appropriately three and a half cents on the dollar.

Sorry; one second, Your Honor. As far as I'm concerned, that remarkable display of investing acumen in and of itself is innocuous enough. However, the term recovery suggests the act of regaining or saving something of loss which is obviously wholly inappropriate here. That notwithstanding, to the extent recovery was a concern to Aurelius, Owl Creek and Centerbridge particularly, I'm curious to know how much recovery they expected to receive from the bonds they purchased above par. If you look to the WMI subordinated notes on appendix D, they all purchased the subordinated notes of WMI above par. So I'm wondering how recovery factors into buying the bonds of a bankrupt company above par.

So, Ms. Nagle further informed the Court that the fifty million dollars that we offered to settle with the bank bondholders came out of our clients' recovery. And upon hearing that statement, I wondered how roughly five percent of the PIERS recovery had been bargained away without any notification or consultation with the other members of that class. I spoke with the trustee for the PIERS debentures, with Mr. Kuzman at Wells Fargo, and he confirmed that Ms. Nagle and Fried Frank's client did own a majority of the PIERS class. That the fifty million settlement was initiated by them but they made the determination that figuring the claim wasn't worth pursuing and thus the settlement was signed off on by them. Apparently, nobody saw fit to consult with the remaining members of the class as Ms. Nagle's clients represented majority interest.

I've already noted that the term "recovery" is inappropriate but, barring that, her whole statement is superficially true. A more accurate statement would be, however, that the fifty million dollars given to the WMB noteholders, a constituency that doesn't have a valid claim against the estate, that money came from the lowest class of securities due some recovery under the proposed plan, a plan that was effectively engineered to stop short at that class by virtue of the settlement noteholders involvement in crafting the settlement agreement.

Again, this is only the lowest class of securities that their clients own a majority interest in. They didn't deign it fit to take fifty million out of their subordinated notes claims, they didn't see fit to take it out of their senior notes. And I'd like to remind the Court that Class 16 actually did reject the plan.

Ms. Nagle went on to say "I feel like I hammer people on a daily basis in this case. We've got to move forward. There can be no delays. I'm sure people on both sides of the table are mad at me and hate my phone calls but we've got to move forward. Our creditors are losing money with every day and every hearing and enough is enough." Let me be clear, Your Honor, I'm a simple retail shareholder. But there's a novel concept for recovery outside of this Court entirely. And -- I mean any creditor in this case, if seriously concerned about the potential for losing any proposed recovery here, has a way out. And that is simply to sell on the open market for above par.

All of WMI's senior notes have traded at or above par for the better part of ten months now since February of 2010. All of WMI's senior subordinated notes have now traded at or above par for the better part of nine months now since March of 2010. Any senior subordinated noteholder who wished to take the safe course of action has had more than ample opportunity to do so. Yet, as I've previously noted, these timid creditors

white knuckled as they placed orders, I'm sure, bought more WMI debt as recently as six months ago above par.

This was the first I could recall hearing Ms. Nagle in these proceedings. It struck me as odd that she was so heavily involved in the particulars of the global settlement. At the time, I was unaware of their holdings in the other classes of debt and figured that there wasn't much that could be done about their decision to gift fifty million of the PIERS recovery to the WMB noteholders as they were majority interest in the PIERS class.

Subsequently, I found the information included in the exhibits to my filing online, graphical representations of their holdings, analysis of PIERS securities, activities and relation and it became abundantly clear that something was seriously amiss. Testimony these past few says has confirmed all this and what's a more amazing revelation to me is that the estate is actually paying the settling noteholders' counsel for the benefit of basically precluding recovery to the PIERS class.

Originally, Aurelius and Owl Creek were represented by White & Case who represent what appear to be holders of largely senior indebtedness in WMI. And Appaloosa and Centerbridge were represented by Fried Frank. In an uncanny display of clairvoyance, JPMorgan initiated an order to compel them to comply with Federal Rule 2019 back in August of 2009. Some

back and forth ensued and in October 2009, right before the passage of the Worker Homeownership and Business Assistance Act, which I think we're all aware resulted in billions coming back to the estate, Aurelius and Owl Creek left the Fried Frank group -- the White & Case group and joined Appaloosa and Centerbridge with Fried Frank.

These four then proceeded to stall regarding compliance with Federal Rule 2019 until seven months later when they filed a purposefully opaque 2019 statement. But what they did impart was clear enough to illustrate their strategy to obtain a majority share of the PIERS units for purposes of gerrymandering the vote. For their majority holdings and the subordinated notes could not be realistically considered an impaired class after the extra billions in tax refunds came back into the estate. Also during the time they were accumulating this interest in the PIERS, the terms of the settlement, as sensibly known only to the insiders involved in crafting it at the time, Fried Frank's clients for clarity, were announced to the Court by debtors' counsel on March 12th of 2010.

And at least one of these insiders accumulated shares upon the adverse market reaction to the statement as evidenced by their 2019 filings. Another indicated that they purchased PIERS units -- issues surrounding availability of these securities again noted -- they indicated that they purchase

PIERS units all the way up until April of 2010, all the while being intimately involved with the settlement and plan negotiations. The most interesting to me was the FDIC's immediate protest that it hadn't agreed to the global settlement despite claims of the debtors to the contrary.

So here we are, we're faced with a plan that doesn't appear to have a single foundation in good faith with a coercive voting process, the 1.2 cost of voting graciously donated from the lowest class that Fried Frank's clients own, I might add, and wholly inappropriate releases that seek, among other questionable things, releases for willful misconduct. Sorry.

In summary, the global settlement was not negotiated in good faith; it appears it wasn't initially negotiated by the debtors at all, actually. The plan that resulted from this global settlement was not proposed in good faith. The details as far as valuation, work product, releases, etcetera are all irrelevant in light of this. Furthermore, actions by some of the settling parties and the debtors are transparent attempts to deliver the estate and reorganize the debtor into the same party's control.

We all now what a debacle the events leading up to the seizure of Washington Mutual Bank was but the parties involved there at least have the thinnest defense that it was a time of panic and uncertainty.

The parties here, post-petition, have no rationalization or justification, regardless of how weak, or what has transpired here. It reeks of bad faith, self-dealing, gerrymandering, failure to maximize the value of the estate, dereliction in performance of fiduciary duties, and, possibly, worse.

There's a subset of our population recently that seems hell bound on amassing as much money and power as they are able, at any cost. They've decimated our markets, destroying any faith or trust in investing in our country. They've stated that they're ahead of the law, knowing that likeminded compatriots on our legislature can be bought to custom tailor whatever bills and riders enable them to accelerate this behavior. They've abused the revolving door between the private and public sectors and making a complete mockery of our regulatory agencies. And it appears that similarly minded forces are threatening to do the same here.

The abject failure of Joshua Hochberg to give any consideration to the above, while probably the crowning feather in the cap that is his white-collar criminal defense career, leads me to suspect that it's unlikely the Court would find an unimpeachable party that might serve as the trustee in light of all that's transpired here. And as the developments regarding Tricadia have transpired after my filing I'm especially curious to see how the debtors attempt to rationalize their utter

failure to maximize the value of the estate by overlooking that the CCB claims are comprised largely of qualified creditors under IRC 382 and the likelihood that payment of the senior subordinated notes of WMI in full, and, instead, issuing them in reorganized common stock to CCB claims and current equity could result in the reorganized debtor with seventeen billion in unrestricted NOLs, as opposed to their inferior determination that only a few hundred million could be utilized by the reorganized company.

I know counsel for the debtor has stated that his eyes tend to glaze over when presented with potential for tens of billions more to come back to the estate, and while I hope that one day he can undertake some endeavor that he finds more engaging and personally fulfilling, the debtors disinterest in a gap of tens of billions of dollars suggest that they are unfit to continue this process.

For reasons above I don't see how any sane person could honestly declare this plan reasonable, let alone fair. But, at the same time, I don't know what ultimate solution I would request of the Court, Your Honor. Perhaps a resumption of the shareholders meeting board vote? I don't know. I await the Court's determination in those regards with great curiosity. But it's clear that more immediately the Court should suspend any determination regarding the plan of confirmation until the above has been more fairly investigated.

All other issues with the plan are, in my opinion, ancillary and to the fundamental flaw of bad faith. Thank you, Your Honor.

THE COURT: Thank you.

MS. NAGLE: Your Honor, Shannon Nagle on behalf of the settlement noteholders. I appreciate the statements made by Mr. Thomas, and just hope the Court would realize they are in the form of argument, and none of the documents that he produced to Your Honor are in evidence. Because we, obviously, dispute a lot of what he said.

THE COURT: Okay.

MR. STARNER: Greg Starner of White & Case on behalf of the WMI senior noteholders, Your Honor. I'll be very brief. We represent a group holding approximately 2.3 billion dollars in WMI senior notes, and I rise to voice our support for confirmation of the plan. Now, we have filed a limited objection, and as we've discussed on the record we have agreed to defer that limited objection subject to the preservation of our rights to pursue that objection and the issues raised in there when appropriate. And I just wanted to, basically, raise this issue. The confirmation order draft we've seen doesn't quite have the language I think we need for preservation of our rights. We've circulated some language to the debtors. We're hopeful that we can work out some appropriate language that, in effect, preserves all our rights with respect to the limited

objection so we can raise it at the appropriate time.

THE COURT: Okay.

MR. ROSEN: Your Honor, I rise immediately because Mr. Starner gave me language saying that we will not consummate this plan until, essentially, he's happy, and we're not going to agree to that, Your Honor. So I know he's filed something where he wants to assert his subordination rights. He had the obligation to come here today to do it. I know that's what Mr. Crowley has asked for. So I think that if he wants to assert those rights that he and Mr. Crowley can discuss those right now.

MR. STARNER: Your Honor, certainly that's not our intention at all. We have no interest, as you can imagine, in holding up this plan or confirmation or the effective date. We just seek to merely preserve all our rights to raise a limited objection when it's appropriate, once the reserves are set and we know whether or not that objection is moot.

MR. CROWLEY: Your Honor, Leo Crowley for the senior notes trustee. I want to be clear that while what Mr. Starner drafted is acceptable to the senior notes trustee I can't speak for the debtor. They have to decide for themselves whether it's acceptable.

MR. CURCHAK: Good evening, Your Honor. Walter Curchak on behalf of Wells Fargo, the indenture trustee for the PIERS. I just rise very briefly to echo Ms. Nagle's comments

that the comments made by Mr. Thomas, while I appreciate them in the context of argument, obviously are hearsay as to what he may or may not have discussed with Mr. Kuzman --

THE COURT: All right.

MR. CURCHAK: -- at the trustee, and I would like to address the Court's attention to Section 20.2, where, in fact, the plan was amended with the debtors' consent and in discussions with us to address a reallocation of values of their rights offering if, in fact, there were any values to the rights offering, to ensure that all holders of the PIERS got the same recovery. Thank you.

THE COURT: Has it been revised?

MR. CURCHAK: Oh, it's been in there for months. It's --

THE COURT: 20.2?

MR. CURCHAK: Yes, Your Honor.

UNIDENTIFIED SPEAKER: On page -- Your Honor, I don't know if you have the composite plan. On page 46.

THE COURT: I have it.

(Pause)

THE COURT: It was in there before it went out for a vote?

MR. CURCHAK: Yes, Your Honor.

THE COURT: Okay. All right. Thank you.

MR. CURCHAK: You're welcome.

MR. THOMAS: Your Honor, if I might with regards to that. The original objection that a lot of the PIERS holders had was that the rights offering prejudiced any holder with less than two million worth of the PIERS units.

THE COURT: How did it do that?

MR. THOMAS: Well, basically, you did not have any right, as somebody without at least two million dollars in PIERS units, to have any access to the rights offering of the reorganized company at all.

THE COURT: Is that correct? Mr. Rosen?

MR. ROSEN: Your Honor, there was a threshold, and I believe it was even in the testimony that was elicited during confirmation, the rationale for it, which was --

UNIDENTIFIED SPEAKER: Oh --

MR. ROSEN: I don't have it in front of me, but public company issues and not having small holders that would cause the company to become a public company. Numerosity issues.

MR. THOMAS: Well, Your Honor, respect --

THE COURT: Is it reflected in 20.2?

MR. ROSEN: The threshold?

THE COURT: Yes.

MR. ROSEN: I believe it is, Your Honor.

THE COURT: Where?

MR. ROSEN: 34.1. Excuse me, Your Honor. 34.1 it is in. That is the article dealing with the subscription rights,

Your Honor.

THE COURT: Give that to me again. 30.1?

MR. ROSEN: 34.1 on page 70, Your Honor. It's in -- Ms. Nagle is correct. It's in several places. 34.4 also goes through that issue.

THE COURT: All right. Well, I understand your argument.

MR. THOMAS: Your Honor, just briefly. Regarding -- I'm not sure about procedure and proper form here. Ms. Nagle's comments that my materials weren't part of the record. As a filed objection is that the case or --

THE COURT: Simply attaching something to an objection does not make it --

MR. THOMAS: It doesn't raise them. Okay.

THE COURT: -- part of the record.

MR. THOMAS: And as far as my conversations with Mr. Kuzman, what would be an appropriate way to submit that to the Court?

THE COURT: Well, is anybody objecting to that part of the presentation? If he were called to testify Mr. Kuzman --

MR. THOMAS: I'm sorry?

THE COURT: Let me see if there's any objection.

MR. CURCHAK: Your Honor, I have to object simply because I haven't had any conversations with Mr. Kuzman. I don't know if the conversation took place, if it -- and it is

hearsay, and he's not here to testify and respond.

MR. THOMAS: Right. My question is how would -- what would be the proper avenue? Should I ask somebody else? I'm sorry if I'm wasting the Court's time.

THE COURT: Well, I'm not sure how you could get it in here without him being present.

MR. NELSON: Your Honor, Justin Nelson --

MR. THOMAS: You want a transcript or --

MR. NELSON: I'm sorry.

THE COURT: Excuse me?

MR. NELSON: I believe because he's a settling party it's -- wouldn't it be a party admission?

MR. CURCHACK: Well, first of all, Wells Fargo is a member of the committee, it's not itself a settling party and certainly Mr. Kuzman is not a settling party.

THE COURT: Yeah, I'm not sure I can consider it.

MR. THOMAS: Okay.

THE COURT: But I understand your argument.

MR. ROSEN: Your Honor, we have several things to handle right now, including our response to what we heard, and I will be extremely brief, Your Honor.

With respect to the releases issue, several points. One, again, we believe what we said we think they represent, Your Honor. I know that there is an argument that when you look at the integration of all of the respective provisions of

the releases that one could argue that the equity holders are indirectly releasing their claims. Again, Your Honor, that is not our intent. And if it is by way of utilization of a definition that achieves that result, Your Honor, we would like to make clear on the record here that we'll modify that definition to make clear that we are not asking any equity holder to release a claim pursuant to 43.6 or any other provision of the plan.

Ms. Leamy stood up, Your Honor, and made a comment about the opt-outs and the fact that the ballot -- or the provision may have changed and it may not have been on the ballot at the time that people went and opted out of it. Your Honor, again, if this would clear up any confusion, we are happy to include in the confirmation order a provision that we will go and ask anyone who opted out if they want to change their mind. And I believe that is what Mr. Sacks had indicated that JPMorgan would be prepared to do. So we would give those people who opted out another opportunity to opt in.

There was a comment, Your Honor -- it was perhaps in a demonstrative -- by Mr. Nelson about the 5.5 billion dollar NOL. And Your Honor, we don't believe that at this point in time that NOL exists, but there was a statement or an inference that Mr. Nelson wanted the Court to draw that that was fully available and would be fully used and would be fully drawn down. Well, of course -- and of course as a corresponding

aspect to that there was a statement about the value of reorg WMI.

Of course, Your Honor, the equity committee put nobody on the stand to challenge the valuation that was performed by the Blackstone group and represented by Mr. Zelin on the stand. And of course they have retained Peter J. Solomon and they could have certainly put someone on to do that. But the usage of any NOL, Your Honor, has been testified to, has been included in the declarations, and somebody out there I know wrote a report about it at one point in time that said that it was actually speculative. And Mr. Zelin went through that on the stand that the usage of that was extremely speculative. And the fact that only thirty-one million dollars of subscription rights were actually exercised makes the usage of any NOL even more suspect because there isn't enough money to generate the kind of income that would utilize any NOL of that sort.

Lastly, Your Honor, for my comments, Mr. Jarvis made some statements and we don't believe that they have anything to do with what we're here today to talk about. He indicated that we will be back here next week. We have the proceeding with respect to his client's claims. We believe that, as he has represented so many times, he is here just to misrepresent or represent people who claim they have been misrepresented. So we will deal with that, Your Honor. We believe that is a Class

18 claim. There is a lawsuit pending with respect to that with respect to some people. They have not filed -- I believe Mr. Jarvis in April said that they were subject to the MDL. But of course they are not part of that, Your Honor; they are merely here because they filed a claim against the estate. We will take care of that, Your Honor, when we get together next week.

But one last point, Your Honor, and I apologize if I say the name wrong, Ms. Slatko, the references to the five billion dollars and the BOLI/COLI, Your Honor, that is not anything that is consistent with the record of this case and I would just ask the Court to consider that as her argument and not certainly the facts as we heard the testimony. I believe that Mr. --

THE COURT: Has the BOLI/COLI insurance been transferred?

MR. ROSEN: No, Your Honor.

THE COURT: Okay.

MR. HODARA: Your Honor, Fred Hodara, Akin, Gump, Strauss, Hauer & Feld for the official committee of unsecured creditors.

I'll respond to two points that were made by Mr. Steinberg with respect to post-petition interest and keep my comments to that. First, Mr. Steinberg made the point that the exception in 726(a), the proviso referencing 510, refers to all of 510 and not just 510(b). And accordingly, Mr. Steinberg

made the comment that therefore the PIERS class would have to be subject to the same effects as we were describing for the 510(b) creditors relative to post-petition interest.

We agree with him that all of 510 is implicated by the proviso, and in fact the plan that's before this Court was very carefully crafted to enforce all of the subordinations that Mr. Steinberg referred to, including with respect to the PIERS, so that the distributions under the plan, including distributions in respect of post-petition interests very carefully take into account the waterfall under 726 and under each level of the waterfall with reference to all of the subordinations in 510 which of course would be the 510(a) contractual subordinations -- that's the type of subordination that affects not only the PIERS but the CCBs and the senior subordinated noteholders -- and then 510(b) which affects, potentially, parties like Mr. Steinberg's clients, although it should never be lost in this discussion that that objecting party, to the extent that they have an interest, it is probably an equity interest which is subject to the further layer of subordination.

The second point is I referred in our comments to the interrelationship between the best interests of creditors test and then the 726 waterfall. I should have also referenced the absolute priority rule in 1129(b)(2)(B) which provides that classes of creditors, unsecured creditors, can be crammed down. And here we do have at least two classes of creditors, the CCBs

and PIERS, that had voted against this plan and have to be crammed down and who could be affected if the results that Mr. Steinberg and others are asking for were to happen to move value down the capital structure to parties fully subordinated to the PIERS and the CCBs. And the provisions, of course, of the absolute priority rule say that the plan can be successfully crammed down if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property". And the Dell Corning case that we referenced earlier, and which is probably the leading case on the application of the contract rate of interest, expressly referred to the absolute priority rule in reaching its conclusion that not only was interest required but interest at the contract rate was required.

Thank you, Your Honor.

MS. SLATKO: Your Honor, I don't mean to disagree with Mr. Rosen, and I apologize to the Court because I don't have my notes with me -- maybe someone on the EC can help me -- but we did hear on a cross-examination that BOLI/COLI was liquidated or sold and then it was -- he said, oh, maybe I made a mistake, but there was definitely testimony to that.

Thank you.

THE COURT: Well, I'll review the transcript.

MS. SLATKO: Thank you.

MR. NELSON: Justin Nelson for the equity committee. The reference, Your Honor, is that December 2nd transcript, page 104, line 16. I will be very, very brief, less than two minutes.

With respect to the PIERS issue there is testimony in the record -- it's excerpted on slide 25 in our presentation -- about this two million dollar issue, about how even if there is subscription rights and even if there's the issue, they're not getting their worth. With respect to -- again, with respect to the PIERS, it is treated as tier I capital under the regulatory scheme. But I rise briefly just for those points and that's it. Thank you.

Oh, I'm sorry, that citation for Kosturos to the rough --

UNIDENTIFIED SPEAKER: Yeah, that's all we have over here.

MR. NELSON: Oh, okay.

(Pause)

MR. CURCHACK: Your Honor, Walter Curchack again, just to correct the record and be sure it's clear, the reference that I should have made when I referenced Section 20.2 is actually Section 20.4. There are two reallocations of value within the PIERS class to be -- to ensure equitable treatment within the class. And Section 20.4 is the one that specifically references the subscription rights and indicates

that the recoveries, however they're received by anyone who elects to exercise the subscription rights, and I'll quote, "shall be reduced on a dollar for dollar basis by the value attributable to the subscription rights". That's on pages 46 and 47 of the plan.

(Pause)

THE COURT: Okay.

MR. CURCHACK: Thank you, Your Honor.

MR. ROSEN: Your Honor, there are a few more housekeeping matters, I think, before we close the proceedings for today. Oh, first --

MS. EDMONSON: Good evening, Your Honor, Jamie Edmonson of Bayard on behalf of Elliot Management Corp. We filed a motion to shorten notice and an expedited motion with respect to amending an election under the plan. My co-counsel, John Shaffer from Stutman, Treister & Glatt is on the phone. I don't believe there were any objections; at least none were filed. If you have any questions we'd be happy to address them.

THE COURT: The debtor has no objection to their amending their election rights?

MR. ROSEN: We do not have an objection, Your Honor.

THE COURT: Anybody else?

All right, then I'll grant the request. Was there a form of order with it?

MS. EDMONSON: Yes, there was, Your Honor.

THE COURT: All right, do me a favor and file a certification of no objection with that form of order.

MS. EDMONSON: Yes, Your Honor, I'll do so.

THE COURT: And send it to chambers. Thank you.

MS. EDMONSON: Thank you, Your Honor.

MR. NELSON: I'm sorry, Your Honor. Justin Nelson for the equity committee. Literally fifteen more seconds. I just need to correct the record on one point. With respect to the NOL issue that Mr. Rosen mentioned, on the rough draft of yesterday's page 76, lines 20 through 25 and then page 77 through line 3 discuss Mr. Zelin agreeing that the entire 5.5 billion dollar NOL would be available.

THE COURT: All right.

MR. ROSEN: Your Honor, before counsel for Tranquility had stood up -- and I wasn't sure if we had announced that we had reached an agreement as to what the language would be so that the Tranquility objection has been withdrawn.

With respect to the Tricadia objection, Your Honor, the parties have reached an agreement and Tricadia is agreeing to withdraw its objection to confirmation of the plan as well.

Your Honor, we did file, as the Court had requested, the chart summarizing those that were resolved, and I think I've gone through all of those already. But we also filed last night, as we had talked about with the Court, two

certifications of counsel, one relating to the agreement with the BKK defense group, California Department of Toxic Substances Control -- oh, do you want me to --

MS. HARRIS: I just want to clarify that.

MR. ROSEN: I apologize.

MS. HARRIS: I'm sorry, Your Honor, I just wanted to clarify that Tricadia has reached agreement and we're reviewing the language now.

MR. ROSEN: Yes.

MS. HARRIS: I didn't want Your Honor to think that it was completely done, but it's just subject to getting all the words right.

MR. ROSEN: I apologize, Your Honor. Ms. Harris is correct.

So Your Honor, with respect to the BKK one, as I indicated, we did file this under certification of counsel last night and ask the Court to approve the settlement agreement among the parties. As I indicated on the record yesterday, and I believe Ms. Murray was here then -- I don't know if she is here now or on the phone or Mr. Potter on the phone. What this does is it further enhances the debtors' estate by ensuring that there won't be any claims remaining against the debtors' estate and at the same time it increases -- I don't want to say the exposure but enlarges the agreement by JPMorgan Chase to make sure that they satisfy any and all claims that were

against the estate. So it is a significant benefit to the debtors, and Your Honor, I would ask the Court to enter the order that we have filed with the Court approving the transaction. I do have an original here.

THE COURT: Well, do you want me to approve it outside of consideration of confirmation or is this only something that would be approved as part of the confirmation?

MR. ROSEN: Your Honor, it is subject to. But we want --

THE COURT: I thought so.

MR. ROSEN: -- I want to hand it up to the Court if you would accept it.

THE COURT: You can hand it up.

MR. ROSEN: The second certification of counsel that we filed, Your Honor, relates to the American Savings litigation and an agreement with respect to the Keystone Partners, Keystone Holdings, et cetera, and we attached to that a proposed order, Your Honor, a stipulation dealing with the issues associated with it.

Specifically, Your Honor, what we wanted to make sure was that the relationship of the parties was going to continue and that nothing contained in the agreement itself, by way of the global settlement agreement or by way of the stipulation and agreement that we have here, is going to impact any of the parties' rights with respect to the existing litigation, the

American Savings litigation, and likewise, consistent with the Section 2.13 of the global settlement agreement, is not intended to any way impact the rights or enhance the rights that anybody might have in connection with defense of any of the claims that are asserted in the American Savings litigation. Again, Your Honor, that will be subject to the agreement of -- or the Court's entry of the order with respect to the confirmation and approval of the global settlement agreement.

Mr. Tancredi is here. He represents the Keystone parties.

Do you want to --

MR. TANCREDI: Yes. If I might address the Court just briefly, Your Honor?

THE COURT: Yes.

MR. TANCREDI: The other thing this agreement does, Your Honor, it embodies by complete reference all the escrow agreements that are the underlying agreements between the parties. Our objection was one to both confirmation and assumption and assignment. It resolves some monetary disputes between the parties as to the exercise of the formula for distributing the assets in the litigation trust paying out some 6.8 million dollars to the Keystone parties and refining the distribution formula as it goes forward so that there are no disputes between the parties, and it takes cognizance of the

fact that stock is being extinguished.

MR. ROSEN: Correct. Mr. Tancredi is right, Your Honor. There was a 6.8 million dollar issue. When we deposited into the escrow of the Court the fifty-five million dollars there was a right of the Keystone parties to draw down on the escrow, take some cash out. There was a stub piece, 6.8 million dollars, that we disputed the entitlement to take out of that escrow. We now have reviewed all of the information and as part of this we are agreeing to allow them to take that out of that separate escrow. Not the fifty-five million dollar escrow, Your Honor, but the escrow that is not subject to the jurisdiction of this Court.

THE COURT: Okay.

MR. TANCREDI: Other things it accomplishes, Your Honor, so that the escrow agent is not in the middle of disputes over distributions, it provides an expanded indemnity and hold harmless to the escrow agent; it withdraws our claims in the bankruptcy case, Your Honor; it amends the schedules of the assumed contracts; and it provides that the confirmation order will provide some clarity that nothing in the global settlement was intended to affect, impair, or otherwise adversely undermine the continued maintenance of the American Savings litigation and the escrow arrangement.

MR. ROSEN: Yes.

THE COURT: Okay.

MR. TANCREDI: That's it, Your Honor. We would ask for the Court's approval. It does satisfy our objection and the requirements of 365 as well.

MR. ROSEN: Your Honor, may I approach?

THE COURT: You may.

MR. ROSEN: Lastly, Your Honor, counsel for Relizon had asked me to repeat what was said the other day which was that he's withdrawing his claim -- his objection, excuse me.

THE COURT: Who is this?

MR. ROSEN: That would have been good, though. Yeah. Counsel for Relizon, who I don't believe is here any longer in the courtroom, has asked me to represent that the claim -- there was a pending claim objection, Your Honor, for months and months and months and the parties, actually as part of the confirmation process and the calculation of the vendor claims underneath the settlement agreement, were able to come to agreement with respect to that and counsel for Relizon is withdrawing their objection to confirmation of a plan.

THE COURT: Okay.

MR. ROSEN: With that, Your Honor, I suggest that the matter is fully submitted to the Court.

THE COURT: All right. I'm taking this matter under advisement. I think it's clear I can't decide this on the fly. And I will consider the parties' argument as well as the brief they previously filed. All right, we'll stand adjourned.

MR. ROSEN: Thank you very much for your time, Your Honor.

IN UNISON: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 6:40 PM)

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

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

Dena Page

Digitally signed by Dena Page
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