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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE  
Case No. 08-12229 (MFW)

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In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court  
824 North Market Street  
Wilmington, Delaware

July 19, 2011  
9:33 AM

B E F O R E:  
HON. MARY F. WALRATH  
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

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**Confirmation Hearing**

**Transcribed by: Hana Copperman**

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DAN BULLOCK, Pro Se

LAWRENCE N. CHANEN, JPMorgan Chase

DALE CHAPPELL, Black Horse Capital

ADAM CHEPENIK, The Blackstone Group

ANDREW COLVIN, Peter J. Solomon Company

MATTHEW EHMER, Silver Point Capital

STANISLAV FEDORENKO, Centerbridge Partners

JEREMY FIELDING, Centerbridge Partners

BRYCE FRASER, Fortress Investment Group

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HELEN GRAYSON, ESQ., Washington Mutual Inc.

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ALSO PRESENT: (TELEPHONICALLY) (CONTINUED)

JOEL HAWKINS, Carval Investors

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

THOMAS KORSMAN, Wells Fargo Bank

KENNETH MALMAN, Appaloosa Management

JOE MCINNIS, Gray Wolf Capital

MICHAEL O'HARA, The Blackstone Group

DANIEL PHILP, White Box Advisors, LLC

DANIEL PINE, Marathon Asset Management

MICHAEL J. RENOFF, Scoggin Capital

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MICHAEL C. SCOTT, Venor Capital

KEVIN STARKE, CRT Capital Group, LLC

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P R O C E E D I N G S

THE CLERK: All rise. Please be seated.

THE COURT: Good morning.

MR. FOLSE: Good morning.

THE COURT: All right. Ready to proceed with cross?

MR. FOLSE: Yes.

THE COURT: Continued cross.

MR. FOLSE: Thank you.

RESUMED CROSS-EXAMINATION

BY MR. FOLSE:

Q. Good morning, Mr. Gropper.

A. Good morning.

Q. In your direct examination yesterday you described a meeting that you attended on May 6th with representatives of the debtors and their attorneys at Quinn Emanuel and Weil, Gotshal. Do you recall that?

A. Yes.

Q. That was the meeting that had been scheduled at your request after you found out that the debtors had made some sort of proposal to Morgan without consulting the bondholders, correct?

A. Yes.

Q. And on direct examination you testified that Quinn Emanuel had just been hired a couple of weeks before that? Is that correct?

1 A. Yes.

2 Q. And you testified that because Quinn Emanuel was new to  
3 the case you wanted your lawyers to brief them on all the work  
4 that your group had done analyzing the claims and  
5 counterclaims, correct?

6 A. Well, specifically, that we at Aurelius had done -- we had  
7 done a lot of work with Kramer Levin that we wanted to  
8 transmit, and I also mentioned that Elliot was there with their  
9 counsel at Stutman, Treister, who wanted to relay their work as  
10 well.

11 Q. All right. And I think you testified in response to Mr.  
12 Eckstein's questions that the debtors were in listening mode.  
13 Is that correct?

14 A. Yes.

15 Q. First of all, I'd like to see if I can refresh your memory  
16 about the date at which Quinn Emanuel was hired.

17 MR. FOLSE: If I could have the ELMO? And, Your  
18 Honor, this is docket 1116, so it's in the Court's record.  
19 It's the first monthly fee application of the Quinn Emanuel  
20 firm.

21 Q. Mr. Gropper, do you see where it says that on the date of  
22 retention, May 18, nunc pro tunc to April 3rd, so they'd  
23 actually been hired more than a month before the meeting.  
24 Isn't that correct?

25 A. From looking at this, yes. But they were still relatively

1 new to the case compared to ourselves and compared to Weil,  
2 Gotshal & Manges.

3 Q. They had, nonetheless, managed in twenty-seven days since  
4 being retained to put in 853,000 dollars worth of time on the  
5 engagement. Do you see that?

6 A. I do. But we're talking about a multibillion dollar  
7 litigation. That doesn't strike me as a very large sum at all  
8 for the lawyers working on this case to bill in their first few  
9 weeks.

10 Q. Well, let's, then, look at the second monthly fee  
11 application of the Quinn Emanuel firm. This has been marked as  
12 EC Exhibit 222, and this covers the month of May, and I want to  
13 direct your attention to, let's see, I believe it's page 20,  
14 and I think you'll find that in your notebook, Exhibit 222.

15 A. I apologize. What exhibit number did you say it was in my  
16 book?

17 Q. Exhibit 222.

18 A. I don't have that exhibit in my book.

19 Q. Let me put it up. It's --

20 UNIDENTIFIED SPEAKER: I have a copy for him.

21 MR. FOLSE: Okay.

22 THE WITNESS: This only has alternating exhibits. It  
23 doesn't have all the exhibits, the book that I have, so, I  
24 don't know if I have the wrong book or what, but --

25 Q. Okay. Do you have 222 in front of you now, sir?

1 A. Yes.

2 Q. I'll represent to you, Mr. Gropper, that the time  
3 descriptions show a significant amount of effort devoted to  
4 preparing and revising a slide presentation in the days leading  
5 up to the May 6th meeting with the creditor group, and if  
6 you'll turn to page 20, for example, you'll see there there's a  
7 May 5th entry of Attorney E.P. on May 5th. That refers to work  
8 on a PowerPoint presentation, attending a group meeting about  
9 it. There's an entry, several entries, actually, on this page  
10 that refer to this slide presentation. The May 5th entry by  
11 Attorney E.P. has 1.3 hours for a team meeting to review and  
12 analyze slide presentation to creditors. Do you see that?

13 A. I apologize. I don't. Now, I do.

14 Q. Okay. Thank you. And, then, if we turn to the next page  
15 there are additional entries. I haven't highlighted all of  
16 them relating to this slide presentation. It continues from  
17 the 3.1 hour meeting with the creditor group, and my question  
18 for you, sir, is does this refresh your recollection that apart  
19 from whatever your counsel or counsel for other creditors  
20 shared with Quinn Emanuel/Weil, Gotshal at this meeting that,  
21 in fact, the Quinn Emanuel lawyers made a presentation to the  
22 creditor group disclosing information about their own analysis  
23 of the claims and counterclaims with respect to JPMC.

24 A. That's not my recollection at all. I have no recollection  
25 of -- in fact, I affirmatively remember not getting a



1 presentation, slide or otherwise, from Quinn Emanuel. A number  
2 of those attorneys you've highlighted, I've -- I don't know who  
3 they are. I've never met them, and while we did attend a  
4 meeting with Quinn Emanuel they didn't, as far as my  
5 recollection goes, provide to us a slide presentation on  
6 anything.

7 Q. Near the end of the day yesterday I asked you questions  
8 about Aurelius's trading activity in May, 2009 after the  
9 confidentiality period ended, and your own attorney did as  
10 well. Did you recall that?

11 A. Yes.

12 Q. And at both times you testified that this was a period of  
13 time when Aurelius had taken in significant amounts of new  
14 investment capital. Do you recall that testimony?

15 A. I said we'd taken in new capital. I don't know if we  
16 said -- I said significant amounts.

17 Q. Isn't it true that, in fact, the May, 2009 period wasn't  
18 one in which there was a lot of capital influx into Aurelius?

19 A. No, we took in capital on both April 1 and May 1. I don't  
20 recall the exact amounts, but I know that we took in an amount  
21 that would cause us to -- buy positions to maintain their  
22 position size within the fund, and, as I also mentioned  
23 yesterday, we also received notice that we would not be having  
24 redemptions at the end of June, which clearly colored all of  
25 our trading activity during that time frame.

1 Q. Let me ask you to look at page 173.

2 MR. FOLSE: And if we could have the monitor switched  
3 to the computer?

4 THE COURT: Page 173 of what?

5 MR. FOLSE: Page 173 of Mr. Gropper's deposition,  
6 beginning at line 2.

7 Q. My partner, Mr. Sargent, was following up on some  
8 testimony you were giving, really, on the same subject in your  
9 deposition and asked:

10 "Q. What was the period in which you expanded your capital  
11 prior to this or around this time?"

12 You answered:

13 "A. Our capital has generally increased since -- I want to say  
14 August of 2009."

15 Mr. Sargent said:

16 "Q. But, okay, this is May."

17 And you said

18 "A. Oh, you know, I apologize. You're right. I had confused  
19 the years. This was not a period in which there was a lot of  
20 capital influx. I had the years crossed in my head."

21 Was that testimony true when you gave it in your  
22 deposition?

23 A. Well, it was true to the extent that my knowledge at the  
24 time. Subsequent to my deposition I went back and looked at  
25 our capital inflows month by month and matched them up more

1 precisely than I had. I didn't think I needed to prepare my,  
2 you know, have all our capital inflows memorized for my  
3 deposition, so I went back with precision to look at those and  
4 realized that we had taken in capital in April and May of 2009.

5 Q. Do you have those documents here today?

6 A. I do not.

7 Q. Mr. Gropper, if you'll look at Exhibit 8. Do you see  
8 Exhibit 8?

9 I showed you this yesterday, along with a table provided  
10 by JPMorgan that compared the debtors' March 12th proposal with  
11 Morgan's March 18th response, and I think you testified you  
12 didn't think you'd seen this e-mail because your name wasn't on  
13 it. Is that correct?

14 A. Yes.

15 Q. And if you look at Exhibit 9, which was the accompanying  
16 table, did you see this table?

17 A. Yes.

18 Q. And did you see the part of Exhibit 8 which is the e-mail  
19 from Morgan's counsel, Hydee Feldstein?

20 A. No.

21 THE COURT: Where are you referring?

22 MR. FOLSE: I was referring, Your Honor, to Exhibit 8.  
23 At the bottom --

24 THE COURT: Oh, 8.

25 MR. FOLSE: -- of the first page. There's an e-mail

1 that's been forwarded.

2 THE COURT: Gotcha. Okay.

3 Q. Mr. Gropper, please look at Exhibit 144. This is a  
4 document produced by Owl Creek in this case but is -- have not  
5 found it in Aurelius's production, and that's the same e-mail  
6 from Hydee Feldstein, Morgan's counsel, at the bottom, correct?

7 A. I haven't matched it up, but I'll take your word for it  
8 that it is.

9 Q. And at the top it indicates that, in fact, that was sent  
10 to you by Mr. Nichols at White & Case the day after Ms.  
11 Feldstein wrote it, correct?

12 A. Yes.

13 Q. So you did get this?

14 A. I suppose I did, but I don't recall getting it and I don't  
15 recall reading it.

16 Q. You don't recall reading it.

17 A. Correct. I have no recollection of reviewing this e-mail.  
18 I received this e-mail more than two years ago.

19 Q. Your recollection of certain things two years ago seems to  
20 be clear as day, but there seem to be e-mails that you have no  
21 recollection of having read despite the fact that you received  
22 them.

23 A. Mr. Folse, I receive 500 plus e-mails a day. I don't keep  
24 in my head every e-mail that I receive. I do keep in my head  
25 certain pertinent details that are necessary in order for us to

1 be represented properly in a case, but I don't think there's  
2 anything unusual about my not remembering one of 500 e-mails  
3 that I received two year and three months ago.

4 Q. How many hundred e-mails did you receive from counsel to  
5 JPMorgan Chase about settlement negotiation with the debtors in  
6 this case?

7 A. I don't know. Not hundreds, I hope. We produced whatever  
8 we received from their counsel.

9 MR. FOLSE: Your Honor, I would offer Exhibit 144 as  
10 well as Exhibit 145, which is the table accompanying the e-  
11 mail.

12 MR. ECKSTEIN: Your Honor, we would object. There is  
13 no foundation that this witness has any familiarity with that  
14 exhibit.

15 THE COURT: He's just testified he got -- he must have  
16 gotten it. It was addressed to him.

17 MR. ECKSTEIN: Your Honor, I think the testimony was  
18 that he understands his name is on it but he didn't recall  
19 receiving it or seeing it.

20 THE COURT: I'm going to overrule and admit them.  
21 (E-mail from Hydee Feldstein was hereby received as Equity  
22 Committee's Exhibit 144 for identification, as of this date.)  
23 (Table accompanying Exhibit 144, e-mail from Hydee Feldstein,  
24 was hereby received as Equity Committee's Exhibit 145 for  
25 identification, as of this date.)

1 Q. Let's move forward, Mr. Gropper, to late October of 2009.  
2 You testified that Aurelius and Owl Creek were asked to leave  
3 the White & Case group in late October, and then both of you  
4 wound up, within a matter of a week, retaining Fried Frank as  
5 your counsel, correct?

6 A. Not correct.

7 Q. Why don't you put it in your own words?

8 A. What I said yesterday is that Aureli -- Owl Creek choose  
9 to leave the White & Case group and about a week later that  
10 Aurelius was asked to leave the White & Case group and we did.

11 Q. All right.

12 A. And, then, a week later after that we joined Fried Frank  
13 group.

14 Q. All right. And once that happened the Fried Frank group  
15 then consisted of the four so-called settlement noteholders  
16 here, Appaloosa, Centerbridge, Owl Creek and Aurelius, correct?

17 A. Yes.

18 Q. And once Aurelius joined the Fried Frank group it's true,  
19 is it not, that you received a briefing from Fried Frank about  
20 the status of settlement negotiations with Morgan and the FDIC?

21 A. I don't recall that, no.

22 Q. Weren't you informed about a settlement proposal that had  
23 been made to Morgan in July of 2009 by two members of the now  
24 four-member Fried Frank group, Appaloosa and Centerbridge?

25 A. I was not.

1 Q. Were you informed about Morgan's August response to that  
2 proposal?

3 A. No, I had never seen either of those until your colleague  
4 put them in front of me at my deposition.

5 Q. Well, let's take a look, first of all, at Exhibit 13.  
6 Now, this e-mail -- first of all, you know who Donald McCree  
7 is, correct?

8 A. Yes.

9 Q. And who is he?

10 A. He is the senior JPMorgan professional responsible for the  
11 Washington Mutual position or situation.

12 Q. His e-mail dated August 18 is addressed to J. Aronson at  
13 centerbridge.com. Do you know who J. Aronson is?

14 A. I believe it's Jeff Aronson, who's the general partner of  
15 Centerbridge.

16 Q. Is he someone that you worked with within the Fried Frank  
17 group on matters of common interest?

18 A. I don't believe I ever spoke to Mr. Aronson about this  
19 position. He's the -- one of the two general partners of  
20 Centerbridge.

21 Q. You don't believe you ever spoke to him about what?

22 A. About Washington Mutual.

23 Q. Did you know who David Tepper is?

24 A. He's the general partner of Appaloosa.

25 Q. Did you ever speak with Mr. Tepper about matters relating

1 to Washington Mutual as part of the Fried Frank group?

2 A. Yes, we did, after we joined.

3 Q. And in this e-mail Mr. McCree is writing to them attaching  
4 a confidential response to their recent settlement proposal.

5 Do you see that?

6 A. Yes.

7 Q. Now, I want to show you what was attached. That's Exhibit  
8 14, which purports to set out the terms of their proposal to  
9 Morgan dated July 29, and then this Morgan response of August  
10 18. Now, I want to ask you, regardless of whether someone  
11 showed you this table, after you joined this group to discuss  
12 settlement, among other things, whether you had become aware  
13 that in late July Centerbridge and Appaloosa had proposed that  
14 future tax refunds be split sixty/forty in favor of Morgan,  
15 except for any extended carryback period authorized by  
16 Congress, which would be split fifty/fifty?

17 MR. ECKSTEIN: Your Honor, I'm going to object to this  
18 line of question. Mr. Folse has already elicited from the  
19 witness that the witness had not seen or heard about this  
20 proposal. I think counsel is simply trying to testify about  
21 this proposal. I would request that he simply determine  
22 whether this witness is or is not familiar with these  
23 documents, and if he's not we would object to testimony about  
24 it.

25 THE COURT: No, I'll overrule. I think he has the



1 right to test his memory, and whether he saw the specific  
2 document or not is one thing. Whether he was aware of certain  
3 terms that had been proposed is another.

4 MR. ECKSTEIN: Your Honor, I understand that. I would  
5 simply request that it be limited to that.

6 Q. Do you have my question in mind?

7 A. I'm sorry. I don't.

8 Q. I'll try again. Again, regardless of whether you ever saw  
9 this document did you become aware, from any source, that over  
10 the summer of 2009 Centerbridge and Appaloosa had proposed to  
11 Morgan that future tax refunds be split sixty/forty in favor of  
12 Morgan, except for any extended carryback period that might be  
13 authorized by Congress, where the split would be fifty/fifty?

14 A. I did not become aware of that.

15 Q. Did you become aware at any point during 2009, including  
16 in the subsequent discussions that occurred during the  
17 confidentiality period in November and December, did you become  
18 aware that over the summer Morgan had made a proposal for a  
19 seventy-five/twenty-five split of tax refunds in its favor and  
20 a ninety/ten split for any extended carryback period, with  
21 ninety percent going to Washington Mutual and with Morgan  
22 actually offering to give up its ten percent share to the trust  
23 preferred shareholders as an inducement?

24 A. I did not become aware of that.

25 Q. At any time?

1 A. Well, until it was put in front of me, no.

2 Q. You joined the Fried Frank group on November 1, roughly?

3 A. Yes.

4 Q. You signed a new confidentiality agreement with the  
5 debtors just a few weeks later in order to participate in  
6 settlement negotiations with Morgan, correct?

7 A. We signed it about eight days later.

8 Q. Eight days later. You worked with other bondholders and  
9 the debtors to formulate settlement positions in November and  
10 December, correct?

11 A. Yes.

12 Q. And yet your testimony is that there was no discussion  
13 among any of those people, including Appaloosa and  
14 Centerbridge, about that offer and counteroffer that had  
15 happened in the summer? Is that your testimony?

16 A. Yes.

17 Q. Well, let's turn to November. You executed the  
18 confidentiality agreement, which is already in evidence. It  
19 had a termination clause identical to the one in the March,  
20 2009 agreement, correct?

21 A. Nearly identical, yes.

22 Q. How did they differ?

23 A. The termination provisions were slightly different in  
24 terms of the timing associated with them.

25 Q. And how did they differ?

1 A. I don't recall. If you want to give them both to me I can  
2 lay them next to one another.

3 Q. I will try to do that.

4 MR. FOLSE: If we could have Exhibit -- EC Exhibit 4,  
5 please.

6 Q. A version of this without the handwriting on it was  
7 admitted in your testimony as Aurelius Exhibit 27. This does  
8 appear to be signed. Do you know whose handwriting is on the  
9 first page of the document?

10 A. It's Eleanor Chan's handwriting.

11 Q. And do you know why she was marking up something that had  
12 already been signed?

13 A. It hadn't already been signed. It was marked up before it  
14 was signed. The -- Washington Mutual had just defined our firm  
15 and spelled it incorrectly, so we were fixing it.

16 Q. Okay. So this is actually the more accurate copy of the  
17 document than Aurelius's Exhibit 27? Because of the  
18 handwritten changes.

19 A. I don't recall what handwriting was on our Exhibit 27, but  
20 this appears to be the executed version.

21 Q. Now, if you'll look at the termination provision. I think  
22 it's paragraph 13. And this indicates that the agreement was  
23 to terminate on the earlier of various occurrences, one of  
24 which being December 31, 2009, correct?

25 A. Yes.

1 Q. And instead it was terminated as of December 30, right?

2 A. Yes.

3 Q. And we'll get to why that happened in a few minutes. This  
4 time I think you testified Aurelius did not establish an  
5 ethical wall. Instead is stopped all of its trading in  
6 Washington Mutual securities during this confidentiality  
7 period, correct?

8 A. Yes.

9 Q. Now, in March of 2009 Aurelius had the same option, and  
10 that time it decided not to suspend its trading and instead you  
11 went behind this ethical wall that you testified about, right?

12 A. Yes.

13 Q. And when Mr. Eckstein asked you why Aurelius did that in  
14 March according to my notes you testified that there were  
15 market dislocations, lots of trading opportunities were  
16 available that Aurelius didn't want to pass up, and at that  
17 time Aurelius was just one member of a seven-member steering  
18 company of the White & Case group, and its influence would be  
19 limited as a result of that in the settlement process anyway.  
20 Is that a fair summary of what you said?

21 A. It is with the addition that we did not have a full  
22 position at that time so wanted to maintain our -- the  
23 institutional flexibility to trade.

24 Q. And you testified that in November, by contrast, Aurelius  
25 had a much fuller position. Now, that may be a term of art I'm

1 not familiar with, but what is a full position or a fuller  
2 position?

3 A. What I meant by that, or what is meant by that is that we  
4 had a position that had reached what we felt to be the  
5 appropriate size as a percent of our assets based on the work  
6 we had done and the opportunity that existed contrasted to the  
7 period earlier in the year when that was not the case and the  
8 position was a much smaller percent of our capital.

9 Q. And you testified that in November -- I mean, the trade  
10 off was no trading and everyone in the firm can know the  
11 confidential information or we can trade and only you can know  
12 it, and I think you testified that as of November Aurelius made  
13 the decision that it would rather stop trading in order to, as  
14 you put it, bring to bear all the available horsepower at the  
15 firm, including Mr. Brodsky, correct?

16 A. Well, it wouldn't be the case that we'd put up a wall that  
17 I could be the only person to be restricted. We could put  
18 other people on the other side of the wall. We could have put  
19 Ms. Chan on the other side of the wall, which would have  
20 availed me of certain analytical resources, but at the time we  
21 felt that the position was important enough and -- to warrant  
22 restricting all of trading to involve everyone at the firm.

23 Q. And you did say you wanted to bring all available  
24 horsepower to bear on this process that was about to start,  
25 including Mr. Brodsky.

1 A. Yes.

2 Q. So that decision reflected your belief that there had, in  
3 fact -- something could well happen in November and December to  
4 make progress on the settlement front, correct?

5 A. Well, we had gotten restricted before and not come to a  
6 resolution, and we understood that JPMorgan wanted to engage  
7 again, so it was our presumption that that may, in fact, lead  
8 to a resolution, yes.

9 Q. And you got word that Morgan wanted to engage again how?

10 A. The debtors told us that Morgan wanted to sit down and  
11 negotiate, so they reached out to us to enter into a  
12 confidentiality agreement.

13 Q. And so you attended a meeting with the debtors after the  
14 confidentiality agreement was signed along with the other  
15 members of the Fried Frank group and attorneys, correct?

16 A. Yes.

17 Q. Now, I think you also testified -- I'm not sure if you put  
18 an exact date on it, but it's true, is it not, that on November  
19 6th Congress had passed the law that allowed corporate  
20 taxpayers to extend permitted NOL carryback from two years to  
21 five years, correct, with taxpayers only getting half the  
22 benefit in the fifth year?

23 A. I'm actually not familiar with the last provision, and I  
24 don't recall the specific date that it occurred in November,  
25 but it was early November.

1 Q. And, among other things, during the meeting that you had  
2 with the debtors you found out from them the size of the  
3 additional net operating loss that they expected would result  
4 from this change in the law, correct?

5 A. Well, you said among other things. That's not correct.  
6 We found out the size that Washington Mutual would be entitled  
7 to by virtue of the passage of the law.

8 Q. And what did they tell you about the size that they  
9 estimated?

10 A. They said that the estimate was 2.6 billion dollars.

11 Q. And also in that meeting you discussed the strengths and  
12 merits of the causes of action that the debtors had against  
13 Morgan and the FDIC, correct?

14 A. I don't -- I don't recall having that discussion at that  
15 meeting. We may have, but I don't recall it specifically.

16 Q. You discussed tax issues and the potential use of the net  
17 operating losses, didn't you?

18 A. I don't understand that question.

19 Q. Let me ask you to look at page 260 of your deposition.  
20 Actually, it starts on page 259, line 23. Question is asked:  
21 "Q. What happened during the period when the confidentiality  
22 agreement was in place? Can you explain to us --"

23 He's referring to the November agreement.

24 " -- the sequence of events that occurred in the negotiation?

25 "A. Well, we had -- sorry. We, the Fried Frank group, at the

1 time, because by that time I had joined the Fried Frank client  
2 group, which included Appaloosa, Owl Creek and Centerbridge, at  
3 a meeting with the debtors, which included Weil, Gotshal and  
4 Quinn Emanuel and Alvarez, and the first thing we learned at  
5 that meeting -- well, one of the first things we learned at  
6 that meeting was the size of the additional NOL. So the 2.6  
7 billion NOL, because that was a key input into the figuring out  
8 what the pie was that we were attempting to negotiate. We then  
9 had a discussion of strength and merits of the various causes  
10 of action. We had some discussions about various tax issues  
11 and utilization of tax assets."

12 Does that refresh your recollection?

13 A. It does.

14 Q. And that testimony is correct?

15 A. It is.

16 Q. By that time you also, at that meeting you got the debtors  
17 version of what they thought should next be proposed to Morgan,  
18 correct?

19 A. That's -- I don't believe that's correct. I believe we  
20 got that, what you're referring to, at a subsequent meeting  
21 that occurred about a week later.

22 Q. How many meetings did you have with the debtor and the  
23 other members of the Fried Frank group in November and  
24 December?

25 A. I recall two in November that I testified about yesterday.



1 I don't recall any in December.

2 Q. All right. So you think it was at the second meeting in  
3 November that the debtors handed out a term sheet?

4 A. Correct.

5 Q. Which reflected their proposal.

6 A. Correct.

7 Q. And there was discussion about it?

8 A. Yes.

9 Q. And your understanding was that that proposal was going to  
10 be delivered to Morgan. Is that correct?

11 A. Yes.

12 Q. And were there changes in the term sheet that resulted  
13 from the discussion?

14 A. I don't believe so.

15 Q. All right. And you and the other members of the Fried  
16 Frank group gave your okay to the debtors to transmit the  
17 proposal?

18 A. Well, I don't know that we had signoff ability. We said  
19 that it was a reasonable proposal and we were -- we were okay  
20 with the -- the debtors making it. I'm not sure what would  
21 have happened if we had said no.

22 Q. Let me ask you to look at Exhibit 119. Now, there -- the  
23 bottom part of this e-mail is a message from Mr. Kosturos to  
24 Jon Goulding dated November 23 attaching a clean version of the  
25 latest draft of the term sheet, and then Mr. Kosturos sends

1 that on to Centerbridge and Appaloosa. Do you see that?

2 A. I do.

3 Q. Saying this is the term sheet I sent to Don McCree. Now,  
4 again, you're not on that e-mail, but what I want to find out  
5 is whether or not you can confirm that the terms reflected in  
6 the attached sheet are the ones that were discussed and that  
7 you understood were going to be delivered to Morgan? That is  
8 on the key terms a thirty-nine/sixty-one split of the tax  
9 refunds in favor of Morgan, except for the additional carryback  
10 period, where it would be split fifty/fifty.

11 A. Yeah. I did not receive this e-mail at the time. It was  
12 sent to people other than me and it wasn't forwarded to me,  
13 so -- and we went over in my direct testimony a term sheet that  
14 is similar in form to this. The terms in the first six bullets  
15 in the tax box match up to the terms in the term sheet that I  
16 went over yesterday, but sitting here I can't say whether every  
17 term in this multipage term sheet is exactly the same as the  
18 one that was discussed at that meeting that I attended.

19 Q. All right. And with respect to the six bullets in the tax  
20 section, your belief is that this is -- this does represent the  
21 proposal that was to be delivered by the debtors to Morgan?

22 A. Yes.

23 Q. You also testified yesterday about how Morgan responded to  
24 this proposal. You recall that?

25 A. Yes.

1 MR. FOLSE: And if we can have a look at Exhibit -- EC  
2 Exhibit 16, which I believe was admitted yesterday as Aurelius  
3 Exhibit 29?

4 Q. This is the one where Mr. Kosturos referred to it as  
5 Morgan resetting the bookends. Do you recall that?

6 A. Yes.

7 Q. And in this proposal -- you did become aware of this  
8 proposal, right?

9 A. Yes. Mr. Bolin forwarded it to me later the same day he  
10 received it.

11 Q. And with respect to the tax refunds this Morgan proposal  
12 would have given them a hundred percent of the refunds other  
13 than the additional carryback period, and as to those it would  
14 have allocated the refunds a hundred percent to the debtors,  
15 correct?

16 A. Yes.

17 Q. And that's the amount that the debtor had estimated at 2.6  
18 billion dollars, right?

19 A. Yes.

20 Q. And, of course, Morgan was still offering to convey, as it  
21 had, apparently, all along, the four billion dollars in deposit  
22 accounts to the debtors, correct?

23 A. Yes.

24 Q. And, so, just those two items would have potentially  
25 provided 6.6 billion dollars in value, correct?

1 A. Not correct. As I mentioned yesterday in my direct  
2 testimony the additional NOLs were pursuant to a bill that had  
3 been passed by Congress three and a half weeks previously by  
4 which the U.S. Treasury had not paid out a single dollar in  
5 refunds. Additionally, it needed approval -- that refund  
6 needed approval by the Joint Congressional Committee on  
7 Taxation. We had no idea whether or not Congress was going to  
8 try to block that by virtue of the fact that a lot of the WMI  
9 bonds were held by hedge funds, and, additionally, we didn't  
10 know whether or not, by virtue of the fact that Morgan was a  
11 TARP recipient, and their being a TARP recipient would preclude  
12 WMI from getting the refund if, in fact, it were owned by  
13 Morgan, so with this proposal that has completely changed the  
14 risk profile associated with the proposal that had been made by  
15 WMI, which is why Mr. Kosturos said it was resetting the  
16 bookends.

17 I'll also note in this proposal that in number 3  
18 Morgan had asked for hundreds of millions of dollars of  
19 additional assets differing from the proposal that the debtors  
20 had made. The Visa shares were 140 million dollars. The  
21 American Savings goodwill litigation was fifty-five million  
22 dollars, plus a chance for hundreds of millions more. The  
23 intercompany debt was a 200 million dollar issue. So under  
24 3(a), (b) and (c) there were hundreds of millions of dollars of  
25 issues that separated the parties in addition to the departures

1 that I explained with respect to the tax refunds.

2 Q. Well, I heard yesterday when you explained about how this  
3 offer completely changed the risk profile by allocating the new  
4 refund period that resulted from the change in the law to  
5 Washington Mutual, but I also heard you say that you described  
6 to Mr. Eckstein's -- in response to Mr. Eckstein's questions  
7 the progress about legislation over 2009. You remember that?

8 A. I do.

9 Q. And do you remember talking about how it had -- the bill  
10 had stalled over the summer and then it had gained momentum in  
11 September and October --

12 A. Yes.

13 Q. -- leading up to the passage in November?

14 A. Yes.

15 Q. And you identified that as a significantly positive market  
16 event affecting Washington Mutual's securities, the  
17 anticipation of that new refund, correct?

18 A. Yes.

19 Q. And, so, how is it that you testified -- how do you  
20 reconcile the testimony that the mere anticipation of this bill  
21 passing was a significantly positive development with respect  
22 to trading in Washington Mutual's securities, the valuation of  
23 Washington Mutual's securities, but then when it comes to the  
24 bill actually passing and Morgan offering to provide a hundred  
25 percent of it to Washington Mutual suddenly it changes the risk

1 profile and it's not even worth bothering with?

2 A. Well, I don't. I think you've mischaracterized what I've  
3 said. What I said is that the passage of the bill is, in fact,  
4 a material input, because it increases the pie that is  
5 available to be shared which exists whether or not there is a  
6 settled resolution. As I mentioned, we predicated our  
7 investments in Washington Mutual on what would be the various  
8 litigation outcomes of a number of scenarios. There were  
9 billions of dollars of fraudulent conveyance claims that  
10 impacted the tax refund and whether or not it would, in fact,  
11 go to the estate or to Morgan, and, so, the fact that the pie  
12 got bigger is independent of the fact of how the pie would be  
13 split up. And the pie got bigger by virtue of the tax refund  
14 bill passing, but this is simply Morgan's attempt to shift all  
15 the risk of the riskiest NOL onto WMI. And that's why Mr.  
16 McCree said the parties are fairly far apart in our views, just  
17 reading your exhibit, and Mr. Kosturos said that JPMorgan was  
18 resetting the bookends, because they were. And it just goes to  
19 show you that until you have a deal in a negotiation the  
20 parties are free to play fifty-two card pickup, which, frankly,  
21 is what Morgan did here.

22 Q. And -- that's what the debtors were doing too, weren't  
23 they?

24 A. I don't think so. I think the debtors made a cogent  
25 proposal, and I think Morgan responded by resetting the

1 bookends.

2 Q. I want to try to understand this pie analogy. For the pie  
3 to get bigger you've got to have pie to eat, right, and it  
4 seems like your testimony is that there's about three-fifths of  
5 this pie that was uncertain and might be inedible, correct?

6 A. That's not correct.

7 Q. You say Congress had never paid -- nobody had paid a  
8 dollar in money out on this new bill, right? You testified to  
9 that?

10 A. That's correct.

11 Q. You testified that it would require approval of a joint  
12 Congressional committee before the refunds would be paid out.

13 A. Any refund over two million dollars requires their  
14 approval.

15 Q. All those facts were known to you at the time the  
16 legislation was moving its way through Congress, as you  
17 testified yesterday, correct?

18 A. Yes.

19 Q. And you said that the bill as it was enacted would not  
20 permit a TARP recipient to receive a refund. Was that your  
21 understanding?

22 A. Yes.

23 Q. And JP Morgan was a TARP recipient?

24 A. Yes.

25 Q. And the tax refunds, however, would have been due on tax

1 returns filed by Washington Mutual and Washington Mutual Bank,  
2 correct?

3 A. Well, Washington Mutual, Inc. was the filer with the IRS.  
4 JPMorgan had claimed as part of the litigation that they had  
5 purchased the tax refunds under the purchase and assignment  
6 agreement, so if that, in fact, were correct then the refund  
7 would come back to Washington Mutual, Inc. but it would be for  
8 the benefit of JPMorgan.

9 Q. I thought you testified that you didn't think that Morgan  
10 argument about having acquired ownership of the tax refunds was  
11 worth anything.

12 A. I didn't say --

13 Q. It was a bad argument.

14 A. No. That's not what I said at all. I said that was  
15 JPMorgan's argument. That wasn't our analysis of it, but it  
16 certainly was the position they're taking, and that would have  
17 been a determination that this Court would make.

18 Q. All right. You got this proposal. You've said what  
19 you've said about it. You said it's Morgan playing fifty-two  
20 card pickup. Nonetheless, the creditor group and the debtors  
21 discussed it and developed a further counteroffer to it,  
22 correct?

23 A. Yes.

24 Q. You collectively came up with a proposal in response, and  
25 your understanding was that the debtor was going to deliver it



1 to Morgan in response to this one, correct?

2 A. Yes.

3 Q. Now, I think you testified that you weren't sure when that  
4 proposal was delivered, because Mr. McCree had gone on vacation  
5 and then the confidentiality period expired on December 30.  
6 Did I get that right?

7 A. What I said was I wasn't sure whether that proposal had  
8 been delivered, not when it had been delivered.

9 Q. You weren't -- I'm sorry. One more time, please.

10 A. I was not sure whether or not that proposal had been  
11 delivered to Mr. McCree before he went on vacation.

12 Q. What were the terms of that proposal?

13 A. I don't recall sitting here today.

14 Q. Well, let me see if I can refresh your memory.

15 MR. FOLSE: If we could look at EC Exhibit 305? Your  
16 Honor, this is in the Court's supplemental volume 8.

17 THE COURT: Thank you.

18 MR. FOLSE: I'm not offering this into evidence.

19 Q. There is no indication that you were copied on the e-mail,  
20 but I do want to see --

21 MR. STROCHAK: Excuse me, Your Honor. Adam Strochak,  
22 Weil, for the debtors. We don't have a copy of 305. Could you  
23 provide a copy, please?

24 MR. FOLSE: You can have mine.

25 MR. STROCHAK: Thank you.

1 Q. So I direct your attention to the attachment. The cover  
2 page, by the way, just so you can get the context, appears to  
3 be an e-mail from Chad Smith, the general counsel of Washington  
4 Mutual, to Don McCree at Morgan. And then there's this  
5 attachment, and it indicates that the debtor was proposing, as  
6 of December 8, a seventy/thirty split in favor of Morgan on the  
7 refunds, with a fifty/fifty split on the extended carryback  
8 period. Do you see that?

9 A. I do.

10 Q. Does that refresh your recollection that this represents  
11 the proposal that the creditors and the debtor had developed in  
12 response to the one from Morgan that came in on November 30th?

13 A. Yes. And I know that this is the -- I recollect that this  
14 is the proposal split that was made with respect to taxes. I  
15 mean, if you want me to look through the rest of it I can to  
16 see if it comports with my recollection.

17 Q. Do you mind looking to see if it does?

18 A. It does.

19 Q. It does?

20 A. Yes.

21 Q. All right.

22 MR. FOLSE: Your Honor, I would move the admission of  
23 Exhibit 305 insofar as the witness has verified that the term  
24 sheet accurately reflects the proposal that he understood was  
25 to be delivered to Morgan on or about December 8th.

1 THE COURT: Objection?

2 MR. ECKSTEIN: Your Honor, we don't have an objection.

3 THE COURT: All right. It's admitted.

4 (Term sheet of proposal that the creditors and the debtor had  
5 developed in response to the one from Morgan that came in on  
6 November 30th was hereby received as Equity Committee's Exhibit  
7 305 for identification, as of this date.)

8 MR. FOLSE: Thank you.

9 Q. This proposal, of course, and the Morgan proposal that  
10 preceded it and the debtors' proposal that preceded that, none  
11 of this was disclosed to the public, correct?

12 A. It was not. But, again, this was the debtors' proposal.  
13 I mean, where the debtor would settle a dispute in this case  
14 doesn't really matter.

15 Q. And, in fact, isn't it correct that Mr. Kosturos had  
16 advised the creditors that based on communications he had had  
17 with Morgan in November he believed they would be willing to  
18 negotiate a deal on the basis of a seventy/thirty tax split?

19 A. Well, it is correct that that Mr. Kosturos advised us in  
20 that manner, but after then making a proposal that split the  
21 taxes thirty-nine/sixty-one for the first refund Morgan had  
22 responded by, in my words, playing fifty-two card pickup and  
23 totally resetting the bookends and asserting that a hundred  
24 percent of the first refund should go to them and a hundred  
25 percent of the second refund should go to the estate. So

1 notwithstanding the fact that Mr. Kosturos had said it it's  
2 clear from the response that we received from JPMorgan that  
3 that was, in fact, not correct.

4 Q. Well, it's correct, though, that what happened within a  
5 week after this Morgan proposal is that the debtors went right  
6 back, with the creditors' approval, to propose a seventy/thirty  
7 split, which is the split that Mr. Kosturos told all of you he  
8 thought Morgan would find acceptable, or, at least, attractive.

9 A. Yes.

10 Q. And the public was not aware of that. What the public did  
11 know is that on December 14th the debtors filed a motion for  
12 authority to conduct further discovery from the FDIC and other  
13 third parties under Rule 2004 as part of their investigation  
14 into claims against Morgan. Do you recall that?

15 A. Yes.

16 Q. And do you recall that the debtors represented to the  
17 Court that they needed that additional discovery as estate  
18 fiduciaries in order to determine the validity and ownership of  
19 potentially significant claims against Morgan relating to the  
20 seizure of the bank? Do you remember that?

21 A. I don't recall that last part.

22 Q. Do you recall that the debtors continued to take that  
23 position publicly at a hearing on their motion for additional  
24 discovery in this courtroom on January 28, 2010?

25 A. I do recall that, but I also know that it was widely known

1 in the marketplace that there were ongoing negotiations between  
2 the debtors and JPMorgan. I testified yesterday that there  
3 were research reports that were published in the beginning of  
4 January saying that there were intense negotiations between the  
5 parties. So it was widely known in the marketplace that the  
6 debtors and JPMorgan were, in fact, negotiating,  
7 notwithstanding the fact that they were taking legal positions  
8 in court to the contrary.

9 THE COURT: We're going to take a break right now.  
10 I'm having a problem with my keyboard. So why don't we take a  
11 break. I'll hear the 10:30 and then we'll follow on this.

12 MR. FOLSE: Thank you.

13 THE COURT: All right.

14 MR. ECKSTEIN: Your Honor, can we leave our materials  
15 at the table?

16 THE COURT: You may

17 (Recess from 10:23 a.m. to 10:52 a.m.)

18 THE CLERK: All rise. You may be seated.

19 THE COURT: All right. You may proceed.

20 MR. FOLSE: Thank you, Your Honor.

21 Before I resume, I had showed the witness a document  
22 marked as EC Exhibit 4, which was a copy of the November 16,  
23 2009 confidentiality agreement that had handwriting on it.

24 THE COURT: Yes.

25 MR. FOLSE: And Mr. Eckstein has advised me that the

1 copy of this agreement, that was admitted yesterday, AU Exhibit  
2 27, actually incorporated the handwritten changes into a typed  
3 version and I accept that representation. So with that, I  
4 think that probably means that AU Exhibit 27 was the final  
5 agreement.

6 THE COURT: Okay.

7 MR. FOLSE: Thank you.

8 BY MR. FOLSE:

9 Q. Mr. Gropper, I think where we had left off we had looked  
10 at that term sheet dated December the 8th, that you understood  
11 was going to be transmitted to JPMorgan. In December did you  
12 know that efforts were being started to prepare a draft  
13 settlement agreement that would incorporate those terms?

14 A. I don't recall knowing that.

15 Q. Do you recall Fried Frank, during the confidentiality  
16 period, receiving or reviewing or discussing, with the  
17 noteholder group, draft settlement agreement papers that were  
18 being prepared by the debtors' counsel?

19 A. I don't recall that. No.

20 Q. Let me ask you to take a look at EC Exhibit 296, please?

21 THE COURT: EC 296?

22 MR. FOLSE: 296, yes Your Honor.

23 Q. The first page of Exhibit 296, Mr. Gropper, is from Chad  
24 Smith, general counsel of the debtor, to Don McCree at Morgan.  
25 You're not shown on this e-mail but I would like you to take a

1 look at the thirty-nine page accompanying settlement agreement  
2 with probably at least that many pages in attachments. I don't  
3 expect you to read this but I would appreciate it if you would,  
4 at least, skim through it and see -- and tell me whether you  
5 think you saw any drafts of a settlement agreement, either in  
6 December or in January, leading up to January 10th, that  
7 resemble this.

8 A. I'm sorry; you want me to read this agreement? I mean, I  
9 can't skim it, it's an agreement. So I'm either going to read  
10 it or not read it in order to -- or I can answer a general  
11 question but I can't partially read it. So I'm just a little  
12 confused as to what the question is.

13 Q. That's a fair point. Let me just ask it this way; as best  
14 you can recall did you ever see a draft of a settlement  
15 agreement incorporating a seventy-thirty split of the tax  
16 refunds except for the extended period where there would be a  
17 fifty-fifty split. Did you ever see a draft settlement  
18 agreement, in December or January, with those terms included in  
19 them?

20 A. I don't recall seeing an agreement. And in fact when --  
21 before we received draft settlement agreements in March and May  
22 and then again in October, Fried Frank made it clear to us that  
23 in order to receive agreements we would have to restrict  
24 trading, which we did, in order to review those agreements.

25 You're asking about a period that includes January, which

1 is a period during which we were not restricted. So I -- I'd  
2 be surprised if we had seen anything like this, given the  
3 procedures and policies we had in Fried Frank that within --  
4 sorry, that we had in place with Fried Frank that were  
5 followed.

6 Q. Did you at least understand, from Fried Frank, that work  
7 was being done on a draft settlement agreement in December?

8 A. I don't recall that. No.

9 Q. You've testified on direct that as of the end of this  
10 confidentiality period, December 30, that it was clear to all  
11 of us that negotiations were over and the parties were very far  
12 apart. Do you recall that?

13 A. Yes.

14 Q. And that remains your testimony notwithstanding the fact  
15 that Aurelius and the other settlement noteholders and the  
16 debtors agreed to make a proposal to Morgan on the basis of a  
17 seventy-thirty split which Mr. Kosturos had represented to you  
18 he believed would be acceptable to Morgan. Is that your  
19 testimony?

20 A. Yes. Mr. McCree had gone on vacation in the middle of  
21 December. He was going to be gone to the end of that year. He  
22 knew that our confidentiality agreement expired and therefore  
23 it would not be possible to reach a deal pursuant to a  
24 confidentiality agreement that would include the noteholders  
25 after December. So the negotiations that included us were



1 over.

2 Q. The negotiations weren't over, as far as you knew, were  
3 they?

4 A. As far as I knew they were over and then, as I said, I  
5 read a research report in early January that said there were  
6 negotiations ongoing but we were not a part of those  
7 negotiations.

8 Q. On December 30 the debtors filed a monthly operating  
9 report, which was identified in your direct testimony,  
10 disclosing that this legislation enacted by Congress would  
11 enable it to obtain an additional 2.6 billion dollars in tax  
12 refunds, correct?

13 A. Yes.

14 Q. And I think you testified that that number was  
15 significantly higher than Aurelius' own internal estimate,  
16 which it had prepared on the basis of GAAP financials rather  
17 than tax returns?

18 A. Yes.

19 Q. And is that the same 2.6 billion dollars in tax refunds --  
20 first of all, did you view that as a material piece of  
21 information with respect to the valuation of Washington Mutual  
22 securities?

23 A. Sorry, what is the that?

24 Q. The 2.6 billion dollar estimate the debtors gave for the  
25 tax refunds that would -- that they estimated they could

1 recover from the amended legislation?

2 A. Yes.

3 Q. And that's the same 2.6 billion dollars in tax refunds  
4 that you've identified were -- that it would be risky as to  
5 whether or not Washington Mutual could actually recover them?

6 A. Yes.

7 Q. And the disclosure on December 30, that was the day the  
8 confidentiality agreement terminated, right?

9 A. Yes.

10 Q. And that was a day earlier than it would have expired  
11 according to its terms, right?

12 A. Yes.

13 Q. And the reason it was terminated a day early was because  
14 Aurelius and the other settlement noteholders asked the debtors  
15 to terminate it on December 30, correct?

16 A. Yes.

17 Q. And the debtors agreed, right?

18 A. Yes.

19 Q. Now if you'll look at Exhibit 6, please sir, this is the  
20 set of trading records, it was admitted as AU Exhibit 8 and if  
21 you would please turn to the third page which shows -- includes  
22 trades on December 31, 2009.

23 And am I reading this correctly, does it show that the day  
24 after the confidentiality agreement terminated -- by the way,  
25 once the confidentiality agreement terminated, Aurelius was

1 free to resume trading, correct?

2 A. Yes.

3 Q. And so the very first day they could do that, which  
4 happened to be the last day of the year, this indicates that  
5 Aurelius sold roughly fifteen million dollars worth of senior  
6 notes, correct?

7 A. Well, the funds managed by Aurelius did, correct.

8 Q. Say that again, please?

9 A. The funds managed by Aurelius sold the notes.

10 Q. Yes. And it looks like they were sold at 97.25 percent of  
11 face value?

12 A. Correct.

13 Q. So those -- those notes were -- I don't know whether this  
14 is the right term of art, close to par?

15 A. They were.

16 Q. Not much upside left in them?

17 A. Well, there was post-petition interest that those notes  
18 could receive. So I don't recall what the full pre-petition  
19 plus post-petition claim was for those notes. It was certainly  
20 north of par.

21 Q. And there were -- this began, verify that I'm reading this  
22 correctly, there were additional sales of senior notes, fifteen  
23 million dollars on January the 5th, you'll have to go over to  
24 the preceding page to follow me, I think. And then another  
25 five million dollars on January 7th, is that correct?

1 A. Yes.

2 Q. Also on December 31st, Aurelius sold senior subordinated  
3 notes with a face amount of about thirty-four million dollars  
4 at ninety-three percent of par?

5 A. Correct.

6 Q. Did the sale -- by the way, did Aurelius report its  
7 financial results on a calendar year basis?

8 A. Yes.

9 Q. Did the sales on December 31 establish a price that  
10 Aurelius used to mark its portfolio to market for financial  
11 reporting purposes?

12 A. I'm not sure. The marking of our portfolio is independent  
13 of trades that can occur in the middle of the day.

14 Q. Well they occurred before the last day of the year, right?

15 A. Yes.

16 Q. And in fact the reason that Aurelius and the other  
17 settlement noteholders asked the debtors to terminate the  
18 agreement early was so you could do trades before the calendar  
19 year ended, isn't that true?

20 A. That's incorrect.

21 Q. Why didn't you just let it expire on December 31st?

22 A. We wanted to make sure that for purposes of marking the  
23 portfolio, that the information in the monthly operating report  
24 was out and that the market prices would reflect it. We didn't  
25 want to be in a situation where after the market closed on the

1 31st, the monthly operating report came out, which would be a  
2 positive piece of information, and then when the auditors went  
3 to determine what should be the year-end mark they'd say, okay,  
4 we know there was a bond that traded at X but then this big  
5 piece of information came out after market hours, we're not  
6 sure how to mark the portfolio. And we wanted to avoid that  
7 ambiguity.

8 Q. Also on December 31st, am I reading this correctly, that  
9 Aurelius began buying PIERS, about 590,000 shares for a total  
10 of 12.625 million?

11 A. Well, I'm not sure what you mean by began buying because  
12 we've sold PIERS after that date, but we bought PIERS on  
13 December 31st and I don't know if the quantity that you quoted  
14 is correct but I'm happy to figure it out.

15 Q. You mean in terms of the dollar amount?

16 A. Correct.

17 Q. The 590,000 shares is correct, right?

18 A. Yes.

19 Q. And to get the price you would multiply, on each of those  
20 two lines, the quantity times the price?

21 A. Yes.

22 Q. All right. Also in January -- by the way, the acquisition  
23 of PIERS on behalf of the Aurelius funds, that continued  
24 further into January, did it not?

25 A. Well, we bought a very, very small amount of PIERS on

1 January 4th. We bought another very, very small amount of  
2 PIERS, I mean these are tiny trades in the context of the  
3 position and the fund, you're talking about 50,000 dollar  
4 trades in the context of a multi-billion dollar fund. We  
5 purchased, again, in other instances in January.

6 Q. Are the trades shown beginning January 7th where it says  
7 WMPFD all the way up to the end of January, are those PIERS  
8 acquisitions?

9 A. they're very small PIERS acquisitions, yes.

10 Q. Something like 70, 80,000 shares? I'm just guessing.

11 A. That sounds high. I mean, I can -- again, I can figure it  
12 out if we --

13 Q. If you want to add them up, that's what we would do?

14 A. Yes.

15 Q. You multiply them by the line items, the prices shown on  
16 the lines next to them?

17 A. Correct.

18 Q. And in January Aurelius also began buying significant  
19 amounts of trust preferred securities, correct?

20 A. Well, we bought trust preferred securities and we sold  
21 trust preferred securities.

22 Q. Well on January 4 and January 5, collectively, Aurelius  
23 bought almost fifty million dollars worth of trust preferred  
24 securities, didn't it?

25 A. Not fifty million dollars worth.

- 1 Q. Fifty million dollars -- how are the PIERS values  
2 determined on this chart? How would you do that? I'm sorry;  
3 the trust preferred?
- 4 A. Oh, that's a percent of face, those numbers. So that's  
5 five -- to use an example, the January 5th trade of trust  
6 preferred is, you know, five million at five and a half percent  
7 of face.
- 8 Q. And on -- also on January 5th, on the next page, there's  
9 ten million shares purchased at 3.25 percent of face?
- 10 A. I'm sorry; I don't see that trade.
- 11 Q. The top of page 3.
- 12 A. Oh, yes. Yes, but that's a tiny trade.
- 13 Q. In terms of dollars?
- 14 A. Yes. And then, as you can see, we sold trust preferred,  
15 quite a bit of trust preferred, on January the 6th.
- 16 Q. Let's move into events concerning the settlement that  
17 occurred, as it developed in 2010. You testified on direct  
18 that Aurelius had no role in the settlement negotiations from  
19 December 31st, 2009 until March 12, 2009, is that correct?
- 20 A. Yes.
- 21 Q. Mr. Eckstein asked you what role Aurelius had played in  
22 the settlement negotiation during that period and you said  
23 none, correct?
- 24 A. Yes.
- 25 Q. Is it still your view, in January 2010, February of 2010,

1 that the settlement discussions were over, the parties were  
2 very far apart, it was time for the debtors to get aggressive  
3 about pursuing litigation against Morgan?

4 A. No, that's not what I said. What I said was that when we  
5 left the negotiations in December they were certainly over. We  
6 knew, and the market knew in general, as I referred to the  
7 research report that came out in the beginning of the year,  
8 that there were ongoing negotiations. We did not participate  
9 in those negotiations. We didn't know the substance of those  
10 negotiations and we did think that the best way to move this  
11 case forward would be for the debtors to pursue litigation  
12 against JPMorgan.

13 In fact when this Court said that it was ready to issue  
14 its summary judgment ruling on the deposit issue, we encouraged  
15 the debtors to have the Court do so because we thought, and I  
16 don't mean to be presumptuous as to how that would come out,  
17 but we thought that however it came out it would serve to  
18 advance these cases and the debtors did not heed our view on  
19 that.

20 Q. Well, you knew -- you just testified that you knew the  
21 settlement negotiations were continuing. You say you only knew  
22 that because of reading some analyst report. Is that the only  
23 reason you knew that?

24 A. I didn't say it's the only reason I knew it. I said that  
25 the market knew it and that the reason I know that the market



1 knew it is because it was in a research report in early  
2 January.

3 Q. Well, I want to ask what you knew. You knew, not from  
4 some analyst report, you knew because you were getting  
5 information from Fried Frank that the settlement negotiations  
6 between Morgan and the debtors was continuing, true?

7 A. That's correct.

8 Q. And you knew that because the settlement noteholders'  
9 counsel at Fried Frank was involved in the continuing  
10 settlement negotiations, correct?

11 A. I don't know why we knew that. We knew it because it was  
12 reported to us and I think that the debtors reported to counsel  
13 for a number of constituencies, whether that be the  
14 bondholders, the senior bondholders, the trust preferred  
15 holders, that negotiations were ongoing. It may even be the  
16 fact that the debtors reported the substance of those  
17 negotiations. But Fried Frank did not convey the substance of  
18 those negotiations to us because we had given them strict  
19 instructions not to.

20 Q. My only question was that you knew that settlement  
21 negotiations were continuing because you were getting reports  
22 from your attorneys at Fried Frank and they were involved in  
23 the process, true?

24 A. Again, we knew that and the market knew that.

25 Q. Just focus on my question, please. First of all, Fried

1 Frank was involved in the settlement negotiations, correct?

2 A. Yes.

3 Q. Number two, they represented you during that period for  
4 that purpose, correct?

5 A. I'm not sure what you mean by that question.

6 Q. They were participating in the settlement process as  
7 counsel for Aurelius and the other settlement noteholders,  
8 correct?

9 A. Yes, but we didn't relegate or delegate our settlement  
10 negotiating authority to our lawyers, that's not something,  
11 frankly, that we have ever done.

12 Q. Really? Isn't it a fact that Fried Frank knew your  
13 group's views of what would be an acceptable settlement and so  
14 they were effectively acting for you in the negotiations?

15 A. Well, they knew our view of the settlement -- what would  
16 be an appropriate settlement because we made a proposal in  
17 December. They were acting for us in the negotiations. They  
18 did not have authority to bind us. They didn't have authority  
19 to agree to any changes. They didn't have authority to  
20 transmit any information to us. And in fact when the  
21 settlement was announced in March we were not a party to it.

22 Q. Please look at your deposition testimony, beginning on  
23 page 267, line 15. You were asked the question;

24 "Q. So, is it true that the negotiations that must have  
25 occurred between the time when you describe things basically

1 breaking down, in December, and March when the settlement was  
2 reached, those negotiations all occurred with no involvement by  
3 Aurelius in the economic terms?

4 "A. Fried Frank was involved in those negotiations and Fried  
5 Frank knew the groups' collective views of what would be an  
6 acceptable settlement. So they were effectively acting for us  
7 in those negotiations."

8 Is that true?

9 A. It is true and that's what I just said.

10 Q. And you knew that the negotiations were making progress in  
11 a way that was consistent with Aurelius' views of what would be  
12 an acceptable settlement, correct?

13 A. We did not know that. We did not know anything of the  
14 substance of the negotiations. And in fact, again, we pushed  
15 the debtors, during that part, advice they did not heed, to  
16 proceed on a litigation path. And in fact we sold securities  
17 in the spring of that year, because we were concerned that we  
18 kept suggesting to the debtors they needed to pursue a  
19 litigation path and that was being ignored and we were not part  
20 of the litigation.

21 So we actually sold securities in the spring -- in the  
22 first quarter of 2010 because of our concern that we weren't  
23 involved in the process and we were concerned the debtors were  
24 not following our recommended path of action.

25 Q. Mr. Gropper, I didn't ask you any question about trading

1 activity. Let me put it this way; if the debtors were making  
2 concessions in those negotiations that were inconsistent with  
3 the instructions you had given to Fried Frank about what was  
4 acceptable to the settlement noteholders, you would have  
5 expected to hear that from Fried Frank, correct?

6 A. No. Not without Fried Frank saying to us we have  
7 information, if you learn it it will restrict you and you will  
8 have to shut down trading.

9 Q. You expected Fried Frank to tell you if the negotiations  
10 were going off in some direction that was different from the  
11 objectives you had told them about when the confidentiality  
12 process ended, isn't that true?

13 A. That's not true. You can't do this half way. You're  
14 either involved in the negotiations and you're restricted or  
15 you're not. This doesn't operate on a wink and a nod. We are  
16 compulsive about our adherence to the securities laws and our  
17 obligations and what you're suggesting would not be  
18 appropriate.

19 Q. What views -- what did you tell Fried Frank would be the  
20 terms of an acceptable settlement when you allowed them to act  
21 on your behalf and stop acting directly?

22 A. Fried Frank was aware of the proposal that we had made --  
23 the debtors were going to make, that I see from your e-mail you  
24 put in front of me, was delivered to JPMorgan. That was  
25 their -- that is what we had provided to, when I say we I mean

1 the settlement noteholders, had provided to Fried Frank as our  
2 view of an appropriate settlement.

3 Q. Isn't it fair to say that knowing that -- that not hearing  
4 from Fried Frank was essentially no news being good news?

5 A. No.

6 Q. And didn't you expect Fried Frank to tell you, maybe they  
7 would say you'll have to go restricted for us to tell you, but  
8 didn't you expect them to tell you if the negotiations had gone  
9 off the rails and had diverged from the proposal that had been  
10 delivered in December?

11 A. I don't see how we could have given them that instruction.

12 Q. You knew the terms that were going to be delivered, either  
13 in December or as soon as Mr. McCree came back from vacation.  
14 You expected Fried Frank to represent your interests as things  
15 progressed from that point forward. You didn't hear anything  
16 from Fried Frank indicating that they weren't and all of that  
17 was information that the public was clueless about, isn't that  
18 true?

19 A. That's not my testimony and that's not correct. And as  
20 mentioned to you, we sold securities in the first three months  
21 of 2010 precisely because we were concerned with the process.  
22 We were not involved in the process. We thought the debtors  
23 were not doing what we would have wanted them to do, which is  
24 to pursue litigation against JPMorgan Chase.

25 Q. Please turn to EC Exhibit 124. There's an e-mail at the

1 bottom of the first page from a Fried Frank attorney to Brian  
2 Rosen dated January 11, 2010 saying, "Are we confirmed for  
3 tomorrow's meeting at 10:30 a.m.? Any update on the equity  
4 committee formation?" And then it says, "Here's the list of  
5 attendees," and it includes you and David Brodsky and Eleanor  
6 Chan. Do you see that?

7 A. I do but I'm not sure who David Brodsky is. It should  
8 have said Mark Brodsky.

9 Q. I'm sorry if I --

10 A. No, you read it correct.

11 Q. Oh, okay.

12 A. It was written incorrectly.

13 Q. But his name is Mark Brodsky, that's the chairman of your  
14 firm, right?

15 A. Correct.

16 Q. And did you attend the meeting on January 12th with the  
17 debtors?

18 A. I know we attended a meeting in January, I don't remember  
19 the specific date.

20 Q. What happened at that meeting?

21 A. Early in 2010 we were having discussions with the debtors  
22 about a plan structure that could be used, in the event there  
23 were a settlement with JPMorgan. We didn't want to have a  
24 situation where there was a settlement announced and then  
25 people spent sixty days talking about the mechanics of how to

1 distribute the money to creditors. We wanted to be in a  
2 position where if there were a settlement those mechanics would  
3 have been, at least conceptually, discussed.

4 And so we were having discussions with the debtors about  
5 the mechanics of doing so. And my understanding is the debtors  
6 were having those discussions with many constituencies. I  
7 actually recall bumping into some of the White & Case lawyers  
8 when we went to one of these January meetings.

9 Additionally we started to have discussions with the  
10 debtors about a way or if it was possible to utilize the NOL  
11 carried forward that WMI had.

12 Q. And all of those subjects were discussed at the January 12  
13 meeting?

14 A. Yes.

15 Q. And you had -- did you have the Fried Frank firm or maybe  
16 other law firms doing work on a proposed term sheet for a plan  
17 of reorganization based on a settlement?

18 A. Yes.

19 Q. When did that work start?

20 A. I don't recall, sometime around this timeframe.

21 Q. Why -- try to explain to the Court why it was that you and  
22 the other members of the Fried Frank were paying, no doubt,  
23 handsome fees to a big New York law firm to work on a proposed  
24 plan of reorganization built around a settlement if you thought  
25 it was clear that the settlement negotiations were over, the

1 parties were very far apart and the debtor ought to be  
2 litigating?

3 A. Well I note, first of all, that's not what I said. What I  
4 said was I was aware that there were negotiations ongoing; I  
5 just didn't know their substance. And again, I thought it made  
6 sense to have our law firm and their fees were what they were,  
7 notwithstanding their location, work on --

8 Q. I love New York, by the way.

9 A. Well --

10 Q. I want to be clear about that.

11 A. I've seen your fee applications too.

12 I thought it was important for us to think about and  
13 noodle on a construct because particularly in that timeframe  
14 all discussions that had taken place prior to then had only  
15 been between the debtors and JPMorgan. So we had a bit of a  
16 bankruptcy conundrum that we were trying to noodle through,  
17 which is let's say hypothetically there were a deal, how do we  
18 distribute money to creditors and deal with the fact that the  
19 FDIC was asserting a twenty billion dollar claim against the  
20 estate.

21 So there were a number of bankruptcy related issues to  
22 think through associated with that and we wanted to be  
23 constructive and think about it. But you -- it's perfectly  
24 appropriate to do that even before you have a settlement  
25 because, again, we didn't want to be in a position where there



1 were a settlement and then we lost a couple months thinking  
2 about this very issue.

3 Q. Did you refer to the term sheet that your counsel worked  
4 up as a dummy term sheet in your direct examination? Something  
5 that would have blanks in it to be filled in later if there  
6 were a deal?

7 A. I don't believe I used that -- that language in my direct  
8 examination.

9 Q. Okay. All right. If you'd then look at Exhibit EC-41,  
10 please. This appears to be an e-mail from an assistant for  
11 Brad Scheler. Mr. Scheler was counsel at Fried Frank on behalf  
12 of the settlement noteholders?

13 A. Correct.

14 Q. To Mr. Rosen and he says, "As we have discussed and as I  
15 promised Brian that we would deliver, albeit my promise was to  
16 deliver prior to today, Brian, apologies and regrets again,  
17 attached is a preliminary working draft of a plan term sheet  
18 for WMI. Together with our clients we are continuing to review  
19 and revise the draft." Do you see that?

20 A. I do.

21 Q. And so did you work with Mr. Scheler or others at Fried  
22 Frank in reviewing and revising this draft term sheet?

23 A. I recall seeing it and working on it. I don't know  
24 whether we did that before it was sent by Mr. Scheler to Mr.  
25 Rosen on this date.

1 Q. You may have before it was sent?

2 A. Correct. I just don't recall whether I did.

3 Q. And you would have continued to work on it after it was  
4 sent, with your counsel?

5 A. Sure.

6 Q. And this is February 9th, correct?

7 A. Yes.

8 Q. If you turn to page 6 of the plan term sheet itself,  
9 actually let's back up to page 4, please. It has proposed  
10 treatment of WMI claims and interest, do you see that?

11 A. Yes.

12 Q. And it specifies the payment of pro rata shares of cash  
13 and various specific dollar amounts down to the pennies, for  
14 the senior debt claims, the subordinated debt claims, the  
15 junior sub debt, so on. Do you know where these numbers came  
16 from?

17 A. Yes. These were the amounts that were due pursuant to the  
18 senior and subordinated indentures and I believe were already  
19 reflected as allowed claims on the court's docket pursuant to  
20 stipulations allowing these claims.

21 Q. Thank you. Now if you'll turn to page 6, there is a box  
22 called JPMC claim, do you see that?

23 A. Yes.

24 Q. And it provides that Morgan would receive, in full and  
25 complete satisfaction of their claim, a distribution from a

1 trust consisting of CD certificates equal to seventy percent of  
2 the first tax refund received by the trust and D certificates  
3 equal to fifty percent of the second tax refund received by the  
4 trust. Do you see that?

5 Q. Yes. And you would have seen that in reviewing the drafts  
6 term sheet with you counsel, correct?

7 A. I believe so. I just don't have a recollection of  
8 reviewing this at the time. But the percentages that are  
9 present in this are consistent with the proposal that the  
10 creditors had suggested the debtors make to JPMorgan in  
11 December.

12 Q. Right.

13 MR. FOLSE: Your Honor, I would offer EC Exhibit 41.

14 THE COURT: Any objections?

15 MR. ECKSTEIN: One moment, Your Honor.

16 (Pause)

17 MR. ECKSTEIN: No objection, Your Honor.

18 THE COURT: It's admitted. I'm sorry?

19 UNIDENTIFIED ATTORNEY: Your Honor, we have no  
20 objection.

21 THE COURT: All right. It's admitted.

22 (E-mail from assistant for Brad Scheler to Mr. Rosen was hereby  
23 received as Equity Committee's Exhibit 41 for identification,  
24 as of this date.)

25 BY MR. FOLSE:

1 Q. By February 9th, or perhaps later, you were reviewing  
2 documents with your counsel at Fried Frank, who themselves knew  
3 what was happening in the settlement negotiations that in fact  
4 reflected the terms that were being discussed, correct?

5 A. Again, I said I don't recall reviewing this at the time,  
6 so I don't know if I did or not.

7 Q. Let me ask you to look at Exhibit 274, please. Now we're  
8 up to February the 18th.

9 THE COURT: Excuse me, what's that number again?

10 MR. FOLSE: I'm sorry. EC 274.

11 THE COURT: 274. Thank you.

12 Q. Mr. Gropper, I direct your attention to the e-mail at the  
13 bottom of page 1, from -- is it Matthew Roose?

14 A. Yes.

15 Q. At Fried Frank to Mr. Rosen, Mr. Kosturos and others dated  
16 February 18th and it refers to WMI Meeting. It says, "Brian  
17 and Bill, we would like to schedule an in-person meeting next  
18 week to discuss the term sheet and next steps." And then you  
19 can see what comes above it, at least the one sentence that's  
20 not redacted.

21 Were you aware of a meeting between counsel for the  
22 settlement noteholders and representatives of the debtor for  
23 purposes of discussing a term sheet?

24 A. Yes.

25 Q. Was this -- do you know whether this meeting was about the

1 bankruptcy term sheet or a settlement term sheet?

2 A. I don't know.

3 Q. And how did you know about this meeting?

4 A. Well again, we had a couple of meetings with the debtors  
5 in the first couple months of 2010. I don't recall whether  
6 this was one of those two meetings where we talked about ways  
7 to implement a settlement, to the extent a settlement was  
8 reached, without knowing the terms. We were clear at those  
9 meetings, and Mr. Rosen acknowledged in those meetings that he  
10 was not going to provide us any material non-public information  
11 at those meetings. We made it very clear we did not want any.  
12 And additionally, our counsel was having meetings with the  
13 debtors that we weren't present at, so we were not exposed to  
14 any material non-public information. So I can't tell whether  
15 or not this was a meeting that the clients attended or not,  
16 from this e-mail and I don't recall the specific dates where we  
17 attended meetings.

18 Q. Let me ask you to look at EC Exhibit 126. And again,  
19 let's start with the e-mail from Matthew Roose to Brian Rosen  
20 dated February 24, 2010. And he says, "Brian, we have prepared  
21 an agenda for tomorrow's meeting." That would be a meeting on  
22 February the 25th. And you can see the agenda being  
23 communications with the FDIC, WMB bondholders and JPMorgan.  
24 Next steps going forward without the FDIC and the WMB  
25 bondholders. There's a section on a plan of reorganization,

1 waterfall issues, a litigation update including March 4 hearing  
2 and communications with Judge Walrath.

3 And then Mr. Rosen said, "There are things on here that  
4 require your clients becoming restricted as that will not  
5 happen tomorrow, those items will be skipped." That suggests  
6 that their -- that the meeting on February 25th was one that  
7 you would have attended, correct?

8 A. Yes.

9 Q. And which of the items in the agenda were discussed at  
10 that meeting?

11 A. My recollection is that the items that were discussed were  
12 the plan of reorganization, waterfall issues, litigation  
13 update.

14 Q. Was there any discussion about communications with the  
15 FDIC?

16 A. I know that we had learned that there were certain WMB  
17 bondholders who were putting a lot of political pressure on the  
18 FDIC, so Mr. Kosturos said that and he asked if we had any  
19 political connections that we might be able to bring to bear,  
20 anyone at our firms to help the debtors. But that's my only  
21 recollection on that topic.

22 Q. Thank you.

23 MR. FOLSE: And Your Honor, I'd like to move the  
24 admission of Exhibit 126.

25 MR. ECKSTEIN: No objection, Your Honor.

1 THE COURT: It's admitted.

2 (E-mail from Matthew Roose to Brian Rosen dated 2/24/2010 was  
3 hereby received as Equity Committee's Exhibit 126 for  
4 identification, as of this date.)

5 Q. Do you recall attending, or not attending, a meeting at  
6 the headquarters of JPMorgan on March 1st, 2010? So that would  
7 have been three days before the court hearing where Mr. Rosen  
8 advised that the parties were nearing a settlement?

9 A. I did not attend such a meeting. I've never had any  
10 direct contact with anyone at JPMorgan in this case.

11 Q. Did your counsel from Fried Frank -- do you know whether  
12 your counsel attended such a meeting?

13 A. I didn't know that that meeting took place until you just  
14 asked me that question.

15 Q. Please look at EC Exhibit 280. I would like to start at  
16 the bottom of the first page with the e-mail from Brian Rosen  
17 dated March 2nd to a group of people that included your  
18 counsel, Brad Scheler. Do you see that?

19 A. Yes.

20 Q. And he's saying, "Attached is language suggested by  
21 JPMorgan to address the problem." And after that, on page 2,  
22 there's an e-mail from counsel at Sullivan & Cromwell for  
23 JPMorgan, with a section on the rights to withdraw from the  
24 settlement.

25 What I'd like to ask you about, though, is Mr. Scheler's

1 response, which is at the top of page 1. And he's registering  
2 some problems he's got with the language. He says, "The key  
3 this week is to get JPM to put even more pressure on FDIC. As  
4 you know well, if the judge grants summary judgment, that goes  
5 to deposit and to tax issues, that is the worst-case scenario  
6 even with appeals for JPM. This takes them off the horns of  
7 that dilemma. Our clients won't go for this." Do you see  
8 that?

9 A. I do.

10 Q. And can you explain how Mr. Scheler was able to tell  
11 debtors' counsel that you and the other settlement noteholders  
12 would not agree to the language that Morgan was proposing?

13 A. Well, I don't know what language Morgan's proposing. I've  
14 never seen this e-mail in my life so I have no ability to  
15 assess them.

16 Q. And you have no ability to assess his statement?

17 A. I don't know what was in Mr. Scheler's state of mind when  
18 he composed this e-mail. He wasn't talking to me about it.

19 MR. FOLSE: Your Honor, I would offer Exhibit 280.

20 MR. ECKSTEIN: Objection, Your Honor. No foundation.

21 THE COURT: Response?

22 MR. FOLSE: I -- Mr. Scheler was acting as agent for  
23 the settlement noteholders. I don't believe there's any  
24 dispute about the authenticity of the document.

25 THE COURT: Well, I don't know how you can get it in



1 through this --

2 MR. FOLSE: I'm sorry?

3 THE COURT: I don't know how you can get it in through  
4 this witness who says he never saw it. So I'm going to sustain  
5 the objection.

6 MR. FOLSE: All right.

7 BY MR. FOLSE:

8 Q. Let's look at Exhibit 281, please. Now we're up to March  
9 2nd and the e-mail is from, again, Mr. Scheler to Brian Rosen,  
10 Mr. Kosturos, a group of other people. And he says at the top,  
11 and he's responding, again, to -- further with respect to this  
12 language and also communication from what JPM expected that the  
13 summary judgment hearing would not be heard.

14 Mr. Scheler said, "Thanks Brian. This makes clear that  
15 JPM wants most to avoid an adverse summary judgment decision.  
16 Our clients either want the tri-part deal or want to move  
17 forward on Thursday." Do you see that?

18 A. I do.

19 Q. Now I'll ask you the same question. Do you have any  
20 explanation -- well first of all, do you recall speaking with  
21 Mr. Scheler about whether you would or wouldn't accept what  
22 JPMorgan was asking for here?

23 A. I do not.

24 Q. Can you explain why Mr. Scheler would tell the debtors  
25 that you and the other settlement noteholders would either want

1 what he refers to as the tri-part deal or want to move forward  
2 on Thursday?

3 A. I cannot explain that. I don't know why Mr. Scheler wrote  
4 that.

5 Q. Did you have phone conversations with Fried Frank during  
6 January, February, first part of March of 2010?

7 A. Yes.

8 Q. Were there conference calls among representatives of the  
9 settlement noteholders and Fried Frank during that period?

10 A. I don't recall any.

11 Q. You were personally involved in gathering and reviewing  
12 documents for production to the equity committee in response to  
13 our discovery requests since the December plan confirmation  
14 hearing, true?

15 A. I was.

16 Q. And in fact you testified in your deposition that you  
17 spent a tremendous amount of time with Aurelius' counsel  
18 collecting documents and then determining with them which  
19 documents were responsive to our requests, correct?

20 A. Yes. I wanted to ensure we fully complied with the  
21 Court's order in that respect.

22 Q. You understood that Aurelius was to produce to us all  
23 information that Aurelius received during the periods when  
24 settlement negotiations with Morgan were occurring, correct?

25 A. Yes.

1 Q. And did you interpret that obligation to include documents  
2 provided by the debtors that were either sent directly to  
3 Aurelius or passed on to Aurelius by your attorneys?

4 A. Yes.

5 Q. Did you interpret that obligation to include e-mails from  
6 the negotiating parties that you either received directly or  
7 that were forwarded on to you by your counsel?

8 A. Yes, and we produced them.

9 Q. There were times, were there not, where your attorneys,  
10 first at White & Case and then at Fried Frank, received  
11 information from the debtors orally, either in phone calls or  
12 through face-to-face meetings, correct?

13 A. Yes.

14 Q. And sometimes they conveyed that information to you  
15 through e-mail reports, isn't that true?

16 A. I'm not sure.

17 Q. You reviewed your documents, right?

18 A. Yes.

19 Q. And didn't you see e-mails from White & Case and Fried  
20 Frank telling you about conversations they had had with  
21 representatives of the debtor or with other settlement  
22 noteholders?

23 A. I just don't recall, sitting here today.

24 Q. It's true, is it not, that Aurelius did not produce to us  
25 all e-mails that it received from counsel, at White & Case or

1 Fried Frank, summarizing or reporting on information that they  
2 had orally received from the debtor, on the ground that those  
3 were privileged?

4 A. There were a number of reasons we either produced or  
5 didn't produce certain items. But I can say that we spent a  
6 tremendous amount of time and money fully complying with the  
7 Court's order on discovery in these cases.

8 Q. Here's my question; isn't it correct that Aurelius  
9 withheld from production e-mails that Fried Frank and possibly  
10 White & Case before them, sent to Aurelius reporting on  
11 information that they had learned from oral contacts with  
12 representatives of the debtor. I spoke to so and so, we  
13 attended a meeting and this was discussed. You got e-mails  
14 like that, didn't you?

15 A. I'm not sure and I'm not sure whether or not we did not  
16 produce those. We produced everything that the Court ordered  
17 us to produce.

18 Q. Didn't you withhold those e-mails, e-mails like that,  
19 which included reports to you from your counsel, on what they  
20 were getting from the debtors orally, on the ground that they  
21 were privileged?

22 A. With all due respect, Mr. Folse, I think I've answered  
23 that question. I just don't recall specific things that were  
24 produced or weren't produced other than to say we spent a  
25 tremendous amount of time ensuring that we fully complied with

1 the court's discovery order, in all respects, in these cases.

2 Q. Your counsel did not prepare a privilege log identifying  
3 what it had withheld under a claim of privilege, did it?

4 A. I don't think you requested a privilege log.

5 Q. You don't? In any event, your counsel never prepared one  
6 and delivered one to us, correct?

7 A. That's correct.

8 Q. You testified that there were points in time, in March and  
9 going forward, where Aurelius became restricted in order to  
10 review certain information.

11 A. Certain documentation associated with the settlement that  
12 had been announced in court in March, correct.

13 Q. And on how many occasions did that happen?

14 A. I believe it was four but I could be off by one in either  
15 direction.

16 Q. And that wasn't done pursuant to any written agreements,  
17 right?

18 A. That's correct. We had given Fried Frank instructions  
19 that or we had developed a procedure with them whereby if they  
20 had received documentation, in draft form, we would receive it  
21 with the opportunity to provide advice and comment on it. This  
22 was all done in conjunction with securities law advice from  
23 Fried Frank. And during the periods where we had those  
24 documents we shut down trading in the debtors' securities, I  
25 believe all of the noteholders did, until those documents were

1 appropriately filed with this court.

2 Q. And how long did each of the four restricted periods last?

3 A. They were a period of days. Some were longer than others  
4 and shorter than others but it was some single digit period of  
5 days.

6 Q. What involvement did Aurelius and its counsel have in the  
7 drafting of the plan of reorganization?

8 A. Well, again I had mentioned that in January, February,  
9 early March timeframe we had discussions about a plan construct  
10 that would apply in the event there were a settlement. Our  
11 counsel was dialoguing with Weil throughout that time about  
12 that construct and after the settlement was announced in court  
13 in mid-March, again I presume my counsel was interacting with  
14 Weil Gotshal on a plan draft; we then received a draft of that  
15 plan and shut down trading later in the month of March in order  
16 to review it.

17 Q. And going beyond March what involvement did Aurelius have  
18 in the preparation of the plan or amendments to it?

19 A. Again, there were four periods during which we received  
20 draft documentation which included the settlement agreement,  
21 the plan and disclosure statement, we provided comments on  
22 those documents, many of which, I should add, were rejected in  
23 all respects. And ultimately those documents were filed with  
24 the court and we ultimately signed on to the settlement  
25 agreement. One -- well, there were two versions filed in May

1 but we signed on to one of the versions that was filed in May.

2 Q. And has Aurelius continued to have involvement in the  
3 modification of the plans as they've been proposed since May of  
4 2010?

5 A. We had involvement in negotiation of the plan that was  
6 filed on October the 6th and we had restricted trading during a  
7 period of time in order to review that draft plan and  
8 disclosure statement. And I believe there was a revised  
9 settlement agreement that time around as well and other than  
10 that not really.

11 Q. Do you anticipate that if the modified plan is confirmed,  
12 Aurelius -- the modified sixth amended, that Aurelius will  
13 become a shareholder of the reorganized WMI?

14 A. I do.

15 Q. And why is that?

16 A. Well, we hold PIERS.

17 Q. Right.

18 A. So to the extent that senior bonds and subordinated bonds  
19 do not elect to take the cash -- sorry, the stock away from the  
20 PIERS that would go to the PIERS, and I believe the debtors  
21 have reported those election results such that there is stock  
22 going to the PIERS class, by virtue of our ownership of PIERS  
23 we will be a stockholder of reorganized WMI.

24 Q. Do you know Steve Zelin?

25 A. I do.

1 Q. At Blackstone?

2 A. Yes.

3 Q. And you understood that he testified here last week? Do  
4 you know that he testified here last week?

5 A. Yes.

6 Q. He was asked what facts and circumstances he considered,  
7 based on discussions with counsel that Blackstone had retained,  
8 as indicia of an intent to avoid taxation by the creditors  
9 acquiring stock pursuant to the plan?

10 MR. FOLSE: Actually, let's just put this up on the  
11 ELMO if we could. This is the daily transcript for the day of  
12 Mr. Zelin's testimony, page 334 beginning at line 11 for the  
13 record.

14 "Q. What facts and circumstances did you consider based on  
15 your discussions with counsel as indicia of an intent to avoid  
16 taxation by the creditors acquiring stock pursuant to the  
17 plan?"

18 MR. STROCHAK: Your Honor, excuse me. Adam Strochak,  
19 Weil, for the debtors. This seems to go beyond our agreement  
20 on what this phase of the case was going to cover. This seems  
21 to be going back to what we covered in the previous phase.

22 THE COURT: I don't know what it's going to yet so I'm  
23 going to overrule your objection till we get there.

24 MR. STROCHAK: Thank you, Your Honor.

25 BY MR. FOLSE:



1 Q. There was some objection and he then begins the answer --

2 A. I apologize. Is there a hard copy of this that I could  
3 look at, just to make it a little easier? It's a little hard  
4 for me to read on the screen.

5 Q. Let me put this on the screen and show you what I want to  
6 ask you about and then I'll come give you my copy.

7 A. Okay.

8 Q. He begins his answer, "We looked at the reorganized WMI,  
9 which would be a reinsurance run off." And then coming down,  
10 "value at the underlying assets relative to the potential  
11 benefits from the NOLs."

12 Then he says, "We looked at the fact that the soon to be  
13 shareholders were active participants in the negotiation of the  
14 plan and structure of the plan as also noted, another important  
15 factor. And those were the two primary factors, the three  
16 primary factors that we considered.

17 Do you accept Mr. Zelin's description that the soon to be  
18 shareholders of reorganized WMI were active participants in the  
19 negotiation of the plan and the structuring of the plan?

20 MR. ECKSTEIN: Your Honor, there's no foundation for  
21 this question. There's no foundation as to who the  
22 shareholders are.

23 THE COURT: I can't hear -- remember, if you're not  
24 speaking into a microphone no one can hear you.

25 MR. ECKSTEIN: Your Honor, we would object. There's

1 no foundation for this witness to answer this question.

2 There's no foundation as to who the shareholders are going to  
3 be. He merely asked him whether he's going to become a  
4 shareholder. But I don't believe --

5 THE COURT: Overruled. I'm going to see if he can  
6 answer to the best of his ability.

7 THE WITNESS: I'm sorry; could I just have the hard  
8 copy so I could read it?

9 MR. FOLSE: That's fine.

10 THE WITNESS: Thank you.

11 MR. STROCHAK: Your Honor, could I ask counsel to  
12 identify the page number of the transcript he's reading from, I  
13 don't have it.

14 MR. FOLSE: I think Mr. Gropper will have to.

15 THE WITNESS: It's page 334. I don't know of what  
16 day, it's not on the transcript.

17 Well, my firm is actually going to own a relatively  
18 small percent, sub ten percent, of reorganized WMI. I actually  
19 was, originally, going to be on the board of it, I'm no longer  
20 going to be on the board of that company. And while it is true  
21 that we were active participants in the -- I wouldn't say  
22 active, I would say participants, not to quibble with Mr.  
23 Zelin, I have a lot of respect for him. We were participants  
24 in the negotiation of the plan -- restructuring plan in  
25 October, we haven't really been involved in the revised plan,

1 other than giving our views to the debtors on certain issues.  
2 Frankly, many of which they ignored.

3 So I'm just -- I'm not sure, sitting here today,  
4 whether this is a proper characterization and I'm certainly not  
5 in a position to make a judgment as to whether it is a proper  
6 characterization as it would go to the factors that Mr. Zelin  
7 is explaining in his testimony.

8 MR. ROSEN: Your Honor, I apologize for interrupting.  
9 That -- we are looking at the official transcript and that is  
10 not on that. I don't know what Mr. Folse is using as his  
11 document here.

12 We're trying to put it into context and we can't even  
13 find it.

14 MR. FOLSE: I printed this from the rough transcript  
15 so I suppose it's possible the pagination changed. I can -- we  
16 can find it, Your Honor, and let you have the exact page  
17 number.

18 THE COURT: All right.

19 (Pause)

20 BY MR. FOLSE:

21 Q. I just want to quickly ask you to identify a few  
22 documents, Mr. Gropper. First, Exhibit EC 286. Can you  
23 identify this?

24 A. I cannot. I've never seen it before.

25 Q. That surprises me. It's from Eleanor Chan, you know who

1 she is, right?

2 A. I must have the wrong exhibit.

3 Q. I'm sorry, 286.

4 A. Oh, I'm sorry. I was on 296.

5 Q. Maybe I mis-said it.

6 A. Yeah, I apologize for the confusion. I see the e-mail.

7 It's an e-mail from Eleanor Chan to Matt Roose and Jon Goulding  
8 and Tal Sapieka at Weil Gotshal.

9 Q. And you're copied and Mark Brodsky are copied?

10 A. That's correct.

11 Q. And did you receive the e-mail?

12 A. I did.

13 Q. Okay.

14 MR. FOLSE: I offer Exhibit 286, please.

15 THE COURT: Any objection?

16 MR. ECKSTEIN: No objection, Your Honor.

17 THE COURT: It's admitted.

18 (E-mail from Eleanor Chan to Matt Roose and Jon Goulding and  
19 Tal Sapieka was hereby received as Equity Committee's Exhibit  
20 286 for identification, as of this date.)

21 Q. Now, if you could look at Exhibit EC 287, also from Ms.  
22 Chan, this one dated May 17, 2010, again, showing you and Mr.  
23 Brodsky as a copy. Did you receive this e-mail?

24 A. I did.

25 MR. FOLSE: I offer Exhibit 287, Your Honor.

1 MR. ECKSTEIN: No objection, Your Honor.

2 THE COURT: All right. Admitted.

3 (E-mail from Eleanor Chan dated 5/17/2010 was hereby received  
4 as Equity Committee's Exhibit 287 for identification, as of  
5 this date.)

6 Q. Now if you'll look at Exhibit 283, please.

7 A. Yes.

8 Q. 283, this appears to be from Brad Scheler, it's dated  
9 March 23, 2010 and it appears to be forwarding two models  
10 related to a DCF valuation of WMMRC as of July 31, 2010,  
11 prepared by Alvarez & Marsal. Do you see that?

12 A. I do.

13 Q. Now at the top Mr. Scheler's forwarding this to an e-mail  
14 group called WaMu creditors, do you see that?

15 A. I do.

16 Q. Are you familiar with that e-mail group?

17 A. Yeah, that's an e-mail group that would distribute, within  
18 the Fried Frank system, to the Fried Frank clients at the time  
19 which we were one of them.

20 Q. So it would have been Aurelius, Centerbridge, Appaloosa  
21 and Owl Creek?

22 A. Well, the people from those firms who were working on the  
23 matter.

24 MR. FOLSE: I'm sorry; I'm being reminded to ask for  
25 the computer feed to be switched back.

1 Q. So this would have come to you?

2 A. Yes.

3 MR. FOLSE: I offer Exhibit 283, Your Honor.

4 MR. ECKSTEIN: Your Honor, we have no objection.

5 THE COURT: All right. It's admitted.

6 (E-mail from Brad Scheler dated 3/23/2010 was hereby received  
7 as Equity Committee's Exhibit 283 for identification, as of  
8 this date.)

9 Q. By the way, Mr. Gropper, this copy of Brad Scheler's e-  
10 mail was produced by Appaloosa with a redaction, as you can  
11 see. Did Aurelius produce this document?

12 A. I don't know.

13 Q. I'm sorry?

14 A. I don't know.

15 Q. You don't recognize it?

16 A. No, I do recognize the document and I know it was  
17 produced. I just don't know if we produced it as well.

18 Q. All right. Is it correct that the settlement noteholders  
19 struck a deal with the debtors that the plan be drafted in  
20 order to provide for the payment of post-petition interest on  
21 their debt at contract rates rather than the federal judgment  
22 rate?

23 A. Well, there were a number of versions of a plan and a  
24 settlement agreement that we ultimately signed on to and that  
25 was certainly one of the provisions of that plan.

1 Q. Do you know Mr. Mayer at Fried Frank?

2 A. He's at Kramer Levin.

3 Q. I'm sorry; Kramer Levin.

4 A. Yeah.

5 Q. Let me show you part of the transcript of the hearing in  
6 this court on February 8th, 2011 on the equity committee's  
7 motion to compel.

8 MR. FOLSE: This is at page 53, if I could have the  
9 ELMO switched back on.

10 Q. Mr. Mayer is speaking here, beginning at line 6. He's  
11 talking about the stakes being hundreds of millions. He says  
12 that's what's before the court. That's what's so disturbing  
13 about the issue that's raised by the equity. And then at line  
14 14 he says, "The contract rate of interest is immaterial to the  
15 term -- to the deal that we cut and that this Court approved."  
16 Do you know what he's talking about?

17 A. Yes.

18 Q. What's he talking about?

19 A. It's what I just said, that paying the bonds at the  
20 contract rate of interest was a term of the deal that we  
21 ultimately signed on to and supported and voted for.

22 Q. With the debtors?

23 A. Yes.

24 Q. And that was something that the settlement noteholders  
25 insisted on, correct? Not something that was offered by the

1 debtors?

2 A. I don't think that was a controversial term at all. All  
3 we said was please pay us interest in accordance with our legal  
4 rights in the documents. There wasn't a lot of back and forth  
5 where they said oh gee, no, we need to have a discussion about  
6 paying at some other rate. That's the rate that, in our view,  
7 was proper under the documents.

8 Q. Now let me ask you to look at Exhibit 3, EC Exhibit 3,  
9 which was admitted as AU Exhibit 17. I think this has been --

10 MR. FOLSE: Mr. Rosen's saying that this should be  
11 taken down.

12 THE COURT: Yes. It should not be up.

13 MR. ROSEN: Yes. Your Honor, I believe this is one of  
14 the documents that's going to be --

15 MR. FOLSE: I'm sorry.

16 Q. Mr. Gropper, you identified this in your direct testimony  
17 as the information barrier, policies and procedures that  
18 Aurelius adopted, is that correct?

19 A. Yes.

20 Q. Were you involved in the preparation of this?

21 A. Yes, I was, in conjunction with our outside counsel,  
22 Schulte Roth.

23 Q. If you turn to the third page of this exhibit, it's a  
24 document titled "Policy Statement on Insider Trading". Do you  
25 see that?



1 A. I do.

2 Q. What is this document?

3 A. Well, as part of our information barriers procedures, we  
4 think it important to educate the investment team on insider  
5 trading, what insider trading is and what the consequences of  
6 insider trading are. We actually have outside counsel come in  
7 and lecture to our investment team on insider trading to ensure  
8 that we fully comply with the securities laws. In fact, I  
9 actually remember that we had a lawyer from one of the law  
10 firms that we use regularly come in and lecture our investment  
11 team on insider trading the day after this wall were entered  
12 into.

13 Q. All right. And who prepared the policy statement on  
14 insider trading?

15 A. Well, I did in conjunction with our counsel at Schulte  
16 Roth & Zabel.

17 Q. And was this prepared especially for this information  
18 barrier under the March 2009 confidentiality agreement or had  
19 it already been in place?

20 A. I'm not sure. We had another wall up at the time in a  
21 matter of credit. So people had already signed this policy  
22 statement and I don't -- I don't actually know whether we  
23 separately had people review the policy statement on insider  
24 trading at our firm. But again, it's something that we spent a  
25 lot of money on making sure our investment team is fully

1 educated on.

2 Q. All right. And this represents the product of all the  
3 money you spent and it represents the understanding that  
4 Aurelius had, and has, about its obligations with respect to  
5 avoidance of insider trading, correct?

6 A. Well, I wouldn't say that it represents all of our  
7 understanding, there's lots of understanding that's not  
8 reflected in this document.

9 I mean, I've been doing this for sixteen years and I've  
10 gotten thousands of hours of advice on insider trading from a  
11 whole variety of law firms over that time. And I'm certain  
12 that all of the advice I've gotten from all of those law firms  
13 is not incorporated into these two and a half pages.

14 Q. Well, I didn't really mean to suggest that. This  
15 certainly represents what you and counsel believed were the  
16 important points that ought to be communicated to the people  
17 who work at Aurelius, correct?

18 A. Well again, it's some of it because we had a lawyer come  
19 in the day after this policy were signed and give a lecture  
20 which lasted -- I remember it lasting more than an hour. It  
21 was a litigator at Kasowitz, came in and lectured our team on  
22 insider trading and how it works and what it is and went  
23 through examples of things that may or may not be material and  
24 had an extensive discussion on it. And we, again, had a  
25 similar presentation the next year on them.

1 Q. Well let me try it this way, as far as this goes would you  
2 agree that it is a statement of legal obligations and  
3 understandings that Aurelius believes is accurate?

4 A. Yes.

5 Q. By the way, in your direct testimony you referred to the  
6 various statements that had been made by Mr. Rosen, both orally  
7 and in e-mails, that such and such was the only material non-  
8 public information, the debtors are disclosing the material  
9 non-public information and so forth.

10 You recognized, did you not, that it was Aurelius'  
11 obligation, regardless of what the debtor or its counsel said  
12 or didn't say, to make its own, independent determination of  
13 whether you had non-public information that you received in  
14 this process that was material, correct?

15 A. Well, yes.

16 MR. ECKSTEIN: Before the witness responds, we would  
17 object to the extent he's asking for a legal conclusion.

18 THE COURT: Well --

19 MR. FOLSE: I'm asking for his understanding of his  
20 obligation.

21 THE COURT: Yeah. Overrule. You could answer.

22 THE WITNESS: I think I already answered anyway. But  
23 yes and I did believe that to be the case. But again, we had a  
24 post-petition agreement with the debtors and Mr. Rosen, I'm  
25 certain, was making determinations in consultation with

1 securities lawyers at Weil Gotshal on these issues. And I've  
2 actually worked with a lot of the securities lawyers at Weil  
3 Gotshal and frankly they're very smart guys and they know this  
4 area of the law as it pertains to bankruptcy cases very well.

5 So we had the debtor with a post-petition contractual  
6 obligation to make a determination. We had Mr. Rosen's  
7 affirmation that was, you know, most likely done in  
8 consultation with partners who are expert in this area of the  
9 law. And yes, I did understand that we had to make our own  
10 determination and we did, in fact, make our own determination  
11 that at the end of both confidentiality periods we were not in  
12 possession of any material non-public information.

13 Q. So the answer is yes?

14 A. I gave you my answer, I can do it --

15 THE COURT: He's answered. He's answered. Go ahead.

16 Q. Aurelius had a model that estimated the recoveries it  
17 would obtain from the Washington Mutual bankruptcy under  
18 certain assumptions, correct?

19 A. Yes.

20 Q. And the model predicted how much would be obtained by the  
21 various classes of creditors in the waterfall, correct?

22 A. Yes.

23 Q. And that model was available to the traders and analysts  
24 within Aurelius, true?

25 A. Yes.

1 Q. Eleanor Chan was the person responsible, primarily  
2 responsible, for inputting data into the model, is that right?

3 A. Yes.

4 Q. And you communicated with her about the content of  
5 settlement discussions between Washington Mutual, the FDIC and  
6 JPMC, correct?

7 A. I'm not sure that's right.

8 Q. I'm sorry?

9 A. I said I'm not sure that's correct.

10 Q. Why are you not sure?

11 A. Well, because I said that, yesterday on direct, that I  
12 don't recall whether at the end of the first confidentiality  
13 period I communicated my knowledge as to the negotiations that  
14 had taken place during the time the wall was up because, in my  
15 view, the negotiations were meaningless. So I just don't have  
16 a recollection, one way or another, whether or not I  
17 communicated them.

18 And during the second confidentiality period Ms. Chan was  
19 involved in those discussions. So I don't know if there was a  
20 need for me to communicate to her something she already knew.

21 Q. Well, let's look at your deposition transcript at page  
22 185. There's actually a question that begins at the bottom of  
23 184 which is?

24 "Q. "Did you personally ever input data into the model?"

25 At the top of 185 you answered no. And then you were

1 asked who did and you said, "Eleanor Chan ran that model for  
2 us. And then you were asked;

3 "Q. And did you ever communicate with her about the contents  
4 of settlement discussions?

5 "A. Yes."

6 Is that correct?

7 A. Yeah. Again, I just don't have a specific recollection of  
8 our discussions of the particulars. We did not communicate,  
9 when there was a wall up, during March, April into May, 2009.  
10 I don't recall whether we had conversations about it after the  
11 wall came down, one way or another, I may have.

12 As I mentioned, my knowledge wasn't part of the entire  
13 firm so I'm not sure it makes a difference. And I just don't  
14 remember the specifics of conversations that we had in the  
15 later part of the year.

16 Q. But in your deposition didn't you testify that you -- you  
17 told her in November about the Morgan proposal to split the tax  
18 refund, a hundred percent to Washington Mutual for the --  
19 initially. And then a hundred percent -- I'm sorry. A hundred  
20 percent to Morgan initially and then a hundred percent to the  
21 debtor for the extended period?

22 A. Oh, I know that we talked about that.

23 Q. All right. And she also knew about the counterproposal  
24 that the Fried Frank group had made in response to that as  
25 well, correct?

1 A. Well sure, everyone in our firm did.

2 Q. And she made changes to the model based on that  
3 information, true?

4 A. I don't know that to be the case.

5 Q. Do you recall testifying in your deposition that you  
6 believe she did?

7 A. I don't.

8 Q. Let me ask you to look at page 187 of the deposition  
9 transcript. At line 6 you were asked;

10 "Q. What's another example of information about settlement  
11 communications that you shared with her?

12 "A. We, meaning the Fried Frank group, had formulated a  
13 proposal after receiving that and obviously we discussed that  
14 proposal and therefore she knew it, so I didn't have to  
15 communicate it to her.

16 "Q. Did she, to your knowledge, input anything related to that  
17 settlement proposal into the model?

18 "A. I believe she did. But again, that was our proposal.

19 "Q. What was the timeframe?

20 "A. December 2009."

21 Does that refresh your recollection?

22 A. It does and I'm sure that we had to model out a proposal  
23 that we were making in order to know whether it was an  
24 appropriate proposal to make. But whether or not that is used  
25 as an input to an investment decision, which it wasn't, is

1 totally independent of whether Eleanor actually knew it or  
2 input it into the model.

3 Q. Well, there's only one model, right? I mean, the model  
4 that's being discussed in your deposition here today, this is  
5 the model that is made available to traders and analysts at  
6 Aurelius, correct?

7 A. Yes.

8 Q. And we're talking about inputting information about the  
9 settlement communications into that model, right?

10 A. Yes. Because, again, in order to assess a settlement  
11 proposal you need to model it. You can't just do it on a sheet  
12 of paper.

13 Q. Well, the model that we've been talking about, that's  
14 available to people within Aurelius, including the people doing  
15 the trading, that model is a valuation model of some sort?

16 A. That question implies that somehow the analysts and  
17 traders are looking at it and making investment decisions?

18 Q. Well, I'm not asking you that question.

19 A. Well, but that's the implication of that question.

20 Q. Well --

21 A. And I don't want to leave the Court with a misimpression.  
22 We needed to model out the settlement proposal in order to  
23 determine whether in fact the settlement proposal made sense.  
24 You can't do that without putting in a model and you're not  
25 going to build a whole new model where you've got, like, the



1 settlement model and the investing model, it's a model.

2 Q. It's a model and that's what I'm trying to find out. You  
3 just called it an investing model and what does it model?

4 A. I didn't call it an investing model. I said you would not  
5 create separate models for those differing purposes.

6 Q. What does it model?

7 A. It models recover to securities within the Washington  
8 Mutual capital structure.

9 Q. Projected recoveries?

10 A. Yes.

11 Q. And it's constantly being updated and evolving from 2008  
12 all the way up to the present?

13 A. Yes. But it's also not the only input into investment  
14 decisions. In fact many times it's not an input at all to  
15 investment decisions.

16 Q. I'm not asking about investment decisions because I think  
17 it's already been established that you're not the one who makes  
18 investment decisions. I'm just trying to establish, which I  
19 think we have, that this model, which was available to the  
20 people who did make the investment decisions, the people who  
21 did execute the trades, included information about the  
22 settlement discussions. Would you agree with that?

23 A. I don't think you've established that at all. I don't  
24 know whether it was modeled and then saved in a version. I  
25 don't know how, in fact, it was modeled out. So I don't think

1 you've established that at all.

2 Q. And we don't know that either because you didn't produce  
3 any of these models to us, correct?

4 A. Well, the Court's already ruled on that dispute. I'm not  
5 sure how to respond to that question.

6 What I can say is that the settlement proposals did not  
7 provide a basis for us making an investment decision.

8 Q. Sir, I -- I'm not asking you to volunteer information,  
9 particularly when you're volunteering something the Court has  
10 already ruled you may not testify about. So I'll ask the next  
11 question, if it's okay.

12 THE COURT: Go ahead.

13 Q. You're aware, are you not, that the modified sixth  
14 amendment plan provides for the payment of the settlement  
15 noteholders' legal fees for representation by Fried Frank,  
16 correct?

17 A. Yes.

18 Q. Why did the debtors agree to pay those legal fees?

19 A. Because I think the debtors viewed the settlement  
20 noteholders to have played a constructive role in the process  
21 of reaching a resolution in these cases, and in fact the  
22 debtors are paying the legal fees, also, of the White & Case  
23 group, of the bank bondholder group and a number of other  
24 parties in the case.

25 Q. And so you think that the -- it is -- I assume that you

1 think the bankruptcy estate should be reimbursing Aurelius for  
2 the legal fees that it paid to Fried Frank, is that correct?

3 A. I do but pursuant to the plan it's all subject to a 503(b)  
4 application and the Court will make a determination as to  
5 whether that's appropriate or not.

6 Q. That's the way it now reads, correct?

7 A. Yes.

8 Q. It didn't used to read that way?

9 A. It did not used to read that way.

10 Q. Let me ask this question; would you agree that unless  
11 Fried Frank and the settlement noteholders had played a  
12 significant role in the process of bringing about a settlement,  
13 the process of negotiating and documenting the plan, there  
14 would be no basis on which to suggest that these legal fees  
15 ought to be paid by the debtors' estate?

16 MR. ECKSTEIN: Your Honor, I would object to the  
17 extent he's asking for a legal conclusion.

18 THE COURT: Sustained.

19 MR. FOLSE: That's all I have, Your Honor.

20 THE COURT: I think it's a good time to break then,  
21 don't you? All right. Let's take an hour. We'll get back at  
22 1:30.

23 (Recess from 12:17 p.m. until 1:38 p.m.)

24 THE CLERK: All rise.

25 THE COURT: Good afternoon.

1 MR. SARGENT: Good afternoon, Your Honor. Edgar  
2 Sargent for Susman Godfrey on behalf of the equity committee.  
3 I just have a brief procedural matter to raise with the Court  
4 before we get started, if that would be all right?

5 THE COURT: Yeah.

6 MR. SARGENT: During the last witness' testimony  
7 counsel for the debtors raised an objection that a question  
8 called for testimony that's outside the scope of module 3, and  
9 that's inconsistent with, at least, to our understanding of how  
10 these modules were to work.

11 We understood that certain witnesses were to be  
12 grouped by subject matter or at least primary subject matter of  
13 their testimony for the convenience of the Court and the  
14 clarity of the presentation but not that that would serve as  
15 some sort of absolute cabin defining the permissible scope of  
16 their testimony.

17 I mean, as the Court is aware, when the Court granted  
18 our motion for Rule 2004 discovery of the settlement  
19 noteholders it was not only into trading records and trading  
20 issues but also into questions of the valuation of the  
21 reorganized debtor. And we asked some questions of the  
22 witnesses on those topics at deposition. There were documents  
23 produced on those topics and we intended to ask some questions,  
24 I believe, on our cross. And I'm not sure that that's inside  
25 or outside the scope of how they're defining module 3, but I

1 wanted to confirm with the Court that that's permissible.

2 Similarly, with Mr. Kosturos, the final witness,  
3 almost all of those questions, if not all of them, will relate  
4 to the insider trading allegations but some of them might be on  
5 some other issues and I just wanted to make sure that that's  
6 not going to be an issue.

7 MR. STROCHAK: Your Honor, Adam Strochak with Weil for  
8 the debtors.

9 That's not our understanding. Our understanding, and  
10 we tried to make this very clear to the Court and all the  
11 parties and everyone who's observing this trial, that the third  
12 unit or module of the case would be devoted to the inequitable  
13 conduct allegations and that's what would be tried.

14 We made very clear to the Court that we were putting  
15 Mr. Kosturos on at the end of the case to address only those  
16 inequitable conduct issues, that our 1129 case was going in  
17 through Mr. Goulding and the other witnesses that we called. I  
18 know there was a colloquy about this on the first day of the  
19 trial. I know we had a colloquy about it on Friday with Mr.  
20 Steinberg. I remember commenting that he did not feel a need  
21 to be here if the remaining witnesses were not going to be  
22 covering 1129 issues.

23 So it is our view that this phase of the case is about  
24 the inequitable conduct and I'll stop there, Your Honor, and  
25 answer any questions that you may have.

1 THE COURT: Well let me ask a question, the equity  
2 committee could certainly call their own witnesses after the  
3 debtor rests.

4 MR. STROCHAK: They certain could, Your Honor.

5 THE COURT: On any issue.

6 MR. STROCHAK: But there were no -- we had disclosures  
7 of witnesses and --

8 THE COURT: They can call your witnesses.

9 MR. STROCHAK: They could, Your Honor. They could  
10 certainly call our witness. But our understanding, through  
11 communications with the equity committee's counsel, as well as  
12 the clarifications that we tried to make on the record here,  
13 was that Mr. Kosturos was not being offered on direct or on  
14 cross or would not be crossed on any issues other than the  
15 inequitable conduct allegation.

16 THE COURT: Well, if they can call him on rebuttal  
17 then I don't see why not let him cross on any issue.

18 MR. ROSEN: Your Honor, I apologize for supplementing  
19 this but it's my --

20 THE COURT: Talk into the record.

21 MR. ROSEN: Yes, Your Honor. Module 2 was expressly  
22 to be the equity committee's case in chief but for inequitable  
23 conduct. Their case in chief consisted of two people, Mr.  
24 Anderson and Mr. Maxwell and they said that they had no  
25 additional witnesses to put on in connection with any 1129

1 issues.

2 So what we now have is that Mr. Sargent is going back  
3 on an agreement that he sent e-mails about, he represented in  
4 court about and now he wants to change the playing field yet  
5 again and we don't know what this is about.

6 If Mr. Sargent is prepared to perhaps make a proffer  
7 right now as to the questions that he would like, we could,  
8 perhaps Your Honor, talk to our witness about this and prepare  
9 them. But he was limited solely to the inequitable conduct.  
10 And as Mr. Stochak said, in response to Mr. Steinberg's  
11 questions to the Court and the Court expressly said on Friday,  
12 Mr. Kosturos will be there only for the inequitable conduct  
13 questions. Only were the Court's words and it was repeated by  
14 Mr. Steinberg, it was repeated by me. The word only was three  
15 times, Your Honor. Now we have Mr. Sargent wanting to change  
16 the rules again.

17 THE COURT: Well, what is the area? Do you want to  
18 respond?

19 MR. SARGENT: Well, one area is the debtors' failure  
20 to pursue claims against the directors and officers. I'm not  
21 sure whether that fits into Mr. Rosen's definition of  
22 inequitable conduct or not. But it's an area where we  
23 questioned Mr. Kosturos at his deposition and I intended to ask  
24 him some questions about it at the hearing.

25 MR. STARK: May I be heard, Your Honor? Thank you.

1 Robert Stark from Brown Rudnick appearing on behalf of the TPS  
2 consortium.

3 Your Honor, this is sharp, okay.

4 THE COURT: What's your argument?

5 MR. STARK: There were no -- there was no agreement at  
6 least with my group. We filed three objections to the plan:  
7 the original objection, which was carried over to the  
8 subsequent two objections. And each one of them raised issues  
9 that asked the debtors -- held the debtors to the burdens of  
10 proof under 1129(a) and (b). There are numerous, numerous  
11 arguments that are raised in those papers; 26(a) as a --

12 THE COURT: Okay.

13 MR. STARK: -- Rule of Civil Procedure on mandatory  
14 disclosures, there was no agreement at all with respect to any  
15 particular limitation on the witnesses. And, in fact, Mr.  
16 Coffey, my partner, raised it the first day, whether or not Mr.  
17 Goulding could be called back, because we were having colloquy  
18 with respect to whether or not he could be called back with  
19 respect to the issues that were raised in our particular  
20 objection papers.

21 It's their burden of proof. Your Honor, we can call  
22 him back. We can call back Mr. Kosturos. We can cross-examine  
23 him. They can all be called as adverse trial witnesses and  
24 asked leading questions then. What's the difference between  
25 asking cross-examination on the matters that are 1129, their



1 burdens, versus calling them as a direct witness but asking  
2 that they be designated as an adverse witness?

3 This is just a game that's being played in order to  
4 prevent the ability of people who are litigating -- actively  
5 litigating their objections.

6 THE COURT: I'm not going to decide this issue. We'll  
7 see what questions are asked and whether I think they're  
8 appropriate.

9 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

10 THE COURT: Just for purposes of preparing, I'm going  
11 to recess at five tonight, so.

12 MR. ROSEN: Your Honor, I believe that Mr. Sargent  
13 gave a half answer, or a little bit of an answer with respect  
14 to the proffer. I know he said about directors and officers --

15 THE COURT: I'm not going into it today. If he raises  
16 questions that I think are appropriate, I'll direct the witness  
17 to answer.

18 MR. FOLSE: Your Honor, Parker Folse on behalf of the  
19 equity committee. I just wanted to close out, not with  
20 questions of the witness, this question that had been raised  
21 about the piece of the trial transcript of Mr. Zelin's  
22 testimony --

23 THE COURT: Okay

24 MR. FOLSE: -- just to tell you what we determined.  
25 What I had showed Mr. Gropper was from the unofficial daily

1 transcript that the court reporter here has been preparing for  
2 the parties. We have the official transcript prepared from the  
3 tape, and I thought I ought to show you there is a difference  
4 that I thought the Court should be aware of. If we could have  
5 the ELMO? It's --

6 THE COURT: All right. A difference in pagination?

7 MR. FOLSE: It is a difference in pagination. The  
8 official trans -- there's also a difference in word. The  
9 official transcript begins -- the relative passage begins at  
10 page 282 line 22 and then carries over to page 284 line 5.  
11 This is the passage from the unofficial transcript that I used  
12 which said, "The soon to be shareholders were active  
13 participants in the negotiation of the plan and structure of  
14 the plan."

15 THE COURT: Okay.

16 MR. FOLSE: And this is from the official transcript,  
17 which says: "The soon to be shareholders were active  
18 participants in the negotiation of the plan and structured the  
19 plan."

20 THE COURT: All right. What was the unofficial? Can  
21 you put them both together, by any chance? Okay. Okay.

22 MR. FOLSE: I don't know if you can see the smaller  
23 one.

24 THE COURT: Yes, there differences. Um-hum.

25 MR. FOLSE: But in any event, I wanted to make sure

1 the Court had the page numbers and the language from the  
2 official transcript.

3 THE COURT: Okay.

4 MR. FOLSE: Thank you.

5 MR. KAPLAN: Your Honor, Howard Kaplan; Arkin, Kaplan,  
6 Rice; on behalf of certain of the trust preferred holders. We  
7 have three exhibits, Rule 1006 summaries of trading and  
8 pricing. But we otherwise have no questions of Mr. Gropper.  
9 So our request is that we either move these into evidence or at  
10 least all agree that we can use them in a closing. And then we  
11 would just put them into the record.

12 THE COURT: Any objection?

13 MR. ECKSTEIN: Your Honor, Kenneth Eckstein on behalf  
14 of Aurelius. I spoke with Mr. Kaplan right before we resumed.  
15 And what I've told Mr. Kaplan, that I'd be happy to review  
16 these, which I've done preliminarily. And to the extent he  
17 wants to use a demonstrative in connection with his closing  
18 argument or whatever closing submissions, subject to the  
19 appropriate confidentiality, we would not object to that.

20 We don't, at this point, agree for it to be admitted  
21 into evidence. The trading records are in evidence. And to  
22 the extent this is coming out of the trading records, we would  
23 be willing to work with Mr. Kaplan so that a demonstrative that  
24 he wants to utilize in connection with closings would be  
25 something that we've seen. And we can obviously argue whatever

1 we want to argue in response. It may not be complete, or what  
2 have you.

3 THE COURT: Okay.

4 MR. ECKSTEIN: But we think that's the proper way to  
5 proceed.

6 THE COURT: All right. Is that sufficient, then? You  
7 can use it at oral argument and after he confirms that it is  
8 consistent with the trading records exhibit that is part of the  
9 record?

10 MR. KAPLAN: Very good, Your Honor.

11 THE COURT: Okay.

12 MR. ROSEN: Your Honor, at this point, we can't take a  
13 position on it, because we haven't been given a copy.

14 THE COURT: All right. Anybody else wish to cross the  
15 witness? Any redirect?

16 MR. ECKSTEIN: Your Honor, my redirect will be quite  
17 brief.

18 THE COURT: Okay.

19 MR. ECKSTEIN: I hope.

20 REDIRECT EXAMINATION

21 BY MR. ECKSTEIN:

22 Q. Mr. Gropper, I'm going to show you a copy of Equity  
23 Committee Exhibit 283, which is a letter from Brad Scheler  
24 dated March 23, 2010, and it indicates that it was provided to  
25 the WaMu creditors. And I believe you testified that Aurelius

1 was, at that point in time, a member of the WaMu creditor  
2 group. Do you recall giving testimony on this exhibit?

3 A. Yes.

4 Q. Do you recall, Mr. Gropper, whether at the time you  
5 received this exhibit, Aurelius was or was not restricted from  
6 trading?

7 A. I believe we were, at this time. This was one of the  
8 periods in March where we restricted trading because we were  
9 receiving documentation associated with the settlement and  
10 plan.

11 Q. Mr. Gropper, I believe you testified that you carefully  
12 followed this case and tried to familiarize yourself with at  
13 least significant pleadings that were filed in this case. Is  
14 that correct?

15 A. Yes.

16 Q. And do you have any -- do you recall a motion filed by  
17 Washington Mutual and WMI Investment, the debtors, for an order  
18 disbanding the official committee of equity holders that was  
19 filed in January of 2010?

20 A. Yes.

21 Q. Now, I'm going to show you a copy of this motion, Mr.  
22 Gropper, and ask you if I can refresh your recollection.

23 MR. ECKSTEIN: Your Honor, can I approach the witness  
24 with a copy of the document?

25 THE COURT: Okay. What's the docket number?

1 MR. ECKSTEIN: I apologize, Your Honor. I'm moving a  
2 little bit quickly on this, so I don't have the docket number  
3 handy unless --

4 THE COURT: All right.

5 MR. ECKSTEIN: I can --

6 THE COURT: Find out.

7 MR. ECKSTEIN: -- if you'd like, Your Honor, I can  
8 approach. I have a copy for the Court.

9 THE COURT: That's fine. You may.

10 MR. ECKSTEIN: Thank you.

11 (Pause)

12 MR. ECKSTEIN: Your Honor, this is docket number 2132.

13 THE COURT: 2132, thank you.

14 Q. Mr. Gropper, let me turn your attention to paragraph --  
15 well, first of all, are you familiar with this motion?

16 A. I am. I read it at the time it was filed.

17 Q. Can I turn your attention to paragraph 3 of the motion  
18 which is on page 2. And can I ask you to read the second  
19 sentence in paragraph 3?

20 A. "Not only will time be lost while the equity committee's  
21 sure to be retained professionals get up to speed, but the  
22 sudden addition of another official committee to the complex  
23 litigations and negotiations that have been ongoing, could  
24 imperil the debtors' efforts to reach a global resolution with  
25 all parties and timely make distributions to creditors."

1 Q. Let me also ask you to turn your attention to paragraph  
2 18. And I'd ask you to read the last sentence of that  
3 paragraph 18?

4 A. "While many issues remain in flux, as further set forth  
5 below, the debtors believe that the addition of the equity  
6 committee at this juncture in the cases would disrupt and  
7 possibly even derail the delicate ongoing negotiations between  
8 the parties."

9 Q. Mr. Gropper, what I'd like to ask you is whether this  
10 document refreshes your recollection as to whether or not in  
11 early January 2010, it was known to the public, based upon a  
12 pleading filed by the debtor, as to whether settlement  
13 negotiations in this case were active and ongoing?

14 A. Yes, it was known. This document was filed on January  
15 11th. And I also mentioned earlier on that there was a  
16 research report that said effectively the same thing with  
17 respect to negotiations.

18 Q. Thank you. Mr. Gropper, you recall giving testimony in  
19 connection with your cross-examination about the fact that you  
20 were one of the parties in the case who was entitled to receive  
21 stock under the plan of reorganization proposed by the debtors  
22 in this case. Do you recall that testimony?

23 A. Yes.

24 Q. And do you recall testifying that Aurelius, when it made  
25 its elections, elected to receive cash rather than stock in

1 this case?

2 A. Yes.

3 Q. Now, in connection with the plan, was there also an  
4 opportunity provided to Aurelius and other parties to subscribe  
5 to a rights offering?

6 A. Yes. An earlier version of the plan pending before the  
7 Court had a rights offering provision in it.

8 Q. And did Aurelius have the right to participate in the  
9 rights offering?

10 A. We did.

11 Q. And can you tell the Court what Aurelius did in connection  
12 with that right to participate in the rights offering?

13 A. We chose not to subscribe, as we did not wish to purchase  
14 additional stock.

15 MR. ECKSTEIN: Can I just have one moment, Your Honor?

16 THE COURT: You may.

17 MR. ECKSTEIN: Your Honor, we have no further  
18 questions of the witness.

19 THE COURT: Thank you. Any recross on those points?

20 MR. FOLSE: Thank you, Your Honor.

21 RECROSS EXAMINATION

22 BY MR. FOLSE:

23 Q. Mr. Gropper, when I asked you about stock in WMMRC -- and  
24 I want to make sure you understood what I was asking you at the  
25 time. It related to Mr. Zelin's testimony who was here



1       testifying about the current modified sixth amended plan. And  
2       my question to you is whether or not Aurelius was one of the  
3       soon to be stockholders in the reorganized WMI pursuant to the  
4       current pending version of the plan?

5       A.    Okay. Are you asking the same question again?

6       Q.    Yes, I just wanted to --

7       A.    Oh. That's correct.

8       Q.    That is correct?

9       A.    Yes.

10      Q.    And it's not a question of there needing to be an  
11      election?

12      A.    It's correct. By virtue of our ownership of PIERS, we are  
13      going to receive stock under the plan as currently on file with  
14      the Court.

15               MR. FOLSE: Thank you, Your Honor.

16               THE COURT: Nothing further?

17               MR. ECKSTEIN: We have nothing further, Your Honor.

18               THE COURT: All right. You may step down.

19               THE WITNESS: Thank you, Your Honor.

20               MR. ECKSTEIN: Your Honor, I just want to confirm  
21      protocol. May the witness be excused at this point in time and  
22      go back to New York if he chooses?

23               MR. FOLSE: No objection.

24               THE COURT: All right. He may.

25               MR. ECKSTEIN: Thank you, Your Honor. Assuming he

1 chooses to remain, is he permitted in the courtroom now that  
2 his testimony is complete?

3 THE COURT: Well, he is, as a representative of  
4 Aurelius --

5 MR. ECKSTEIN: That's correct. He's a representative  
6 of Aurelius.

7 THE COURT: He may.

8 MR. ECKSTEIN: Thank you, Your Honor.

9 THE COURT: Who's our next witness?

10 MR. GLICKMAN: Good afternoon, Your Honor. Alan  
11 Glickman; Schulte Roth & Zabel on behalf of Owl Creek Asset  
12 Management. Our next witness is going to be Dan Krueger of Owl  
13 Creek. But he was not permitted to be in the courtroom during  
14 Mr. Gropper's testimony. And so he's been waiting at the  
15 hotel. If we could take a very, very brief recess. I believe  
16 he's on his way. We notified him when the cross was concluded  
17 to get over here.

18 THE COURT: All right. We'll take a short break.

19 MR. GLICKMAN: Thank you, Your Honor.

20 THE COURT: Let me know when he's here.

21 (Recess from 1:58 p.m. until 2:10 p.m.)

22 THE CLERK: All rise. You may be seated.

23 THE COURT: All right.

24 MR. GLICKMAN: Good afternoon, again, Your Honor.

25 Alan Glickman; Schulte Roth & Zabel for Owl Creek Asset

1 Management. As I mentioned, our witness is going to be Dan  
2 Krueger, and I would call him to the stand now.

3 THE COURT: All right. Please remain standing so you  
4 can be sworn.

5 (Witness sworn)

6 THE CLERK: Please state your full name and spell your  
7 last name for the record.

8 THE COURT: Here she is. Okay, sorry. Somebody  
9 forgot the most important person. All right. Now, can you  
10 state your name for the record and spell the last name?

11 THE WITNESS: Sure. Daniel Krueger, K-R-U-E-G-E-R.

12 MR. GLICKMAN: Your Honor, I believe we provided your  
13 law clerk with a binder of the exhibits that we intend to use.  
14 If it's all right with Your Honor, I'm not the most technically  
15 proficient person in the world, I'm not going to use the ELMO,  
16 and we'll just stick with the hard copies, if that's all right.  
17 We're going to try to get Mr. Krueger on and off the stand as  
18 quickly as we can, and avoid repetition with some of the other  
19 things that have been said.

20 THE COURT: All right. Thank you.

21 DIRECT EXAMINATION

22 BY MR. GLICKMAN:

23 Q. Mr. Krueger, where are you currently employed?

24 A. Owl Creek Asset Management L.P.

25 Q. Tell us your position there, please?

1 A. Sure. I am a managing director and assistant portfolio  
2 manager.

3 Q. Okay. You understand that the equity committee and Owl  
4 Creek have designated you as a witness in these proceedings?

5 A. Yes, I do.

6 Q. Have you ever testified before at a hearing or at a trial?

7 A. No.

8 Q. Have you read the opposition that was filed by the equity  
9 committee to the current plan?

10 A. Yes.

11 Q. Did you see any assertion in there that Owl Creek traded  
12 on the basis of material nonpublic information in connection  
13 with WMI securities?

14 A. No.

15 Q. Did Owl Creek do so?

16 A. No.

17 Q. Did you see any assertion in there that Owl Creek  
18 participated in hijacking the settlement negotiations in this  
19 case?

20 A. Yes.

21 Q. Is that true?

22 A. No.

23 Q. Did you see any assertion in there that Owl Creek  
24 dominated the settlement negotiations in this case?

25 A. Yes.

1 Q. Is that true?

2 A. No.

3 Q. Let's cover your personal background, if we can, quickly.

4 Beginning with college, would you tell us your education?

5 A. Sure. I graduated from Harvard College in 1995 with a

6 degree in economics; attended Columbia Business School,

7 graduated in 2002, with an MBA.

8 Q. Do you hold any academic positions?

9 A. Yes. I'm an adjunct professor at Columbia Business

10 School.

11 Q. What do you teach there?

12 A. Distressed debt investing.

13 Q. Are you an attorney?

14 A. No.

15 Q. Would you briefly describe your employment between the end

16 of college and joining Owl Creek?

17 A. Sure. For those -- well, for the five years between

18 college and business school, I worked at Chase Securities Inc.

19 doing some investment banking, some private equity, and doing

20 research. I had a summer job during business school, and

21 joined Owl Creek as my final semester in business school was

22 winding up.

23 Q. And when was that?

24 A. I joined in January of 2002. The firm started investing

25 in February of 2002.

1 Q. So were you there from the inception?

2 A. Yes, I was.

3 Q. Okay. What's the nature of Owl Creek's business?

4 A. Owl Creek is an investment fund. We pursue a value  
5 investing strategy. We invest in securities up and down the  
6 capital structure from distressed debt to high-yield bonds to  
7 equity securities.

8 Q. And can you explain to the Court what a value investment  
9 strategy is?

10 A. Yes. A value investing strategy is distinct from say  
11 growth investing. We make a practice of investing in  
12 companies, industries or situations where you can ascribe some  
13 sort of hard value to a company; buying things cheaply and, you  
14 know, selling them at higher prices.

15 Q. Does Owl Creek invest in event-driven situations?

16 A. Event-driven is part of what we do, yes.

17 Q. And what do you understand that to mean, event-driven?

18 A. Event-driven to me is investing with a mandate of  
19 investing in situations where there's a definable catalyst, so,  
20 for example, a bankruptcy is a very event-driven type of  
21 investment, or securities of a bankrupt company. But event-  
22 driven can also include equity securities where an industry  
23 might be going through regulatory change or something like  
24 that.

25 Q. Can you describe the funds that Owl Creek manages and

1       advises?

2       A.     There are seven distinct legal funds.  They're broken out  
3       into two fund families.  The first is the flagship fund family.  
4       There are four distinct funds there.  The flagship funds are  
5       what we've been investing since inception.  It's the vast  
6       majority of our assets.  And those funds invest on a pari passu  
7       basis, meaning when we decide to buy or sell a security, we  
8       typically buy it or sell it in all of the funds in a pro rata  
9       amount so that they're all run pro rata, pari passu.  The  
10      flagship fund invests across the globe.

11             The other fund family that I mentioned is the Asia fund  
12      family.  There are three separate legal funds there.  Very  
13      similar strategy; the only difference is that they are  
14      primarily involved with investing in companies based in Asia.

15      Q.     Have both of those two fund groups invested in WMI  
16      securities?

17      A.     Yes.

18      Q.     How many employees does Owl Creek have now?

19      A.     Probably around sixty.

20      Q.     Does that include both staff and investment professionals?

21      A.     Yes, it does.

22      Q.     Okay.  You testified that you are the managing director  
23      and assistant portfolio manager -- or a managing director.  Can  
24      you tell me what your duties and responsibilities are in those  
25      positions?

1 A. I work with the analysts to help refine their analyses on  
2 companies and situations. And with that analysis, we go to the  
3 portfolio manager to convey our ideas on what might be an  
4 attractive investment.

5 Q. Does Owl Creek have a senior management team?

6 A. Yes. There's one portfolio manager and three assistant  
7 PMs of which I'm one.

8 Q. Okay. And who is the portfolio manager?

9 A. Jeff Altman.

10 Q. And is he the firm's lead principal?

11 A. Yes, he is.

12 Q. Do you know what his background is?

13 A. I do. He worked for a long time, over ten years, I'm not  
14 sure exactly how many years, but a long time, at Mutual Series,  
15 which is a mutual fund company in New Jersey that was later  
16 sold. And that's what he did from college to when he founded  
17 Owl Creek.

18 Q. Okay. You testified a moment ago that both groups of  
19 funds have invested in WMI securities. Who at Owl Creek has  
20 been principally involved in dealing with Owl Creek's  
21 investment in WMI securities?

22 A. I have.

23 Q. Does Owl Creek take measures to ensure that it doesn't  
24 trade on the basis of material nonpublic information?

25 A. Yes, we do.



1 Q. Okay. Would you turn to the binder, please, and take a  
2 look at tab 1, which has as document there's that's been marked  
3 AOC --

4 A. Is there a binder for me?

5 Q. It's tab 1, Mr. Krueger, in that binder, and it's been  
6 marked AOC-14.

7 A. I see it.

8 Q. This is a document that was produced by Owl Creek in  
9 connection with these proceedings. Can you identify it for us?

10 A. Yes. It's a compliance manual dated January 2011.

11 Q. And what is a compliance manual?

12 A. A compliance manual is a document that we use to sort of  
13 sum up all of our policies, including code of ethics, vacation  
14 days, which is part of the employee handbook, which I believe  
15 is an exhibit to this document, trading policies, insider  
16 trading issues that we want to prevent. It's -- every employee  
17 receives one of these when they first start working, and of  
18 course sign, you know, documents indicating that they've read  
19 these documents.

20 Q. Okay. And flipping through it, you can see that there are  
21 various portions that are redacted. Are these excerpts from  
22 the compliance manual?

23 A. Parts of it have been redacted, yes.

24 Q. Right. And the remaining portions would be excerpts from  
25 the manual?

1 A. Yes, that's correct.

2 Q. Okay. And the nonredacted parts, are they the portions of  
3 the manual that deal with insider trading issues?

4 A. Yes, they are.

5 Q. Does AOC-14 reflect what you believe to be Owl Creek's  
6 policies and procedures with respect to not trading on the  
7 basis of material nonpublic information?

8 A. Yes.

9 Q. Does the January 11th date on the front, mean that these  
10 were in effect as of that time? Is that what that date means?

11 A. That's correct.

12 Q. All right. Take a look, if you would, at tab number 2,  
13 which is AOC-15. That was also produced by Owl Creek in these  
14 proceedings. Can you tell us what this document is?

15 A. Sure. This is a compliance manual dated September 2009.

16 Q. And does this appear to contain policies and procedures  
17 with respect to insider trading as well?

18 A. Yes, it does.

19 Q. And does the September 2009 date mean that this was in  
20 effect beginning in or about September of 2009?

21 A. That's correct.

22 Q. And do you believe this to be the prior version of the  
23 manual that we took a look at a AOC-14?

24 A. Yes, I believe it is.

25 Q. All right. Take a look at tab 3, if you would, which

1 contains a document that's been marked AOC-16. Can you  
2 identify that for us, also produced in connection with these  
3 proceedings by Owl Creek?

4 A. This is the compliance manual dated April 2008.

5 Q. Is it another prior version of the portion of the manual  
6 reflecting policies and procedures with respect to material  
7 nonpublic information?

8 A. Yes, it is.

9 Q. And I think you may have just testified, just so it's  
10 clear. The April 2008 signifies that that's on or about when  
11 it became effective?

12 A. That's correct.

13 Q. Okay. So we've seen what I understand is the current  
14 version and two prior versions of this compliance manual,  
15 correct?

16 A. Yes.

17 Q. Okay. And are the prior versions substantially similar,  
18 as you understand it, to the current version?

19 A. They are.

20 Q. Are you familiar with these procedures?

21 A. Yes, I am.

22 Q. How are they prepared?

23 A. The compliance manual was prepared -- well, it's a  
24 document that was first prepared many, many years ago by our  
25 CFO in conjunction with Schulte Roth, as you see on the cover

1 page.

2 Q. Schulte Roth & Zabel, LLP?

3 A. Yes.

4 Q. That's your outside counsel?

5 A. That's --

6 Q. That's one of your outside counsels?

7 A. -- correct.

8 Q. Okay.

9 MR. GLICKMAN: Your Honor, I would ask that AOC-14, 15  
10 and 16 be admitted into evidence, and consistent with the  
11 understanding that they be admitted under seal.

12 THE COURT: Any objection?

13 MR. WALKER: Your Honor, for the record, this is Dan  
14 Walker from Susman Godfrey. We have no objection to 15 or  
15 16 -- Exhibits 15 or 16 going into evidence. I would object  
16 that Exhibit 14 -- AOC-14 is irrelevant, given that it went  
17 into effect in January of 2011.

18 MR. GLICKMAN: Your Honor, we're introducing it to  
19 complete the record. It is the current version of the policy.

20 THE COURT: Well, I'll allow it, for what it's worth.  
21 (1/2011 compliance manual was hereby received in evidence under  
22 seal as Owl Creek's Exhibit 14, as of this date.)

23 (9/2009 compliance manual was hereby received in evidence under  
24 seal as Owl Creek's Exhibit 15, as of this date.)

25 (4/2008 compliance manual was hereby received in evidence under

1 seal as Owl Creek's Exhibit 16, as of this date.)

2 Q. Mr. Krueger, have you at all times observed the policies  
3 and procedures that are reflected in AOC-14, 15, and 16?

4 A. Yes.

5 Q. And pursuant to those policies and procedures, does Owl  
6 Creek have a restricted list?

7 A. Yes, we do.

8 Q. Okay. What is the restricted list?

9 A. The restricted list is a list of securities that's  
10 maintained by our general counsel and chief compliance officer.  
11 The list shows and dictates which securities we have prohibited  
12 ourselves from trading in.

13 Q. Does that prohibition affect the entire firm?

14 A. Yes, it does.

15 Q. Okay. And is the restricted list updated and circulated  
16 from time to time?

17 A. It is. It's updated and circulated immediately any time a  
18 security goes onto that list. It's circulated immediately  
19 electronically in an e-mail from our general counsel to every  
20 employee of the firm, attaching the entire list, and also in  
21 the subject line indicating what's changed, just to highlight  
22 it for people. And then a hard copy is also shortly thereafter  
23 dropped on everybody's desk.

24 Q. Besides the compliance manual that we've seen, is there  
25 anything else that Owl Creek does to provide its employees with

1 guidance regarding insider trading issues?

2 A. Yes. At least once a year, sometimes more than that, a  
3 couple of partners from Schulte Roth will come over to our  
4 firm's offices and lead a seminar, I guess you could call it,  
5 on insider trading policies, for which every single member of  
6 Owl Creek at all levels: staff, professionals, everybody  
7 attends and signs a sign-in sheet to indicate that they were  
8 there in attendance. There's also -- separate from that,  
9 there's a compliance meeting annually in which insider trading  
10 is also discussed, in addition with other more broad topics.

11 Q. Has Owl Creek ever been the subject of an investigation  
12 into insider trading or been charged with insider trading?

13 A. No, not that I know of.

14 Q. Would you describe the circumstances for us of Owl Creek's  
15 initial decision to invest in securities of WMI?

16 A. Our initial investment was right around the time of the  
17 bank going into receivership. We had read the news. This was  
18 a big headline, grabbed everybody's attention; and we knew  
19 that -- we didn't know, but we assumed with high confidence  
20 that the bonds of Washington Mutual would be trading much lower  
21 after that headline, so we -- my recollection is somebody at  
22 the firm had already done a little bit of work on the name.  
23 But we doubled the effort at that point in time, and sure  
24 enough, the securities had started trading much lower than  
25 where they were before. And we thought at those prices they

1 looked like good investments.

2 Q. Did Owl Creek make its decision to invest in WMI on the  
3 basis of anything other than publicly available information?

4 A. No.

5 Q. Can you tell us what WMI securities Owl Creek is invested  
6 in today?

7 A. Today we own senior bonds, subordinated bonds, PIERS and  
8 preferred stock.

9 Q. Tell us your first recollection of Owl Creek having any  
10 involvement in settlement negotiations in this case?

11 A. My first recollection of settlement discussions was a  
12 meeting in March of 2009. It wasn't at Weil's offices, it was  
13 at some other law firm's offices there in midtown New York.

14 Q. Did Owl Creek enter into a confidentiality agreement with  
15 the debtors prior to participating in that meeting?

16 A. Yes, we did.

17 Q. If you'd take a look in your binder at tab 4, you'll see  
18 another document that Owl Creek produced in these proceedings  
19 that's been designated EC-141. Is that the confidentiality  
20 agreement that you're referring to?

21 A. Yes.

22 Q. Take a look at the page that's stamped 0010941, if you  
23 would?

24 A. Okay.

25 Q. And under "Owl Creek", is that your signature?

1 A. Yes.

2 Q. Do you believe that this was also executed on behalf of  
3 Washington Mutual, Inc. and WMI Investment Corp.?

4 A. Yes, it was.

5 Q. And do you believe that this agreement was executed on or  
6 about March 9th of 2009, the date on the first page?

7 A. Yes.

8 Q. Did Owl Creek put WMI on its restricted list when it  
9 entered into this confidentiality agreement?

10 A. Yes, we did.

11 Q. Did you understand this agreement to have a termination  
12 point?

13 A. Yes.

14 Q. What was your understanding of what that termination point  
15 was?

16 A. Paragraph 13 of this agreement talks about the outside  
17 date, the latest date at which this agreement would exist, as  
18 being sixty days following the date of execution of this  
19 agreement. So we knew it would expire on that date, if not  
20 earlier.

21 Q. And is it consistent with your understanding that this  
22 agreement in fact terminated on or about May 8, 2009?

23 A. Sometime around then, yes.

24 Q. Okay. Did Owl Creek trade in WMI securities during the  
25 term of this agreement?



1 A. No.

2 Q. Did you understand the debtors to have any obligation  
3 under this agreement?

4 A. Yes, they did. There in paragraph 13, there's a provision  
5 that describes how upon termination of this agreement, that the  
6 debtors must disclose any information that they deem material  
7 and nonpublic.

8 MR. GLICKMAN: Your Honor, I would ask that EC-141 be  
9 admitted into evidence.

10 THE COURT: Any objection?

11 MR. WALKER: No objection, Your Honor.

12 THE COURT: It's admitted.

13 (Confidentiality agreement with Owl Creek was hereby received  
14 in evidence as Equity Committee's Exhibit 141, as of this  
15 date.)

16 MR. GLICKMAN: Thank you.

17 Q. Let's go back to the March meeting that you mentioned.  
18 Tell us what you recall about the events at that meeting?

19 A. It was a large meeting. There were a lot of people there,  
20 I recall. There were a number of different bondholders. At  
21 that point in time, we were being represented -- Owl Creek was  
22 being represented by White & Case along with, you know, twenty  
23 or so other noteholders. A number of us were there, maybe four  
24 or five White & Case members. Fried Frank was there with their  
25 two clients at the time. The day -- the way the day evolved, I

1 remember, the debtor and debtor's counsel were kind of  
2 shuttling between different rooms.

3 The bondholders, as I said, were all in this large  
4 conference room. The debtors would periodically come in and  
5 talk to us about the issues at hand and then leave. And my  
6 understanding was that they were talking to other parties. My  
7 understanding was that JPMorgan was there with their counsel.  
8 I believe the FDIC, the creditors' committee, were there with  
9 their counsel as well. But I never sat in with any of those  
10 other parties. But that's my understanding.

11 Q. Did Owl Creek receive a proposed term sheet at the  
12 meeting?

13 A. Yes, we did.

14 Q. Would you take a look at tab 5, please, which is another  
15 document that Owl Creek produced in connection with these  
16 proceedings, and it's been marked EC-140. Is this the term  
17 sheet that Owl Creek received at the meeting?

18 A. Yes.

19 Q. Did Owl Creek prepare this?

20 A. No.

21 Q. What was your understanding as to who prepared this?

22 A. Well, my understanding at the time, and looking at this  
23 header, I believe Weil prepared it.

24 Q. Do you see a date there, March 5th, 2009. Is that when  
25 you received this draft?

1 A. No. I know that the meeting was on a later date than  
2 that. It was after I signed the confi, so it -- you know, no.  
3 That wasn't the date that I received this document.

4 Q. You received it on the date of the meeting, as far as you  
5 recall?

6 A. Yeah. This was handed out in hard copy format, which is  
7 why it has my handwritten notes on it.

8 Q. Okay. And all of these notes that we see here in the  
9 document, those are your handwritten notes?

10 A. Yes.

11 Q. When did you take them?

12 A. At some point during the day.

13 MR. GLICKMAN: Your Honor, I would ask that EC-140 be  
14 admitted into evidence.

15 MR. WALKER: No objection.

16 THE COURT: It's admitted.

17 (Term sheet for Owl Creek was hereby received into evidence as  
18 Equity Committee's Exhibit 140, as of this date.)

19 Q. You'll note, for example, on the second page, that there  
20 are various blanks in this term sheet. Can you tell us your  
21 understanding of what was done with the term sheet at the  
22 meeting?

23 A. My recollection of that meeting is that, you know, the  
24 debtor and debtor's counsel were trying to use this as a  
25 starting point to kick-start settlement discussions, basically.

1 Q. During or after the meeting -- I think you testified at  
2 the meeting you didn't have any face-to-face negotiations with  
3 JPMorgan or the FDIC. Is that correct?

4 A. That's correct.

5 Q. Did you have such face-to-face negotiations after the  
6 meeting with them?

7 A. No.

8 Q. Was a settlement agreement reached --

9 A. No.

10 Q. -- with JPMorgan at that meeting?

11 A. No.

12 Q. Okay. Would you take a look at tab 6, please? And you'll  
13 see there two documents, the first of which is an e-mail which  
14 has been marked EC-142 -- this is a document that was also  
15 produced by Owl Creek in these proceedings. And the second is  
16 a document that is designated EC-143, also produced in these  
17 proceedings. Can you identify those documents for us?

18 A. Yes. The first one is an e-mail from somebody at White &  
19 Case to a number of the White & Case clients at that time,  
20 including me, where he forwards an e-mail from Weil to Sullivan  
21 & Cromwell, it appears. And the e-mail attaches a draft term  
22 sheet, which is what follows.

23 Q. That is EC-143?

24 A. Yes.

25 Q. And do you believe that you received the e-mail that's

1       been marked as EC-142 and the draft term sheet that's been  
2       marked EC-143?

3       A.     Yes, I do.

4               MR. GLICKMAN:  I would ask that Exhibits EC-142 and  
5       EC-143 be admitted into evidence, Your Honor.

6               MR. WALKER:  No objection, Your Honor.

7               THE COURT:  All right.  They're admitted.

8       (E-mail with draft term sheet attached was hereby received into  
9       evidence as Equity Committee's Exhibit 142, as of this date.)

10       (Draft term sheet for Owl Creek was hereby received into  
11       evidence as Equity Committee's Exhibit 143, as of this date.)

12       Q.     Now focusing on EC-143, did Owl Creek prepare this term  
13       sheet?

14       A.     No.

15       Q.     Did Owl Creek instruct the debtors as to what numbers to  
16       put into the term sheet?

17       A.     No.

18       Q.     What's your understanding as to how these numbers got into  
19       the term sheet?

20       A.     The -- if -- you're talking about the numbers on page 2  
21       relating to the tax refunds?

22       Q.     Correct.

23       A.     You know, like I said, the draft that was handed out at  
24       the meeting had blanks in those spots.  And I remember a dialog  
25       back and forth amongst, you know, bondholders and the debtor

1 and each other. And I don't -- I don't know exactly how these  
2 numbers got in here. But, you know, I would assume that it  
3 was -- these numbers are informed by whatever conversations the  
4 debtor had during the day.

5 Q. Was it your understanding, based on EC-142, that this term  
6 sheet was provided to counsel for JPMorgan?

7 A. It appears that way, yeah.

8 Q. Okay. And did you understand that JPMorgan responded to  
9 its receipt of this term sheet?

10 A. I do recall that, yes.

11 Q. Okay. Let's take a look at tab 7. That's been marked as  
12 EC-144, also a document that Owl Creek produced in these  
13 proceedings. And behind the blue sheet there is another  
14 exhibit EC-145, also produced by Owl Creek in these  
15 proceedings. Can you identify these documents for us?

16 A. The first document is an e-mail, again, from White & Case  
17 to a number of their clients, which appears to forward an  
18 e-mail from Sullivan & Cromwell to Weil with some text in the  
19 body of that e-mail. And I believe this term sheet was  
20 attached to that e-mail.

21 MR. GLICKMAN: Your Honor, both of these documents  
22 were admitted into evidence this morning, so I'm not going to  
23 go through that --

24 THE COURT: Okay.

25 MR. GLICKMAN: -- again.

1 Q. What did you understand the term sheet to be? Did you  
2 understand that to be JPMorgan's response to the term sheet  
3 that had been sent to them?

4 A. Yes.

5 Q. And what was your reaction to it?

6 A. My reaction in getting this term sheet was that it seemed  
7 clear to me that JPMorgan did not have any intention of  
8 approaching the, you know, the bargaining table. You know,  
9 looking at the tax bullet point on page 2 of the document, you  
10 see that their idea of a settlement was to take all of the tax  
11 refunds, which was obviously a non-starter for us as creditors.

12 Q. What happened next in terms of any negotiations as far as  
13 Owl Creek was aware?

14 A. Well, this -- you know, this period of time ended shortly  
15 thereafter when the confidentiality period expired, I guess you  
16 could say. And I don't remember much happening over the  
17 summer. And then in the fall or winter -- I guess it was  
18 November or so timeframe, one thing that happened during that  
19 period of time was that a law had been passed by Congress which  
20 extended the ability for a company to look back to collect a  
21 tax refund from two years to five years. And everybody who  
22 knew anything about this company knew that that would bring in  
23 some large amount of money into the estate.

24 My recollection is that with that event, people thought it  
25 would be a good time to try and get people back to the

1 bargaining table. And so I -- you asked me about settlement  
2 discussions. I remember going to a meeting at Weil's offices,  
3 I believe it was in late November.

4 Q. Let's hold the discussion, if we can of that November  
5 meeting for a moment, and just finish up with the  
6 confidentiality period, if we can. But that November period is  
7 your next recollection of involvement by Owl Creek in  
8 settlement negotiations?

9 A. Yes.

10 Q. All right. So when the March confidentiality agreement  
11 ended, did Owl Creek take WMI off its restricted list?

12 A. Yes, we did.

13 Q. And what steps did Owl Creek take to determine whether it  
14 was appropriate to take WMI off its restricted list? And  
15 before you answer, consistent with the Court's ruling yesterday  
16 with respect to the issue of waiver, I'm going to ask you to  
17 exclude any testimony as to whether Owl Creek consulted with  
18 counsel.

19 MR. GLICKMAN: For the record, we would join in the  
20 position that Aurelius expressed, but we're not going to  
21 reargue the issue. We understand Your Honor's ruling.

22 Q. So I'm asking you to exclude from your answer to that  
23 question whether or not you consulted with counsel in making  
24 the determination to take WMI off. Tell me anything else you  
25 did in making that determination?



1 A. Sure. We -- well, we certainly requested that the debtor  
2 confirm that they had abided by that paragraph 13 that we spoke  
3 about before, which they did. As we always do, we talked about  
4 it internally. We talked about the facts of the case as we  
5 knew them at that point in time, and along with some other  
6 things that we did, we came to the conclusion that Washington  
7 Mutual should be taken off of our restricted list.

8 Q. Would you take a look at tab 8? There's a document there  
9 that was also produced by Owl Creek in connection with these  
10 proceedings, that's been marked as EC-146. Can you identify  
11 that document for us?

12 A. Yes. It's an e-mail from somebody at White & Case to me,  
13 where he forwards an e-mail from Weil confirming that the  
14 debtors believe that all required disclosure has been made.

15 Q. Okay. And do you believe that you received EC-146?

16 A. Yes, I did.

17 MR. GLICKMAN: Your Honor, I'd ask that it be admitted  
18 into evidence.

19 THE COURT: Any objection?

20 MR. WALKER: Your Honor, we have no objection to the  
21 extent it's --

22 THE COURT: Talk into a mic.

23 MR. WALKER: Sorry, Your Honor. We have no objection  
24 to the extent it's just being admitted to show that he received  
25 this e-mail. Obviously the lower e-mail from Brian Rosen to

1 Gerry Uzzi is hearsay, and so we don't want it admitted for the  
2 truth of that point.

3 THE COURT: All right. But just for the fact that he  
4 received it?

5 MR. WALKER: Yes, ma'am.

6 THE COURT: All right. It's admitted.

7 (E-mail from White & Case forwarding an e-mail from Weil to Owl  
8 Creek was hereby received into evidence as Equity Committee's  
9 Exhibit 146, as of this date.)

10 Q. We've looked at some term sheets during the course of your  
11 testimony thus far. Did you consider them to be material  
12 nonpublic information when you made the determination to take  
13 WMI off the restricted list?

14 A. No, we did not consider them material nonpublic  
15 information.

16 Q. Why not?

17 A. Well, no agreement had been reached. You know, the  
18 parties at that point in time were extremely far apart. And,  
19 you know, with those facts along with others, we knew that  
20 those term sheets could not be considered material nonpublic  
21 information.

22 Q. Okay. Let me go to the November meeting that you  
23 testified was your next recollection of involvement in  
24 settlement negotiations. Was Owl Creek being represented by  
25 White & Case at the time of that meeting?

1 A. The November meeting? No. We had -- we had left the  
2 White & Case group and joined the Fried Frank group.

3 Q. When did you do that?

4 A. I don't -- I believe it was sometime in October of that  
5 year. Sometime around October or November of 2009.

6 Q. Did Owl Creek enter into a second confidentiality  
7 agreement prior to entering into those November discussions?

8 A. Yes, we did.

9 Q. Take a look, if you would, at tab 9, also a document that  
10 was produced by Owl Creek in these proceedings. It has the  
11 designation EC-148. Is that the confidentiality agreement  
12 you're referring to?

13 A. Yes, it is.

14 Q. And if you'd take a look at page 0010948? Under "Owl  
15 Creek", is that your signature?

16 A. Yes, it is.

17 Q. And was this entered into on or about November 16, 2009,  
18 which is the date on the first page?

19 A. Yes.

20 Q. Did Owl Creek put WMI on its restricted list when it  
21 entered into this agreement?

22 A. Yes.

23 Q. And did you understand this agreement to have a  
24 termination point?

25 A. Yes, it did. It's also in paragraph 13 where it describes

1 the outside date as being December 31st of 2009.

2 Q. And is it your recollection that it, in fact, terminated  
3 on or about the end of December 2009?

4 A. Sometime around then, yes.

5 Q. Did this agreement have any obligations of the debtor, as  
6 the other one did?

7 A. Yes, it did.

8 Q. Can you describe those as you understood them?

9 A. Again, paragraph 13 talks about the debtors needing to  
10 immediately make public disclosure within the meaning of Rule  
11 101 of Reg. F.D. of a fair summary of any confidential  
12 information that constitutes material nonpublic information  
13 under U.S. federal securities laws.

14 Q. Did Owl Creek trade in any securities of WMI while this  
15 confidentiality agreement was in effect?

16 A. No.

17 MR. GLICKMAN: Your Honor, I would ask that EC-148 be  
18 admitted into evidence.

19 MR. WALKER: No objection, Your Honor.

20 THE COURT: It's admitted.

21 (November 2009 confidentiality agreement with Owl Creek was  
22 hereby received into evidence as Equity Committee's Exhibit  
23 148, as of this date.)

24 Q. Can you describe the November discussions for us?

25 A. I remember, again, at that meeting, at Weil's offices this

1 time, a term sheet was handed out, again, in hard copy form. I  
2 believe there were blanks again. But the thing I remember most  
3 about that meeting is that the debtor told us basically what  
4 that extra tax refund was going to be, to their best guess, at  
5 the time.

6 Q. Could you take a look at tab 10, another document that was  
7 produced by Owl Creek in these proceedings. It's been  
8 designated EC-150. Can you identify that for us?

9 A. Yes. That's the term sheet that I was just talking about  
10 that was handed out at the meeting.

11 Q. Did you have an understanding as to who prepared this term  
12 sheet?

13 A. Yes, the debtor or their counsel.

14 Q. And whose handwritten notes are they that we see on this  
15 document?

16 A. Those are mine.

17 Q. And when did you take them?

18 A. Sometime that day.

19 MR. GLICKMAN: Your Honor, I'd ask that EC-150 be  
20 admitted into evidence.

21 THE COURT: Any objection?

22 MR. WALKER: No objection, Your Honor.

23 THE COURT: It's admitted.

24 (November 2009 term sheet was hereby received into evidence as  
25 Equity Committee's Exhibit 150, as of this date.)

1 Q. Mr. Krueger, do you recall whether a term sheet like this,  
2 perhaps with numbers filled in, was subsequently sent to  
3 JPMorgan, as far as you understood it, by the debtors?

4 A. I don't recall one being sent, no.

5 Q. Okay. And do you recall receiving a response from JPMC in  
6 response to any such term sheet?

7 A. No.

8 Q. Were you aware of any settlement agreement being reached  
9 with JPMorgan during the term of the November confidentiality  
10 period?

11 A. No.

12 Q. So at the conclusion of the November confidentiality  
13 period, did Owl Creek take WMI securities off its restricted  
14 list?

15 A. Yes, we did.

16 Q. And would you describe for us what steps, if any, Owl  
17 Creek took to determine whether it was appropriate to do that,  
18 again, please, pursuant with the Court's waiver ruling, do not  
19 testify as to whether those steps included consultation with  
20 counsel?

21 A. I recall, again, requesting confirmation that the debtor  
22 had abided by that provision in paragraph 13 we were talking  
23 about. We spoke internally about, you know, the facts that we  
24 knew at the time; made sure that all of the information that we  
25 thought could be material nonpublic information had been

1 disclosed through that process. And with those things and  
2 other things, came to the conclusion that we could take those  
3 securities off of our restricted list.

4 Q. Did you come to an understanding that the debtor had  
5 indicated that it complied with the cleansing procedures that  
6 we looked at in the confidentiality agreement of November?

7 A. Yes.

8 Q. Okay. And how did you come to that understanding?

9 A. Well, I want to answer you. I'm just not sure. You gave  
10 me that big caveat before. I want to make sure I don't step  
11 outside of that rule.

12 Q. I'm just asking, did anybody pass that along to you? I'm  
13 not asking you about any advice that you got from any of your  
14 outside counsel about the appropriateness of coming off that  
15 list.

16 A. Okay.

17 Q. I'm simply asking a pass-through question --

18 A. Yes, I understand.

19 Q. -- of your understanding.

20 A. That information was relayed to us through Fried Frank.

21 Q. Okay. Did you believe that any term sheet information  
22 that you saw during this confidentiality period was material  
23 nonpublic information?

24 A. I'm sorry, can you repeat that question again?

25 Q. Did you believe that any of the term sheets that we looked

1 at -- I believe it was one that you remembered getting -- was  
2 material nonpublic information?

3 A. No, we didn't think that was material nonpublic  
4 information.

5 Q. You're aware that on March 12, 2010, the debtors announced  
6 in court the terms of a settlement agreement in principle?

7 A. Yes.

8 Q. And when did you first learn of those terms?

9 A. On that day, I was sitting in this room, and I recall Mr.  
10 Rosen getting up and reading those terms into the record.

11 Q. Okay. So between the time that the November  
12 confidentiality agreement ended and March 12, 2010, was Owl  
13 Creek involved in conducting settlement negotiations?

14 A. No.

15 Q. Now, I want you to focus on the period between March 12th  
16 and October 6th, 2010. You're aware that on or about October  
17 6th, the proposed plan that included a global settlement  
18 agreement was filed in court?

19 A. Yes.

20 Q. Between March 12, 2010 and October 6, 2010, was Owl Creek  
21 involved in conducting settlement negotiations?

22 A. No.

23 Q. Did Owl Creek, during that period, receive any draft plans  
24 or disclosure statements?

25 A. Yes, we did.



1 Q. Did Owl Creek restrict itself in terms of trading in  
2 securities of WMI before receiving that information?

3 A. Yes, we did.

4 Q. And when did Owl Creek remove WMI from its restricted list  
5 in those instances?

6 A. We would remove the securities from our restricted list at  
7 some point in time after those documents had been released to  
8 the public.

9 Q. Throughout Owl Creek's dealings with White & Case and  
10 Fried Frank and Weil Gotshal, did Owl Creek have any  
11 understanding with them regarding the receipt of anything that  
12 might be considered material nonpublic information?

13 A. Yeah. With all of those, it was made very clear that the  
14 rules of the game were that if we were to receive any  
15 restricted information or material nonpublic information that  
16 it would be discussed ahead of time. So in other words, we  
17 didn't ever want to find out by accident that we had received  
18 it.

19 Q. Would you turn to tab 11, please, in the binder? We've  
20 only got two more exhibits to go. Can you identify what's  
21 behind tab 11? And I'll represent it's a document that was  
22 produced by Owl Creek in these proceedings, and it has been  
23 designated AOC-18. What is that?

24 A. This document, AOC-18, is Owl Creek's trading and  
25 rebalancing records for the period from January 1, 2009 up

1 through I believe October of 2010.

2 Q. You said trading and rebalancing. What is rebalancing as  
3 opposed to trading?

4 A. A rebalancing transaction -- well, as I said at the start  
5 of this discussion, we run our funds in a pari passu form. So  
6 our goal is to have the allocation to any one specific  
7 investment be identical between all the funds. And as  
8 investors put money in or take money out of the funds, those  
9 investments get out of balance. So our accounting team  
10 rebalances them, essentially, so that they remain in balance.

11 Q. So the rebalancing transactions are not trades?

12 A. That's correct.

13 Q. How can we identify those particular transactions as  
14 opposed to the trades, on AOC-18?

15 A. Column L, which is titled "Broker" will tell you the  
16 broker, or in the case of a rebalancing transaction, it will  
17 say "Cross", which signifies an internal crossing between  
18 funds.

19 Q. Take a look at tab 12, if you would, Mr. Krueger?

20 A. Okay.

21 Q. Last exhibit. It's also one that was produced by Owl  
22 Creek in these proceedings. And it's been designated AOC-19.  
23 Can you identify that for us?

24 A. Sure. These are Owl Creek's trading records from  
25 September 29th of '08 to December 31st of '08. And the reason

1 it's a different format from the prior is that our internal  
2 operations people switched software providers on January 1st of  
3 2009.

4 Q. But it's meant to convey fundamentally the same  
5 information?

6 A. Yes, absolutely.

7 Q. You're familiar with these trading records, Mr. Krueger?

8 A. Yes, I am.

9 Q. And are they maintained in the ordinary course of Owl  
10 Creek's business?

11 A. They are.

12 MR. GLICKMAN: Your Honor, I would ask that AOC-18 and  
13 19 be admitted into evidence, and consistent with the parties'  
14 understanding that they be admitted under seal.

15 MR. WALKER: No objection, Your Honor.

16 THE COURT: All right, they're both admitted under  
17 seal.

18 (Owl Creek's trading and rebalancing records 1/2009 to 10/2010  
19 were hereby received into evidence under seal as Owl Creek's  
20 Exhibit 18, as of this date.)

21 (Owl Creek's trading records 9/2008 to 12/2008 were hereby  
22 received into evidence under seal as Owl Creek's Exhibit 19, as  
23 of this date.)

24 Q. Mr. Krueger, do you know Steven Zelin, the debtors' expert  
25 in this case?

1 A. No.

2 Q. Did you or to your knowledge did anyone else at Owl Creek  
3 participate in any meetings or calls with him relating to this  
4 case?

5 A. No.

6 Q. Was Owl Creek eligible to receive equity -- elect to  
7 receive equity in connection with the plan that's at issue?

8 A. I'm sorry, can you repeat that question, please?

9 Q. Was Owl Creek eligible to elect to receive equity in  
10 connection with the plan that's at issue here?

11 A. Yes.

12 Q. Did it elect to do so?

13 A. No, we did not.

14 Q. In connection with the prior plan that was presented last  
15 year, did Owl Creek have the opportunity to participate in the  
16 proposed rights offering?

17 A. Yes, we did.

18 Q. Did it elect to do so?

19 A. No, we did not.

20 MR. GLICKMAN: I'm finished.

21 THE COURT: All right. Let's take a short five-minute  
22 break and then we'll start cross.

23 (Recess from 2:58 p.m. until 3:04 p.m.)

24 THE CLERK: All rise. You may be seated.

25 THE COURT: All right, you may proceed with cross.

1 MR. WALKER: Thank you, Your Honor. And again, for  
2 the record, this is Dan Walker from Susman Godfrey on behalf of  
3 the equity committee.

4 CROSS-EXAMINATION

5 BY MR. WALKER:

6 Q. Good afternoon, Mr. Krueger.

7 A. Hello.

8 Q. I believe you testified earlier that Owl Creek specializes  
9 in distressed debt investing, correct?

10 A. No. What we do is both equities and distressed debt,  
11 probably about fifty-fifty.

12 Q. Okay. And at Owl Creek, you handle most of the credit  
13 investments. Is that correct?

14 A. That's correct.

15 Q. Okay. And you were the lead portfolio manager for Owl  
16 Creek's investments in Washington Mutual, correct?

17 A. I was the assistant portfolio manager who was in charge of  
18 Washington Mutual.

19 Q. And at Owl Creek, I assume you've worked on other  
20 investments in companies going through bankruptcy. Is that  
21 correct?

22 A. Yes.

23 Q. And when you consider investing in a company going through  
24 bankruptcy, you try to make determinations of how litigation  
25 over the ownership of estate assets might play out. Isn't that

1 right?

2 A. Yes.

3 Q. Okay. And certainly in the case of the Washington Mutual  
4 bankruptcy, you understood that there were disputes with  
5 JPMorgan Chase that could materially affect the bondholders'  
6 recovery in the bankruptcy, correct?

7 A. That's correct.

8 Q. Okay. And as part of your investment thesis, let's say,  
9 you were interested in how this dispute with JPMorgan Chase  
10 would play out. Isn't that right?

11 A. Yes.

12 Q. Okay. And I believe you said earlier -- you testified  
13 earlier that Owl Creek made its first investments in Washington  
14 Mutual around the time that Washington Mutual filed its  
15 bankruptcy petition. Isn't that right?

16 A. Yes.

17 Q. Okay. But -- and I believe you also testified that you  
18 had been monitoring Washington Mutual as a potential investment  
19 even before the seizure by the FDIC. Isn't that right?

20 A. My recollection was that it was only a short period, maybe  
21 a couple of days, a week, maybe a couple of weeks.

22 Q. Okay. And before you began investing in WaMu, you had  
23 performed an examination of what you thought were the holding  
24 company's assets, to determine the extent to which it could  
25 make good on its bonds, right?

1 A. Yes.

2 Q. Okay. And one of the primary motivators behind your  
3 initial investment in WaMu was that you had determined that  
4 JPMorgan Chase was in possession of four billion dollars in  
5 deposits that you thought would eventually end up being given  
6 back to the holding company, correct?

7 A. That's correct.

8 Q. Okay. And you thought that if it ultimately came down to  
9 litigation, WMI would prevail over JPMC in that litigation,  
10 correct?

11 A. We believed that the argument was very good for WMI.

12 Q. Okay. And given that conclusion, you came to the  
13 conclusion that the bonds were a good value, given the  
14 magnitude of that potential asset to the estate, correct?

15 A. Yes. I just -- I want to make sure I'm understanding what  
16 specific period of time you're referring to, because obviously,  
17 our analysis on Washington Mutual changed over time. So, I  
18 just want to make sure I'm understanding your question  
19 correctly.

20 Q. I'm talking about the period of time where you were first  
21 beginning to make investments into Washington Mutual.

22 A. Yeah, we thought that the argument was good that that  
23 deposit was a true asset of the estate. And if that ended up  
24 being the case, the senior bonds would have a very good  
25 recovery.

1 (Pause)

2 Q. And as of January of 2009, you believed the many investors  
3 in the marketplace didn't even know about the potential  
4 deposits, isn't that right?

5 A. No, that's the opposite of what I thought at the time.  
6 You asked about January of 2009?

7 Q. Yes, sir.

8 A. My recollection of January of 2009 -- maybe I didn't  
9 understand your question -- but my recollection of that period  
10 of time was that the broad marketplace at that point had  
11 figured out that that was -- the likelihood was that the  
12 holding company would get that deposit back and my recollection  
13 is that the senior bonds had traded up substantially to reflect  
14 that view.

15 Q. In January, 2009, you also believed, isn't it true, that  
16 there were investors out there who even if they did realize  
17 there were deposits that potentially that belonged to WMI, they  
18 were worried that either -- that JPMorgan would find a way to  
19 latch on to the cash? Isn't that right?

20 A. I think the worry that you're describing existed more  
21 towards the beginning of the case, not so much in January of  
22 2009. I guess it's anybody's guess as to what, you know, every  
23 single participant in the marketplace thought at the time.

24 MR. WALKER: Okay, well -- may I approach, Your Honor?

25 THE COURT: You may.



1           You want to give debtors' counsel a copy?

2           Do we want to mark this?

3           MR. WALKER: Ma'am, I don't want to mark it, I just  
4 wanted to see if I could either fresh his recollection about  
5 what he was -- or what Owl Creek was thinking as of January  
6 2009.

7           If you could --

8           THE COURT: Well, I think it has to be marked, you may  
9 not ask for it to be admitted --

10          MR. WALKER: Okay.

11          THE COURT: -- but, can we give a number to it, so we  
12 know what we're talking about?

13          MR. WALKER: Yes, ma'am.

14          THE COURT: EC 307, all right.

15          MR. WALKER: Thank you.

16 BY MR. WALKER:

17 Q. Do you recognize this letter, Mr. Krueger?

18 A. Yes, it's a quarterly letter from Owl Creek, dated January  
19 30th, 2009.

20 Q. Um-hum. And would this be a letter to the Owl Creek  
21 investors?

22 A. Yes.

23 Q. Okay.

24          MR. GLICKMAN: Your Honor, I'm going to object to this  
25 line of questioning, we had an elaborate procedure --

1 THE COURT: You have to talk into a --

2 MR. GLICKMAN: Right, I apologize --

3 THE COURT: -- a microphone.

4 MR. GLICKMAN: Your Honor, we had an elaborate  
5 procedure where we were indicating to each other what documents  
6 were going to be used in these proceedings, and lists were  
7 being exchanged going back a week or two, we've been getting  
8 updates at the last minute; everybody's been making an effort  
9 to comply. We have never seen this document on any list that  
10 the equity committee has indicated that it intended to use.

11 THE COURT: Well, this is cross-examination. Are you  
12 not familiar with the exhibit?

13 MR. GLICKMAN: Your Honor, I don't recall whether I've  
14 seen this exhibit. I certainly would object to it being  
15 admitted into evidence.

16 THE COURT: Well, he hasn't asked that yet.

17 MR. GLICKMAN: I understand.

18 THE COURT: I'll allow him to ask questions to refresh  
19 the witness's recollection of the time.

20 MR. GLICKMAN: Okay, thank you, Your Honor.

21 MR. WALKER: Thank you, Your Honor.

22 BY MR. WALKER:

23 Q. If you turn to the seventh page -- it's not numbered at  
24 the bottom there -- but you see your name is signed at the  
25 bottom of the letter, after 'sincerely'?

1 A. Yes.

2 Q. Okay. And those -- would those four individuals -- those  
3 four names be the portfolio managers at Owl Creek?

4 A. That's correct.

5 Q. Okay. And if you turn two more pages to -- one of the  
6 exhibits is a description of the Washington Mutual  
7 investment -- do you see that?

8 A. Yes.

9 Q. Do you think you wrote this section?

10 A. Yes, I did.

11 Q. Okay. And do you recall here -- or if you'll just read  
12 with me, about the middle of the paragraph -- it says "the  
13 crown jewel is roughly four billion of cash at the holding  
14 company that was held on deposit at WaMu Bank and its  
15 subsidiary, prior to its failure" --

16 THE COURT: I'm sorry, where are you?

17 MR. WALKER: On the ninth page, in the middle of the  
18 paragraph -- first paragraph -- discussing Washington Mutual.

19 THE COURT: Okay, thank you.

20 MR. WALKER: Sure; it says -- I'll reread that  
21 sentence --

22 Q. -- "the crown jewel is roughly four billion of cash at the  
23 holding company that was held on deposit at WaMu Bank and its  
24 subsidiary, prior to its failure. This was subsequently  
25 assumed by JPM as part of its deal with the FDIC to assume all

1 deposit liabilities.

2 Because WaMu's consolidated financial statements  
3 eliminated this inter-company balance, many investors did not  
4 initially realize that this value existed." And you go on to  
5 say "and even those that did, worried that the bank or JPM  
6 might find a way to latch on to the cash."

7 Do you see that?

8 A. Yes.

9 Q. Does that refresh your memory about what you believed the  
10 market knew, as of January, 2009?

11 A. I'm very familiar with this paragraph, and I think it's  
12 pretty clear that this paragraph is a narrative of what  
13 happened to Washington Mutual.

14 The first sentence of this paragraph is, "in the ten  
15 days leading up to the largest bank failure in U.S. history",  
16 it then goes on to describe a narrative, it talks about how  
17 "many investors did not initially realize that this value  
18 existed and even those that did, worried that the bank or JPM  
19 might find a way to latch on to the cash." So the bonds that  
20 we were buying at the time were trading -- my recollection  
21 is -- that they were trading at thirteen, fourteen cents on the  
22 dollar. I don't know off the top of my head where they were  
23 trading in January of 2009, but I would guess it was seventy  
24 cents on the dollar or so, so this paragraph that you're  
25 referring me to is a narrative of what had happened, but not --

1 those words there, as you can see from reading the paragraph,  
2 don't indicate what our state of mind was at the time.

3 MR. WALKER: Well, I've been asked before the next  
4 question is asked, to fix the transcription, I guess, it's not  
5 working for some people --

6 THE COURT: What?

7 MR. STRATTON: Your Honor, each table has the  
8 instantaneous transcript and I don't think it's working any  
9 place, and ours says our subscription is expired.

10 THE CLERK: Okay.

11 MR. STRATTON: And I know they have money to pay for  
12 it, so --

13 THE COURT: All right, well --

14 MR. STRATTON: -- if we could just get that fixed,  
15 thank you.

16 THE COURT: Do you need to break?

17 THE CLERK: Yes, just a second, just --

18 THE COURT: All right, let's wait.

19 (Pause to fix a technical problem)

20 MR. STRATTON: Your Honor, while we're trying to fix  
21 that, one other request; to the extent parties are going to be  
22 bringing new exhibits that aren't on any exhibit list accord,  
23 we'd appreciate it if they'd bring enough copies for all the  
24 parties?

25 THE COURT: Okay.

1 MR. STRATTON: Thank you.

2 (Pause to fix a technical problem)

3 THE COURT: Are they back on?

4 THE CLERK: Yes, they are.

5 THE COURT: All right, we're back on the record.

6 BY MR. WALKER:

7 A. And so just to round out that answer, the second paragraph  
8 that starts at the top of the next page, says "by locating and  
9 studying numerous documents, such as public financials,  
10 bankruptcy docs, regulatory filings, monthly operating reports,  
11 state filings for the insurance subsidiaries, litigation  
12 pleadings, et cetera, we were able to identify these sources of  
13 value and take advantage of unprecedented fear and dislocation  
14 in the markets to build a position and holding company senior  
15 and subordinated bonds at attractive prices. At the beginning  
16 of the case, we took severe haircuts, et cetera, et cetera."

17 Q. Thanks, Mr. Krueger, I just wanted to know if that  
18 refreshed your memory about how you felt about the market in  
19 January of 2009, but suffice to say, from the outset, your  
20 belief that Washington Mutual was the rightful owner of four  
21 billion dollars in deposits was immaterial to your decision to  
22 invest in Washington Mutual debt; isn't that right?

23 A. Yes.

24 Q. Okay, thank you. And Mr. Krueger, in January of 2009, you  
25 began working with other investors to put together a settlement

1 proposal for JPMC, isn't that right?

2 A. You're talking about the White & Case term sheet?

3 Q. Well, I was just asking you if you recall working with  
4 other investors to put together a settlement proposal for JPMC  
5 in January of 2009?

6 A. In January of 2009, we -- members of the White & Case  
7 group -- were meeting and I recall at least one meeting and at  
8 least one conference call where we talked about putting  
9 together a term sheet.

10 Q. If you'll turn to EC 7 -- Exhibit 7 -- you should have it  
11 in your binder, Mr. Krueger --

12 MR. WALKER: Here's a copy for you.

13 A. Okay.

14 Q. Do you see you're listed as one of the recipients on this  
15 e-mail, Mr. Krueger?

16 A. Yes, I do.

17 Q. Okay. And Mark Kronfeld, and Vik Ghei., I believe are  
18 listed as recipients too?

19 A. Correct.

20 Q. Okay. And those are analysts at Owl Creek, correct?

21 A. That is correct.

22 Q. And those were analysts working on the Washington Mutual  
23 investment, correct?

24 A. Yes.

25 Q. Okay.

1 Q. In January, 2009, you were part of a group of creditors  
2 being represented by White & Case in connection with this  
3 bankruptcy, isn't that right?

4 A. Yes.

5 Q. Okay. And the -- if you flip to the attachment in this  
6 term sheet, referenced in Mr. Nichols' e-mail -- do you  
7 recognize that as a term sheet that was put together by the  
8 White & Case group?

9 A. From the e-mail, it, you know, I believe it is, I don't  
10 remember this exact document, but I remember generally that we  
11 prepared a term sheet, yes.

12 Q. And you believe that this term sheet here would be the one  
13 that you paired along with the other members of the White &  
14 Case group?

15 A. Yes.

16 Q. Okay.

17 MR. WALKER: Your Honor, I move to admit Exhibit 7.

18 MR. STRATTON: No objection, Your Honor.

19 THE COURT: It's admitted.

20 (E-mail from Mr. Nichols was hereby received as Equity  
21 Committee's Exhibit 7 for identification, as of this date.)

22 MR. WALKER: Can we switch the screen to this  
23 gentleman's computer over here; if you could pull up Exhibit 7?

24 Q. Briefly, if you'll turn to page 3 of Exhibit 7; page 3 of  
25 the attachment? You'll see that first bullet point under



1 'global settlement', it says "JPM and FDIC each shall waive and  
2 release all right, title, claim and interest in and to the  
3 accounts and the fund held therein." Do you see that?

4 A. Yes.

5 Q. And that would be the four billion dollars in deposits,  
6 correct? That we were discussing earlier?

7 A. Yes.

8 Q. Okay. And if you turn to the next page, under C -- part  
9 C -- you have point 1 -- part C is labeled 'treatment of tax  
10 refunds', and point 1 says "first to WMI, the first two billion  
11 dollars in the net tax refunds received", correct?

12 A. That's correct.

13 Q. Okay. And then you have point 2, "second to the FDIC, all  
14 net tax refunds received in excess of two billion dollars, up  
15 to the net aggregate of three billion dollars", correct?

16 A. That's correct.

17 Q. Okay. And there were other provisions in the settlement  
18 agreement to dispose of other assets that you believe might be  
19 in dispute between JPMorgan and WMI, correct?

20 A. I believe so, yeah.

21 Q. And to your knowledge, this settlement proposal was never  
22 made public, is that right?

23 A. That's correct.

24 Q. Mr. Krueger, do you recall that Owl Creek started buying  
25 heavily into the more junior debt securities in the days just

1 before this proposal was sent to the Fried Frank group?

2 A. I don't recall one way or the other.

3 Q. And Mr. Krueger, if you'll turn to Exhibit 131 -- and I  
4 believe I'm not going to put this up on the ELMO because --

5 THE COURT: Wait, give the number again; EC 131?

6 MR. WALKER: EC 131, yes Your Honor.

7 Q. These were admitted earlier, you recognize these as the  
8 Owl Creek trading records, correct?

9 A. Yes, I do.

10 Q. Okay. And we'll just go briefly through a few of the  
11 trades in this period, but on the first page, lines 3 through  
12 6, "for the AsiaOne Fund" -- so I actually just want to take  
13 step back -- this document is arranged by fund, correct? And  
14 then by date and then by investment, correct? That's how this  
15 is organized?

16 A. That's correct.

17 Q. Okay, good. And so the first page here, we've got  
18 investments by the AsiaOne Fund, during this time period?

19 A. That's correct.

20 Q. Okay. And you see lines three, four, five, six, you've  
21 got a number of buys -- and what are the securities you're  
22 purchasing for the AsiaOne Fund on those days?

23 A. In rows three, four, five and six, the fund was buying  
24 subordinated bonds.

25 Q. And do you know what base numbers are, Mr. Krueger?

1 A. Yes.

2 Q. Okay. If you'll flip to the page Bates numbered OWL and  
3 then it looks like seven zeros and a five?

4 A. Okay.

5 Q. And actually going back to that last point, you testified  
6 earlier that the Asia funds are generally invested pari passu?

7 A. With each other, yes.

8 Q. With the other Asia funds?

9 A. Correct.

10 Q. Okay. And so you'd expect the trades for the other Asia  
11 funds to be similar for those days?

12 A. I would, yes.

13 Q. And so on page OWL 0005, you have investments made by the  
14 Owl One fund, is that correct?

15 A. Yes.

16 Q. Okay. Now that would be one of the non-Asia funds?

17 A. That's correct.

18 Q. Okay. And just to take the week prior to your counsel's  
19 transmission of the term sheet to the Fried Frank group, if you  
20 look at lines 241 through 259, in that period you're buying  
21 subordinated bonds, is that correct?

22 THE COURT: Can you repeat the line numbers again?

23 MR. WALKER: 241 through 259.

24 THE COURT: Thank you.

25 Q. You're buying subordinated bonds as one of the securities

1 during that time, correct?

2 A. 241 through 259, correct?

3 Q. And the ones, for example, on lines 247 and 250 are PIERS,  
4 is that correct?

5 A. Yeah, let me just quickly glance at these. From scanning  
6 this, it looks like the purchases are of subordinated bonds and  
7 PIERS.

8 Q. And did you consider the January 2009 settlement offer put  
9 together by the large group of creditors represented by the  
10 White & Case group, to be material information?

11 A. No.

12 Q. And why not, Mr. Krueger?

13 A. For -- to me, the first obvious reason that jumps out, is  
14 that it was prepared by everybody who is on the same side, so,  
15 you know, everybody always wants a lot, and to not -- to just  
16 have an agreement amongst people who all own the same bonds, to  
17 me, is not material.

18 Q. Mr. Krueger, you -- I believe you testified earlier that  
19 you also attended a settlement meeting with the debtor and  
20 JPMorgan, and some of the other creditors on March 10, 2009,  
21 correct?

22 A. That's correct.

23 Q. Okay. And do you recall testifying in your deposition  
24 that the purpose of that big hands-on meeting was to try and  
25 start the process for a global settlement?

1 A. That -- I don't remember those exact words in my  
2 deposition, but if you're asking me the purpose of that  
3 meeting, I think that's a fair characterization of the purpose,  
4 yeah.

5 Q. And the fact that the debtor and JPMorgan Chase and the  
6 FDIC and a number of powerful hedge funds managing a lot of  
7 money, were participating in a settlement meeting that wasn't  
8 public information as of March, 2009, was it?

9 MR. GLICKMAN: Your Honor, I'm going to object to the  
10 characterization of the questions.

11 THE COURT: Sustained.

12 MR. WALKER: I'll re-ask the question, trying not to  
13 characterize anything in there.

14 Q. The fact that the debtor and JPMC and the FDIC and a  
15 number of hedge funds were participating in a settlement  
16 meeting was not public information in March, 2009, was it?

17 A. I don't think it was public in the sense that you're  
18 talking about.

19 Q. In what sense was it public?

20 A. Well, as I -- my memory of the White & Case group was that  
21 there were a number of bond holders in that group -- I think it  
22 was more twenty -- my memory is those other bond holders knew  
23 that we were becoming restricted; I actually don't know if they  
24 knew about the meeting or not, but to answer your question was  
25 it printed in the Wall Street Journal or made public in that

1 sort of way, no.

2 Q. Well, even if the other members of the White & Case group  
3 knew about the meeting, would that be your definition of public  
4 information?

5 A. No.

6 Q. Okay. And did you consider it material information that  
7 all of the interested parties were starting the process for a  
8 global settlement of billions of dollars of disputed assets?

9 A. Did I consider that meeting material in its existence?  
10 I'm sorry, can you repeat the question, please?

11 Q. The information -- the knowledge that all of the  
12 parties -- all of the interested parties, really -- were  
13 starting the process for, in your words, a global settlement of  
14 billions of dollars of disputed assets to Washington Mutual,  
15 Incorporated; in your mind, would that be material information?

16 A. No.

17 Q. You testified earlier about having signed a  
18 confidentiality agreement as a condition to participating in  
19 the meeting, is that accurate?

20 A. Well, I'm not sure I'd use the word 'condition', I recall  
21 that we signed a confidentiality agreement around the time  
22 of -- shortly before -- attending that meeting.

23 Q. Um-hum. And the purpose for signing the confidentiality  
24 agreement was so you could attend that meeting, correct?

25 A. Well, the confidentiality agreement was something that

1 we -- it was important to us, you know, understanding that  
2 there was some chance that we might get material information  
3 during the meeting; knowing that there was that possibility, we  
4 wanted to make sure that we had a mechanism in a document  
5 signed by both sides, whereby that information would be  
6 cleansed at some point in the future, because we knew that we  
7 didn't want to get restricted from trading forever.

8 Q. And you think if you did receive information -- strike the  
9 question -- I believe you testified too, that during the period  
10 of the confidentiality agreement ran from March 10th to May  
11 8th, is that correct?

12 A. Those dates sound correct.

13 Q. Okay. And I believe you also testified, right, that the  
14 duration of the confidentiality agreement during that time  
15 period, you had Washington Mutual on a restricted trading list  
16 at your firm, correct?

17 A. That's correct.

18 Q. Okay. And during this time period, did your firm  
19 implement an ethical wall between you and any other members of  
20 the firm to prevent you from sharing confidential information?

21 A. No.

22 Q. And as soon as the confidentiality period ended,  
23 Washington Mutual came off of the restricted list, isn't that  
24 right?

25 A. It came off at some point after the period ended.

- 1 Q. Okay, and you started trading Washington Mutual bonds  
2 pretty much as soon as the restriction was lifted, isn't that  
3 right?
- 4 A. I don't -- sitting here today, I don't recall.
- 5 Q. Okay. If we could look back at Exhibit 131 --  
6 (Pause)
- 7 Q. Do you have that document in front of you, Mr. Krueger?
- 8 A. Yes, I do.
- 9 Q. Okay.
- 10 A. The dates you mentioned were May 10th, I believe, correct?  
11 I think there was a sell on May 11th, if that's your question.
- 12 Q. And then a week later there was a buy of PIERS, correct?  
13 Let's look, for example, Mr. Krueger, at the Owl One, that's  
14 one of your flagship funds, correct?
- 15 A. Yes.
- 16 Q. So that would be on page OWL 0 -- seven zeroes and a six;  
17 and in line 312, you're pointing out the May 11th trade of a  
18 sell, correct?
- 19 A. That's correct.
- 20 Q. And that's sell would be of what kind of security?
- 21 A. That's a senior bond.
- 22 Q. Right. And then we've got trades on the 18th, 19th, that  
23 are buying PIERS, correct?
- 24 A. That's correct.
- 25 Q. Okay. And then you've got a sell again of senior bonds on



1 the 20th, correct?

2 A. Correct.

3 Q. Okay. And you would expect that trading throughout the  
4 flagship funds would generally follow those lines, is that  
5 correct?

6 A. That's correct.

7 Q. Okay. And do you recall testifying at your deposition,  
8 Mr. Krueger, that one of the strategies you observed -- or one  
9 of the patterns you observed -- in looking at this, was that in  
10 that time period, you began to sell senior bonds to take some  
11 profit off the table and to reinvest a part of that money in  
12 junior securities that had more upside, correct?

13 A. That's correct.

14 Q. Okay. And the reason for that was that, mathematically,  
15 there was the same upside because there was little upside left  
16 in the senior bonds, correct?

17 A. I guess, that's fair; the senior bonds had more capital  
18 invested in them because they traded at higher dollar prices.  
19 I think it looks like from here, what I'm looking at, they were  
20 trading in the eighties at that point in time.

21 Q. And Mr. Krueger, when the confidentiality period ended,  
22 nothing prevented you from sharing what you had learned during  
23 the settlement negotiations with your coworkers at Owl Creek,  
24 isn't that right?

25 A. Well, I'm -- I never had to really answer that question

1 because at Owl Creek, we always were all in the same boat; it's  
2 not as though certain employees had information and others  
3 didn't. I mean, when we put something on the restricted list,  
4 it restricts every single employee of the firm.

5 Q. Okay; and you're testifying that during the March to mid-  
6 May -- mid-March to mid-May period -- in the course of the  
7 settlement negotiations, you had always been discussing these  
8 issues with the other investment professionals at Owl Creek?

9 A. I don't remember specifically, but I know it as a policy,  
10 we would have considered every Owl Creek employee to be  
11 restricted and would need to abide by, you know, the  
12 restrictions.

13 Q. Right, and I just asked you if there was anything that  
14 prevented you from sharing what you'd learned at the settlement  
15 negotiations with your coworkers at Owl Creek, either during or  
16 after the confidentiality period?

17 A. I don't believe that there was, from memory.

18 Q. Okay, Mr. Krueger, if you'll turn to Exhibits 142 and 143?  
19 I believe you testified about these earlier with your -- on  
20 direct -- with your attorneys.

21 A. Okay.

22 Q. And you see that the first e-mail in the chain is from  
23 Michael Walsh, at Weil Gotshal, forwarding a draft terms sheet,  
24 correct?

25 A. Correct.

1 Q. And you see that he's forwarding to that on behalf of the  
2 debtor, to among others, JPMorgan's counsel at Sullivan &  
3 Cromwell, correct?

4 A. Correct.

5 Q. And then in the top e-mail is from Philip Nichols from  
6 White & Case, forwarding that e-mail to you -- the e-mail and  
7 the attachment to you -- and others within Owl Creek, correct?

8 A. Yes, not just Owl Creek, but --

9 Q. Right.

10 A. -- certain of us at Owl Creek.

11 Q. Right, we see Dan Gropper on there as well and others from  
12 other investors?

13 A. Correct.

14 Q. And do you recall receiving this e-mail and term sheet?

15 A. I'm sure I did, I guess -- I don't specifically recall  
16 getting this e-mail from the person at White & Case, but it  
17 does appear that I did get it, yes.

18 Q. And I believe you testified on your direct, didn't you,  
19 that when you went to the May -- excuse me, the March -- 2009  
20 meeting, you were given a term sheet with blanks in hard copy  
21 to write on, correct?

22 A. Correct.

23 Q. And that term sheet had blanks in it because the debtors  
24 wanted to get your input and the input of other creditors  
25 before filing in those banks, correct?

1 A. I believe that's probably true, yes.

2 Q. Okay. And if you turn to page 2 of the term sheet -- I'm  
3 not sure if that's on the computer, so I'll just put it on the  
4 ELMO.

5 THE COURT: Go back.

6 MR. WALKER: I'm sorry, if you go back to the  
7 computer, he had it.

8 Q. I just want to direct you to a couple of the parts; under  
9 the Section 363 sale, this term sheet again proposes that the  
10 funds in the deposit accounts be turned over to WMI, correct?  
11 You see, it says "as the purchase price, JPMC shall pay or  
12 transfer to WMI all of JPMC's right, title and interest in and  
13 to the funds in the deposit accounts."

14 A. I see that, yes.

15 Q. Okay. And that would again, be the four billion dollars  
16 of deposits that we had been talking about earlier, correct?

17 A. That's correct.

18 Q. Okay. And that did not change from the January term  
19 sheet, correct?

20 A. No.

21 Q. Okay. And then under 'tax issues', the second section,  
22 that I believe is one of the sections that had blanks in it  
23 when you got to the meeting. And here, there's proposed a  
24 split the first 500,000,000 received, after the date here up to  
25 WMI and the remainder would be split sixty-forty between WMI

1 and JPMC, correct?

2 A. That's correct.

3 Q. Okay. And then any additional amount due to the extended  
4 five-year carry back would be related to the legislation that  
5 was working its way through Congress, it would extend the net  
6 operating loss carry back refund, correct?

7 A. Correct.

8 Q. Okay. And again, to your knowledge, this proposal was  
9 never disclosed to the investing public generally, isn't that  
10 right?

11 A. That's my understanding.

12 Q. Okay. And again, I'll ask you, do you believe that the  
13 terms of a settlement of billions of dollars of assets that  
14 have been arrived at between the debtor and its major creditors  
15 and propose to an adverse party to be material information for  
16 the purposes of investment?

17 MR. GLICKMAN: Your Honor, objection; I'm sure Mr.  
18 Walker misspoke, he said the terms of his --

19 THE COURT: Wait, you have to talk into a microphone,  
20 please.

21 MR. GLICKMAN: I'm sure Mr. Walker misspoke; he said  
22 the terms of a settlement, which I think mischaracterizes the  
23 testimony and the document.

24 THE COURT: Well did you want an answer to that  
25 question?

1 MR. WALKER: I'll re-ask the question, Your Honor,  
2 thanks.

3 BY MR. WALKER:

4 Q. Do you believe that the terms of a settlement offer  
5 proposed as a group by the debtor and its major creditors, to  
6 its main adversary in a bankruptcy, would be information that  
7 would be important to a reasonable investor in the marketplace?

8 A. No.

9 Q. Mr. Krueger, I'd ask you to turn Exhibit AO-16 -- excuse  
10 me, AOC-16, I believe that is an exhibit that was admitted  
11 earlier, and that you discussed with your counsel on direct  
12 examination?

13 THE COURT: Give me that number again?

14 MR. WALKER: It's AOC-016.

15 MR. KRUEGER: Do you happen to know which tab it is  
16 in --

17 MR. GLICKMAN: Three.

18 MR. WALKER: Your Honor, may I approach, I can give  
19 him a copy of the --

20 MR. KRUEGER: I've got it.

21 THE COURT: Tab three.

22 MR. KRUEGER: Thank you.

23 BY MR. WALKER:

24 Q. And if you'll turn to Exhibit A, its Bates number is O-W-L  
25 0010746.

1 A. Okay.

2 Q. Okay. And you see under -- there's a question there; what  
3 is material information? Do you see that?

4 A. Yes. Um-hum.

5 Q. Okay. And it says information is material where there is  
6 a substantial likelihood that a reasonable investor would  
7 consider that information important in making his or her  
8 investment decisions. You see that?

9 A. I do.

10 Q. And if you turn to the next page, you see some examples of  
11 material information. Do you see that?

12 A. I do.

13 Q. And one of those examples -- you know, there are several  
14 significant merger or acquisition proposals or agreements,  
15 major litigation. Do you see that?

16 A. Yes.

17 Q. And at this -- at the time you were working on the  
18 Washington Mutual investments, was this your understanding of  
19 what the definition of material information was?

20 A. Yes.

21 Q. Okay. And just for example, if you had -- if you had had  
22 a meeting with counsel for JPMorgan Chase, and they had given  
23 you their views on what they thought the potential outcome of  
24 the litigation is, would you have considered that material  
25 information?

1 MR. STROCHAK: Objection, Your Honor. Calls for  
2 speculation.

3 THE COURT: Overruled. I think he can ask.

4 A. So in this hypothetical, I've met with J -- can you just  
5 repeat that question, please?

6 Q. Yeah, in the hypothetical, you -- you've been in -- you've  
7 met with JPMorgan's counsel, and they've conveyed to you  
8 their -- JPMorgan's belief and position on how they believe  
9 litigation over the estate assets would resolve.

10 A. That's -- that's really hard for me analyze on the fly.  
11 I've never needed to analyze that situation. Sitting here  
12 today, thinking about this person at JPMorgan explaining their  
13 views, I don't think that would be material, no.

14 Q. Mr. Krueger, if could please turn to Exhibits 144 and 145.  
15 Again, I believe those were admitted earlier, and you discussed  
16 them with your counsel a little bit on direct. It's tab 7.

17 A. Okay.

18 Q. And just to be clear, the top e-mail you've received this  
19 as a forward from your lawyer at White & Case, correct? Along  
20 with Mark Kronfeld and Vic Dee from Owl Creek?

21 A. That's correct.

22 Q. Okay. And there's some others on that list as well.  
23 And -- but if you go to the e-mail that's being forwarded, it's  
24 from Hyde Feldstein at Sullivan & Cromwell. You understood at  
25 the time, right, that Sullivan & Cromwell was representing



1 JPMorgan and -- in connection with the settlement negotiations  
2 and such?

3 A. Yes.

4 Q. Okay. And do you recall receiving this e-mail?

5 A. I don't -- I recall getting a proposal back from JPMorgan.  
6 I can't say that I recall this specific e-mail.

7 Q. Okay. You -- it's safe to say that you would have read  
8 this e-mail at the time had you received it, correct?

9 A. It's -- I would have opened the attachment.

10 Q. Okay. And you would have wanted to read the words of  
11 JPMorgan's counsel, which describe the analysis that they  
12 approached in arriving at the attachment, correct?

13 A. The -- I'm not sure I would have because my recollection  
14 is, as I said earlier today, of getting this term sheet as that  
15 it was akin to a slap in the face. You know? To propose to  
16 settle the tax refunds as JPMorgan taking a hundred percent of  
17 them was not negotiating. And I have a recollection of  
18 thinking being disappointed that we, you know, couldn't have  
19 actually taken a good first step in the process and moving on.

20 Q. If you go to the second paragraph of Ms. Feldstein's e-  
21 mail, the first sentence is please understand that we are  
22 approaching the analysis from the perspective of what we think  
23 are our clients' perspective right and what we believe you and  
24 we are legitimately entitled to claim and likelihood to prevail  
25 upon at the end of the day. Do you see that?

1 A. Yes, I do.

2 Q. So reading this here today, you understand that JPMorgan  
3 Chase's attorney is telling Washington Mutual that there are  
4 assets to which JPMorgan Chase believes Washington Mutual is  
5 legitimately entitled, correct?

6 A. I'm sorry. You're saying what Washington Mutual, because  
7 it says you and -- you and we?

8 Q. Correct.

9 A. That's right. I think what this lawyer is saying is that  
10 she believes that -- yeah, it seems like she's talking about  
11 litigation outcomes, I guess.

12 Q. Um-hum.

13 A. I guess you could say that.

14 Q. And if you turn to Exhibit 145; that would be the term  
15 sheet that she was sending along. And --

16 A. I believe so, yes.

17 Q. Thank you. And in the first section here, on the first  
18 page, it has for the balances in the deposit accounts agreed  
19 with the exception of an adjustment of 250 million for a tax  
20 issue. So here you've got the counsel for JPMorgan Chase  
21 agreeing that you are likely to prevail in litigation over the  
22 balances in the deposit accounts, correct?

23 MR. GLICKMAN: Objection. Calls for speculation. And  
24 he's mischaracterizing the document (speaking away from  
25 microphone).

1 THE COURT: Well -- overruled. What is your  
2 understanding of that?

3 THE WITNESS: I'm sorry. I forgot the question. Can  
4 you please repeat it?

5 Q. Do you understand here, looking at this and in conjunction  
6 with the e-mail we just discussed, where you acknowledge that  
7 she's talking about litigation outcomes, that here JPMorgan  
8 Chase is conceding that you are legitimately entitled the  
9 deposits less the adjustment for the tax refunds?

10 MR. GLICKMAN: Objection to form. As long as it's  
11 clear, he's almost (speaking away from microphone) --

12 THE COURT: Sustained.

13 MR. WALKER: You know what --

14 THE COURT: Thank you.

15 MR. WALKER: -- I'll withdraw the question, and we can  
16 move on.

17 Q. And as far as you knew, JPMorgan Chase's proposal here was  
18 never made public. Is that correct?

19 A. I don't believe that it was.

20 Q. Okay. And the e-mail and the views expressed by Hydee  
21 Feldstein was never made public, to your knowledge, correct?

22 A. That's correct.

23 Q. Okay. And you were aware also that the -- that JPMorgan  
24 Chase filed a motion for -- excuse me, filed a complaint  
25 asserting its right to the deposits in March of 2009, correct?

1 A. Yes, I recall that.

2 Q. Okay. So Mr. Krueger, don't you think that a reasonable  
3 investor would consider the views expressed by JPMorgan Chase's  
4 lawyer and the counterproposal here to be important information  
5 to be considered in making his or her investment decision?

6 A. No.

7 Q. And I believe you testified earlier that you -- or excuse  
8 me, that Owl Creek left the White & Case group in October of  
9 2009. Is that accurate?

10 MR. GLICKMAN: Your Honor, excuse me. I think there  
11 was a transcription error in response to that last question.  
12 It said yes, and the witness testified no. Kind of an  
13 important question. I just wanted to clear that up.

14 THE COURT: This is not just the official transcript,  
15 so I'm not going to get involved in that.

16 MR. GLICKMAN: Okay.

17 THE COURT: You deal with it -- the court reporter on  
18 that. What was the question?

19 Q. So the question was I was just trying to recall you  
20 testified earlier with your counsel that you left the JPMorgan  
21 group -- excuse me, that Owl Creek left the White & Case group  
22 and -- sometime in October of 2009. Is that correct?

23 A. Around then, yes.

24 Q. Do you recall the reasons why you left the White & Case  
25 group at that time?

1 A. Yes, I do. The White & Case group at that point in time  
2 was comprised of mostly investors who owned the bulk of their  
3 bonds as senior bonds. And Owl Creek didn't really fit in  
4 that -- into that mold because at that point in time we owned a  
5 fair amount of subordinated bonds and peers. And our  
6 understanding was that the Fried Frank group of bond holders  
7 had a similar positioning, and so we thought it made more sense  
8 to join that group.

9 Q. Okay. And so, why did it make more position -- why did it  
10 make more sense -- and maybe this is an obvious answer, so I  
11 apologize. Why did it make more sense for you to join a group  
12 that was representing primarily more junior bonds as opposed to  
13 staying with the group you had been with that had a bunch of  
14 senior bond holders in it?

15 A. Well, I -- thinking back on the -- on that period of time,  
16 I think the major reason was that there was a lot of friction  
17 in the White & Case group because of the different  
18 positionings, and we felt like it would be better for the  
19 process to be in a group where there wasn't as much friction.

20 Q. And I believe you testified earlier that you entered into  
21 your next confidentiality agreement in November -- on November  
22 16, 2009. Is that correct?

23 A. That date sounds about correct, yes.

24 Q. And you entered into that agreement again so you could  
25 participate in settlement discussions, settlement negotiations.

1 Is that correct?

2 A. Well, again, just like with the first confi, I don't  
3 recall that being the motivating factor. My recollection is  
4 the same as it was for the first, which is that when you're  
5 involved in a process like this there's a possibility of  
6 getting information that might be considered material non  
7 public information. And with that as a possibility, we wanted  
8 to make sure that we had some sort of mechanism whereby we  
9 wouldn't be forbidden from trading forever.

10 Q. And I'm sorry. I want to go back for one second to the  
11 last answer, where you described friction in the White & Case  
12 group right around the time you left. Friction over what?

13 A. I don't recall specific examples, but, you know, I  
14 remember heated conversations between various participants.  
15 And by heated, I mean yelling.

16 Q. And what were these individuals yelling at each other  
17 about? Do you recall, generally, the purpose of the yelling?

18 A. I don't.

19 Q. And I believe you testified that one of the -- one of the  
20 reasons or one of the catalysts for entering into the November  
21 confidentiality agreement was that legislation had just been  
22 passed which would potentially give WMI an additional two years  
23 of net operating loss carry-back, correct?

24 A. That's correct, although I think it's an additional three  
25 years. I could be wrong, but I think it was from two to five

1 years.

2 Q. Okay. And you wanted to find out -- or they were going to  
3 tell you the number, the amount that would be there, correct?

4 WMI was?

5 A. I have a recollection of having the belief that that  
6 information would be disclosed to us under this confi, yes.

7 Q. And you learned that that additional amount was 2.6  
8 billion dollars, correct?

9 A. I don't remember the exact amount, but I do remember that  
10 they told us their best guess of that amount.

11 Q. Okay. And you were involved in some settlement  
12 negotiations in November of 2009, correct?

13 A. Well, I recall getting a term sheet from the debtor or  
14 debtor's counsel at that meeting that I described earlier. You  
15 asked me if I was involved. I mean, I just want to be clear.  
16 I've never been in a room negotiating with JPMorgan or the  
17 FDIC. I've been -- I've been -- I've spoken to the debtor and  
18 to other noteholders about term sheets.

19 Q. And in November of 2009 you were part of the Fried Frank  
20 group, correct?

21 A. That's correct.

22 Q. And Fried Frank was -- was representing you in  
23 negotiations face-to-face with JPMorgan Chase, correct?

24 A. I don't know if Fried Frank was negotiating with JPMorgan  
25 or the debtor was. I'm just not sure.

1 Q. And I believe you testified earlier that you don't recall  
2 getting a response from JPMorgan Chase to your November offer.  
3 Is that correct?

4 A. That's correct.

5 Q. Okay. Could you put up Exhibit 16? It might also be AU  
6 29.

7 MR. WALKER: Your Honor, may I approach the witness?  
8 Thank you.

9 A. Which one again?

10 Q. It would be either be EC 16, perhaps, in there, in that  
11 binder.

12 A. Yeah, okay. I see it.

13 Q. Okay. And you see the top. The e-mail is from Jim Bolin.

14 MR. GLICKMAN: Excuse me, can we get a copy (speaking  
15 away from microphone)?

16 MR. WALKER: Oh. Well, we have it on the screen here.

17 THE COURT: Redo.

18 Q. You see the top e-mail is from Jim Bolin. You -- do you  
19 know who Jim Bolin is?

20 A. Yes.

21 Q. Okay.

22 A. He works at Appaloosa.

23 Q. Okay. And that's to Dank@owlcreeklp.com? Is that you?

24 A. That's me, correct.

25 Q. Okay. And then, if you go to the -- below it, you see



1 it's an e-mail from Bill Kosturos, who had forwarded that e-  
2 mail, and it says see JPM's proposal. Do you see that?

3 A. Yes.

4 Q. Okay. And then below that, from Donald McCree is  
5 JPMorgan's proposal.

6 A. Okay.

7 Q. Okay. And does that refresh your recollection of your  
8 involvement in the November 2009 settlement negotiations?

9 A. No.

10 Q. You don't recall getting this -- this e-mail from --  
11 forwarded from Bill Kosturos from JPMorgan Chase?

12 A. No. I -- I'm sure I did get it. I'm -- I just don't  
13 recall getting it. I mean, I say that because, as you see, my  
14 name is in the two line in that first e-mail.

15 Q. And can you put up EC 305? If you look at EC 305, this is  
16 another exhibit that was used with Mr. Gropper earlier.

17 THE COURT: What's the number again?

18 MR. WALKER: 3 -- EC 305.

19 Q. And here you see, correct, that this is a proposal from  
20 Cha -- sent from Chad Smith at WaMu, who is the general counsel  
21 of WaMu? Is that your recollection at the time?

22 A. That sounds correct, yes.

23 Q. Okay. To Donald McCree at JPMorgan, who was taking the  
24 lead on the settlement negotiations for JPMorgan. Do you  
25 recall that?

1 A. I don't recall that about Mr. McCree, but I do see that he  
2 is being sent this e-mail.

3 Q. Okay. And if you look at the attachment, which is  
4 described in the e-mail as a summary term sheet. Does this  
5 refresh your recollection about having worked on putting  
6 together a new proposal to JPMorgan in December -- November and  
7 December of 2009?

8 A. Well, I said earlier I do remember a meeting where I was  
9 handed the term sheet with blanks in it. Just glancing, it  
10 looks like it was a similar format, so I recall going to a  
11 meeting where that happened. I don't -- it doesn't look like I  
12 got this e-mail. I don't recall getting an e-mail. I'm not  
13 sure if that answers your question or not.

14 Q. Okay, that's fine. Thanks. I'm just going to go through  
15 a few more documents with you, Mr. Krueger. If you'll turn to  
16 Exhibit 134. Here you go.

17 A. So would that be in one of these --

18 Q. That would be in the -- that binder, yes. It should be in  
19 that binder.

20 A. Okay, I see it.

21 Q. Okay. You mind switching it to the L mode? Thank you.  
22 Okay. As you can see, the first page is totally redacted --

23 THE COURT: Keep your voice up or move the mic. Thank  
24 you.

25 Q. As you can see, Mr. Krueger, the first page is heavily

1 redacted, but do you recognize this document?

2 A. Yes, I do.

3 Q. Okay. And what do you recognize this document as?

4 A. These were a few pages of notes that Jeff Altman took with  
5 him to, you can call it, a conference where portfolio managers  
6 discussed ideas that they were invested in.

7 Q. Do you recall when this document was created?

8 A. Yes. It was some time towards the end of 2008, possibly  
9 November or December.

10 MR. WALKER: Your Honor, I move for admission of  
11 Exhibit 144.

12 MR. GLICKMAN: No objection, Your Honor.

13 MR. STROCHAK: We do object, Your Honor. There  
14 doesn't seem to be any foundation other than it's something  
15 that was created by someone in the witness's firm for purposes  
16 of some conference. No foundation.

17 THE COURT: Overruled. I'll admit it.

18 (Jeff Altman's Notes from Portfolio Managers Conference were  
19 hereby entered into evidence as Equity Committee's Exhibit 144  
20 for identification, as of this date.)

21 MR. WALKER: Thank you, Your Honor.

22 Q. And let's just stay on the first page that has valuation  
23 at the top. Do you see that?

24 A. Yes.

25 Q. Okay. And so, as of late 2008 you had determined that

1 WaMu likely had a three billion dollar tax refund coming to it.

2 Is that correct?

3 A. We thought that that was a possibility, yes.

4 Q. Right. And do you recall how you came to that

5 determination?

6 A. Yes. From looking at footnotes and Ks and Qs, you could

7 see approximately what amount of cash taxes Washington Mutual

8 had paid over prior years.

9 Q. And do you recall testifying that your estimate of the  
10 value of the potential tax refund was "important part of your  
11 investment pieces in Washington Mutual"?

12 A. Yes.

13 Q. If you'll turn to EC Exhibit 132. Not a lot to work with  
14 here, Mr. Krueger. But do you recognize this document?

15 A. Yes, I do.

16 Q. What is this document?

17 A. This is a short waterfall model that analyzes a number of  
18 different line items.

19 Q. And you understand that WMMRC would refer to the  
20 Washington Mutual subsidiary, correct?

21 A. That's correct.

22 Q. Okay. And this document was produced from Owl Creek's  
23 files, correct?

24 A. Correct.

25 Q. And do you recall testifying that you think maybe the --

1 there would be redacted information on here that was relevant  
2 to Washington Mutual, correct?

3 A. Yes.

4 Q. Okay.

5 A. Well, I actually don't recall. Are you saying I said that  
6 at my deposition or --

7 Q. I believe you did, yeah.

8 A. Okay. Well, maybe if you could just ask the question  
9 again, and I'm happy to answer it.

10 Q. I'll ask it -- I'll ask a better question. Do you think,  
11 Mr. Krueger, that some of the redacted material relates to  
12 Washington Mutual?

13 A. Yes.

14 Q. Okay.

15 MR. WALKER: Your Honor, I move for admission of  
16 Exhibit 132.

17 MR. GLICKMAN: I'm going to object unless there's a  
18 foundation -- I'm going to object unless there's a foundation  
19 as to how much that this witness had a role in preparing this  
20 document.

21 MR. WALKER: Well, Your Honor, he testified as to the  
22 fact that it came from a valuation model that relates to  
23 Washington Mutual and that it came from their files. And I  
24 would love to establish more about the document except  
25 everything -- except for WMMRC's been redacted from it.

1 THE COURT: Well, I think he testified it came from  
2 Al's files, and it related to WaMu. And he was the manager in  
3 charge of WaMu, so I will admit the document.

4 (Waterfall Model relating to Washington Mutual was hereby  
5 admitted into evidence as Equity Committee's Exhibit 132 for  
6 identification, as of this date.)

7 MR. WALKER: Thank you, Your Honor.

8 Q. And on this -- the one line surviving of the waterfall  
9 here, correct, gives a valuation for WMMRC of 250 million  
10 dollars? Is that correct?

11 A. It uses a 250 valuation in that line item, yes.

12 Q. Thank you. If you could turn to Exhibit 138 -- EC 138,  
13 Mr. Krueger. There are actually a couple pages I'd like to  
14 talk to you about this document. But again, do you recognize  
15 this document?

16 A. Yes, I do.

17 Q. And it was produced from Owl Creek's files, correct?

18 A. That's correct.

19 Q. And this first page we're looking at is similar to the  
20 last document we just looked at, correct?

21 A. It is.

22 Q. It's a redacted version of a waterfall for Washington  
23 Mutual that, again, gives a value or inputs a value to -- of  
24 WMMRC at 250 million, correct?

25 A. Yeah. And I appreciate you changing your question because

1 it doesn't give a value. It inputs a value, which is an  
2 important distinction in my mind.

3 Q. And let's just turn to the second page. And this table  
4 represents an effort by Owl Creek to determine the value of  
5 WMI's net operating loss carry forwards based on a number of  
6 assumptions, correct?

7 A. The -- this page makes a lot of assumptions across a wide  
8 range of different possible scenarios in order to do that math,  
9 that derives if, and then a while were to be able to be  
10 monetized what could that value be.

11 Q. And do you recall, Mr. Krueger, when this document was  
12 created?

13 A. No, I would only -- I would be guessing if I ge -- I can  
14 only guess.

15 Q. And do you recall, Mr. Krueger, at your deposition that  
16 the Owl Creek privilege log was shown to you with -- giving a  
17 date of January 2011 for this document?

18 A. I do recall that.

19 Q. Okay. And do you recall testifying in your deposition  
20 that you would not be surprised to learn that as of January  
21 2011 Owl Creek was trying to determine the level investment  
22 that could be made into reorganized WMI to take advantage of  
23 the net operating loss?

24 A. I -- you're asking me if I remember saying that at my  
25 deposition? Yeah, I do remember saying that. I mean, I guess

1 the reason I said that January of 2011 my -- I guess you said  
2 that was the date on the privilege log. I -- that's all.  
3 That's the only basis I have for that date.

4 Q. And just to briefly explain this chart, and I'm not going  
5 to go into it in detail, for everybody's sake here. But across  
6 the top here, these values 5 -- that's 5 billion, right? The  
7 values across this top column. That's five billion, and then  
8 two billion, three billion --

9 A. That's correct.

10 Q. -- four billion, et cetera? And those amounts represent  
11 an assumed gross net operating loss, correct? Is that what  
12 that --

13 A. Yeah, that's one of the sensitivities in this spread  
14 sheet, which is varying the assumed gross NOL from, it appears,  
15 two billion up to nine billion.

16 Q. And across the very bottom of the chart, those are a range  
17 of total net present values of those net operating losses;  
18 ranging from 13 million in the left-hand most column to 1.3  
19 billion in the right-hand most column, correct?

20 A. Let me see here. Yes, I think that's correct. If -- you  
21 know, this model inputs a lot of assumptions, as you see on the  
22 top. and that bottom most row is the sum of the NPVs above,  
23 which are, you know, intended to signify if a person is able to  
24 actually derive value from an NOL, what might it be worth  
25 across the -- a wide range.



1 Q. Okay. and just to be clear, the left-hand most column  
2 that has a net present value of thirteen million, that assumed  
3 a -- an effective date of the plan of December 31st, 2010,  
4 which would have been off the table in January of 2011,  
5 correct?

6 A. If January of '11 is when this model was created -- I'm  
7 not sure if it is or isn't -- but if that's true, then of  
8 course an emergent state in 2010 would have been off the table,  
9 yes.

10 Q. And do you think this chart was created by analysts at Owl  
11 Creek?

12 A. I believe it was, yes.

13 Q. And there's nothing in that page on -- the use of the NOL  
14 that refers to any Internal Revenue Code Section 269 risks.  
15 Isn't that right?

16 A. No. This model is just a collection of formulas that one  
17 of the analysts put together probably in twenty or twenty-five  
18 minutes but doesn't analyze any of those issues that you're  
19 talking about.

20 MR. WALKER: Your Honor, I move for admission of EC  
21 138.

22 MR. GLICKMAN: Consistent with Your Honor's prior  
23 ruling, no objection.

24 THE COURT: All right. It's admitted.

25 (Redacted valuation model for WMMRC was hereby admitted into

1 evidence as Equity Committee's Exhibit 138 for identification,  
2 as of this date.)

3 Q. And Mr. Krueger, just briefly, you'll note that the EC 138  
4 has beginning dates of Owl 0010862. Do you see that?

5 A. Yes, I do.

6 Q. Okay. And -- unfortunately, I don't have copies to share.  
7 But this is the Owl Creek privilege logs -- log. It's EC 133.  
8 You see there a date of January 2011?

9 A. Yes, I see that.

10 Q. Okay.

11 A. I'm not sure if I was clear, but I just want to make sure  
12 it is clear that, and maybe you asked me a different question,  
13 but I was assuming you were asking me when this model was  
14 created. I guessed wrong at my deposition, and I was shown  
15 that privilege log as you highlight, so --

16 Q. Okay.

17 A. -- you know, I'm going with that information. But because  
18 of the December 2010 date that you highlighted it seems to me  
19 silly that somebody would have used that as an assumption,  
20 because as you point out that would have been in the past if  
21 that analysis had been created in January of 2011. So my best  
22 guess would have been in -- it would have been created prior to  
23 December 31st of 2010.

24 Q. Right. Right. I recall that conversation, although that  
25 wasn't me at the deposition. And that what elicited the

1 testimony that you would not have been surprised that in  
2 January of 2011 that analysis was being conducted, correct?

3 A. That's true.

4 Q. Okay.

5 MR. WALKER: Your Honor, I'd like to move for  
6 admission of EC 133 as well, please.

7 MR. GLICKMAN: No objection.

8 THE COURT: All right. It's admitted.

9 (Owl Creek Privilege Log was hereby admitted into evidence as  
10 Equity Committee's Exhibit 133 for identification, as of this  
11 date.)

12 MR. WALKER: Thank you, Your Honor.

13 Q. If you'll turn to Exhibit EC 139, Mr. Krueger.

14 A. Okay.

15 Q. Do you recognize this document as a model intended to  
16 analyze the net present value of the net operating loss carry-  
17 forward that Washington Mutual would have or might have in the  
18 bankruptcy?

19 A. I don't specifically recall this model, but looking at it  
20 in -- and knowing that it was generated at Owl Creek it strikes  
21 me as one of a number of tools that we would have used.

22 Q. And this came from Owl Creek's files, too, correct?

23 A. I believe so, yes.

24 Q. Yeah.

25 MR. WALKER: Your Honor, I move for admission of

1 Exhibit 139.

2 MR. GLICKMAN: No objection.

3 THE COURT: It's admitted.

4 (March 2010 Owl Creek Valuation Model was hereby entered into  
5 evidence as Equity Committee's Exhibit 139 for identification,  
6 as of this date.)

7 Q. And you see, Mr. Krueger, I just want to read this for the  
8 record, the header in the middle of the page above the chart;  
9 NPV of deploying five million dollars into buying a business  
10 and using the tax carry-forward before selling it. Carries  
11 over the page. Do you see that?

12 A. Yes, I do.

13 Q. And NPV there would be the net present value, correct?

14 A. That's correct.

15 Q. And the chart here, based on various assumption, is  
16 predicting a range of net present values for the NOL between  
17 six billion and eleven and a half billion dollars. Did I read  
18 that chart correctly?

19 A. No, the chart that you're referring to at the bottom is  
20 the net present value, not of the NOL, which is I believe what  
21 you just said. It's the net present value of this hypothetical  
22 business.

23 Q. I see. And so, as an investor, the only way you could  
24 take advantage of the value reflected in this chart would be if  
25 you were an owner of WMI post-emergence from bankruptcy,

1 correct?

2 A. I'm sorry. You asked a lot of thing -- can you just  
3 repeat that question?

4 Q. Sure. As an investor --

5 A. Um-hum.

6 Q. -- the only way you could take advantage of the value  
7 reflected in the chart you're looking at would be if you were  
8 an owner of reorganized WMI, correct?

9 A. This chart analyzes the net present value of a business  
10 that purchased -- purchases or has purchased for five billion  
11 dollars with an -- I mean, I don't want go through this list of  
12 assumptions. They're right there at the top of this page. So  
13 you're -- I think what you're highlighting is a part of these  
14 cash flow streams include shielding taxable income and not  
15 paying taxes. That is certainly one component of this  
16 analysis.

17 Q. Well, I actually think you're probably answering a more  
18 complicated question that I asked. My question was simply in  
19 order to take advantage as an investor of the values reflected  
20 in this analysis here you would have to be a shareholder of  
21 reorganized WMI, correct?

22 A. I don't think that question is analyzed by this model,  
23 which is maybe why I'm confused by your question. This model  
24 does a lot of math, as I described. I'm not understanding why  
25 it's tied into your question.

1 Q. I'll withdraw the question. It's -- thank you, though,  
2 Mr. Kruger. If you'll turn to Exhibit 135. You have that --

3 A. Yes.

4 Q. Okay. And this is a redacted copy of a WMI waterfall  
5 prepared by Owl Creek, correct?

6 A. Yes, it is.

7 Q. Okay. And this came from Owl Creek's files?

8 A. Yes.

9 Q. And this document was derived from information contained  
10 in the March 2010 monthly operating report, correct?

11 A. You're saying that because of the header at the top. I --  
12 you know, I assume that this model has data at least up to that  
13 point in time. I -- you know, I'm not sure how frequently the  
14 analysts would have changed that header to be clear.

15 Q. Okay. And you think this would have been produced by an  
16 analyst at Owl Creek, correct?

17 A. Yes.

18 Q. Okay.

19 MR. WALKER: Your Honor, I move for admission of EC  
20 135.

21 MR. GLICKMAN: No objection.

22 MR. STROCHAK: We do object on the same grounds as  
23 previously. It's just one line of a spread sheet with no  
24 explanation.

25 THE COURT: Overruled. It's admitted.

1 (Owl Creek WMI Waterfall Model was admitted into evidence as  
2 Equity Committee's Exhibit 135 for identification, as of this  
3 date.)

4 Q. And in the first unredacted line here, you see -- you've  
5 ascribed a value to WMMRC of 140 million, correct -- or the  
6 person creating this chart as ascribed a value of 140 million,  
7 correct?

8 A. That's the value that is assumed in this iteration of this  
9 model that's been printed out.

10 Q. Okay. And the term haircut along the top is -- reflects a  
11 discount to be applied to the amount based on your assessment  
12 of being able to utilize that asset. Is that an accurate  
13 description of the haircut?

14 A. Utilize -- certainly for the NOL, utilize is the correct  
15 term. You know, haircut is a generic term that, you know,  
16 somebody at Owl Creek would have used for a number of different  
17 purposes. But the reason you gave is certainly one of those.

18 Q. Okay. And for the value for WMMRC you or this chart has a  
19 zero percent haircut. So that would indicate a high amount of  
20 certainty. Is that correct?

21 A. No. I -- well, high amount of certainty that WMMRC will  
22 end up being worth exactly 140 million? I don't believe that's  
23 what that haircut implies. It's not an indication of  
24 conviction level.

25 Q. Okay. But you applied no discount to that number,

1 correct?

2 A. That's correct.

3 Q. And then, if you look at the other unredacted line here,  
4 it has NOL carry forward value, PV value. Do you see that?

5 A. Yes, I do.

6 Q. And you understand that to be the net operating loss  
7 carry-forward value?

8 A. I do.

9 Q. And PV value would stand for present value?

10 A. Yes.

11 Q. Present value value. And there you've given an amount for  
12 the NOL of 500 million, correct?

13 A. Yes.

14 Q. And an eighty percent haircut. Is that correct?

15 A. That's correct.

16 Q. And that netted out to a hundred million. Is that  
17 correct?

18 A. That's correct.

19 Q. So here you've ascribed for the purposes of this chart in  
20 the assumptions a value of a hundred million to the NOL carry-  
21 forward. Is that correct?

22 A. Actually, no, because, as you see, this waterfall model  
23 works such that the columns that matter are the two left most  
24 columns. I guess --

25 Q. Um-hum.



1 A. -- you can't see them up on the -- on the screen. But the  
2 header is there are litigation flow through --

3 Q. Um-hum.

4 A. -- which is an analysis of litigating the items that we're  
5 discussing here today to their ultimate conclusion. And the  
6 other -- the other column is titled settlement, indicating it's  
7 our analysis of potential settlement. And for that line item,  
8 we assumed zero at that point in time.

9 Q. And why do you that, because you're leaving them blank?

10 A. Correct.

11 Q. Okay. Turning to the next page -- of if you turn to the  
12 next page, Mr. Krueger, that's essentially the same chart but  
13 with -- excuse me, with a hundred million filled in for the  
14 litigation flow through. Do you see that?

15 A. I do.

16 Q. So you're assuming here a hundred million dollar value for  
17 the -- for at least the analysis of what value you might  
18 ascribe to the NOL if you have to litigate the issues. Is that  
19 right?

20 A. That is correct, although my recollection of this period  
21 of time, you know, post the March MOR we were -- we were more  
22 focused on the settlement outcome because there was that period  
23 of time where we thought we had a settlement agreed to. So  
24 we -- it's possible that the analyst -- as you can see, it's a  
25 hundred for one, and it's zero for the other. So as I think

1 about the dates here, I -- I'm led to believe that the analyst  
2 probably just ignored that input because we weren't focused on  
3 the litigation column.

4 Q. And when you say focused on the dates, you mean that in  
5 March 2010 you were focused -- or -- as of the March 2010  
6 operating report, you were focused on the potential settlement?

7 A. That's correct. My -- you know, we all know that there  
8 was a settlement "reached" in March of 2010. So my  
9 recollection of this period of time is that we were hopeful  
10 that we didn't need to worry about litigating these issues for  
11 years and years.

12 Q. And there's nothing in the chart you're looking at  
13 reflecting any Section 269 risks. Is that correct?

14 A. Not that I see on this page.

15 Q. Okay.

16 MR. WALKER: Your Honor, I hate to ask this, but did I  
17 move admission of EC 135? If not, I would like to.

18 THE COURT: Yes, you did. And that was admitted.

19 MR. WALKER: Great. Thank you, Your Honor.

20 THE COURT: How much longer are you going to be?

21 MR. WALKER: About a minute and thirty seconds.

22 THE COURT: Okay.

23 Q. Mr. Krueger, if you'll turn to EC 136.

24 A. Yes.

25 Q. And this is the same type of analysis we were just looking

1 at, correct, except it's changed to August 2010 monthly  
2 operating report at the top?

3 A. Yes, I see that.

4 Q. Okay. And do you think this was created by an analyst at  
5 Owl Creek?

6 A. I do.

7 Q. It was produced from Owl Creek's files, correct?

8 A. Correct.

9 MR. WALKER: Okay. I'd like to move for admission of  
10 EC 136.

11 MR. STROCHAK: Same objection, Your Honor, which I  
12 assume you'll overrule.

13 THE COURT: Overruled. It will --

14 MR. STROCHAK: Thank you, Your Honor.

15 THE COURT: -- be admitted.

16 (August 2010 Owl Creek WMI Waterfall Model was hereby admitted  
17 into evidence as Equity Committee's Exhibit 136 for  
18 identification, as of this date.)

19 MR. WALKER: I have no further questions, Your Honor.  
20 Thank you. Thank you, Mr. Krueger.

21 THE WITNESS: Sure.

22 THE COURT: Any redirect -- or excuse me, any  
23 further --

24 MR. GLICKMAN: I don't know if they're named for the  
25 cross.

1 MR. KAPLAN: I just have a few minutes, Your Honor, if  
2 that's okay?

3 THE COURT: You may.

4 MR. KAPLAN: With no documents.

5 CROSS EXAMINATION

6 BY MR. KAPLAN:

7 Q. Mr. Krueger, Howard Kaplan from Arkin Kaplan Rice. I  
8 represent certain trust preferred holders, sir. I wanted to  
9 direct you back to September and October of 2009. You had  
10 testified about some friction, I believe you called it, within  
11 the White & Case group, sir. Do you remember that?

12 A. Yes.

13 Q. Some of that friction was based on differing settlement  
14 positions, correct?

15 A. I don't recall specifically what caused the -- you know,  
16 that friction that I'm describing as people yelling at each  
17 other.

18 Q. Well, you remember, sir, though, there were disagreements  
19 about settlement positions, and the senior bond holders had  
20 different settlement positions than you and Aurelius?

21 A. I don't recall that.

22 Q. Sir, was the friction that Owl Creek and Aurelius wanted  
23 to be more aggressive, because they wanted to get recovery on  
24 their subordinated bonds and peers as well the seniors?

25 A. I don't remember if it was or wasn't.

1 Q. You don't remember at all what the dispute was within the  
2 White & Case group?

3 A. The -- the -- I remember personalities -- people didn't  
4 get along.

5 Q. Do you recall there came a point where the White & Case  
6 group asked Aurelius to leave the group?

7 A. No.

8 Q. You left before Aurelius, correct?

9 A. That sounds correct, but that was a long time ago. I  
10 can't be certain.

11 Q. When you left the group, sir, did you reach out to Fried  
12 Frank?

13 A. Yes.

14 Q. Did you reach out to Centerbridge and Appaloosa as well?

15 A. I -- as I was switching in to the Fried Frank group, I'm  
16 sure I did. I don't recall, but it would seem to make sense.

17 Q. Did you ask them about the settlement posture or the  
18 settlement strategy of the Fried Frank group before you decided  
19 to switch?

20 A. No.

21 Q. Did you talk to Aurelius before you left the White & Case  
22 group about the reasons that you were leaving?

23 A. I don't believe so.

24 Q. Did you discuss with Fried Frank, sir, anything about the  
25 Fried Frank group's strategy before you decided to switch?

1 A. Not that I recall.

2 Q. So you were leaving a fractured group where everyone  
3 fighting and you were jumping into a new group, and you didn't  
4 have the faintest idea what the strategy was of the Fried Frank  
5 group going forward?

6 A. As I said before, I had a general idea of how those  
7 investors were positioned in terms of what they owned.

8 Q. When you joined that group, did they tell you they had  
9 engaged in settlement negotiations with JPMorgan over the  
10 summer?

11 A. I don't recall that they did.

12 Q. They never told you that, sir?

13 A. I don't remember that they did, no.

14 Q. Now, sir, Owl Creek, I think you testified entered into  
15 two confidentiality agreements; one in March and one in  
16 November, I believe?

17 A. That's correct.

18 Q. Both for the purpose of engaging in settlement  
19 negotiations, correct?

20 A. I --

21 MR. GLICKMAN: I got to object on the grounds that  
22 that's been asked and answered already in the prior  
23 examination.

24 THE COURT: All right. Just move to it along, I think  
25 you said that, right? Yes? All right.

1 Q. Is it honestly your position, sir, that settlement  
2 negotiations and settlement proposals never can be material non  
3 public information?

4 A. My belief is that when a deal is reached, that would be  
5 material non public information.

6 Q. Only when the deal is reached?

7 A. Correct.

8 Q. So you went into both of these agreements with the belief,  
9 sir, that settlement negotiations and settlement proposals, no  
10 matter how far along, could never be material non public  
11 information. Is that correct?

12 A. Absolutely.

13 Q. Thank you.

14 THE COURT: Anybody else?

15 MS. HAPER: Bettina Haper, pro se objector.

16 THE COURT: Okay.

17 CROSS EXAMINATION

18 BY MS. HAPER:

19 Q. You just said that no matter how far along, those  
20 negotiations could never be material. How far along exactly,  
21 because the GSA at that point, when it was announced, and it  
22 caused the market, the commons market to literally crash, had  
23 not been approved, the deal was not done, yet it appears that  
24 that was material, at least to investors? So would you say  
25 that that particular information was material, but that was an

1 exception?

2 A. No. I -- what I'm saying is that at that point in time,  
3 when Mr. Rosen was standing at that podium reading the terms  
4 into the record --

5 Q. Um-hum.

6 A. -- people had the belief that a deal had been reached. So  
7 that was newsworthy information.

8 Q. But it hadn't been confirmed. It could have been changed  
9 as easily as a term sheet. There was nothing carved in stone.  
10 So it was as mootable as air. There was -- there -- you can't  
11 have it both ways. Either negotiations --

12 THE COURT: Well --

13 Q. -- go all the way or --

14 THE COURT: Ask a question.

15 MS. HAPER: Right.

16 THE COURT: You can't make your argument now. I think  
17 you --

18 MS. HAPER: Yes.

19 THE COURT: -- he's --

20 MS. HAPER: Yes, Your Honor.

21 THE COURT: -- answered.

22 MS. HAPER: Yes, Your Honor. That's actually all I  
23 have.

24 THE COURT: Thank you.

25 Anybody else cross? Redirect?



1 MR. GLICKMAN: Very briefly, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. GLICKMAN:

4 Q. Mr. Krueger, would you turn to EC 132, please?

5 MR. GLICKMAN: Does Your Honor have that handy as  
6 well?

7 THE COURT: EC 130?

8 MR. GLICKMAN: 132.

9 THE COURT: 2. I have it.

10 MR. GLICKMAN: Okay. I see it.

11 Q. Do you recall testifying that this 250 number here was an  
12 input, not an output?

13 A. I do.

14 Q. Can you explain to the Court what you mean by that?

15 A. Sure. Well, we do analyses as part of our job, and the  
16 analysis on this page is of the total value of the assets of  
17 the debtor. The number 250 was not being analyzed. It's a  
18 number that somebody dropped into this model for illustrative  
19 purposes. It's a sort of what if analysis.

20 If all of these things occur as how this model describes,  
21 then what is the result.

22 Q. And when you run your models, do you sometimes generate  
23 iterations for illustrative purposes?

24 A. Absolutely.

25 Q. Okay. Does that mean that you think that there's a high

1 probability that that's the appropriate number?

2 A. Definitely not.

3 Q. Okay. Now, are you aware that there was a discovery  
4 request made by the equity committee for documents that  
5 contained valuation of WMMRC?

6 A. Yes.

7 Q. Okay. And you remember testifying that you believe that  
8 there some redacted information on this page that related to  
9 WaMu?

10 A. Yes.

11 Q. Do you believe that any of the redactions contained  
12 information relating to the valuation of WMMRC?

13 A. No.

14 Q. Okay. Let's turn, if we could, to Exhibit 135.

15 MR. GLICKMAN: Does Your Honor have that?

16 THE COURT: I do.

17 MR. GLICKMAN: Okay.

18 Q. Mr. Krueger, you recall that you were shown two blank  
19 rectangles, for lack of a better word, on the first page on the  
20 bottom right and a rectangle on the bottom right of the second  
21 page that has a hundred million in it?

22 A. That's correct.

23 Q. Okay. Do you have a view as to which of these two pages  
24 was more recent or whether they were contemporaneous?

25 A. Well, I guess I would assume that the first page is more

1 recent because, as I said earlier, it appears to me that the  
2 analysts that prepared the second page zeroed out the NOL line  
3 for settlement, because, as I said, that was where our heads  
4 were at at that point in time, and then later went back and  
5 cleaned up that cell for both columns but probably forgot the  
6 first time around. I -- that's what I would assume.

7 Q. And the first page is the one that has a zero value for  
8 the NOLs in the columns that says litigation flow and  
9 settlement?

10 A. Yes.

11 Q. Okay. Would you turn to EC 136?

12 A. Okay.

13 Q. Now, you recall testifying that -- or being -- or noting  
14 that at the top it refers to the August monthly operating  
15 report whereas Exhibit 135 referred to the March monthly  
16 operating report?

17 A. Yes.

18 Q. Do you believe that Exhibit 136 was prepared more recently  
19 than Exhibit 135?

20 A. I'm sure it was, yes.

21 Q. And does Exhibit 136 show a zero value in the litigation  
22 flow and in the settlement columns for the NOLs?

23 A. Yes, it shows that on all three pages.

24 Q. Okay. Would you take a look, please, at EC 138? And  
25 specifically, could you take a look at the second page? You

1 recall being asked a series of questions about this chart?

2 A. Yes.

3 Q. Take a look at the bottom line, if you would, that says  
4 total maximum NOL value. Is that right?

5 A. Yes.

6 Q. What does maximum mean in this context?

7 A. It means that no NOL value can be higher than that for  
8 those columns. I mean, I'm not sure if I'm answering your  
9 question.

10 Q. Was this meant to reflect what assessment Owl Creek had of  
11 the likelihood that these maximum values would be achieved?

12 A. No. As I said earlier, this page doesn't analyze anything  
13 at all having to do with the much more relevant issues of  
14 whether or not you can "monetize" an NOL. This is, as I said,  
15 just formulas on a page; that the hard work, the really time  
16 intensive work is done talking to tax lawyers and tax experts  
17 and trying to figure out within the confines of IRS regulations  
18 whether you can use the NOL at all.

19 Q. Let's look at a page of this exhibit that counsel for the  
20 equity committee didn't point to you. Take a look at the page  
21 that comes right after the chart. You see there's a line there  
22 that says, I can read it, plus reorganized WMI, and then it  
23 says 145 and then 145 again?

24 A. Yes, I see that.

25 Q. Can you explain to us what's being represented on this

1 page?

2 A. Sure. This is another version of a waterfall model where  
3 we have two columns; one shows the assumption in the disclosure  
4 statement, and one shows Owl Creek's assumption. And then, in  
5 the disclosure statement, I guess, at this point in time the  
6 assumption was 145 million. And our own assessment was also  
7 145 million.

8 Q. And is Owl Creek's assessment of 145 million reflected on  
9 the last page of this exhibit as well?

10 A. Yes.

11 Q. Okay. And lastly, would you turn to Exhibit 139, which  
12 were you also shown? Am I reading this correctly? Based on  
13 your testimony, to say it's based on, among other assumption,  
14 the assumption that there would be a purchase price of five  
15 billion dollars?

16 A. That's correct.

17 Q. Okay. And in your view, is that a realistic assumption?

18 A. No, that's not a realistic at all. To inject five billion  
19 dollars into a shell company that has a hundred million or so  
20 of assets is a tremendous red flag. I mean, everybody in this  
21 room at this point, I'm sure, understands all the various  
22 regulations that prevent things like trafficking in NOLs and  
23 prevent things exactly like what this page shows.

24 Q. If it was unrealistic, why was this model run, if you  
25 know?

1 A. I don't remember this model, but it looks, to me, like  
2 somebody, either me or one of the analysts, decided that we  
3 should do a what if analysis and analyze, you know, what if all  
4 of these things were to occur, including the thing I just  
5 described, which is that you can actually use the NOL in the  
6 first place. That's always the gating issue, obviously. What  
7 if all of those things happen, what would the output be, which  
8 is shown at the bottom of this page?

9 Q. Did Owl Creek's view of the value of the NOLs evolve over  
10 time?

11 A. Yes, it did.

12 Q. Could you tell us briefly in what fashion they evolved?

13 A. We started out with the knowledge that a large NOL would  
14 be created, and we went about our work trying to understand if  
15 there would be a way to create value from it. And we spoke to  
16 a lot of tax experts. We had high hopes, but slowly over the  
17 course of time our hopes were extinguished to the place where  
18 we are today, which is that, you know, as is shown in the  
19 disclosure statement, the NOLs can be used in a limited extent  
20 to shield income that's generated by the WMMRC assets.

21 But we don't believe that there's any, you know, huge home  
22 run as we would have hoped at one time there might be.

23 Q. Okay.

24 MR. GLICKMAN: I don't have anything further, Your  
25 Honor.

1 THE COURT: Thank you.

2 Anything more? How long?

3 MR. WALKER: One or two minutes.

4 THE COURT: All right.

5 RECROSS-EXAMINATION

6 BY MR. WALKER:

7 Q. You testified just now, Mr. Krueger, that you were aware  
8 of the discovery request to produce documents relating to the  
9 valuation of WMMRC, correct?

10 A. Yes.

11 Q. And presumably, you produced all those documents?

12 A. I believe so, yes.

13 Q. Okay. And so, if there were documents with different  
14 input numbers that you had you -- tho -- you would have  
15 produced those, correct, for the models?

16 A. That's correct.

17 Q. Okay. And if you'll turn quickly to EC 138. I believe  
18 that you testified that on the third page of that document this  
19 is a model with the disclosure statement value for reorganized  
20 WMI. Is that correct?

21 A. I believe so, yes.

22 Q. Okay. That's what you think the DS is at the top?

23 A. Yeah. DS is -- stands for disclosure statement.

24 Q. Okay. And you -- and then you testified that the next  
25 page would be your own waterfall with a value that happens to

1 be the same as the disclosure statement for reorganized WMI  
2 stock. Is that right?

3 A. No. I -- the -- this document that's labeled EC 138  
4 has -- it's an Excel spread sheet that would have a lot of  
5 different tabs, so there are discrete analyses done on each  
6 individual tab. Page 1 has nothing to do with page 2. Page 3  
7 has nothing to do with page 1 or 2, and I don't believe page 3  
8 and 4 have anything to do with each other. So --

9 Q. Okay.

10 A. -- I would look at each page separately.

11 Q. Okay. So just briefly, on page 3, you've got a value for  
12 what's in the disclosure statement for reorganized WMI, and  
13 then you've input your own value, which is the same as the  
14 disclosure statement --

15 A. Correct.

16 Q. -- correct? Okay. And then, then next page is a separate  
17 analysis with some inputs for the value of the reorganized WMI,  
18 correct?

19 A. Yes.

20 Q. And that would be a waterfall analysis?

21 A. I believe so, yeah. It says waterfall there.

22 Q. Okay.

23 MR. WALKER: I have no further questions. Thank you.

24 Thank you, Your Honor.

25 MR. GLICKMAN: I have nothing further, Your Honor.



1 THE COURT: All right. Thank you. You may step down.

2 THE WITNESS: Thank you.

3 THE COURT: All right. We'll break for the day.

4 And --

5 MR. STROCHAK: Your Honor, I just want to clarify that  
6 Mr. Krueger can also be excused.

7 THE COURT: Any objection?

8 MR. WALKER: No objection.

9 THE COURT: You may be excused.

10 THE WITNESS: Thank you very much.

11 MR. STROCHAK: Your Honor, can I just ask you about  
12 the schedule for tomorrow. I thought you had mentioned a  
13 Chapter 7 calendar tomorrow, but perhaps I got that confused.

14 THE COURT: I do, at 2 o'clock. So we'll start at  
15 9:30, then break, and maybe come back at 3. Break at 12:30  
16 maybe. I have a 1:30 conference call as well. So we'll start  
17 at 9:30.

18 MR. STROCHAK: Thank you.

19 THE COURT: We'll stand adjourned. You can leave your  
20 papers here.

21 (Whereupon these proceedings were concluded at 5:02 PM)

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C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

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HANA COPPERMAN

AAERT Certified Electronic Transcriber CET\*\*D 487

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Date: July 21, 2011