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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

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

July 21, 2011
9:33 AM

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

ECR OPERATOR: BRANDON MCCARTHY

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

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: All right. Good morning.

MR. KAPLAN: Good morning, Your Honor.

THE COURT: You may proceed with cross.

MR. KAPLAN: Thank you, Your Honor. Howard Kaplan, Arkin Kaplan & Rice, on behalf of certain trust preferred holders. Your Honor and Mr. Melwani, we're going to be using exhibits from two sources. One is the book with Mr. Melwani's name; and the other from the equity committee set of binders which, Mr. Melwani, are just over your left shoulder there. And I'll let you know when you need to look in those.

CROSS-EXAMINATION

BY MR. KAPLAN:

Q. I'd like to start, Mr. Melwani, by going back to the April 2009 time period, the first confidentiality period. And you recall that term sheets were exchanged in March of 2009, correct?

A. I do.

Q. Now you met with the debtor in April of 2009, correct?

A. I don't know. I don't recall. I mean, we may have. We met with the debtors from time to time. I don't recall a specific meeting with you in April.

Q. You may have? You don't recall, sir? Is that your testimony?

A. My testimony is during this case we met with the debtors

1 from time to time. If you can point me to a specific date, it
2 may help me remember.

3 Q. I'm just asking for your recollection. Do you not
4 remember meeting with the debtors in April 2009? Just don't
5 recall one way or the other?

6 A. I don't recall one way or the other.

7 Q. Okay. Let's go to EC-216. This one you do have to go to
8 the books over your shoulder there.

9 MR. KAPLAN: May I approach, Your Honor?

10 THE WITNESS: That's okay. I got it.

11 Q. Do you have that open?

12 A. I do.

13 Q. Okay. EC-216 is a e-mail, sir, do you see that, dated
14 April 7, 2009?

15 A. I do.

16 Q. And it's from Fried Frank, Ryan -- I'm sorry -- Pfeiffer?
17 Is that his name?

18 A. It is.

19 Q. And it's to Mr. Rosen and Mr. Kosturos. You see that,
20 sir?

21 A. I do.

22 Q. And Mr. Pfeiffer writes, "As discussed, attached are the
23 combined holdings of the various funds represented by
24 Centerbridge and Appaloosa." Do you see that, sir?

25 A. I do.

1 Q. Okay. Do you recall that this information was given to
2 the debtor on April 7th, 2009?

3 A. I recall giving this information to Fried Frank. I
4 believe that I -- I knew that they communicated it to the
5 debtors. I don't have a recollection that it was done on April
6 7th.

7 Q. Let's look at the attachment, sir, which is the
8 information being transmitted. And there's a chart there, a
9 little hard to read. And I just want to point out -- it's very
10 hard to read -- the percentages under "Senior Subordinated",
11 the "Peers" and the "Repreferred". Okay? Let's start with the
12 "Senior Subordinated". And it says "Percent Ownership"?

13 A. Yes.

14 Q. And that number is -- it looks like 45 point something.
15 Do you see that?

16 A. I'm sorry. "Senior Subordinated"?

17 Q. Yes.

18 A. Yes, forty-five percent.

19 Q. Approximately forty-five percent between the two firms?

20 A. Yes. Yes.

21 Q. And the hold -- the "Peers" number is -- it looks to be
22 approximately forty-one percent?

23 A. It does.

24 Q. So in those two classes, Centerbridge and Appaloosa
25 together had a blocking position?

1 A. We did.

2 Q. And then under the "Repreferred Percent Ownership", it
3 looks to be approximately twenty-eight percent?

4 A. I think it's twenty-six but it could be twenty-eight.

5 Q. Twenty-six percent? Let's call it twenty-six percent,
6 sir. And that is not quite a blocking position but pretty
7 close, correct?

8 A. Ten percent away, but yeah. Well, actually, I can't -- I
9 shouldn't say that. I don't know if the repreferreds are in
10 their own class or they're pari with all the preferreds. So I
11 don't know.

12 Q. Okay.

13 A. There -- it is a blocking perc -- it is a third -- these
14 percentages are off that issuance. I don't know how it was
15 going to be classified.

16 Q. Substantial number of repreferred owned by the two firms,
17 correct?

18 A. Yes, sir?

19 Q. Now was it your understanding that this information was
20 being conveyed to JPMorgan?

21 A. No.

22 Q. Was this information being given to the debtor in
23 connection your anticipation of further settlement discussions?

24 A. At this time, are you asking me about --

25 Q. Yes.

1 A. -- or just generally?

2 Q. Just generally.

3 A. I don't know when it was -- I don't know why it was given
4 at this time. I knew it was communicated to debtors at some
5 point. I didn't know it was communicated on April 7th. I
6 don't have a recollection it was communicated on April 7th. My
7 belief is it would probably have been communicated earlier
8 before we signed the confis because typically debtors want to
9 know who they're signing with. I don't know why --

10 Q. Okay. Let's leave off your belief about what happened
11 before the confi 'cause I have an e-mail here from April 7th.
12 My question to you, sir, is when this information was
13 communicated, maybe not exactly on the April 7th date, was it
14 communicated in connection with an anticipation of further
15 settlement discussions?

16 A. I don't know why it was communicated on April 7th.

17 Q. Let's turn to EC-11.

18 A. Which binder? This binder?

19 Q. You have to go --

20 A. Oh, new binder.

21 Q. -- back behind you. I'm sorry. We do have copies of
22 these if it's easier for the Court or for the witness? No?

23 A. This is fine.

24 (Pause)

25 A. Yes, sir.

1 MR. KAPLAN: Oh. Can we -- I'm sorry. Technical
2 point. Apparently, the gentleman over here has the exhibits on
3 the screen and can put them up if you can turn them on.

4 Q. All right. You remember this one, sir. This is the term
5 sheet summary for the end of April term sheets?

6 A. Yeah. I don't know if I ever saw it in this form.

7 Q. Oh, apologies. Actually, I'm looking at another exhibit.
8 This was summarized for you by your counsel, is that correct?

9 A. Not at this time but subsequently we received the summary
10 of this.

11 Q. On July 1st?

12 A. Yes.

13 Q. Okay. And you see here, just to go to the second page,
14 JPMorgan had proposed an eighty-five/fifteen split of the tax
15 refunds. You remember that?

16 A. I see that now, yes.

17 Q. And a fifty/fifty split of the additional carryback if the
18 new legislation is passed, correct, right under that?

19 A. Yep.

20 Q. All right. Now that is a significant move from where
21 JPMorgan was in March, correct?

22 A. Yeah. I believe in March, they kept the tax refund in
23 other than amounts that they had advanced.

24 Q. Yeah. They kept everything, right?

25 A. Well, no.

1 Q. They said they keep all the tax refunds.

2 A. No. That's not what they said.

3 Q. What did they say in March?

4 A. Well, I can look back at it. But I think they said they
5 keep everything -- less amounts advanced by Washington Mutual
6 Inc. on behalf of bonds -- on behalf of interest that had -- on
7 behalf of taxes that were owing.

8 Q. Okay. In March, they were saying we're going to take
9 mostly everything, most of these 2.6 to three billion in
10 refunds, correct?

11 A. Yes. They're still saying that but yes.

12 Q. Okay. Here they're saying we'll give fifteen percent to
13 WMI.

14 A. And we'll keep eighty-five, yes.

15 Q. Yes. Let's go then to EC-10 which is the transmittal e-
16 mail, sir.

17 A. Yes, sir.

18 Q. -- dated April 27th, 2009. And it's from Mr. Rosen to a
19 distribution including Mr. Pfeiffer of Fried Frank.

20 A. Yes.

21 Q. See that? And also to White & Case?

22 A. Yes.

23 Q. You see that? Okay. Now this cover email says WMI -- let
24 me read the first two sentences. "As discussed or left by
25 voicemail with each of you, annexed is an e-mail from Sullivan

1 & Cromwell regarding the counterproposal from JPMC. WMI
2 considers this and the counterproposal to be confidential and
3 should not be provided to or the contents share with parties
4 that have executed a light confidentiality agreement." Do you
5 see that, sir?

6 A. I do.

7 Q. Now that's what you had executed, a light confi, correct?

8 A. I don't know of any other confis that were executed, so I
9 don't know. I mean, it wasn't called -- I never heard of it
10 called a light confi.

11 Q. Well, it's one that expires in sixty days, correct?

12 A. It does.

13 Q. And required disclosure of material nonpublic information
14 provided during the term of it, correct?

15 A. It does.

16 Q. Is that what you understand this to be referring to, your
17 confidentiality agreement, sir?

18 A. Let me read this. I've never seen -- from the context of
19 this e-mail, I think that's what they're referring to. But
20 again, I don't know if there were some other confis that other
21 people had signed or light as opposed to our. But --

22 Q. Well, in any event, Fried Frank did not give you these
23 term sheets at the time, in April, correct?

24 A. They did not.

25 Q. They told you that these term sheets had come in?

1 A. Not that I recall.

2 Q. Fried Frank didn't even tell you something had come in
3 from JPMorgan and they couldn't tell you what it was?

4 A. Not that I recall.

5 Q. Now this was still during the confidentiality agreement
6 period, correct.

7 A. It was.

8 Q. That didn't expire till May 8th.

9 A. Yes, that's correct.

10 Q. Let's turn to EC-215 which I think we had just referred
11 to. And for this one, you can go into that book with your name
12 on it.

13 A. Okay.

14 Q. Now, in EC-215, this is July 1st, 2009. I'm sorry?

15 A. Yeah.

16 Q. Okay. This is July 1st, 2009, correct, sir?

17 A. Yes, sir.

18 Q. And this Mr. Pfeiffer forwarding a summary of those April
19 term sheets, correct?

20 A. Yes, sir.

21 Q. And your name is specifically there, right, in the second
22 line there, in the two --

23 A. It is.

24 Q. Okay. Now, sir, did the debtor authorize Fried Frank to
25 provide the summary to you?

1 A. I -- I don't know.

2 Q. Did JPMorgan know that you were getting these?

3 A. I don't know.

4 Q. Was the debtor or JPMorgan informed that Centerbridge was
5 going to be trading while in possession of these term sheets,
6 sir?

7 A. My presumption is that Fried Frank --

8 Q. Let's not go into presumptions.

9 A. Okay. I don't know.

10 Q. Do you recall any e-mails or other documents, sir,
11 surrounding the provision of this document to you?

12 A. I'm sorry?

13 Q. Any other e-mails or documents where Fried Frank
14 communicated why it was being sent to you, how it was being
15 sent, what conversations they had about this?

16 A. No, I don't.

17 Q. Any discussions, sir, that you recall with whether the
18 debtor had lifted its instruction not to provide the contents
19 of this to any of the creditors?

20 A. I don't think I knew that instruction was there.

21 Q. Were you aware, sir, that at this point in time --

22 MR. KAPLAN: Well, let me strike that --

23 Q. -- and ask you if you understood at this point in time
24 that Centerbridge and Appaloosa were the only two creditors
25 that had summaries of these April term sheets?

1 A. I didn't know if they just sent them to us or if it had
2 gone to the White & Case group for --

3 Q. You didn't know? You didn't know?

4 A. Okay.

5 Q. Now you're getting these on July 1st. So the other
6 creditors didn't get them in April either, right?

7 A. I don't know.

8 Q. Did you ask your lawyer why didn't I get these in April?

9 A. No.

10 Q. Now, sir, turning to the second page, this summary -- your
11 understanding is this summary was prepared by Fried Frank?

12 A. Yes.

13 Q. All right. And on the top, it says "Privileged and
14 Confidential - Attorney Work Product". Do you see that, sir?

15 A. I do.

16 Q. Did Fried Frank tell you this was a privileged document,
17 their summary?

18 A. I don't know if I had that discussion with them.

19 Q. Were you told not to let anyone know that you had this in
20 your possession, sir?

21 A. No.

22 Q. Now let's go to EC-115.

23 A. Yes, sir.

24 Q. This -- I think we had some testimony on this one, sir.

25 This is JPMorgan's response to the proposal by Centerbridge and

1 Appaloosa, correct?

2 A. It is.

3 Q. And you saw this e-mail and the attachment at or about the
4 time it came in, sir?

5 A. I did.

6 MR. KAPLAN: Your Honor, I think this document was
7 used but not offered into evidence yesterday. So we would
8 offer this one into evidence.

9 MR. OWENS: No objection.

10 THE COURT: It's admitted.

11 (Equity Committee's Exhibit EC-115, e-mail from Don McCree to
12 J. Aron re JPMorgan's response to the proposal by Centerbridge
13 and Appaloosa, was hereby received into evidence as of this
14 date.)

15 Q. Now, sir, you testified that you had a meeting with
16 JPMorgan on July 29th.

17 A. Yeah. I don't recall whether it was the 28th or the 29th
18 but around there.

19 Q. Okay. And that was the meeting where you conveyed
20 proposed settlement terms?

21 A. Um-hmm.

22 Q. Yes, sir? You have to answer yes --

23 A. Yes. I'm sorry.

24 Q. -- so the court reporter can write it down. And you
25 conveyed at that time that your group would be willing to do a

1 sixty/forty split of the tax refunds?

2 A. Yes. Well, let me just -- sixty/forty of the first and
3 fifty/fifty of the second.

4 Q. Sixty/forty for the tax refunds and fifty/fifty for the
5 additional carryback if the law is passed.

6 A. Yes.

7 Q. Correct?

8 A. Yes.

9 Q. All right. Now, sir, why didn't you convey that proposal
10 in writing?

11 A. I think the thought was, in part, to see if we could
12 jumpstart the negotiations. But there was also a lot of -- the
13 parties were litigating. You didn't want to -- honestly,
14 probably didn't want to seem overanxious. And having a meeting
15 to say can we jumpstart it, here's something we're thinking
16 about is probably in some ways less than saying here's a term
17 sheet. So we had a conversation.

18 Q. Now you say when you offered the sixty/forty split, there
19 was no reaction from JPMorgan?

20 A. There was not.

21 Q. And that sixty/forty was essentially your counterproposal
22 to the eighty-five/fifteen that JPMorgan had previously
23 proposed, correct?

24 A. I don't know if I agree with that way.

25 Q. Well, it was, right? I mean, you knew they had offered

1 eighty-five/fifteen and you were now offering sixty/forty.

2 A. They had not offered eighty-five/fifteen. That -- we -- I
3 don't know where we came up with the sixty/forty. I don't know
4 if we viewed it as a counter to eighty-five/fifteen.

5 Q. But you knew that JPMorgan would say, hey, we were at
6 eighty-five/fifteen; you're now offering sixty/forty, right?
7 That's the way JPMorgan would think about it?

8 A. I don't know if we thought it about it that way at the
9 time but I hear what you're saying.

10 Q. Now, sir, before you gave this proposal, the sixty/forty
11 proposal, to JPMorgan, you ran it through your internal models?

12 A. I'm sure we did to figure out what it would do.

13 Q. And what the waterfall would be and the recovery for
14 different securities under your models?

15 A. Yes.

16 Q. And when you got JPMorgan's response back on August 17th,
17 2009, you ran that through your models, too, correct?

18 A. I'm not positive if we did or not just because the thought
19 of pushing it all to the backend was not palatable.

20 Q. Well, let me ask you specifically. When they came back
21 with seventy-five/twenty-five, you ran that through your
22 models, correct?

23 A. I don't know if we did. We may have to see what it would
24 have done, to see whether it was unacceptable or acceptable.
25 But I think also just conceptually that the moving to the

1 ninety percent to the backend was something that --

2 Q. Well, let's -- I'm going to get to the backend. I'm
3 talking about the --

4 MR. OWENS: Objection. Would counsel please allow the
5 witness to finish his answer?

6 THE COURT: Yeah. Allow him to finish first.

7 MR. KAPLAN: Apologies.

8 A. I'm sorry. What's the question again?

9 Q. I was focusing on the seventy-five/twenty-five. We'll
10 talk about the ninety percent as well. I was asking whether
11 when you got the seventy-five/twenty-five, you ran that one
12 through your model to see how that would work?

13 A. I don't know specifically if we put it in because -- well,
14 we wouldn't have just put in one number. I could do seventy-
15 five/twenty-five in my head right now. All right? Well, maybe
16 I need a calculator, but --

17 Q. I can't but I'm sure you can.

18 A. Well, I'm not sure I could but seventy-five percent of
19 three billion -- it's -- I don't know if we would have had to
20 put that into the model. I don't know if we put it in. I
21 wouldn't be surprised if we put it in to see what it did. But
22 I can't tell you for a fact that I remember putting it in.

23 Q. Now, sir, you're at sixty/forty. Just focusing on the
24 first part, leaving the additional carryback aside for the
25 moment. You're at sixty/forty. And they come to seventy-

1 five/twenty-five which is pretty close to halfway between forty
2 and fifteen, that twenty-five percent, right?

3 A. I'm sorry? Ask me that question again.

4 Q. They were giving fifteen to WMI at the end of April. You
5 come back with give us forty percent. And they come back with
6 twenty-five, right, which is pretty close to the midpoint
7 between those two numbers.

8 A. It is. Again, I'm not sure we looked at it as a -- I'm
9 not sure we looked the other bookend that was the eighty-
10 five/fifteen. But the analysis you're doing right now,
11 fifteen -- twenty-five is close to halfway between forty and
12 fifteen.

13 Q. Well, let me ask you something, Mr. Melwani. Did you
14 think when you made your July 29th proposal that JPMorgan would
15 just agree to it?

16 A. No.

17 Q. They would negotiate, correct?

18 A. Yes.

19 Q. You knew they would negotiate.

20 A. I presumed they would, yes.

21 Q. Now, under either of these proposals, or both of them, I
22 should say, just roughly, the subordinated bonds would be in
23 the money, correct?

24 A. Would be in the money. I think under -- I think under
25 almost any scenario regardless of these proposals they would be

1 in the money. I mean, yeah, I think they were just --
2 regardless of the tax refund, they would be somewhat in the
3 money.

4 Q. But even -- but you're now discussing at least some part
5 of the refund coming to WMI. And under that scenario, the
6 subordinated bonds would be in the money, correct?

7 A. The senior subordinated bonds or the --

8 Q. Yeah.

9 A. -- junior?

10 Q. Senior subordinated bonds.

11 A. They were in the money, meaning they were getting
12 recoveries regardless of the tax refund.

13 Q. But they would be getting almost par then if you were
14 getting some of the tax refund.

15 A. I would have to do the math. But, yeah, they would
16 certainly do better.

17 Q. Yes. Okay. And, sir, during the period through August
18 18th, I mean, you had the April term sheets. And you had your
19 proposals. And you had a meeting with JPMorgan. Centerbridge
20 was trading in the debtors' securities, correct?

21 A. We were.

22 MR. KAPLAN: Your Honor, I have a demonstrative which
23 I provided to counsel for Centerbridge. May I approach the
24 witness and Your Honor?

25 THE COURT: Yes. Well, dare we mark it TPS-1?

1 MR. KAPLAN: Yes, Your Honor. Apologies. Just
2 because -- one second, Your Honor.

3 (Exhibit TPS-1, demonstrative, was hereby marked for
4 identification as of this date.)

5 Q. Mr. Melwani, we have a document here, a demonstrative,
6 that's been marked --

7 MR. KAPLAN: Your Honor, TPS-1 is what it's been
8 marked?

9 THE COURT: Yes.

10 MR. KAPLAN: Okay.

11 Q. -- marked for identification as TPS-1. And just to walk
12 through this, what we've put on here is, on the left-hand side,
13 the end of the confidentiality period. Do you see that, sir?

14 A. I do.

15 Q. And that was May 8th, 2009, correct?

16 A. Yes, sir.

17 Q. And Centerbridge made a purchase --

18 A. Well, the disclosure was made April 30th.

19 Q. But the end of the confi -- the confi period, though,
20 ended on May 8th, correct?

21 A. I'm not sure when it ended.

22 Q. Okay. In any event, I'm going to get back to that one,
23 the purchases there. What I want to do is move into July and
24 August which is what we've been talking about.

25 A. Yes.

1 Q. And you see on July 1st, 2009, you received the summaries
2 of the April term sheets, correct? And Centerbridge then
3 bought some subordinated bonds?

4 A. Uhh --

5 Q. Senior subordinated bonds?

6 A. I see it on your graph but, obviously -- yes. I do see it
7 on your graph.

8 Q. Well, why don't we do this? Why don't you turn to AOC-54
9 which is in the binder with your name on it. This is the
10 trading records in case you have any questions.

11 (Pause)

12 A. What would be easier for me is if we went to the summary
13 page, if that's okay.

14 Q. What number is that, sir?

15 A. I don't know.

16 Q. 36.

17 A. 36.

18 THE COURT: Okay.

19 Q. Okay. Now I'm there. Right? So in senior
20 subordinated -- we're looking at C36 now, sir?

21 A. I am.

22 Q. Okay. And if we go to July, Centerbridge purchased a net
23 of five million of senior subordinated bonds?

24 A. We did.

25 Q. All right. And then in August, sir, Centerbridge

1 purchased senior notes and senior subordinated bonds?

2 A. We did.

3 Q. Approximately sixty-one million face of senior notes and
4 approximately twenty-six million -- it says 26,500,000 face of
5 senior subordinated notes.

6 A. We did.

7 Q. Okay. And then in September, sir, you continued to
8 purchase senior subordinated bonds, almost fifty-three million
9 face?

10 A. We did.

11 Q. And those appear to be the only purchases for those three
12 months, correct?

13 A. Again, yes. They weren't single purchasers but yes.

14 Q. Well, there were a number of trades. But those were the
15 only purchases made during those three months?

16 A. They were the aggregate of the trades, the net aggregate
17 of the trades -- of numerous trades made during those months.

18 Q. But you didn't purchase any other securities during those
19 three months, correct?

20 A. We did not.

21 Q. Now, sir, you suggested yesterday that you -- it wasn't
22 clear to me. Restricted trading I think is the word you used
23 on August 18th, 2009 after you received the debtors' proposal,
24 is that correct?

25 A. Yes. We decided --

1 THE COURT: Can you speak up?

2 MR. KAPLAN: Oh, I'm sorry.

3 THE COURT: What did you say

4 MR. KAPLAN: It's not very often when someone has to
5 tell me to speak up.

6 THE COURT: Ask the lawyer to speak up, I know.

7 MR. KAPLAN: I'm sorry.

8 THE COURT: On what date?

9 MR. KAPLAN: August 18th, 2009.

10 Q. I think your testimony yesterday was after receiving the
11 debtors' proposal, Centerbridge restricted its trading.

12 A. Do you mean JPM's proposal?

13 Q. JPM's proposal.

14 A. Once we received JPM's proposal, we decided not to trade.

15 Q. Well, now, was there a formal restriction in place at
16 Centerbridge?

17 A. We decided -- we told -- we all decided. And we told our
18 trader we're not trading in Centerbridge --

19 Q. Well, you have a procedure for this in your compliance
20 manual, correct, for restricting trading of the phone?

21 A. Yes.

22 Q. Did you implement that procedure?

23 A. The way we implemented that procedure was we would tell
24 everyone on the team that we were restricted including the
25 trader. And we decided not to -- my only point is when we

1 talked about it then, it wasn't that we made the decision that
2 we were legally restricted. We decided that, to be
3 conservative, we shouldn't trade.

4 Q. Did you restrict under your policy, sir, formal
5 restriction of trading at Centerbridge?

6 A. Yes.

7 Q. Okay. And you followed all the procedures in your manual
8 for that?

9 A. The way we restricted was we told everyone on the team
10 that we were not trading in Washington Mutual securities at
11 this point.

12 Q. Did you follow your procedures, sir? Did you go through
13 your compliance department? Were there any memos, any
14 documentation of this decision?

15 A. There was not.

16 Q. No paper at all? No memorandum to the files as to why
17 this was restricted?

18 A. I don't believe there was.

19 Q. Any e-mail communications to the trading desk?

20 A. No.

21 Q. And, sir, you didn't have that conversation with your
22 traders after receiving JPMorgan's April term sheet or at least
23 the summary on July 1st, correct?

24 A. Yes. We didn't view it as material.

25 Q. But you didn't have that conversation? No restriction,

1 free to trade?

2 A. Yes.

3 Q. Now there was some testimony, sir, about a September 2nd
4 meeting with JPMorgan. Do you remember that?

5 A. I do.

6 Q. Do you remember attending that meeting?

7 A. I don't.

8 Q. Do you remember what counterproposal you and Centerbridge
9 and Appaloosa made to JPMorgan?

10 A. I'm sorry?

11 Q. Was there any counterproposal made to JPMorgan's seventy-
12 five/twenty-five offer?

13 A. My understanding of the meeting was JPMorgan said that
14 they'd been contacted by a number of other holders and other
15 constituencies including large senior noteholders and they
16 wanted to step back and just regroup. And they were retracting
17 their proposal --

18 Q. Sir, I asked you a specific question. Did you make a
19 counterproposal to JPMorgan at that meeting?

20 A. To my understanding, no.

21 Q. Did you have a counterproposal even, Centerbridge and
22 Appaloosa, to make to JPMorgan at that meeting?

23 A. I don't believe we did.

24 Q. So you hadn't decided even to move off the sixty-forty
25 split that you had proposed at the time you had that meeting,

1 correct?

2 A. I don't recall exactly but I don't believe we had. I
3 think we had come to the conclusion that this was going
4 nowhere.

5 Q. Well, sir, the day before the meeting, you didn't think it
6 was going nowhere, did you?

7 A. I think we kind of thought this was going nowhere.

8 Q. The day before the meeting? Why would you think that,
9 sir?

10 A. 'Cause I think we felt we were very far apart.

11 Q. Well, sir, they had moved to seventy-five/twenty-five,
12 right? And so you're in the middle of a negotiation and you
13 decide just to walk away from the negotiation?

14 A. No. We took the meeting. But they also asked us to move
15 the bulk of recovery to the backend on a refund that the
16 legislation -- while in August there was more noise about the
17 legislation passing and it was picking up steam, it hadn't even
18 come to a vote yet. The legislation wasn't even drafted yet.

19 Q. Well, let me ask you about that, sir. In the proposal --
20 you had proposed a fifty/fifty split of that additional
21 carryback, correct?

22 A. Uhh --

23 Q. You can look at it if you want. It's EC-115.

24 A. I will take a look but I believe that's correct. Yes, we
25 have.

1 Q. So JPMorgan had increased their offer to WMI by ten
2 percent and, in response to your fifty/fifty offer, said we'll
3 give you ninety percent of the tax refund, correct?

4 A. Um-hmm.

5 Q. So they moved up on both accounts, isn't that right?

6 A. Yeah. But the second wasn't real.

7 Q. Well, sir, they moved up on both, correct?

8 A. Yes, they did.

9 Q. And you decided just to walk away from that?

10 A. I'm not saying -- we took the meeting. We went to the
11 meeting. Walking away would have been saying no meeting.

12 Q. So you went to the meeting but didn't make any
13 counterproposal?

14 A. To the best of my understanding, no.

15 Q. And you didn't have one to make either, sir, correct?

16 A. To the best of my recollection, we didn't. But I didn't
17 attend the meeting, again.

18 Q. Now, sir, at this time, you had a blocking position
19 together with Appaloosa in two of the impaired classes,
20 correct --

21 A. We did --

22 Q. -- potentially?

23 A. We did.

24 Q. Did you think that was it? There'd never be a negotiation
25 again, that you were done, that was it?

1 A. A negotiation with anyone or --

2 Q. With anyone.

3 A. No. I thought people like to get consensus. But the
4 PIERS voted no in the last plan. There's this concept of
5 cramdown. It's not like we had an affirmative vote. So could
6 a deal have gotten done where were in negotiation? Yeah, it
7 was possible.

8 Q. So.

9 A. Did I think there would be a negotiation, if that's your
10 question? Yeah. People like to build consensus. So at some
11 point, we probably did think there'd be a negotiation again.

12 Q. Did you think as of September 2nd that you'd never talk to
13 JPMorgan again about settling this matter?

14 A. Actually, I don't think we did.

15 Q. You thought that that was it. You owned blocking
16 positions in two impaired classes and you thought that was it.
17 You'd never be talking to JPMorgan again at that point.

18 A. No, sir. When I said I actually don't think we did, I was
19 just stating a fact that I actually don't think we did. As to
20 what we thought at that point, on September 2nd, I don't know
21 whether we -- we probably believed that we would be talking
22 again at some point just because people like to build
23 consensus. But you think that in every case in every day of
24 the week.

25 Q. Now, sir, I want to briefly go back in time. And then I'm

1 going to go forward in time.

2 A. Okay.

3 Q. So I want to go back to the May time period on that first
4 demonstrative, TPS-1. You see we had some purchases in May of
5 2009 and I just want to go back to that time period.

6 A. Can I just go to my chart, too?

7 Q. You can, sure. Of course.

8 A. Yes, sir.

9 Q. Now, sir, I think you testified that the April 30th -- the
10 disclosure of the tax refund, the 2.6 to three billion dollar
11 one, the actual tax refund, came out on April 30th, 2009,
12 correct?

13 A. It did.

14 Q. And I think we've had testimony and I think it's correct
15 to say that the confidentiality period actually ended on May
16 8th, 2009 which was approximately a week later. Do you recall
17 that?

18 A. I don't because we didn't trade until after that sold.
19 But I could look at it if you want.

20 Q. Well, let me ask you this question. Once that disclosure
21 comes out, correct, the market sees it.

22 A. They do.

23 Q. And the market prices, or the securities, are affected or
24 not depending on what the information is, correct?

25 A. That's correct.

1 Q. That's the whole point of disclosing it, so that the
2 information is not held by one creditor and not other
3 creditors, correct?

4 A. Yes.

5 Q. Now you did not make these trades -- we're looking at that
6 May 2009 purchase of those senior bonds. You didn't make those
7 trades until after May 8th, correct?

8 A. That's correct.

9 Q. So by that time, the market would have absorbed the news
10 of the April -- of the disclosure about the tax refunds,
11 correct?

12 A. That is.

13 Q. Now let me hand out another demonstrative.

14 MR. KAPLAN: Your Honor, TPS-2 -- I think we'll have
15 to mark this one. I should have put --

16 THE COURT: Okay.

17 MR. KAPLAN: -- some stickers on this.

18 (Exhibit TPS-2, demonstrative, was hereby marked for
19 identification as of this date.)

20 MR. KAPLAN: May I approach?

21 Q. TPS-2, sir, do you have that in front of you?

22 A. I do.

23 Q. Okay. So we have right in the middle there the
24 confidentiality period.

25 A. We do.

1 Q. You see, it's got the arrows in there, March 9th to May
2 8th. Now just before that, Centerbridge had sold senior
3 floating rate bonds. Do you see that, sir?

4 A. I do.

5 Q. And then just after the confidentiality period ends -- and
6 that's about forty-four million? At least according to my
7 chart here is forty-four million?

8 A. Umm --

9 Q. And floating rate bonds sold a week -- in February and
10 March of 2009?

11 A. I'm sorry. Yes. Yes.

12 Q. All right. And then just after the confidentiality period
13 ends, Centerbridge buys a little more than thirty-one face of
14 those same bonds, correct?

15 A. It is. Can I just say that I think this chart's a bit
16 misleading by just -- by not showing what was happening in the
17 portfolio. It's -- you're just pulling out the senior notes.
18 So I think it's misleading.

19 Q. Well --

20 A. And I could tell you how if you want to hear it.

21 Q. -- I pulled it out because I want to focus on this one
22 series. Okay? And you can turn to the chart. You want to go
23 turn to the page in AOC-54 which is the trading record?

24 A. I'd rather go to 36, if that's okay, which is the summary.

25 Q. All right. We're going to -- let me ask you a couple of

1 questions because I want to talk about the trading prices of
2 these bonds, too, which I think we're going to need AOC --

3 A. Okay.

4 Q. -- 54. So --

5 A. I'm sorry. What was --

6 Q. Do you see this stuff, sir, the senior floating rate
7 bonds? Okay? The purchase of just more than thirty-one
8 million right after the confidentiality period ends.

9 A. Yes. I do.

10 Q. Now, sir, leave this open. Okay? Leave all this open. I
11 have a couple of questions for you.

12 A. Okay.

13 Q. All right? You testified yesterday that when you are
14 assessing economics, you also have to assess the risk, correct?

15 A. I do.

16 Q. And that's what you're paid to do, correct?

17 A. One of the things, yes.

18 Q. Well, one of the important things is for a fund to be able
19 to assess risk, correct?

20 A. It is.

21 Q. And you have to take risk to make returns, correct?

22 A. Yes.

23 Q. For the most part. Not too many people can make a lot of
24 money without taking some risk, correct, in this business?

25 A. Some can but most people can't.

1 Q. Now, in a case like this, sir, when the outcome is based
2 principally on litigation, part of the risk you need to assess
3 is the outcome of the litigation, correct?

4 A. Yes.

5 Q. And in part of your business, you try to analyze whether
6 WMI will win the claim on the deposits or the tax refunds and
7 so forth, correct?

8 A. Yes.

9 Q. And one possible outcome of litigation always is
10 settlement, right?

11 A. It is.

12 Q. And so, part of what you need to do as an expert in this
13 area in assessing risk is assess the possibility of settlement,
14 correct?

15 A. Correct.

16 Q. And not only whether settlement will happen but also at
17 what level it will happen, correct?

18 A. It's -- yeah. I guess that's generally correct.

19 Q. And, sir, when you're making that kind of -- and that's
20 all built into your models and so forth. That's why you use
21 financial models to assess those types of risks, correct?

22 A. Well, the risk I think you're talking about such as how a
23 litigation may come out, I'm not sure that's built into a
24 model. That's looking at -- on the tax refund, looking at the
25 documents on -- looking at tax sharing agreements and coming to

1 a view. I'm not sure there's a model that -- I wish there was
2 a model that said this is how it's going to come out.

3 Q. Well, it's based on subjective judgment, I think is what
4 you're saying. Some of that is based on subjective judgment.

5 A. Yes.

6 Q. Now, sir, when you analyze the litigation potential
7 outcomes and you analyze potential settlements and levels, you
8 then compare that to the price of a security and determine
9 whether there's an expected return on that security that meets
10 your goals, correct?

11 A. Correct.

12 THE COURT: Please keep your voice up.

13 THE WITNESS: I'm sorry.

14 Q. Now, at the time -- going back to TPS-2, at the time --

15 A. Sorry. TPS-2 is the chart?

16 Q. I'm sorry. The demonstrative, sir, the second
17 demonstrative. At the time you did these trades here,
18 particularly --

19 THE COURT: Which trades?

20 MR. KAPLAN: The purchases at the -- the purchases of
21 the senior bonds after the confidentiality period.

22 Q. You had modeled a settlement scenario, correct, at least
23 one?

24 A. The -- my belief is we probably looked at the May -- the
25 proposals that were made -- I'm sorry. This is May. So the

1 proposals that were made in March -- the proposals that were
2 made in March to see whether they would be acceptable to us.

3 Q. Now, sir, let me ask you a question about pricing. As a
4 general matter, if the April 30th disclosure comes about and
5 the price of the security goes down, what does that mean the
6 market is telling you?

7 A. The price of which security?

8 Q. Let's use as an example the senior floating rate bonds.
9 If April 30th there was this disclosure, and let's say the
10 floating rate bonds went down in price after the disclosure.

11 A. I think to answer that question, you need to know how much
12 it went down.

13 Q. Well, why don't we take a look at AOC-54 --

14 A. Okay.

15 Q. -- page 14, my notes tell me. So let's see. I'm not
16 always right on that with these trading records. Okay. There
17 we go. And just looking at the -- are you there?

18 A. I am. I am.

19 MR. KAPLAN: Your Honor?

20 THE COURT: I have it.

21 Q. Okay. So March 6th -- right? They are sells at eighty-
22 four of those floating rate bonds?

23 A. Yep.

24 Q. All right. And May 14th, when you start buying them,
25 they're at eighty-two?

1 A. 82.25.

2 Q. 82. -- that's the first one anyway. There were other
3 prices. But that's the first one.

4 A. Yeah -- can I --

5 Q. Now is the market discounting these bonds from where they
6 were before?

7 A. I don't think you can look at it from March 6th to May
8 13th. If you want to see the effect of the disclosure, you
9 would need to look at it April 29th to May 1st. And I think if
10 you look at that -- like, I know I looked at this yesterday for
11 the four percents. They were eighty the day before the
12 disclosure. They were at eighty the day of the disclosure.
13 And they were at eighty the day after the disclosure.

14 Q. So you would have to look at only the day before, is that
15 your testimony?

16 A. Or you can look two days before. You can't look two
17 months before.

18 Q. Well, what had changed during that two months, sir, other
19 than the disclosure of the tax refund?

20 A. The world changes. The price people are willing to pay
21 for things is dependent on other opportunities. Buying these
22 bonds -- you could have bought these bonds far cheaper, if
23 nothing else changed, in 2009 than you could in 2010.

24 Q. Well, what changed, sir, is that JPMorgan filed a lawsuit,
25 correct?

1 A. No.

2 Q. If the market thought that those deposits were coming back
3 into the estate, these bonds would have been trading closer to
4 par, right?

5 A. No. If the market thought there was any risk that these
6 deposits weren't coming back, they would have been trading far,
7 far south of eighty. There were four billion of these. If we
8 thought there was any risk in the numbers you show, which is
9 why I said your chart was misleading, in February and March
10 when we were selling, we were actually moving down the capital
11 structure. If you look at my other -- if you look at the
12 summary chart, we were buying senior subs. If we thought there
13 was risk, we wouldn't have been selling seniors to buy senior
14 subs.

15 Q. All right. So when you bought these --

16 MR. OWENS: Objection. I don't think the witness had
17 finished his answer.

18 MR. KAPLAN: I thought he did. I'm sorry.

19 THE COURT: All right. Please. Are you through?

20 THE WITNESS: I'm sorry.

21 A. So the --

22 Q. Sorry.

23 A. The answer to your question is did the market -- if the
24 market had any question about the refund coming back -- and I
25 think you are looking from March to May. It is completely

1 inaccurate but even if you did that, it wouldn't have dropped
2 two points. It would have dropped eighty points.

3 Q. You certainly thought there was upside in these bonds when
4 you bought them at eighty-two, correct?

5 A. I thought there was upside when we bought the 270 million
6 of bonds before this.

7 Q. Well, you sold some of these, though, in March.

8 A. To move down the cap --

9 Q. When you bought them back, you thought there was upside.

10 A. But we sold them to move down the capital structure.

11 Q. But then you bought them back and you thought there was
12 upside when you bought them back at eighty-two, right?

13 A. Because --

14 Q. Sir, did you think there was upside when you bought them?

15 A. Whenever we buy things, we think there's upside.

16 Q. Thank you. Let's move forward in time. I told you I
17 would jump around a little. So let's go back to September,
18 October of 2009. Did you hear there were problems within the
19 White & Case group at that point?

20 A. I'm sorry. What time frame are we talking about?

21 Q. September, October 2009, sir. So this is after the
22 JPMorgan meeting coming into the early fall now.

23 A. Okay. And the question?

24 Q. Did you think -- did you hear that there were problems in
25 the White & Case group?

1 A. Not really. I mean, I don't recall. It's not something I
2 paid a lot of attention to, to be honest.

3 Q. Did Owl Creek reach out to your group and say there were
4 problems with the White & Case group?

5 A. Owl Creek never reached out to us directly.

6 Q. Who did Owl Creek reach out to in order to join your
7 group?

8 A. My belief was they reached out to Appaloosa.

9 Q. Did you hear from Appaloosa there were problems in the
10 White & Case group?

11 A. I don't recall whether we heard there were problems. I
12 heard that Owl Creek wanted to join our group.

13 Q. And you heard at some point that Aurelius wanted to join
14 your group as well.

15 A. I did.

16 Q. Did you know that Aurelius had been asked to leave the
17 White & Case group?

18 A. I don't think I knew that.

19 Q. Now White & Case hadn't been participating in any
20 settlement effort since March, correct, as far as you knew?

21 A. I don't know whether they were or not.

22 Q. And were --

23 A. I know they were very active but --

24 Q. Well, were you aware of any settlement efforts that the
25 White & Case group was making from March until September or

1 October 2009?

2 A. I know they filed a Chapter 7 motion. I don't remember
3 when they did it. But that wasn't done in a vacuum. It was
4 done for purposes, I'm sure, to try and get people to do
5 something. So I -- I know they were active. So I'm not sure I
6 can answer your question as a yes or a no because it depends
7 what you mean by settlement efforts. Filing that Chapter 7
8 conversion motion, my presumption, was done for a reason, to
9 push people to do something. I don't know what that was.

10 Q. Let me be a little more precise in my question. Are you
11 aware of any settlement negotiations that White & Case
12 participated in from March through September, October 2009?

13 A. I don't know the specific meeting. I just know that they
14 were active in the sense that when they did that, would I be --
15 I would have been expected that was done as a follow-up to some
16 conversation because people don't typically just file
17 conversion motions. So I don't know if there were discussions.
18 But I don't know a specific meeting.

19 Q. Now, before Owl Creek and Aurelius joined your group, did
20 you have any discussions with them about settlement strategy?

21 A. I don't believe we did.

22 Q. Did you have any discussions about general strategy?

23 A. I don't believe we did.

24 Q. Now Aurelius, I think is fair to say, is known as a pretty
25 activist investor in bankruptcies?

1 A. I mean, they're active. I don't know how they're
2 perceived but they are active.

3 Q. And Mr. Gropper himself has been in a number of
4 substantial bankruptcies, correct?

5 A. I've seen him in this and I've seen him in Tribune. I
6 haven't seen him in others.

7 Q. Is it your testimony, sir, that both of these firms, Owl
8 Creek and Aurelius, joined your group without any knowledge of
9 your settlement strategy, of the history of settlement
10 negotiations of your group, any of that?

11 A. I'm not sure I completely understand the question. I
12 think they probably knew, for example, when we signed the confi
13 -- well, I don't know if they were in the White & Case group in
14 the March period. So if they were in the White & Group in the
15 March period, they probably knew we had signed the confi as
16 well. So --

17 Q. Let me be more precise in that --

18 A. Yes.

19 Q. -- question, too, because I think it was a little too
20 broad. Is it your testimony, sir, that when Owl Creek and
21 Aurelius joined the Fried Frank group, they had no
22 understanding of the Fried Frank group's strategies, settlement
23 strategies or strategies for the case?

24 A. I think that's -- yeah. That's -- I mean, just sort of --
25 it's not like we had this master plan. It wasn't like a book

1 of strategies. So, again, are you asking me whether I think
2 they knew that we went to meetings? I think they -- for
3 example, if they were in the White & Case group in March, they
4 certainly knew. Did we have an initiation meeting where we
5 kind of gave them the book of secrets? I wish I had the book
6 of secrets. So we didn't give them that.

7 Q. But did anyone tell them anything about the Fried Frank
8 strategy going forward before they joined your group?

9 A. I don't -- there wasn't a global strategy. The strategy
10 was trying to see if we could come to a deal. And if we
11 couldn't come to a deal, there were times we were pushing --
12 got to ignore, where we were pushing debtors to say have the
13 judge rule on the turn -- have the Court rule on the turnover
14 motion. It wasn't like a master plan. You kind of played it
15 day by day. So again, I'm not sure -- if the question is did
16 we give them the master strategy, there wasn't a master
17 strategy to give them.

18 Q. Well, certainly, sir, you and Appaloosa had decided, based
19 on your holdings, where you'd like to see a settlement,
20 correct?

21 A. No. We decided we'd like to see a settlement that was
22 highest possible to get recovery as far as possible.

23 Q. Yeah, for the securities that you held.

24 A. Yeah. But we didn't -- you know, they owned more -- far
25 more of certain things than we did.

1 Q. So your testimony is you think Aurelius joined your group
2 and didn't have any conversations about settlement posture,
3 discussions that happened over the summer, strategies for the
4 case, any of that. You think Aurelius joined without any of
5 those discussions? That's your recollection.

6 A. Before they joined our group?

7 Q. Yeah.

8 A. Yeah. I think that they -- we didn't interview them.
9 They didn't ask to interview us. They asked to join not in --
10 I don't think they asked us directly. I think they asked
11 Appaloosa. Appaloosa asked us. We thought about it a bit and
12 eventually said, all right, if they want to join, let them
13 join.

14 Q. Was there any disclosure at any time to Aurelius and Owl
15 Creek about the conversations you had over the summer with
16 JPMorgan?

17 A. I don't recall. I don't know.

18 Q. Were they provided with those term sheets, the July and
19 August term sheets?

20 A. I don't know what Fried Frank provided them or not.

21 Q. Were they told about the September 2nd meeting?

22 A. Again, I don't have a recollection of it.

23 Q. Coming into the November period, sir, which is when the
24 second confi is signed --

25 A. Yes, sir.

1 Q. -- is it your testimony that Aurelius and Owl Creek, two
2 of the four members of your group, came into that without any
3 understanding of the history of negotiations with JPMorgan that
4 happened over the summer?

5 A. Again, I don't know what they knew. I don't know what
6 they -- I don't know for a fact they may have been in those
7 negotiations.

8 Q. You just don't know?

9 A. No.

10 Q. You don't know what they knew.

11 A. I don't know why I would.

12 Q. Did you meet with Gropper in -- Mr. Gropper in November
13 2009 at all?

14 A. I don't recall any meeting with him about Washington
15 Mutual. Did I run into him in places? I'm sure I did.
16 Actually, I don't even know if I did run into him in places.

17 Q. Did you meet with Mr. Krueger at all during November 2009?

18 A. I did not.

19 Q. Were there telephone calls of your group?

20 A. Were there phone calls among the four of us?

21 Q. Yeah.

22 A. There may have --

23 Q. With Fried Frank.

24 A. I'm sure there were.

25 Q. You don't remember any of those discussions?

1 A. What discussions are we talking about exactly?

2 Q. Discussions between --

3 A. The discussions where we say --

4 Q. -- Centerbridge -- Centerbridge --

5 THE COURT: Please let him answer.

6 MR. KAPLAN: I'm sorry. I thought he was asking me a
7 question, Your Honor.

8 THE COURT: Yeah. Let him

9 THE WITNESS: But I wasn't finished, though.

10 A. But are you asking me whether I remem -- is this the
11 question you asked me before, do I remember discussions where
12 we said here's the master strategy or any strategy?

13 Q. No. I was just asking whether you had any group calls.

14 A. I'm sure we had group calls.

15 Q. Okay.

16 A. During the period --

17 Q. November.

18 A. But during the period -- oh.

19 Q. November 2009.

20 A. I don't know whether we had calls in November of '09.

21 There was a lot going on for us. CIT was coming out of
22 bankruptcy in '09 and we were very involved in that. So I
23 can't state for a fact that there was a group call in November.

24 But I can state for a fact there were group calls.

25 Q. During those group calls, do you have any recollection of

1 discussing settlement posture or what JPMorgan had done before?

2 A. I don't.

3 Q. Okay. Let's go to EC-118.

4 A. Yes, sir.

5 Q. Now, sir, there's been some testimony on this. You
6 remember this e-mail where McCree is confirming that JPMorgan
7 was ready to engage in a thirty/seventy split?

8 A. Yes. I mean, I remember seeing this e-mail yesterday.

9 Q. Well, in the middle there, it was forwarded to you by
10 Kosturos on November 20th, 2009, correct?

11 A. It was.

12 Q. Do you remember any of the discussions that led up to this
13 e-mail, sir?

14 A. I don't.

15 Q. Now thirty -- obviously, thirty/seventy is higher than the
16 twenty-five/seventy-five that had been given to you in August,
17 correct?

18 A. It is.

19 Q. Did you have any discussions about this? Do you recall
20 any discussions about the thirty/seventy split?

21 A. I'm trying to recall when the proposal was made from the
22 debtors. I think it was on the 21st.

23 Q. I think it was the 23rd, actually --

24 A. 23rd. So --

25 Q. -- which is the Monday right after this.

1 A. I mean, I don't recall specific discussions. But I'm sure
2 in the context of commenting on that term sheet that was after
3 this e-mail, I would be surp -- I don't recall specific
4 discussions. But I would be surprised if we didn't talk about
5 the e-mail in the context of getting comments on that term
6 sheet.

7 Q. Did you talk to Mr. Kosturos at any time in November or
8 December? Do you have any recollection of discussions about
9 the thirty/seventy split?

10 A. I don't remember any specific discussions. But I know we
11 gave comments on the term sheet that was sent to him.

12 Q. Is Mr. Kosturos telling you that let's do thirty/seventy.
13 JPMorgan is there.

14 A. I mean, I read this e-mail. I don't remember having
15 specific conversations with them. But we also sent in a
16 term -- I don't know what we sent in on the term sheet. I
17 didn't think it was seventy/thirty. I thought it was something
18 less, to be honest.

19 Q. Well, it was. I'm just asking you if your remember --

20 A. I don't.

21 Q. -- Mr. Kosturos coming and saying to you JPMorgan is at
22 thirty/seventy. Let's do that deal. Do you remember that?

23 A. I don't. And the only -- I don't.

24 Q. Let's go to EC-220 next.

25 A. Okay. Is this in a different book? Give me one second.

1 Q. Oh yeah. It's in -- I'm sorry. It's in the big binders
2 behind you.

3 (Pause)

4 Q. Are you there, sir?

5 A. I am.

6 Q. Okay. So EC-220 on the first page, you see Mr. Kosturos
7 is forwarding this proposed term sheet to you and Mr. Bolin.

8 A. He is.

9 Q. All right. And if we just look at page 2 quickly, I just
10 want to look at the numbers there. See it's the proposal of a
11 sixty-one/thirty-nine split?

12 A. I do.

13 Q. Okay. So that's -- so that's up only one percent from the
14 sixty/forty proposal you made in July, correct?

15 A. I believe that's correct.

16 Q. So looking at it from JPMorgan's view, you went from
17 sixty/forty -- they went to seventy-five/twenty-five. And now
18 you're going only one percent up to sixty-one/thirty-nine for
19 that tax refund.

20 A. Yes. But again, you have to look at it as a package not
21 as a line item.

22 Q. I understand. There's also a fifty/fifty split offered
23 for the carryback, correct?

24 A. There is.

25 Q. All right. Now, sir, you understood since JPMorgan was

1 saying let's do thirty/seventy that this was not going to go
2 over well, this one percent move only?

3 A. No.

4 Q. You thought that they would agree to this proposal,
5 JPMorgan.

6 A. I don't know whether I thought they would sign the -- sign
7 on the dotted line. But I don't think the intention was ever
8 to make proposals that, quote, wouldn't go over well.
9 Bankruptcy, and all negotiations, but certainly bankruptcy
10 negotiations, are all about posturing. You know? Everyone
11 asks for more than they want. So I don't recall if -- when
12 this was sent out, we thought they would come back and say
13 where do we sign. My guess is we probably didn't think that.
14 I also don't think we probably sent it out saying boy, this
15 isn't going to go over well.

16 Q. Now, in response to this, JPMorgan came back with that
17 e-mail that we've looked at, the resetting the bookends e-mail,
18 we've been calling it, correct --

19 A. Yes, sir.

20 Q. -- where they said they'll give WMI a hundred percent of
21 the carryback and they wanted a hundred percent of the upfront
22 refunds, correct?

23 A. Yes, sir.

24 Q. And you've testified, sir, that that was not an acceptable
25 proposal --

1 A. Yes.

2 Q. -- because I think you said it changes the risk profile?

3 A. Among other reasons.

4 Q. Well, I think you testified that that carryback amount,
5 even though the law had passed, was a very risky and uncertain
6 number?

7 A. I don't think I said it that way. I said I think -- I
8 recall my testimony -- that while the law had passed, there's
9 obviously more risk in something you're just starting to
10 process as opposed to something you've already -- that you've
11 already processed and filed refunds on. And there's a timing
12 aspect on it. And I think I also said that the other parts --
13 and I can -- if I looked at it, it'd be easier. But there was
14 a lot of other things in their response which made it a
15 nonstarter which -- such as the -- I'm doing this from memory
16 now -- but the intercompany receivables got canceled. So there
17 was that whole -- their bullet which had a whole bunch of
18 things which were actually meaningful.

19 Q. Let's -- I understand your testimony about those things as
20 was given yesterday. I want to focus on that carryback number.

21 A. Okay.

22 Q. You testified you had a concern that it can't be given to
23 TARP banks and JPMorgan's involvement may invalidate the whole
24 tax refund?

25 A. I don't think I was saying that yesterday in the context

1 of this. But I think I talked about that in my deposition in a
2 different context.

3 Q. Well, you thought that -- if you thought that 2.6 billion
4 dollar number was a good number, that would have been a good
5 offer by JPMorgan, right, at least on that tax split?

6 A. But you have to look at the whole package. You can't look
7 at one line item. I can't answer --

8 Q. Just on that line item.

9 A. Honestly, I can't answer that question in a vacuum. If
10 someone said -- if they said we'll give you the entire first
11 refund but we take everything else, I couldn't say that was a
12 good offer. If we --

13 Q. But you -- I'm sorry.

14 A. I'm sorry. Go ahead.

15 Q. Please.

16 A. I'm done.

17 Q. I thought you were done.

18 MR. KAPLAN: We're having that just a little bit.

19 THE COURT: How much longer --

20 MR. KAPLAN: I'll try to have a little more patience.

21 THE COURT: -- are you going to be? I thought you
22 said forty-five minutes.

23 MR. KAPLAN: Your Honor, I think probably ten minutes
24 or fifteen minutes.

25 THE COURT: All right. Let's finish up then.

1 MR. KAPLAN: Okay.

2 Q. Was there a material risk in your mind about whether WMI
3 would be able to secure that 2.6 billion dollar additional
4 carryback amount?

5 A. At what point?

6 Q. At -- in December of 2009.

7 A. In December of 2009. To the best of my recollection,
8 probably not.

9 Q. Okay. Now --

10 A. Just --

11 Q. I'm sorry.

12 A. Just -- I'm sorry. Just to -- when you say material risk
13 in -- I don't think that we thought at that point the whole
14 refund was going to go away. I think with anything, even in
15 the first refund, there's always the concern is the debtors'
16 estimate right because it's not a one-way thing. It's not like
17 you just go in and you put your estimate in and the IRS writes
18 you a check. They look at it.

19 Q. Let's go to EC-305.

20 A. I'm sorry. Which book?

21 Q. EC-30 -- oh. That's in the book with your name on it.

22 (Pause)

23 A. Yes, sir.

24 Q. All right. Now we looked briefly at this. I think you
25 testified you had never seen this document or this term sheet,

1 sir?

2 A. I don't know if I testified that yesterday but I haven't.
3 I didn't.

4 Q. I'll just ask the question. You haven't seen this one
5 before?

6 A. I have not.

7 Q. Do you recall after receiving the resetting the bookends
8 e-mail that your Fried Frank group got together and talked
9 about a counterproposal to JPMorgan?

10 A. December -- I remember doing that in February.

11 Q. I'm still in the December -- still the first
12 confidentiality period.

13 A. Okay. I don't recall a meeting.

14 Q. Do you recall talking about coming back with that
15 thirty/seventy split with Mr. Kosturos?

16 A. I don't.

17 Q. Is it your testimony, sir, that you have no recollection
18 of these conversations or you don't think you had them?

19 A. I don't have a recollection of them.

20 Q. Okay. Let's go to EC-122 which should be in that same
21 book.

22 A. Yes.

23 Q. Now, sir, this is an e-mail chain where Mr. Kosturos is
24 trying to set up a call with Centerbridge and Appaloosa?

25 A. Yes.

1 Q. Fried Frank is not copied on this e-mail. Do you remember
2 why that was?

3 A. I don't. He didn't -- I didn't send it so I don't know.

4 Q. All right. Now you weren't -- this is December 17th,
5 2009, correct, sir --

6 A. Yes.

7 Q. -- these e-mails? And you were apparently unavailable and
8 Mr. Hart was offering to have a conversation in your place?

9 A. He was.

10 Q. Was Mr. Hart involved in discussions with the debtor in
11 December 2009?

12 A. When you say discussions with the debtors, do I think that
13 we talked to the debtors? We may have. I may have talked to
14 the debtors. I don't think I did this call. But did I ever
15 talk in December? I can't -- I don't recall a specific call
16 but I may have. I don't know whether Jed did this call either.

17 Q. Did Mr. Hart have any conversations with the debtor in
18 December 2009 about settlement?

19 A. Not that I know of.

20 Q. Do you know every conversation that Mr. Hart had with the
21 debtors?

22 A. No. That's why I said not that I know of.

23 Q. Okay. You may have; you just don't know.

24 A. I -- I'd be shocked if he did. And I didn't -- and he
25 didn't tell me. I sit right next to the guy.

1 Q. Did he -- well, you weren't in the office at this day,
2 right?

3 A. I got back the next day.

4 Q. Okay. Do you recall any conversations with him about the
5 thirty/seventy split for December 2009?

6 A. I don't.

7 Q. Now, sir, right at the end of this confidentiality period,
8 Centerbridge again started trading, correct?

9 A. We did.

10 (Pause)

11 MR. KAPLAN: Your Honor, may I approach? This is our
12 last demonstrative.

13 THE COURT: Yes. Thank you.

14 MR. KAPLAN: The PIERS chart with the yellow on it, we
15 should mark as, Your Honor, TPS-3, if that's all right.

16 THE COURT: All right.

17 MR. KAPLAN: And the other is TPS-4.

18 (TPS Exhibit 3, demonstrative of PIERS chart, was hereby marked
19 for identification as of this date.)

20 (TPS Exhibit 4, summary of bonds trading, was hereby marked for
21 identification as of this date.)

22 Q. Now, sir, looking at TPS-3, which is the PIERS chart, so
23 the confidentiality period ends on December 30, correct?

24 A. It does.

25 Q. And then from December 31st through January, Centerbridge

1 buys more than 612,000 shares of PIERS?

2 A. Yep. And that was a mistake, but yes.

3 Q. That's what you did, though, sir, right?

4 A. It is what we did.

5 Q. All right. And just looking back, the act, you recall,
6 was signed into effect November 6th, 2009, the Business
7 Assistance Act?

8 A. I believe that was -- yes.

9 Q. Okay. And between that date and the date of the
10 confidentiality period, those ten days, November 16th --
11 Centerbridge bought no PIERS, correct?

12 A. That is correct.

13 Q. All right. And turning to TPS-4 --

14 A. I'm sorry. What is TPS-4?

15 Q. -- which is the bonds trading, after the confidentiality
16 period, Centerbridge sold senior bonds -- that's the red -- and
17 bought senior subordinated bonds, which is the green?

18 A. Yes.

19 Q. Now, sir, just on the PIERS --

20 A. Again, I haven't checked the numbers. But I'm just
21 answering to your graph. But I haven't checked it against our
22 chart which I know is correct. But I'm answering with respect
23 to what's showing on your chart --

24 Q. Okay. Very good.

25 A. -- which I have no reason to believe is wrong. But --

1 Q. On the PIERS, you bought those PIERS at a price above
2 twenty dollars, correct?

3 A. Yes.

4 Q. And before the confidentiality period, those PIERS were
5 trading at a price of seven or thereabouts.

6 A. I don't know if that's right or not. I know we had sold
7 them at eight before that, well before the confi period.

8 Q. Do you happen to have the trading records, AOC-5 --

9 THE COURT: 4.

10 Q. -- 4? AOC-54?

11 A. Yes.

12 Q. It appears if you go into -- I'd like to start on page 17
13 just quickly and show you some of the prices, sir. If you look
14 at the end of October 2009, page 17, down near the bottom. See
15 there are a bunch of PIERS trades?

16 A. Yes.

17 Q. They're around -- actually, closer to eight, it looks
18 like? 7.9 and 7.4?

19 A. Yes.

20 Q. You see that? All right. And then afterwards, which is
21 the next page, 18, the PIERS price had jumped, to December
22 31st, over 21, right?

23 A. They had.

24 Q. And you bought more than 612,000 shares of PIERS at around
25 that price, 21 or so.

1 A. We did.

2 Q. Okay.

3 A. Again, I -- we did.

4 Q. Let's turn to --

5 MR. KAPLAN: Your Honor, I just have one exhibit that
6 I want to identify with this witness which is the internal
7 policy of Centerbridge. That's the last thing. EC-103.

8 A. Is that in one of the big binders or is it in here?

9 Q. That is in the binder with your name on it.

10 A. Okay.

11 THE COURT: 103?

12 MR. KAPLAN: EC-103.

13 A. Yes.

14 Q. Let me just identify this for the record because I think
15 Mr. Owens did some identification at your deposition. So just
16 to be clear what this is -- and then I'll have you identify the
17 substance of it. But it's an internal manual for Centerbridge.
18 And this one was effective March 2009. And Mr. Owens told us
19 that at your deposition at page 64. And if you could just turn
20 to the third page, sir, which is 19002.

21 A. Yes, sir.

22 Q. All right? This is the Centerbridge compliance manual?

23 A. It is.

24 Q. And if you turn to page -- the production number in the
25 lower right-hand corner, 19012.

1 A. Yes.

2 Q. And the following pages are pages relating to the insider
3 trading section of that compliance manual?

4 A. Confidentiality and inside information, yes.

5 Q. Okay. And then if you turn to page 19032. That's an
6 appendix that is part of the compliance manual?

7 A. It is.

8 Q. Okay. And that lists potential material corporate or
9 other developments?

10 A. It does.

11 MR. KAPLAN: Thank you, Your Honor. I have nothing
12 further. Oh, I'm sorry. Now I'm being passed a note. We
13 offer EC-103 into evidence.

14 MR. OWENS: No objection, Your Honor, as long as it's
15 filed under seal.

16 THE COURT: All right. It's admitted under seal.
17 (Exhibit EC-103, Centerbridge internal compliance manual, was
18 hereby received into evidence under seal as of this date.)

19 MR. KAPLAN: Thank you, Your Honor. Apologies for
20 going over my --

21 THE COURT: All right.

22 MR. KAPLAN: -- promised time.

23 THE COURT: I have a 10:30. Do you want to finish up
24 direct -- redirect or -- will you be long or short?

25 MR. OWENS: I probably have ten or fifteen minutes,

1 Your Honor. It's Your Honor's preference.

2 THE COURT: I'd like to get rid of this witness,
3 though, anyway -- just to -- not that --

4 MR. OWENS: I'm happy to go ahead. I'm sure he'd like
5 to leave as well.

6 THE COURT: For no personal reasons but I think --

7 THE WITNESS: I appreciate it.

8 THE COURT: -- he'd like to get off the --

9 THE WITNESS: Thank you, Your Honor.

10 THE COURT: -- off the witness stand. So --

11 THE WITNESS: Thank you.

12 REDIRECT EXAMINATION

13 BY MR. OWENS:

14 Q. Mr. Melwani, do you have what we've just received in
15 evidence as EC-103 in front of you?

16 A. I do.

17 Q. Turning to the page that Mr. Kaplan mentioned, which is
18 page 29 of the document, do you see the -- what is that a --
19 what information is set forth on that page? You don't need to
20 read it for us. Just tell us generally what it is.

21 A. Potential -- it's an -- it's a list of potentially
22 material events. It's examples.

23 Q. And what's the first bullet point.

24 A. "A joint venture merger acquisition tender or exchange
25 offer, a proposal or plan for any such transaction even if

1 preliminary in nature."

2 Q. When you consider the potential materiality of the sorts
3 of transactions mentioned there, how do you consider
4 information about such potential transactions in determining
5 whether or not they are material?

6 A. I think there are two things. First, as I talked about
7 yesterday, you have to always consider the facts and
8 circumstances so you don't -- me making the proposal to buy
9 Google and -- confidentiality with my financial statements, I
10 don't think that's ever going to be material to anyone. Warren
11 Buffett doing it, probably a different analysis. So I think
12 you have to look at the facts and circumstances. And I think
13 on all of these that are listed here -- and I think the reason
14 that -- we do a lot of bankruptcy. We probably predominantly
15 do bankruptcies and restructurings and that's not listed here.

16 I think the big difference among these things besides
17 always have to consider the facts and circumstances, these are
18 corporate events. So the fact that someone is thinking about
19 merging, that is -- that, in and of itself, is material. In
20 this bankruptcy and in every bankruptcy, I think it's slightly
21 different because there's always a pie. And in every
22 bankruptcy, everyone's fighting for the pie. Everyone says
23 they have a claim to the pie. And everyone either negotiates
24 or fights about the pie. So the fact that -- so I think there
25 is a distinction that in any of these events, someone is

1 saying, hey, I'm thinking -- anyone -- me doing it doesn't do
2 it. But in the facts and circumstances of Warren Buffett or
3 IBM saying, hey, here's a proposal to potentially buy Google,
4 that fact, in and of itself, is new information that the
5 company is going to play. I'm not sure if that was articulate.
6 But --

7 MR. OWENS: Your Honor, can I ask the equity committee
8 to put up on the computer their Exhibit EC-215? And if we
9 could look at the second page, please.

10 Q. When did you receive this summary, Mr. Melwani?

11 A. I believe we received this in July.

12 Q. And at that point in time, how long had it been since the
13 terms summarized here, to your knowledge or as you came to
14 learn, had been exchanged?

15 A. It was at the end of April. So over two months. And in
16 that period also, everyone had started litigating with each
17 other.

18 Q. Did you consider, at the time you received this summary --

19 MR. OWENS: Strike that.

20 Q. At the time you received this summary, how material were
21 these proposals to determination whether to buy or sell
22 securities in Washington Mutual in your mind?

23 A. We didn't view them as material?

24 Q. Why not?

25 A. Because, again, if you look at the spectrum, the -- you

1 look at -- they hadn't reached a deal. They put these two
2 proposals out but they were in the midst -- they were in the
3 throes of litigation. They were both fighting with each other.
4 They had both filed adversary proceedings. And you also look
5 at whether all of the relevant parties were involved in this
6 negotiation. And the FDIC wasn't involved. To our knowledge,
7 and to the extent they were helpful or necessary, the creditors
8 weren't involved in that negotiation.

9 MR. OWENS: Can we blow up the paragraph at the top?
10 Particularly, the four lines right above the summary areas. Do
11 you see the last sentence, the second to last sentence there,
12 Mr. Melwani?

13 A. Um-hmm.

14 Q. What did that advise you about the currency or materiality
15 of the proposal summarized in this exhibit?

16 A. As you know, no agreements never occurred concerning these
17 matters. So I think it was telling us what we already knew
18 because we were in the throes of litigation.

19 Q. Do you have TPS-1 in front of you?

20 A. They're actually not marked. So I don't know which one is
21 1.

22 MR. KAPLAN: Let me just --

23 MR. OWENS: Can I borrow that?

24 MR. KAPLAN: Thank you, Mr. Rosen.

25 MR. OWENS: Does Your Honor have it?

1 THE COURT: I have it.

2 Q. Do you see -- you were asked some questions about your
3 trading in August of 2009?

4 A. Yes, sir.

5 Q. And do you see -- can you read to us the bullet point
6 below?

7 A. "July 2009. Summaries of April term sheets to
8 Centerbridge. August 18, 2009. JPM term sheet to
9 Centerbridge."

10 Q. And you see there's a large blue bar that purports to
11 reflect the number of senior bonds purchased in August?

12 A. Um-hmm.

13 Q. How many bonds did you purchase in August after you
14 received the term sheet on August 18th?

15 A. None.

16 Q. And the green line which represents subordinated bonds,
17 how many subordinated bonds did you purchase in August after
18 August 18th?

19 A. None.

20 Q. And you see the bar with the -- reflecting purchases of
21 subordinated notes in the month of September?

22 A. Yes.

23 Q. How many of those did you purchase before JPMorgan
24 withdrew their offer?

25 A. None.

1 Q. If you could look now at TPS-3.

2 A. Again, I don't --

3 Q. It's the --

4 A. I have them all but I just don't know which one.

5 Q. It's the yellow one.

6 MR. OWENS: If I may approach?

7 A. Okay. I have it. The PIERS. I have it.

8 Q. Okay. Great.

9 A. Sorry.

10 MR. OWENS: Does Your Honor have it?

11 THE COURT: I have it.

12 Q. You were asked some questions about your purchases of
13 PIERS on cross and you said that these purchases were a
14 mistake. Why were they a mistake?

15 A. 'Cause we had sold them at eight in September, eight
16 dollars a share. We're buying them back here -- I don't
17 remember the exact prices. I could look. But in the low to
18 mid-twenties. And today -- and shortly -- and those were the
19 highest prices ever. They're in the -- I'm not sure where they
20 are exactly today but I think they are like fifteen. So we did
21 what we're not supposed to do. We sold low, bought high.

22 MR. OWENS: Your Honor, I neglected to mention when I
23 offered CB-36 and AOC-54 that we'd like those filed under seal
24 because they are trading records. So I'd like to ask that now.

25 THE COURT: All right. Give me the numbers again.

1 MR. OWENS: It is CB-36, which is the monthly summary,
2 and AOC-54 which is the daily trading activity.

3 THE COURT: All right. They will be sealed.

4 Q. Mr. Melwani, could you also look now at TPS-2, which is
5 the chart with the heading "February 15, 2009 - May 21, 2009".

6 A. Yes, sir.

7 Q. Do you have that in front of you?

8 A. I do.

9 Q. You were asked some questions about this on cross. And
10 you stated that you thought this chart was somewhat misleading.
11 Can you explain to us in what way you believe this chart to be
12 misleading.

13 A. Yeah. I think I touched on it. But if you look at -- if
14 I can just -- can I pull our summary chart for a second?

15 Q. CB-36? Yes.

16 A. I just think -- I thought it was misleading because by
17 just pulling out the senior notes as opposed to showing what
18 was happening in the entire portfolio, I thought it was
19 misleading because we certainly were not selling in February
20 and March because we thought there was an iota of risk on the
21 seniors, on the deposit, because we -- if we had a concern
22 about the risk, we wouldn't have -- we sold twenty-seven
23 million in February. We had 250 million. We would have sold
24 much more if we thought there was a risk. And we absolutely
25 without a doubt would not have sold seniors if we thought there

1 was a risk on the seniors to buy subor -- senior subs which we
2 bought a lot of in February.

3 Q. Well, the chart, TPS-2, reflects purchases and sales in
4 which particular class of WMI securities?

5 A. Senior notes.

6 Q. And can you tell us with reference to CB-36 what was your
7 purchase and sale activity in that time period in the senior
8 subordinated notes?

9 A. We bought eighteen in February. And in March, we bought
10 collectively 21.5 million dollars.

11 Q. Well, if we look at the position in terms of the net --
12 the percentage of Centerbridge's net holdings of WMI securities
13 at the end of March of 2009 -- I'm sorry. Let's look at the
14 beginning of February -- the end of February.

15 A. I'm not going to be able to answer it because, for some
16 reason, this chart --

17 Q. But --

18 A. -- I looked at yesterday did have that column. This one
19 doesn't have that column. So --

20 Q. Let me get you the -- I'm not sure what you're looking at.

21 A. I know. The book -- different but -- I'm sorry. The
22 question again?

23 Q. The question is at the end of February, what was
24 Centerbridge's net asset value or, rather, the percentage of
25 its WMI holdings as a percentage of its net asset value?

1 A. 7.82 percent.

2 Q. And at the end of May, what was the percentage?

3 A. 7.05 percent.

4 MR. OWENS: Thank you, Mr. Melwani. No further
5 questions, Your Honor.

6 MR. KAPLAN: Nothing further, Your Honor. I have
7 nothing further.

8 MR. SARGENT: Two or three questions on one topic,
9 Your Honor? Can I do that now?

10 THE COURT: All right. Quickly, please.

11 MR. SARGENT: I'll be very quick.

12 RECROSS-EXAMINATION

13 BY MR. SARGENT:

14 Q. Mr. Melwani, you just testified that on September 2nd,
15 JPMC withdrew its offer, is that right?

16 A. That was my understanding.

17 Q. And when they withdrew their offer, they weren't saying
18 that they were no longer interested in any negotiations, is
19 that right?

20 A. I don't know. I wasn't at the meeting. But my
21 understanding is that they -- my understanding of what they
22 said was we've been contacted by a lot of other people. We
23 want to step back and we retract our proposal.

24 Q. They wanted to regroup and reconsider but they weren't
25 saying that they were not going to continue further

1 negotiations at any point, were they? That wasn't your
2 understanding.

3 A. I don't think that that was my understanding.

4 Q. And you didn't have any cause to believe that they were
5 somehow going to go backwards on the twenty-five percent, the
6 first tax refund that they had already offered the estate. You
7 had no reason to believe that, did you?

8 A. I don't know. They just retracted a proposal and they --
9 everyone in this case -- nothing that -- people have oftentimes
10 said things in this case and gone the other way. There have
11 been three times people have come into this court and announced
12 things and people have changed their minds. So in this
13 bankruptcy and in every bankruptcy, I never presume that people
14 don't go backwards. I think you're foolish to -- I would be
15 foolish to presume that.

16 MR. SARGENT: I have no further questions, Your Honor.

17 THE COURT: Any more?

18 MR. KAPLAN: No, Your Honor. Thank you.

19 THE COURT: All right. Now we can release the
20 witness.

21 THE WITNESS: Thank you.

22 THE COURT: All right. We'll stand adjourned. I'll
23 hear my Accredited case and then come back.

24 (Recess from 10:59 a.m. until 11:36 a.m.)

25 THE COURT: All right. Next witness.

1 MR. ROSEN: Yes, Your Honor. We're now up to Mr.
2 Kosturos. Before we do that, Your Honor, I just wanted to say
3 that because of the possibility that there might be some items
4 raised on cross-examination that go beyond what we believe the
5 scope of this is to be, we will be tag-teaming, Your Honor,
6 myself and Mr. Richard Slack, my partner, who will be handling
7 the direct examination of Mr. Kosturos. So I will be handling
8 the non-inequitable conduct, the allegation part of any issues.

9 THE COURT: And that would be on redirect, I guess?

10 MR. ROSEN: Yes.

11 THE COURT: Okay.

12 MR. ROSEN: Or objections, Your Honor.

13 THE COURT: All right. All right. Does he want to
14 take the stand?

15 MR. SLACK: Your Honor, Richard Slack from Weil for
16 the debtor. Before we start, we have a couple of housekeeping
17 matters that might expedite Mr. Kosturos' testimony in that
18 there's a number of exhibits that we had on our exhibit list
19 which I don't think there's going to be any issue in terms of
20 admitting. And I was hoping to be able to do that without
21 showing this witness exhibits given the agreement that we've
22 had the last few days. And if I could --

23 THE COURT: Well, could we --

24 MR. SLACK: -- brief --

25 THE COURT: Well, can we have him sworn so he's not

1 still standing here?

2 MR. SLACK: Sure.

3 THE CLERK: Raise your right hand, please, and place
4 your left hand on the Bible.

5 (Witness sworn)

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

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

9 THE COURT: Okay. Do you have an agreement on the
10 exhibits that can be admitted?

11 MR. SLACK: Well, what I was saying is we don't have
12 an agreement on exhibits to be admitted. But the Court has --
13 if I could go through a couple of areas. The first is, really,
14 a confirmation from the Court. There are a number of
15 transcripts from the earlier confirmation hearing. It's our
16 understanding that the Court is essentially going to use -- or
17 the parties are going to be able to use all of the transcripts
18 from the previous confirmation hearing. And I wanted a
19 confirmation from the Court as to whether you wanted us to
20 admit those. We have identified them as exhibits -- or whether
21 the parties are just going to be able to freely use those
22 transcripts.

23 THE COURT: Well, I think they are part of the record.
24 So I don't know if they have to be admitted as an exhibit. If
25 you want to --

1 MR. SLACK: That --

2 THE COURT: -- identify them --

3 MR. SLACK: That's what we understood as well, Your
4 Honor.

5 THE COURT: Okay.

6 MR. SLACK: The second area, Your Honor, is there are
7 two exhibits that have been admitted already, Exhibit 253 which
8 is the revised --

9 THE COURT: Is this Debtors' 253?

10 MR. SLACK: Yes, it is. It's the Debtors' Exhibit 253
11 which is the revised supplemental disclosure statement for the
12 modified sixth amended joint plan. And that was admitted
13 without its exhibits. The exhibits are also listed on our
14 exhibit list as 253A, 253B, 253C, D and E. And we would ask
15 that the exhibits that I've just listed also be admitted into
16 evidence.

17 THE COURT: They're admitted -- any objection to that?
18 I mean, they're part of the record.

19 MR. KAPLAN: No.

20 THE COURT: All right. They're admitted.
21 (Debtors' Exhibits 253A, B, C, D, and E, attached exhibits to
22 revised supplemental disclosure statement, were hereby received
23 into evidence as of this date.)

24 MR. KAPLAN: Your Honor, while we're on exhibits,
25 there's on exhibit -- Howard Kaplan, Arkin Kaplan & Rice.

1 There's a transcript of the March 12th hearing where the
2 settlement was announced that we would like to submit. And
3 it's AOC Exhibit 58. And the docket number is 2518. So we'd
4 like to -

5 THE COURT: Well, why don't we wait till the end?

6 MR. KAPLAN: Okay. I'm sorry.

7 THE COURT: I'm just hearing them -- and we want to
8 get this witness through today.

9 MR. KAPLAN: Okay.

10 THE COURT: So I'd like as minimal discussion as
11 possible before we get the testimony. All right. The exhibits
12 to the disclosure statement are admitted.

13 MR. SLACK: And then in a very similar manner, Your
14 Honor, Exhibit 255 is -- was also admitted. It's the modified
15 sixth amended joint plan. And to that, there were exhibits
16 255A through 255H. And we would ask that those exhibits also
17 be admitted.

18 THE COURT: They're admitted.

19 (Debtors' 255A through 255H, attached exhibits to the modified
20 sixth amended joint plan of reorganization, were hereby
21 received into evidence as of this date.)

22 MR. SLACK: Lastly, Your Honor, there are three other
23 exhibits that we would ask be admitted. Exhibit --
24 Defendants -- or I should say Debtors' Exhibit 402 is the
25 second amended -- amendment to the second amended and restated

1 settlement agreement.

2 THE COURT: Say that again.

3 MR. SLACK: Exhibit 402 is the second amendment to the
4 second amended and restated settlement agreement.

5 THE COURT: Is that filed of record?

6 MR. SLACK: I don't know whether it is. But we would
7 ask that that be admitted.

8 MR. SARGENT: Your Honor, we have no objection if it
9 was filed of record. If not, we'd like at least the
10 opportunity to look at the document. Is the debtor able to
11 confirm that this was filed?

12 MR. SLACK: Your Honor, I do not know whether it was
13 filed or not. The purpose of the amendment was to -- in light
14 of the extension of the confirmation hearing to this particular
15 date and time, it was to extend the termination date. And
16 there was one other modification to the document, Your Honor,
17 just to make sure, at the FDIC's request, that costs associated
18 with some tax fees and expenses were coming out of a particular
19 escrow. And those were the only modifications.

20 THE COURT: Well, at the -- after we're done with him,
21 you can confirm whether it's been filed of record.

22 MR. SLACK: And, Your Honor, Exhibit 422 is in a
23 similar mode -- is the amendment to the second amended and
24 restated settlement agreement. And I'm going to hand that out
25 as well.

1 MR. SARGENT: Again, we would ask that a ruling on the
2 admission of this document just be reserved till after the
3 witness testifies.

4 THE COURT: All right.

5 MR. SLACK: And in this set, the last document is
6 Debtors' Exhibit 408 which is a confidentiality agreement
7 between the debtors and Fried Frank. And I know that the
8 equity committee has seen this. And we would ask that this
9 also be admitted.

10 MR. SARGENT: I don't know that we have seen it.
11 And --

12 MR. SLACK: It's been produced.

13 MR. ROSEN: Your Honor, it was provided to the equity
14 committee in February. And Mr. Ard and I discussed it the
15 other day as well.

16 MR. COFFEY: Could we get copies of it?

17 MR. SARGENT: We have no objection to the admission of
18 this document.

19 THE COURT: All right. It'll be admitted.
20 (Debtors' Exhibit 408, confidentiality agreement between the
21 debtors and Fried Frank, was hereby received into evidence as
22 of this date.)

23 MR. SLACK: One last set of documents, Your Honor --
24 and I'm going to suggest that I'll go over these with the
25 equity committee over the next break -- which is --

1 THE COURT: All right. Then let's not discuss them.

2 I think you want to start your witness --

3 MR. SLACK: Fine.

4 THE COURT: -- and get him done.

5 DIRECT EXAMINATION

6 BY MR. SLACK:

7 Q. Good morning, Mr. Kosturos. Could you please state your
8 full name for the record?

9 A. William Kosturos.

10 Q. And can you please describe your educational background?

11 A. I have an undergraduate degree from the University of San
12 Francisco in business with an emphasis in accounting.

13 Q. Are you currently employed?

14 A. Yes, I am.

15 Q. And by whom are you employed?

16 A. Alvarez & Marsal.

17 Q. How long have you worked at Alvarez & Marsal?

18 A. A little over nine years.

19 Q. And before you started at Alvarez & Marsal --

20 THE COURT: Excuse me.

21 Q. -- where did you work?

22 THE COURT: Excuse me. I think Mr. Kosturos testified
23 at the first. Do we need to go through background again? It
24 should already be on the record.

25 MR. SLACK: I will move to a couple background points

1 that I think are more relevant to today.

2 Q. Have you worked on a number of restructurings in the past,
3 Mr. Kosturos?

4 A. I have.

5 Q. And can you briefly describe for the Court some of the
6 matters you've worked on?

7 A. Certainly. Prior to this assignment, I was the chief
8 restructuring officer of Movie Gallery before their first
9 Chapter 11 and then during their first Chapter 11. Prior to
10 that, I was the interim chief executive officer and chief
11 restructuring officer of Spiegel Inc. And then I have done a
12 couple interim assignments of some private companies. And then
13 during my tenure at Arthur Andersen, I was a financial advisor
14 to many large Chapter 11 cases including Pacific Gas &
15 Electric, Levi Strauss was out of court, Clothestime, Hexcel
16 Corporation, Spreckels Industries, just really to name a few.

17 Q. And what are your duties and responsibilities as chief
18 restructuring officer of WMI?

19 A. As the chief restructuring officer, I am in charge of the
20 day to day operations of the debtor as well as I have
21 previously been the lead negotiator on behalf of the estate.

22 Q. And when you say you were the lead negotiator, the lead
23 negotiator for what?

24 A. I'm sorry. For the global settlement agreement as well as
25 the plan of reorganization.

1 Q. Now are you familiar with the term settlement noteholders
2 as it relates to this case?

3 A. I am.

4 Q. And what is your understanding of the term "settlement
5 noteholders" as it relates to this case?

6 A. I believe the settlement noteholders would be the four
7 hedge funds who signed the global settlement agreement which
8 would be Appaloosa, Centerbridge, Owl Creek and Aurelius.

9 Q. What role did the settlement noteholders have in making
10 decisions on behalf of the debtor with respect to the
11 settlement negotiations with JPMorgan?

12 A. None whatsoever.

13 Q. What role did the settlement noteholders play in the
14 negotiations with JPMorgan?

15 A. They were involved in the negotiations from time to time
16 with JPMorgan during confidentiality periods as well as I
17 believe that they had done some negotiations directly with
18 JPMorgan. At least a subset of them have.

19 Q. Now you had mentioned a number of times the global
20 settlement agreement. Can you tell me who are the parties to
21 the global settlement agreement?

22 A. Certainly. The debtor, JPMorgan, the FDIC, the unsecured
23 creditors' committee and the four settlement noteholders.

24 Q. Now the --

25 A. By the way, that has changed over time. So those were the

1 signing parties at the beginning. I believe the last
2 settlement agreement does not have the settlement noteholders
3 as signators.

4 Q. Now before we get into some of the specifics of the
5 negotiations of the global settlement agreement, as the chief
6 negotiator on behalf of the debtor, what was your overall
7 impression of the negotiation process that led to the
8 settlement?

9 A. Well, there's a lot of impressions I might have. First of
10 all, it was a very complex negotiation when you had multi-
11 parties. Number two, it was very, very lengthy. We were very
12 far apart throughout most of the period when we were
13 negotiating because -- at some points in time, the negotiations
14 were a two-way negotiation with JPMorgan. But some points, it
15 began three-way negotiation and, ultimately, became a four-way
16 negotiation. So the negotiations certainly ebb and flow
17 throughout the period.

18 Q. And how long was the process from the time you started
19 till the time you reached agreement on the global settlement?

20 A. Well, with the very nature of this agreement continue and
21 to change, I think that probably somewhere between eighteen
22 months and two years is probably the duration.

23 Q. Now you talked about just a moment ago that the parties
24 were far apart. Can you tell me how you would characterize the
25 parties' positions up until the time of the settlement?

1 A. Well, I would say that the signator parties were -- each
2 had their own agenda and their own items that were very
3 important to them. As you said, being far apart, I -- I'm not
4 quite sure what you -- I'm sorry. I'm not sure what you're
5 getting at. Could you --

6 Q. Well, let me go directly to the negotiation periods. Mr.
7 Kosturos, in your view in looking at the negotiations, do the
8 negotiations fall into different periods?

9 A. I believe they do.

10 Q. And can you briefly describe those periods?

11 A. Certainly. The first period would really be from the time
12 we -- the debtor filed Chapter 11 to approximately the date of
13 the first confidentiality period. The second would be the
14 March 2009 confidentiality period. The third would be the --
15 at the end of that period up to the second confidentiality
16 agreement in mid-November 2009. And then the last period would
17 be after the second confidentiality period, which would
18 probably be most of 2010.

19 Q. So looking at the first period that you just identified,
20 the period before March 2009, what discussions occurred between
21 JPMorgan and the debtor during that period?

22 A. Well, at that period, JPMorgan had purchased the banking
23 assets from the FDIC. So they were onsite. WMI was getting
24 organized as a debtor. So there was lots of conversations with
25 JPMorgan in this period of trying to sort out assets, trying to

1 sort out financial reporting issues, documents. We had
2 negotiated an information sharing agreement with JPMorgan. And
3 so, there were lots of meetings just trying to get the debtor
4 organized and get its ability to understand its financial
5 records. And JPMorgan was similarly trying to do the same
6 thing.

7 Q. Do you recall a meeting during this period at the FDIC's
8 offices in February?

9 A. I do.

10 Q. Who was present at this February meeting at the FDIC?

11 A. I believe the meeting was on February 23rd. It was called
12 by the FDIC. And it was the debtor and its representatives.
13 It was JPMorgan and its lawyers, the unsecured creditors'
14 committee; their counsel and advisors were there; Fried Frank
15 lawyers were there; the White & Case lawyers were there; and
16 the FDIC, obviously, was there.

17 Q. Now what happened at this February 23rd meeting that you
18 just identified?

19 A. The FDIC had called the meeting. They wanted to see if
20 the parties couldn't get together and start discussing issues
21 between them. And the FDIC chaired the meeting. And we really
22 started to talk about what we believed some of the differences
23 and issues were that revolved around the debtor.

24 Q. Now what information, if any, did the debtor provide to
25 the settlement noteholders concerning the discussions with

1 JPMorgan and the FDIC in this period prior to March 9, 2009?

2 A. I don't believe we gave any documents or materials to the
3 settlement noteholders during this period.

4 Q. Now did the debtor provide any information to counsel for
5 certain noteholders during this pre-March 2009 period?

6 A. Yes.

7 Q. And what steps did the debtor take to protect any
8 confidential information that might have been shared with the
9 counsel for the -- for certain noteholders during these early
10 discussions and then later into the negotiations?

11 A. We executed confidentiality agreements with White & Case
12 and their advisor, Zolfo Cooper. And we executed
13 confidentiality agreements with Fried Frank.

14 Q. Now you went through your educational background. You
15 don't have a legal training, do you?

16 A. I do not.

17 Q. And so, as a businessman, what was your basic
18 understanding of the terms of the confidentiality agreements
19 that had been entered into with counsel for certain of the
20 noteholders?

21 A. For the counsel confidentiality agreements, they would
22 last for the duration of the case. And the information that we
23 gave to them was to be kept confidential and not to be shared
24 with anyone unless any of their clients -- unless they had also
25 executed confidentiality agreements.

1 Q. And under those agreements, was it the debtor who was
2 supposed to police the information that went from counsel to
3 the noteholders?

4 A. No.

5 Q. Now let's turn to the second period you identified, the
6 period between March 9th and May 8th of 2009. What was the
7 first event you recall occurring during that period with
8 respect to the negotiations with JPMorgan?

9 A. There was a meeting March 10th at Sullivan & Cromwell's
10 offices.

11 Q. And who attended the March 10th meeting at the offices of
12 Sullivan & Cromwell?

13 A. It was the debtor, the unsecured creditors' committee,
14 White & Case and certain of their noteholders who had executed
15 confidentiality agreements, Fried Frank and their clients who
16 had executed confidentiality agreements, JPMorgan and the FDIC.

17 Q. Now how did it come to be that the settlement noteholders
18 became involved in this period in negotiations with JPMorgan?

19 A. Their counsel had asked us to include them in
20 negotiations. And they were willing to enter into
21 confidentiality agreements to participate.

22 Q. And did the debtor believe it would be helpful to have
23 them involved at this time?

24 A. Yes.

25 Q. And why was that?

1 A. I think it's very important when you have your major
2 constituency creditors who hold very large positions in the
3 case participating in negotiations from time to time.

4 Q. Now you just mentioned that these noteholders agreed to
5 execute confidentiality agreements. Was that something that
6 was required by the debtor in order to attend these
7 negotiations?

8 A. Yes.

9 Q. And again, as a businessman, what was your general
10 understanding of the terms of the confidentiality agreements
11 that were executed between the debtor and the settlement
12 noteholders and other noteholders at this time?

13 A. Sure. The confidentiality agreements would have a
14 duration to them. I believe that the March 2009
15 confidentiality agreement had a duration of sixty days and that
16 any information that was shared with them was to be kept
17 confidential for the period of that confidentiality agreement.
18 And then at the end of that period, that the debtor would
19 disclose any material nonpublic information that had been
20 discussed during that time with the noteholders who had
21 executed confidentiality agreements.

22 Q. Now let's turn back to the March 10 meeting at the offices
23 of Sullivan & Cromwell. Could you briefly describe what
24 happened at that meeting?

25 A. Sure. During that meeting, each of the major parties was

1 in their own conference room. So the debtor had their own
2 room. JPMorgan and Sullivan & Cromwell had their own room.
3 Unsecured creditors' committee had their own room. The White &
4 Case group had a room and the Fried Frank had a room. I'm not
5 exactly -- I don't recall where the FDIC was, whether they were
6 there in another room or where they were during this period.
7 But at the start of the meeting, the debtors had a meeting with
8 the creditors -- White & Case, Fried Frank and the unsecured
9 creditors' committee. And we discussed items that might be
10 included in a potential term sheet that would be prepared and
11 delivered to JPMorgan.

12 Q. Coming into this meeting, did the debtor have a different
13 idea of a potential term sheet to present to JPMorgan?

14 A. Yes.

15 Q. So how was it determined at the meeting what proposal
16 should be made to JPMorgan?

17 A. I believe that the debtor had circulated a draft of the
18 term sheet prior to that meeting to counsel for White & Case
19 and Fried Frank. And prior to that as well, I believe that the
20 White & Case group had put their preliminary thoughts down on a
21 term sheet of their own.

22 Q. And so, at the end of this internal meeting with the
23 debtor and certain settlement noteholders and their counsel,
24 how was it determined what proposal to actually make to
25 JPMorgan?

1 A. After a lengthy meeting, certain of the creditors of the
2 White & Case group as well as the unsecured creditors'
3 committee had kind of coalesced around an offer that they would
4 like to present to JPMorgan. It was higher in value than the
5 debtors' idea of a proposal. And after much discussion, we
6 collectively agreed to deliver the creditors' proposal to
7 JPMorgan.

8 Q. Now during this first part of the meeting at Sullivan &
9 Cromwell, did the creditors including the settlement
10 noteholders ask the debtor financial and other questions in
11 connection with the discussions you were having?

12 A. Yes.

13 Q. Did the debtor answer all those questions?

14 A. No.

15 Q. What types of questions did the debtor refuse to answer?

16 A. There was a lot of detailed questions that they had asked.
17 It was really the first time that we had had an opportunity to
18 speak with a lot of the noteholders directly. They were asking
19 about details about the size of the net operating losses, pack
20 spaces. Those seemed to be the things that I remember from
21 that meeting. And I'm sure there are many others that I just
22 don't recall. And we did not want to disclose that type of
23 information.

24 Q. So at the conclusion of this internal meeting amongst the
25 debtor and certain creditors, was there, in fact, an offer

1 presented to JPMorgan at this meeting?

2 A. Yes.

3 Q. And can you tell me how this offer was presented at that
4 meeting to JPMorgan?

5 A. Sure. There was a big conference room that Sullivan &
6 Cromwell and JPMorgan was using. The debtors' representatives,
7 the unsecured creditors' committee's representatives, I believe
8 it was just the lawyers for White & Case and just the lawyers
9 for Fried Frank went and -- of which we had the lawyers from
10 White & Case verbally deliver the offer to JPMorgan.

11 Q. Now you had testified earlier that the offer that the
12 creditors wanted to make was higher than the one that the
13 debtors initially wanted to make. What were the basic terms of
14 the proposal made by White & Case to JPMorgan at this meeting?

15 A. My recollection of the offer was -- is that the debtor
16 would receive the cash accounts, the deposit accounts.
17 JPMorgan would receive the TPS securities and that the taxes
18 would be split to the debtor, the first 500 million dollars and
19 then thereafter, sixty/forty in favor of the debtor. And then
20 I believe that there -- it was -- if there would be any
21 additional -- if there was any additional tax refunds or NOLs
22 that would -- any tax refunds that would occur, that the debtor
23 would get them on an eighty/twenty split.

24 Q. How did JPMorgan react to the proposal that was made at
25 this meeting?

1 A. Very badly.

2 Q. And when you say very badly, what happened?

3 A. I believe that after the verbal offer was presented that
4 they excused us from the premises.

5 Q. And was that quickly after the proposal was made?

6 A. Yes.

7 Q. Now if the debtors were always in charge of the
8 negotiations, why did the debtor let White & Case present the
9 proposal to JPMorgan ?

10 A. Well, I think at the outset of any case, it's very
11 important to have as much consensus as you can. And while the
12 offer was a little more aggressive than the debtors' offer, I
13 don't believe that JPMorgan was going to accept any of the two
14 offers out of the gate. So I think it was very important that
15 we had consensus with the unsecured creditors' committee and
16 with the noteholders and the major creditors, that we were all
17 on the same page and present that offer together.

18 Q. Now what happened next after the meeting at Sullivan &
19 Cromwell with respect to the negotiations?

20 A. The debtors' attorneys, Weil & Gotshal, put the verbal
21 offer in writing. And then we delivered that offer in writing
22 to JPMorgan in the next couple of days.

23 Q. There's an exhibit that has already been admitted which is
24 AU Exhibit 18. It's in the binder in front of you. Could --

25 MR. SLACK: Your Honor, do you --

1 THE COURT: AU what?

2 MR. SLACK: 18.

3 THE COURT: Okay.

4 MR. SLACK: I believe, Your Honor, that there's a book
5 that we have --

6 THE COURT: I have Aurelius.

7 MR. ROSEN: Your Honor, we put a binder right up there
8 just for Mr. Kosturos' --

9 THE COURT: All right. Thank you.

10 Q. Mr. Kosturos, does AU Exhibit 18 attach the term sheet
11 that Weil sent to JPMorgan shortly after the meeting at
12 Sullivan & Cromwell?

13 A. Yes.

14 Q. And who authorized sending this term sheet?

15 A. I did.

16 Q. Did JPMorgan respond to the term sheet that was sent by
17 Weil after the Sullivan & Cromwell meeting?

18 A. Yes, they did.

19 Q. And how long after sending the term sheet did JPMorgan
20 respond?

21 A. I think it was approximately a week later.

22 Q. Now take a look at AU Exhibit 19 which is the next
23 document in your book. Do you recognize this document?

24 A. Yes, I do.

25 Q. And can you tell the Court what it is?

1 A. Sure. It's a analys -- it's a draft prepared by Sullivan
2 & Cromwell that lists side by side the WMI proposal of March
3 12th, 2009 and the JPM proposal dated March 18th, 2009.

4 Q. Again, sort of high level, how did the terms of JPMorgan's
5 counterproposal compare with the terms of the debtors' proposal
6 sent about a week earlier?

7 A. Well, they at least addressed each of the issues -- in the
8 far left-hand column is the issues of which -- is the major
9 items in the term sheet. They at least lined up their
10 responses in that form. But the offer from JPMorgan was
11 materially different -- I'm sorry. Material is the wrong
12 word -- is a poor word. Is very different in terms of value
13 than the offer that we had delivered on March 12th.

14 Q. How did the debtor react to the proposal that JPMorgan
15 made in this exhibit?

16 A. I think from the debtors' perspective, it was expected
17 that we have a aggressive offer that we had put together on
18 March 12th and they have an equally poor offer delivered the
19 following week.

20 Q. How would you describe, if you can, in dollars the gap
21 between the parties with respect to these two offers?

22 A. Including the value of the second NOL that's here that
23 these offers were over four billion dollars apart from each
24 other.

25 Q. Now if you could please -- I know there's been some

1 testimony on this, but if you could please explain what you
2 understood the three columns in AU Exhibit 19 to represent.

3 A. The far left-hand column would represent the items that we
4 have listed as negotiating items that followed the next four
5 pages. The middle column represents the position taken by WMI.
6 And the far right-hand column represents the position taken by
7 JPMC.

8 Q. Now if you look, Mr. Kosturos, at the last column, the
9 JPMorgan proposal column, there are a number of items were
10 JPMorgan writes the word "Agree" next to an issue. When you
11 received this, did you understand that the parties had reached
12 agreement on those specific issues?

13 A. No, I did not.

14 Q. And can you explain why not?

15 A. This is an offer that needs to be taken in its whole.
16 Whether individual line items would use the word "Agreed",
17 really, unless you agree to the entire offer, you're not
18 agreeing really to anything in these proposals.

19 Q. Now did there come a time after the term sheets were
20 exchanged that we just looked at that the items in this term
21 sheet, at least some of them, became the subject of litigation
22 by the debtor and JPMorgan?

23 A. Yes, they did.

24 Q. And can you tell me what litigation arose after these term
25 sheets were exchanged?

1 A. Yes. On March 20th, the debtor filed a motion in the
2 district court to challenge the FDIC's rejection of our claim
3 that was filed in their receivership. After March 20th, JPM
4 filed a suit in this case on March 24th alleging that they
5 owned the deposit accounts, that we would turn over the TPS
6 securities and that, I believe, that there was some mention of
7 packs refunds in there as well as a bunch of other things. But
8 I can't be sure exactly what the others are besides the deposit
9 and the TPS securities.

10 Q. And what other claims did JPMorgan bring in its lawsuit?

11 A. What other claims than just --

12 Q. What -- yeah. Any other?

13 A. I'm not aware of any other.

14 Q. Okay. So what did the litigation efforts by the debtor
15 and JPMorgan in this time period indicate to the debtor about
16 the level of agreement that the parties have reached on the
17 issues in the global settlement?

18 A. Well, I think that the litigation positions taken by
19 JPMorgan and the debtor would indicate that there was no
20 agreement on any items in this term sheet.

21 Q. Now what effect, if any, did the lawsuit that was filed by
22 JPMorgan have on the ongoing negotiations?

23 A. It certainly put a chill into the negotiations as well as
24 it stopped the information that was ongoing between JPMorgan
25 and the debtor. There had been a number of groups, working

1 groups, set up from the FDIC meeting that were working on, a
2 number of different items trying to get a fact set together.
3 And after the JPMorgan lawsuit, those efforts ceased.

4 Q. Did, in fact, the negotiations resume at some point?

5 A. They did.

6 Q. And can you explain what was the next step in the
7 negotiations once they resumed?

8 A. I believe sometime around mid-April, I had reached out to
9 Don McCree and tried to resume negotiations. He was interested
10 in pursuing those negotiations. And I believe the debtor
11 prepared a term sheet in mid-April 2009 and sent that to Mr.
12 McCree and JPMorgan.

13 Q. If you could take a look at the next tab in your exhibit
14 book, which is EC-11, let me ask you if you recognize EC-11.

15 A. I do.

16 Q. And what is it?

17 A. It is the Sullivan & Cromwell draft of a comparison of the
18 two proposals similar to the form of the March format where
19 they would line up the two proposals side by side.

20 Q. So this document contains a column that has the WMI
21 proposal that was made on April 16th that you just testified
22 to, correct?

23 A. Yes.

24 Q. And then it has another column that has the JPMorgan
25 response to that proposal, is that correct?

1 A. That's correct.

2 Q. Did you participate yourself in the negotiations over the
3 terms that are set forth in this document?

4 A. I did.

5 Q. And you actually received this document?

6 A. I think I did. I'm pretty sure I would have gotten some
7 type of similar document, but yes.

8 MR. SLACK: I would offer EC-11 into evidence, Your
9 Honor.

10 THE COURT: Is it already in?

11 MR. COFFEY: EC-11 is already in evidence.

12 MR. SLACK: Is it?

13 THE COURT: It's been admitted?

14 MR. COFFEY: I believe so.

15 THE COURT: All right. Well, it's admitted.

16 (Equity Committee's Exhibit EC-11, Sullivan & Cromwell draft of
17 the WMI 4/16/09 proposal with the JPMC response lined up next
18 to it to show the comparison, was hereby received into evidence
19 as of this date.)

20 Q. So, Mr. Kosturos, how did JPMorgan react to your April
21 16th, 2009 proposal?

22 A. I think they reacted slightly more positive.

23 Q. And yet, notwithstanding that, in dollar terms, how far
24 apart were the parties in the negotiations?

25 A. Again, taken into the second NOL, I would say that we're

1 well over three billion dollars apart.

2 Q. Now were there any further exchanges of settlement offers
3 by the debtor and JPMorgan during the March confidentiality
4 period?

5 A. No.

6 Q. Now you had testified earlier about certain requirements
7 of the confidentiality agreements that the debtor had entered
8 into with the settlement noteholders. Did the debtor, in fact,
9 share material nonpublic information during the March
10 confidentiality period with the settlement noteholders?

11 A. Yes.

12 Q. And did the debtor comply with the provisions of the
13 confidentiality agreements that it had with the settlement
14 noteholders requiring the debtor to disclose that material
15 nonpublic information that had been shared with the settlement
16 noteholders?

17 A. Yes.

18 Q. If you could turn to the next tab in your binder, which is
19 Debtors' Exhibit 427 -- do you recognize this document, Mr.
20 Kosturos?

21 A. Yes.

22 Q. And what is it?

23 A. That is a Form 8K filed by Washington Mutual of our March
24 monthly operating report.

25 Q. And the March monthly operating report has already been

1 identified in another exhibit. But did, in fact, the debtor
2 file its monthly operating reports with the SEC?

3 A. Yes.

4 Q. And this is an example of the filing of a monthly
5 operating report with the SEC?

6 A. Yes.

7 MR. SLACK: Your Honor, I would offer Defendants'
8 (sic) Exhibit 427 into evidence.

9 MR. SARGENT: No objection, Your Honor.

10 THE COURT: It's admitted.
11 (Debtors' Exhibit 427, Form 8K filed by Washington Mutual of
12 its March monthly operating report, was hereby received into
13 evidence as of this date.)

14 Q. Can you briefly describe what types of information are
15 included in the monthly operating report that the debtor files?

16 A. Certainly. It is a form that's required by the bankruptcy
17 court and the U.S. trustee's office of which they ask for
18 specific formats of financial information that usually is filed
19 in every case. So this is using the format that is typically
20 done in a regular normal Chapter 11.

21 Q. So what material nonpublic information that had been
22 disclosed during this confidentiality period was disclosed
23 publicly in the March 2009 monthly operating report?

24 A. Sure. The -- first of all, the MOR was filed on April
25 30th. And there were four areas that we disclosed that we had

1 not previously disclosed, the first one being the estimated
2 size of the expected refunds in the approximate range of 2.6 to
3 three billion dollars. We also disclosed that WMI understands
4 that JPMorgan the purchaser of substantially all of WMB's
5 assets may seek to claim all or a portion of those expected tax
6 refunds.

7 We broke out some restricted cash balances. In footnote
8 2, they had not been previously disclosed. We broke out the --
9 under note 3, the unsecured notes receivable that our nondebtor
10 subsidiaries had with WMB or JPMorgan in the total of 178
11 million dollars.

12 And then we also disclosed an accrued liability that we
13 had that was not previously broken out.

14 Q. Now what determination did the debtor make about
15 disclosing in this March 2009 monthly operating report the back
16 and forth in negotiations between the debtor and JPMorgan
17 during this period?

18 A. The debtor and its advisors and attorneys determined that
19 there was no additional material nonpublic information that
20 needed to be disclosed.

21 Q. Now did any of the parties to the March confidentiality
22 agreements ever challenge the debtors' determination as to what
23 needed to be disclosed?

24 A. No.

25 Q. And did any of the parties to the March confidentiality

1 agreements ever disclose any additional information that they
2 perceived to be material?

3 A. Not to my knowledge.

4 Q. Now did there come a time in 2009 when the debtor retained
5 the law firm of Quinn Emanuel?

6 A. Yes.

7 Q. And why did the debtor retain Quinn Emanuel?

8 A. The debtor retained Quinn Emanuel because Weil Gotshal had
9 identified some conflicts in their early application with the
10 court that they had with JPMorgan over adverse litigation. And
11 we hired Quinn Emanuel to be the conflicts counsel on that
12 issue.

13 Q. And do you recall roughly what time they were hired?

14 A. I think it was some time in early April. I'm sure it's on
15 a click docket. April 3rd seems to come to mind but I can't be
16 exactly sure.

17 Q. And did there come a time shortly after their hiring that
18 there was a meeting where Quinn Emanuel met with the debtor and
19 certain of the settlement noteholders and their counsel
20 regarding litigation issues?

21 A. Yes.

22 Q. And when do you recall that meeting taking place, if you
23 do?

24 A. I believe it was May 6th, 2009.

25 Q. And how did that meeting come about?

1 A. That meeting was requested by one of the noteholders who
2 had executed a confidentiality agreement, Aurelius Capital, Mr.
3 Gropper, who had sent a letter to me and my counsel.

4 Q. And what happened at the meeting where Quinn Emanuel and
5 certain of the noteholders met with the debtor?

6 A. Well, at the start of the meeting, Mr. Rosen had said that
7 no nonpublic information would be exchanged at this meeting.
8 Everyone agreed to that. At that point, certain of the
9 noteholders who had executed confidentiality agreements had
10 expressed their displeasure with the debtor over negotiations
11 with JPMorgan. That lasted a little while. Pretty one-sided
12 from the noteholders to the debtor, again, just voicing their
13 frustration with us. And then after that, I believe the
14 noteholders and their counsel went into a discussion about some
15 of the litigation items that they would like the debtor and its
16 counsel to pursue and also had commented on the timing of some
17 of that litigation as well.

18 Q. Prior to that meeting, are you aware of whether Quinn
19 Emanuel had prepared a slide deck potentially to use for that
20 meeting?

21 A. Yes. They did prepare a slide deck.

22 Q. And was a slide deck actually used and given out at that
23 meeting?

24 A. No.

25 Q. Now was, in fact, there any nonpublic information that was

1 shared at the meeting with Quinn Emanuel and some of the
2 settlement noteholders?

3 A. At the May 6th, 2009 meeting?

4 Q. Yes.

5 A. No.

6 Q. So let's turn to the third period you identified earlier.
7 This is the period after the first confidentiality period up
8 until mid-November of 2009. So what is the first event during
9 this period that you recall occurring with respect to the
10 negotiations with JPMorgan?

11 A. Well, in this period, there was not much negotiation going
12 on. This was a period that could be described of as litigation
13 commencing. We had -- I believe, somewhere in late April, the
14 debtor had filed the turnover motion. And it had also seeked
15 (sic) to get discovery under Rule 2004. So Quinn Emanuel was
16 proceeding upon getting discovery documents. There was lots of
17 motions being filed back and forth between JPMorgan and us,
18 many hearings in front of Your Honor where lots of discussion
19 was going on between the parties and litigation strategy. And
20 that lasted most of the summer of 2009.

21 Q. And did there come a time in this period when you found
22 out that certain noteholders had been negotiating directly with
23 JPMorgan?

24 A. Yes.

25 Q. And how and when did you find that out?

1 A. I believe I found that out in September -- mid-September
2 meeting in 2009 that we had had with JPMor -- sorry -- with
3 Appaloosa and Centerbridge and their counsel.

4 Q. And what did you learn about negotiations between those
5 parties and JPMorgan at that meeting?

6 A. I had learned that -- and this was in discussion format --
7 that Appaloosa and Centerbridge had exchanged -- had given an
8 offer to JPMorgan and that JPMorgan then responded with a
9 response of a term sheet.

10 Q. And how did you react when you found out that Appaloosa
11 and Centerbridge had made their own proposal to JPMorgan
12 without involving the debtor?

13 A. Not well.

14 Q. What ability did Appaloosa and Centerbridge have to make a
15 deal without the debtors' consent?

16 A. Well, as long as the debtors maintain exclusivity, I don't
17 believe they had any ability to make a deal and bind the
18 debtor.

19 Q. So apart from this offer that you just talked about with
20 Appaloosa and Centerbridge, was there anyone apart from the
21 debtor -- anyone else apart from the debtor who was involved
22 with negotiations with JPMorgan during this period we're
23 discussing?

24 A. Yes.

25 Q. And can you tell me about those?

1 A. Sure. Shortly thereafter, in this mid to late September
2 meeting, we found out that the Paulson group who was a large
3 senior noteholder had been negotiating with JPMorgan as well
4 they had claimed that they had a couple other noteholders who
5 were supporting that -- WMI noteholders, senior noteholders,
6 that were supporting that proposal as well. And they had also
7 engaged negotiations directly with the WMB noteholders of which
8 they had negotiated that the WMB noteholders would receive a
9 400 million dollar secured claim as well as a 700 million
10 dollar unsecured claim.

11 Q. What implications did the Paulson term sheet have for a
12 settlement between JPMorgan and the debtor?

13 A. It really set negotiations backwards on a couple of
14 fronts: (1) that JPMorgan had now seen a lower number for a tax
15 split that they had seen certain WMI creditors want to agree
16 to. And probably most important that really set the
17 negotiations backwards, that it really enabled the bank
18 bondholders to think that they had a seat at the table as well
19 an idea that they thought that they would have been able to
20 negotiate a 1.1 billion dollar claim in our estate.

21 Q. At this point, was the FDIC involved in the negotiations?

22 A. They were not directly involved in the negotiations. They
23 had been kind of involved around the edges. Their counsel as
24 well as individuals at the FDIC had been talking to creditors
25 directly and trying to figure out where potential creditors

1 might settle at. So while they were not directly involved in
2 the negotiations, they were around the edges and talking to
3 people in the estate.

4 Q. During this time frame, did you hear anything from the
5 FDIC about their Section 9.5 rights?

6 A. Yes. I believe that around this time we were -- we had
7 motions in the court of summary judgment of the turnover
8 action. I can't remember the exact hearing that the FDIC
9 attorney had stood up and said he wanted to assert his 9.5
10 rights should the Court decide to grant our summary motion.

11 Q. And what legislative developments, if any, had an impact
12 on the settlement during this period?

13 A. Also at this time, Congress had enacted -- I can't
14 remember if it was in late October or early November 2009.
15 They had enacted the Homeowner -- Homeownership Act where they
16 had extended the ability to carry back net operating losses
17 from two years to five years with the fifth year being a half a
18 year of ability to carry that.

19 Q. So at the end of this third period that we've just
20 discussed where you had the Paulson term sheet, you had the
21 assertion of 9.5 rights. How far apart did you view the
22 parties in reaching a global settlement at this point?

23 A. Well, at this point, it became obvious that we were not
24 going to be able to execute a two-way deal with just JPMorgan
25 and the debtor, that at the very least, we were going to have

1 to figure out a way to get the bank bondholders involved since
2 they already had claims that would have been filed in this
3 estate as well as the FDIC who had claims in this estate and
4 exercising their 9.5 rights.

5 Q. Did you believe that the parties, that is, JPMorgan and
6 the debtor, were far apart at this point?

7 A. Yes.

8 Q. During this period after March of 2009 and up through the
9 middle of November, what confidential information did the
10 debtors share with the settlement noteholders?

11 A. None.

12 Q. So, Mr. Kosturos, let's turn to the fourth period you
13 identified which is the period between mid-November 2009 and
14 the end of the year. During that period, did there come a time
15 when the debtor entered into a second set of confidentiality
16 agreements with settlement noteholders?

17 A. Yes.

18 Q. And again, generally, as a businessman, what was your
19 understanding of the basic terms of those confidentiality
20 agreements?

21 A. The November 2009 confidentiality agreement was similar in
22 nature to the confidentiality agreement we had executed in
23 March. It had a duration from approximately November 16th to
24 December 31st and that each party would be under, effectively,
25 the same rights as the first agreement.

1 Q. Now how did it come to pass or what was the genesis of
2 entering into these renewed confidentiality agreements at this
3 time?

4 A. The debtor had been requested from settlement noteholders'
5 counsel to participate in negotiations.

6 Q. And did the debtor believe that the settlement noteholders
7 would add something to the negotiations at this point?

8 A. Yeah. Similar to the first period with the addition of a
9 potential sizeable second NOL and all of the different term
10 sheets that had been circulated that weren't the debtors, we
11 thought it was a good idea that everyone start renegotiating a
12 term sheet with JPMorgan to get things back on track.

13 Q. So what was the next event, so to speak, that happened in
14 the negotiations after the signing of the November
15 confidentiality agreement?

16 A. I believe in late November that the debtor makes a
17 proposal to JPMorgan.

18 Q. So if we take a look at the next tab in the binder, which
19 is EC-119, which I believe has already been admitted, do you
20 recognize this document?

21 A. Yes.

22 Q. And what is it?

23 A. It is the draft of the term sheet sent by WMI to JPMorgan.

24 Q. And again, as a basic matter, it's a long term sheet.

25 What did you understand the basic terms of the term sheet to

1 be?

2 A. Well, I think the two things that come to mind are we had
3 offered on the existing -- the existing tax refunds that we
4 knew -- the 2.6 to three billion dollars, that we would split
5 those sixty-one percent to thirty-nine percent with JPMorgan
6 getting sixty-one percent. We would split the second NOL
7 fifty/fifty. But the new thing that was introduced in this
8 term sheet is really the most important part of this term sheet
9 -- was that we were trying to figure out a mechanism to bring a
10 three-way negotiation with the bank bondholders out of which
11 WMI and JPM would split that fifty/fifty out of the second NOL.

12 Q. And did JPMorgan respond to this proposal?

13 A. They did.

14 Q. If we take a look at EC-120, which is the next exhibit in
15 your binder, does this document contain the JPMorgan response
16 to the debtors' proposal?

17 A. Yes, it does.

18 Q. And again, briefly, can you describe what was the proposal
19 made by JPMorgan in EC-120?

20 A. This proposal from JPMorgan was really a completely
21 different construct than we had ever seen and was not really
22 responding to what we had wanted to get into a three-way.
23 JPMorgan in this decide -- had offered that they would receive
24 a hundred percent of the existing tax refunds. That would be
25 the 2.6 to three billion dollars. WMI would receive a hundred

1 percent of the additional NOLs received by the new legislation.
2 And then herein, Section 3, they were to take a significant
3 amount of assets of which the debtor believed belonged to them.
4 And the last part, 3(e), that they would say that anything --
5 releases from third parties, i.e., the bank bondholders, that
6 WMI would pay for all of that not to exceed 500 million
7 dollars.

8 Q. Mr. Kosturos, when you received the JPMorgan
9 counterproposal that we just looked at, what was your reaction?

10 A. I did not think that this proposal was helpful at all to
11 the process of settlement.

12 Q. And when you -- if you take back -- take a look back at
13 EC-120, do you see your e-mail to Mr. Bolin and Mr. Melwani?

14 A. Yes, I do.

15 Q. And you say in there "They are resetting the bookends."
16 Do you see that?

17 A. I do.

18 Q. And you wrote that, correct?

19 A. I did.

20 Q. And what did you mean by "resetting the bookends"?

21 A. What I meant by that was just what I had just said is that
22 the proposal that they had made here on November 30th was not
23 responsive to what the type of structure that we had hoped to
24 get where we were going to be able to bring in the bank
25 bondholders and hopefully the FDIC such that we could have

1 certainty to the estate within those claims and then be able to
2 project what the return would be back to creditors. So we
3 found this proposal to be really nonresponsive and really had
4 changed the whole dynamics and constructs of what we had been
5 talking about previously.

6 Q. Is it fair to say at this point it was your view that the
7 parties were very far apart in reaching a settlement?

8 A. Very far apart.

9 Q. Now after the exchange of term sheets, what further
10 negotiations did you have with JPMorgan during this November
11 confidentiality period?

12 A. I had continued to discuss getting the term sheets and
13 process back on track with Mr. McCree. And we had continued to
14 have direct dialogue between Mr. McCree and myself.

15 Q. Did there come a time where the debtor sent an actual term
16 sheet during December?

17 A. Yes.

18 Q. And if you'd take a look at the next tab, which is EC-305,
19 again, which I also believe has been admitted already, does
20 this reflect the offer that was made by the debtor during this
21 period?

22 A. It does.

23 Q. To your recollection, was this offer that was delivered to
24 the -- to JPMorgan ever disclosed to the settlement noteholders
25 at this time?

1 A. I can't be sure but not to my recollection did we share
2 this with any of the settlement noteholders.

3 Q. Now once again, at the end of the confidentiality period
4 that ended at the end of the year, did the debtor make a
5 determination whether it had shared material nonpublic
6 information with the settlement noteholders?

7 A. Yes.

8 Q. And what determination did it make?

9 A. We determined that we had material nonpublic information
10 and we disclosed it in our November 2009 MOR which was filed on
11 December 30th, 2009.

12 Q. If you could take a look at the next tab in your binder,
13 which is AU-32 -- I'm sorry -- which is -- I apologize -- which
14 is Debtors' Exhibit 428, do you recognize this document?

15 A. Yes.

16 Q. And what is it?

17 A. This is the 8K we filed on December 30th with the SEC
18 which filed our November 2009 MOR.

19 Q. And in the November monthly operating report that was
20 filed with this court and the SEC, was there a disclosure of
21 the information that the debtor had provided to the settlement
22 noteholders?

23 A. Yes.

24 Q. And what information was set forth in the monthly
25 operating report?

1 A. Under note 5, under "Taxes", the second paragraph, we had
2 filed -- we disclosed that we estimated under the Workers'
3 Homeowner and Business Assistance Act of 2009 that our
4 potential NOL could result in tax refunds of up to 2.6 billion
5 dollars of which we also disclosed that there could be
6 competing claims of ownership.

7 MR. SLACK: Your Honor, I would move the admission of
8 Debtors' Exhibit 428.

9 MR. SARGENT: No objection, Your Honor.

10 THE COURT: It's admitted.

11 (Debtors' Exhibit 428, 8K filed by the debtors on 12/30/09 with
12 the SEC and the Court which filed the November 2009 monthly
13 operating report, was hereby received into evidence as of this
14 date.)

15 Q. Was there a determination made by the debtor with respect
16 to the materiality of information pertaining to the back and
17 forth of negotiations between the debtor and JPMorgan during
18 this period?

19 A. Yes.

20 Q. And what was the determination that was made by the
21 debtor?

22 A. The debtor, in connection with its advisors and lawyers,
23 determined that there was not any material nonpublic
24 information that needed to be disclosed.

25 Q. Now when did the November 2009 confidentiality agreements

1 with the settlement noteholders in fact terminate?

2 A. December 30th.

3 Q. And that was a day earlier than set forth in the
4 confidentiality agreements, correct?

5 A. That's correct.

6 Q. How did it come that the termination of the
7 confidentiality agreements occurred on December 30th rather
8 than December 31st?

9 A. I believe that Fried Frank had requested that we terminate
10 the confidentiality agreement a day earlier on behalf of one of
11 its noteholders.

12 Q. And why did the debtor agree to do that?

13 A. We had already put in to the public the required
14 disclosures that we needed to make. And we agreed with their
15 request of reducing the confidentiality period that day.

16 Q. So on December 30th, the debtor had already filed its MOR,
17 correct?

18 A. That's correct.

19 Q. Now at the end of this confidentiality period, can you, in
20 your own words, describe how far apart in dollars or otherwise
21 you believe the debtor was from reaching agreement with
22 JPMorgan?

23 A. Well, I would say that it was not just JPMorgan that we
24 needed to reach agreement with. The prior term sheet had a
25 clause in there that we had to reach agreement also with the

1 bank bondholders as well as the FDIC. The bank bondholders at
2 this point in time had decided that they were going to make
3 allegations that they owned the second NOL via the FDIC
4 receivership. So they had -- they were making very large
5 request of the share of the second NOL. So with all that said,
6 we were very far apart on the term sheet that we had been
7 discussing with JPMorgan.

8 Q. Mr. Kosturos, let's turn now to the fifth and last period
9 that you identified earlier in your testimony. And that's the
10 period after the second confidentiality period. There's been
11 testimony about a January 12th meeting that was attended by the
12 debtors and others. Do you recall that meeting?

13 A. Vaguely, yes.

14 Q. What recollection do you have, if any, of that meeting?

15 A. Well, I believe that, again, at the start of the meeting,
16 Mr. Rosen had declared that the debtor would not be producing
17 or discussing any nonpublic information. Also, at that
18 meeting, the settlement noteholders and Fried Frank discussed
19 an idea that they had for a potential plan of reorganization
20 should we reach agreement ever with JPMorgan.

21 Q. At this time, was the debtor interested in devising-- in
22 structuring a plan?

23 A. Well, I think we had thought about that clearly along the
24 lines more of the way that the benchers would go down in a
25 waterfall. But the idea that the Fried Frank group had and the

1 settlement noteholders with their construct, we really did not
2 have much interest in. And since they had verbally talked
3 about it, we had asked that they reduce their ideas to writing.

4 Q. And was there any nonpublic information shared by the
5 debtor with the settlement noteholders at this January 12th
6 meeting?

7 A. Not that I can recall.

8 Q. Shortly after this meeting, did the debtor have a meeting
9 in Washington with the FDIC?

10 A. Yes. A couple days later, Mr. Rosen and I went to
11 Washington D.C. to meet with the FDIC and their general
12 counsel, Mike Bradfield.

13 Q. And again, very briefly, describe what that meeting was
14 about.

15 A. Well, that meeting was to try to get the FDIC to engage in
16 negotiations. We had found that our discussions directly with
17 the bank bondholders was really not -- not moving the ball
18 forward. We didn't think that from their negotiating position
19 of bank bondholders that for the numbers that they had
20 discussed with us that they would be willing to settle, we
21 didn't even find that there was a reason to negotiate with
22 them. And we thought that it would be much more fruitful, the
23 negotiations, to have the FDIC as a party directly as
24 receivership -- as the receiver for the FDIC entity as well as
25 to discuss with them an ability to settle their claims of 9.5

1 as well.

2 Q. Now you had just had a meeting two days earlier with the
3 settlement noteholders. Did you inform them of the meeting
4 that you were going to have with the FDIC?

5 A. No.

6 Q. And why did you decide not to tell the settlement
7 noteholders about the meeting that you were going to have two
8 days later at the FDIC?

9 A. There were many meetings throughout this case where we
10 didn't tell the noteholders or anybody in this case what the
11 debtor was doing. So we found it under no obligation to let
12 people know what the debtor was doing.

13 Q. Now after that meeting, did there come a time when the
14 debtor received from counsel for the settlement noteholders a
15 written proposed plan of reorganization?

16 A. Yes.

17 Q. And was that later in this period?

18 A. It was somewhere in the February time frame. One of the
19 confusing things about looking at things in this period is
20 people use the word "term sheet" -- they throw that around. So
21 I believe that they had sent us to that under the idea that it
22 was a term sheet. But it was really their document.

23 Q. And it was their document relating to a proposed plan of
24 reorganization, correct?

25 A. Yes. Yes.

1 Q. Now what was the debtors' reaction to receiving this
2 so-called term sheet for a proposed plan?

3 A. It was very complicated.

4 Q. And did the debtor ultimately decide to use the structure,
5 in any way, that was sent over by the settlement noteholders?

6 A. No. We had discussed the term sheet, if you will, or
7 really the construct that the Fried Frank and settlement
8 noteholders had put together with the unsecured creditors'
9 committee, and collectively we had decided that this was not a
10 structure we were interested in.

11 Q. Now, a couple of weeks after receiving the term sheet,
12 did the debtor have a meeting with the settlement noteholders
13 and their counsel?

14 A. I believe that that meeting occurred sometime in late
15 February.

16 Q. So if you could take a look at the next tab in your
17 binder, which is EC Exhibit 126, which again, has already been
18 admitted into evidence, do you recognize this document?

19 A. Yes.

20 Q. And the bottom e-mail from Mr. Roose sets an agenda for a
21 meeting. Do you see that?

22 A. I do.

23 Q. Can you tell me, in your own words, what happened at that
24 meeting?

25 A. Well, again, Mr. Rosen had said that the debtor would not

1 be talking about any nonpublic information since the
2 noteholders were not going to become restricted. So I think
3 that -- of these agenda items I can't be sure what we talked
4 about but I can be sure that whatever we talked about with them
5 with the noteholders in the room was nonpublic and then soon
6 thereafter we -- I believe the settlement noteholders left that
7 meeting and then there was a discussion amongst the debtor. I
8 can't remember if the unsecured creditors' committee was at
9 this meeting or not -- I believe they were -- as well as the
10 Fried Frank lawyers. So there was just -- there was no
11 nonconfident -- nobody at this meeting, when we started talking
12 about most of these agenda items, was present without a
13 confidentiality agreement in place.

14 Q. I may have misheard you, Mr. Kosturos, but I believe you
15 said that there was nonpublic information that was shared with
16 the --

17 A. Oh --

18 Q. -- settlement noteholders?

19 A. I --

20 Q. Is -- could you just clarify what information was provided
21 to the settlement noteholders, just in case I didn't mis-hear
22 you?

23 A. I apologize. The only thing that would be shared with the
24 settlement noteholders here would be public information.

25 Q. And so given that and Mr. Rosen's comments at the

1 beginning of the meeting, was in fact the only information
2 provided to the settlement noteholders at this meeting public?

3 A. Yes.

4 Q. Now, during this period, what was the FDIC's role in
5 negotiations in order to reach a global settlement?

6 A. The FDIC had been spending a lot of time trying to
7 negotiate with the bank bondholders behind the scenes to see if
8 they could get agreement on our term sheet that we had been
9 provided to the -- that we provided to the FDIC, in general
10 what kind of offers would they be interested in. Also at this
11 time that the FDIC and JPMorgan were having conversations, as I
12 came to understand later, about issues within the receivership.

13 Q. Now did there come a time when the debtor actually reached
14 some agreement or thought it reached agreement with JPMorgan
15 and the FDIC?

16 A. Yes. There did come a time where we thought we had
17 reached an agreement with them.

18 Q. And can you describe that time?

19 A. We had come to a verbal agreement the night of March 11th.
20 It was fairly late in the evening when Mr. Bradfield from the
21 FDIC called me to let me know that they would agree to the
22 financial terms of our previous term sheet and that the
23 following morning he would like to have a discussion to clear
24 up a few other issues.

25 Q. And did there come a time when those issues were cleared

1 up?

2 A. Yes. The morning of March 12th, in a conference not too
3 far from here, we wrapped up the remaining items of which we
4 thought, and then Mr. Rosen came into court and read those
5 terms into the record.

6 Q. And was this agreement the final agreement?

7 A. No. There were --

8 Q. There were changes, correct?

9 A. There would be changes.

10 Q. Now, in reaching this agreement that you just described up
11 through March 12th, what was the involvement of the settlement
12 noteholders in those negotiations during this period?

13 A. The settlement noteholders had no involvement in the
14 negotiations. There was one meeting when one of the settlement
15 noteholders in Fried Frank attended with JPMorgan. I believe
16 that meeting was on March 1st. But exclusive of that one
17 meeting there was no involvement with them.

18 Q. And why weren't they involved in this process during this
19 period?

20 A. There wasn't any need to involve them. We're the debtor.
21 We have -- we're -- it is our responsibility to determine what
22 we believe is in the best interest of the debtor, and that's
23 what we did.

24 Q. And who in fact made the decision to enter into the final
25 settlement agreement that was reached?

1 A. I did, and it was later ratified by the board.

2 Q. Now, are you aware that in this proceeding the equity
3 committee has contended that the debtor was controlled and
4 dominated by certain of the noteholders?

5 A. I'm aware of that.

6 Q. And what is your reaction to that allegation?

7 A. It's completely false.

8 Q. And why is that?

9 A. Well, I think there's been numerous instances here that we
10 have talked about in this discussion as well as others of where
11 the settlement noteholders wanted the debtor to do something
12 and we rejected their ideas and did what we thought was best
13 for the estate. We led the negotiations; the settlement
14 noteholders did not. The unsecured creditors' committee
15 participated with us throughout this case. And ultimately the
16 debtor exercised its judgment, its sole judgment in entering
17 into the global settlement agreement.

18 MR. SLACK: Thank you very much, Mr. Kosturos. I have
19 no more questions.

20 THE COURT: All right. I think this is a good time to
21 take a lunch break. Let's get back at 1. Well, let me ask how
22 long the parties think they'll need for cross.

23 MR. SARGENT: I expect my cross to be between an
24 hour -- certainly no more than an hour and a half, Your Honor.

25 MR. COFFEY: Your --

1 THE COURT: Let me hear from others.

2 MR. COFFEY: Your Honor, Jeremy Coffey with Brown
3 Rudnick. I can really try to pare it back, working with Mr.
4 Sargent. I think we can get it done in forty-five minutes. A
5 large part of our cross is going to be dealing with a
6 particular set of documents we think should be included in the
7 record. So if we're able to stipulate to the inclusion of
8 those I think I can cut my cross back significantly.

9 THE COURT: All right. Why don't you talk during
10 lunch? Do we want to make it a half an hour for lunch and the
11 parties just stay and talk about exhibits?

12 MR. COFFEY: I'm happy to do that, Your Honor.

13 THE COURT: All right. Well, let's come back at 1:30
14 then.

15 MR. SLACK: Your Honor, one clarification, since the
16 witness has not yet started cross, I want to make it -- I want
17 to make sure that we can in fact talk to the witness.

18 THE COURT: You may.

19 MR. SLACK: Thank you.

20 THE COURT: And just for counsel's edification, I
21 believe, in looking at my calendar for next week, that there
22 may be time next Thursday. The debtor has an omnibus on
23 Thursday, is that right?

24 MR. ROSEN: There is an omnibus hearing, Your Honor.
25 I know that that's also the time that the equity committee has

1 scheduled their motion for standing. And usually omnibus
2 hearings are only for an hour so I don't know how much time
3 they would go --

4 THE COURT: I believe the bulk of the day can be
5 cleaned up. I'm waiting to hear on some matters but why don't
6 you all talk and see if Thursday works for -- and Mr. Steinberg
7 should be contacted, I guess, on his vacation to see if that
8 works.

9 MR. ROSEN: We'll see if we can get his ship to shore
10 phone or otherwise, Your Honor.

11 THE COURT: All right. Let's come back at 1:30 then.

12 (Recess from 12:54 p.m. until 1:33 p.m.)

13 THE COURT: Good afternoon. All right. You may
14 commence cross.

15 MR. SARGENT: Thank you, Your Honor. Edgar Sargent,
16 Susman Godfrey on behalf of the equity committee.

17 CROSS-EXAMINATION

18 BY MR. SARGENT:

19 Q. Good afternoon, Mr. Kosturos. You testified on your
20 direct examination about a meeting that you attended at
21 Sullivan & Cromwell's offices on March 10, 2009. Do you recall
22 that?

23 A. I do.

24 Q. And the purpose of that meeting was to begin settlement
25 negotiations between the debtor and JPMC?

1 A. And the creditors, yes.

2 Q. And the creditors were participating in the negotiations,
3 is that your testimony?

4 A. Yes, as well as the unsecured creditors' committee, I
5 might add.

6 Q. And the FDIC?

7 A. I'm pretty cer -- I think they -- I'm pretty sure they
8 were there. I think Mr. Reeves from the FDIC was there.

9 Q. And one of the creditors' groups that was there was
10 represented by White & Case, I think you testified, is that
11 right?

12 A. Yes.

13 Q. And the White & Case group included the hedge fund
14 Aurelius at that point?

15 A. Yes.

16 Q. And Dan Gropper was there on behalf of Aurelius, is that
17 right?

18 A. I think I recall Mr. Gropper being there, yes.

19 Q. You testified just a few moments ago, I believe, that at
20 that meeting the White & Case group prepared a settlement
21 proposal, correct?

22 A. I think I testified that the White & Case group had
23 previously had a term sheet that they had circulated.

24 Q. But they presented it to you and discussed it with you at
25 that meeting on March 10th, right?

1 A. I don't know if they had used that term sheet as the basis
2 for our discussions. I think most of those discussions that
3 day about the potential offer were verbal.

4 Q. They presented you verbally or orally with terms for a
5 proposed settlement with JPMC, the White & Case group did,
6 correct?

7 A. Yes, in connection with the creditors' committee
8 supporting that proposal.

9 Q. And the debtors didn't approve that proposal at the time,
10 isn't that right?

11 A. I wouldn't use the word "approve".

12 Q. You had -- you thought it was a little bit too aggressive.

13 A. It was more aggressive than the offer that we had
14 considered to lever.

15 Q. And one of the things you testified about on direct was
16 the debtors' offer and the White & Case offer. I just want to
17 make it clear, the debtor did not, itself, make an offer to
18 JPMC at that meeting, isn't that right?

19 A. No. Just to be clear, the White & Case and the creditors'
20 committee, but mostly the White & Case lawyers, verbally
21 delivered the offer to JPMorgan at that meeting, of which we
22 had been sitting at the table as well.

23 Q. And those -- that settlement proposal would settle claims
24 on behalf of the estate if it had been accepted, correct?

25 A. Yes.

1 Q. And at the meeting -- at the portion of the meeting where
2 White & Case presented the settlement proposal, the debtors
3 didn't indicate any view, one way or the other, of their
4 opinion of that settlement proposal, did they?

5 A. No. I think I've testified -- I think I said that in my
6 deposition as well that we had remained silent in the room with
7 everybody and JPMorgan.

8 Q. And you testified on direct that JPMorgan reacted
9 negatively to the proposal, is that right?

10 A. One of various words one could use for their reaction.

11 Q. The meeting was very short and you were excused more or
12 less immediately, correct?

13 A. Yes.

14 Q. And shortly after the meeting JPMorgan filed a complaint
15 against the debtor, right?

16 A. Yeah. I think around -- I think they filed their
17 complaint on March 24th, yes.

18 Q. So within two weeks, three weeks?

19 A. Yes.

20 Q. And so what the public knew when that complaint was filed
21 was that there was still a very active dispute over these
22 deposits, correct?

23 A. Yes.

24 Q. But what you knew, having been in the settlement meeting,
25 was that JPMorgan had made a settlement offer turning over the

1 entire amount of the deposits, less some taxes that had already
2 been collected, to the debtor, correct?

3 A. JPMorgan used various tactics throughout this case in
4 negotiations. Earlier in the case in a cash stipulation motion
5 that we had filed with the Court that JPM had agreed on the
6 record that that deposit was ours, subject to offsets and the
7 rights of 9.5. They had said that there. They had said things
8 in settlement discussions that they would give it to us, let us
9 have it as part of a global settlement agreement of which all
10 items on the term sheet had been agreed to. So they certainly
11 took many different tactics as it related to the cash deposit
12 account.

13 Q. And you knew that that was an active -- still an active
14 settlement offer by JPMorgan at the time the complaint was
15 filed, didn't you?

16 A. I can't remember. I guess that would be the last term
17 sheet that they had given us where we could have the -- they
18 would turn over the cash and no taxes. It wasn't a very
19 attractive offer.

20 Q. But it was an offer that turned over the deposits to the
21 estate and it was an active offer at the time JPMorgan's
22 adversary complaint was filed against the estate seeking
23 ownership of the deposits. Is that not true?

24 A. Only if you agreed to all the other terms. I mean, you
25 can't single out one line item. It's -- negotiations and term

1 sheets don't work that way.

2 Q. You emphasized on direct that JPMorgan's counsel reacted
3 very negatively to the proposal and asked you to leave the
4 meeting, isn't that right?

5 A. Yes.

6 Q. But they also asked you to provide the offer in written
7 form shortly after the meeting, didn't they?

8 A. I can't remember if they asked us or we just went ahead
9 and put the term sheet in writing. So it's obviously in
10 evidence that we did document the term sheet.

11 Q. At the very least, you didn't hear anything that made you
12 think it would be a waste of time to spend putting an attorney
13 to work drafting a written term sheet and providing it to
14 JPMorgan, did you?

15 A. I would hate to start talking about waste of times by
16 attorneys in the last two and a half years.

17 Q. Fair enough. Shortly afterwards, after you provided the
18 written term sheet to JPMorgan, they responded with their own
19 counter-offer, didn't they?

20 A. Yes, they did.

21 Q. And that's the theme, isn't it, that runs, I think,
22 throughout the offers and counter-offers that we've been
23 discussing in this case. There's an offer by the debtor;
24 that's true in April. And then JPMorgan responds within a week
25 or two. Wasn't that true in April?

1 A. That was true in April.

2 Q. And we've heard about an offer that was made by Appaloosa
3 and Centerbridge in late July or early August, and JPMorgan
4 responded with a counter-offer just a few weeks later, didn't
5 they?

6 A. Yes.

7 Q. And each one of those times JPMorgan made economic
8 concessions to the estate, didn't they?

9 A. I would say that it was not a pattern of every offer that
10 they would make more concessions to the estate. I think
11 there's a couple of examples here where they went the other
12 way.

13 Q. Which example are you thinking of Mr. Kosturos?

14 A. I'm thinking about the November offer that JPMorgan made
15 that I think I've termed to be resetting the bookends. That
16 was a -- we went the other way there.

17 Q. The resetting the bookends offer. Other than that do you
18 know if any offers that you've been discussing demonstrate a
19 negative move economically by JPMorgan with respect to the
20 estate, do they?

21 A. Nothing comes to mind, but as you well know, throughout
22 this case it's been several years or many months in
23 negotiations of things moving around left and right, somebody
24 says something one day only to retract it another, so -- but in
25 general, I would say that we had continued to -- you know, we'd

1 make an offer, hopefully they would make an offer if they
2 weren't too offended by our previous offer.

3 Q. And you responded to that resetting the bookends offer
4 within a week or two yourself on behalf of the estate, isn't
5 that right?

6 A. On behalf of the estate I did.

7 Q. And JPMorgan didn't respond unfavorably to that offer, did
8 they? They didn't walk away from negotiations, for example,
9 did they?

10 A. No. But the most important thing about that December term
11 sheet was we were trying to introduce the idea of a three-way
12 deal, that no deal would be acceptable between us and JPMorgan
13 directly, only if we could figure out a way to get the FDIC and
14 the bank bondholders on board so that we can determine
15 certainty within the estate.

16 Q. You testified on direct that the March offers that grew
17 out of the meeting we were discussing a moment ago at Sullivan
18 & Cromwell March 10th, that those offers, if you count the
19 second tax refund, they were four billion or more apart. Do
20 you remember that testimony?

21 A. I do.

22 Q. And if you move ahead just one month to the April offer
23 that JPMorgan made, in that offer they offered fifty percent of
24 the second tax refund to the estate, isn't that right? Don't
25 you recall that?

1 A. I don't remember what their offer contained about the
2 second NOL.

3 Q. Well, I'll represent to you it was fifty percent.
4 Assuming I'm correct, by your math that's a concession in one
5 month of 1.3 billion dollars by JPMC, is that not true?

6 A. I think you're incorrect.

7 Q. Why?

8 A. Would you like to look at the term sheet?

9 Q. Sure.

10 A. Okay.

11 Q. Do you have a binder of exhibits in front of you?

12 A. I do.

13 Q. Look at Exhibit 11.

14 A. Which Exhibit 11? I'm sorry.

15 Q. It should be in Exhibit 11.

16 THE COURT: EC-11.

17 Q. EC-11, I'm sorry.

18 A. EC -- I --

19 THE COURT: EC-11. It's in your binder.

20 MR. SARGENT: May I approach the witness, Your Honor?

21 THE COURT: You may.

22 THE WITNESS: Okay.

23 Q. Do you have that, Mr. Kosturos?

24 MR. SARGENT: And could you bring up EC-11 on the
25 screen?

1 A. Oh, I stand corrected.

2 Q. So they offered fifty percent of the second tax refund --

3 A. They did.

4 Q. -- to the debtor?

5 A. They did.

6 Q. And that's a concession of 1.3 billion dollars by JPMC
7 between mid-March and mid-April, isn't that right?

8 A. I'm just trying to find that previous term sheet.

9 Q. The March term sheet? You were looking at it with your
10 counsel. I don't know that I have it as an exhibit in your
11 binder, I'm afraid. But don't you recall that in the March --

12 A. I'll find it.

13 Q. -- March offer.

14 THE COURT: I think it's AU-19, isn't it, the
15 comparison of the March?

16 THE WITNESS: Thank you.

17 MR. SARGENT: Thank you, Your Honor. It's also EC-30,
18 I believe.

19 A. That's right. They don't make any mention of the second
20 NOL.

21 Q. Well, the terms of the March proposal, both the White &
22 Case proposal and JPMC's response, they were not public, were
23 they?

24 A. No.

25 Q. They were confidential?

1 A. Yes.

2 Q. And they weren't made public after May 8th when the
3 confidentiality agreements with the settling noteholders
4 expired? They were still confidential, weren't they?

5 A. They were not made public by the debtor.

6 Q. And the confidentiality of these settlement discussions
7 was protected by the confidentiality agreements that the debtor
8 entered into with the settlement noteholders, wasn't it?

9 MR. SLACK: Your Honor, I would object to the extent
10 that it calls for a legal conclusion. If he's asking for this
11 witness' understanding I'm okay with it. But --

12 THE COURT: All right. He can answer to his
13 understanding.

14 A. My understanding is that's correct.

15 Q. And actually at your deposition you testified that that's
16 the way the debtors understood these agreements, that the
17 debtors understood that the hedge funds were required to
18 maintain the confidentiality of this information, meaning the
19 settlement discussions under the confidentiality agreements, at
20 least during the term of the agreement. Do you recall that
21 testimony?

22 A. Yeah, I think -- yeah.

23 Q. It's consistent with what you just said.

24 A. Yeah.

25 Q. Now, at your deposition you were designated as the

1 debtors' representative to testify on a number of topics,
2 correct?

3 A. My understanding was I was only testifying to the extent
4 of the insider trading allegations.

5 Q. Well, one of the topics you were designated on, and I can
6 call up the notice if you'd like, is the negotiation and terms
7 of any confidentiality agreement that the debtors entered into
8 with the settlement noteholders. Do you recall that that was
9 one of the topics in which you were designated to testify?

10 A. I think so, sure.

11 Q. And I believe you testified you spent most of a week,
12 forty hours, preparing for your deposition. Do you recall
13 that?

14 A. I can't remember exactly what I had said but I did spend
15 significant time preparing for the deposition.

16 Q. I think you said you spent two full days meeting with your
17 lawyers to prepare for the testimony, is that right?

18 A. Covering many, many different topics, sure.

19 Q. Yet when I asked you whether the debtors understood, and I
20 was asking about your understanding, that the confidentiality
21 agreements required the hedge funds to maintain confidentiality
22 over this information after the sixty-day period expired, your
23 answer was that the agreement speaks for itself. Do you recall
24 that?

25 A. I do.

1 Q. I'm going to ask you that question today and see if your
2 answer has gotten any more specific, Mr. Kosturos. Does the
3 debtor believe that the confidentiality agreements with the
4 settlement noteholders require the funds to maintain
5 confidentiality after the sixty-day term expires?

6 A. Well, again, I am not a lawyer and I'm a fact witness
7 here, but my understanding is, first of all, the document does
8 speak for itself so I won't change that part of it, but my
9 understanding is that at the conclusion of the confidentiality
10 agreements that the parties are released from whatever
11 agreement that we have.

12 Q. So the debtor would not have considered it a breach if one
13 of the settlement noteholders had attached the settlement terms
14 to a filing in court or had polished it in The Wall Street
15 Journal? That would have not been a breach of the
16 confidentiality agreement from the debtors' perspective, is
17 that your testimony?

18 MR. SLACK: Your Honor, I object to the extent that
19 that particular question calls for a legal conclusion.

20 THE COURT: Well, I'll -- overruled and he can answer
21 his understanding.

22 A. Mr. Sargent, can you just repeat the question? I want to
23 make sure I get this exactly right.

24 Q. Sure. I just want to -- I'm trying to get the debtors'
25 understanding whether it would have been a breach, in the

1 debtors' view, of the confidentiality agreements for one of the
2 hedge funds to publicly disclose the settlement terms after the
3 confidentiality agreement expired, after May 8th, in other
4 words, when we're speaking of the March confidentiality
5 agreement.

6 A. I believe that would not be a breach of the agreement.

7 Q. At the same deposition designated on the same topics, I
8 asked you if the debtor believed it would be a breach of this
9 agreement if the settlement noteholders traded based on
10 information that they obtained in these settlement proposals.
11 Do you recall that question?

12 A. I do.

13 Q. And your testimony then was you didn't -- the debtor did
14 not have an opinion one way or the other whether that would be
15 a breach. Do you recall that?

16 MR. SLACK: Your Honor, I believe that he can't -- I
17 mean, that's a different question and I believe he can't
18 impeach the witness without asking the same question.

19 THE COURT: I agree. You've got to ask him a
20 question -- are you impeaching -- you can't just -- what are
21 you offering the deposition for? To impeach him you have to
22 ask him the same question first.

23 MR. SARGENT: I'm sorry, Your Honor, I will. Let me
24 rephrase.

25 Q. Do you have an opinion -- does the debtor have an opinion

1 whether or not it would be a breach of the confidentiality
2 agreement for the hedge funds to have traded based on the
3 information that they learned during the pendency of the
4 agreement?

5 A. I believe that at the conclusion of the confidential
6 period in agreements the parties are free to do whatever they
7 want to do, that the agreement is no longer in place.

8 Q. The debtor made a determination, made a conscious
9 determination, did it not, about whether or not the terms being
10 exchanged between itself and JPMorgan were material. And it
11 made that determination in conjunction with its disclosure
12 obligations under the confidentiality agreement, is that right?

13 A. The debtor, with advise from counsel, made that
14 determination, yes.

15 Q. And so when you considered that issue you knew, you
16 understood the possibility that the hedge funds might trade on
17 this information, didn't you? The debtor understood that?

18 A. Well, again, the confidentiality period extends for as
19 long as the confidentiality period extends. And then after it
20 expires, we have a duty to disclose material nonpublic
21 information, and then at the conclusion of the confidentiality
22 agreement, the agreement is no longer in place.

23 Q. And there's some confidential information, the information
24 that was confidential at least during the pendency of the
25 agreement, that you determined was not material, isn't that

1 right?

2 A. Yes.

3 Q. And one example of that were the settlement terms that
4 were being exchanged, isn't that right?

5 A. I think the facts are on the record that we thought that
6 that was -- that we did not need to disclose that.

7 Q. And so the debtor understood -- when the debtor made the
8 determination it did not need to disclose that, the debtor
9 understood that the hedge funds might trade on that
10 information, didn't the debtor know that?

11 A. The hedge funds might have done a lot of things after the
12 conclusion of the confidentiality agreement, and quite frankly,
13 they're going to do what they're going to do.

14 Q. The March negotiations were not the only time that the
15 settlement noteholders were allowed to participate in
16 settlement negotiations with JPMC, were they?

17 A. That's correct.

18 Q. The debtor also entered into confidentiality agreements
19 with those four funds for the same purpose in November of 2009.
20 You testified about that on direct, correct?

21 A. Yes.

22 Q. And the debtor also sought the settlement noteholders'
23 views on other issues relevant to the bankruptcy at other
24 times, is that true?

25 A. I think that outside of the confidentiality agreement

1 periods we certainly sought advise -- or not advise but input
2 from their respective lawyers. And we were able to have
3 discussions with their lawyers via the confidentiality
4 agreements that we had in place with them.

5 Q. That's true. And you knew that the lawyers were in
6 communication with the clients about the clients' goals, didn't
7 you? You understood that when you were communicating with the
8 lawyers or the lawyers were communicating with you about the
9 settlement noteholders' views of the bankruptcy?

10 A. I presume that the settlement noteholders' lawyers talked
11 to the settlement noteholders, yes.

12 Q. And there were also times, outside of the confidentiality
13 agreements, when the debtor had communications directly with
14 the settlement noteholders. For example, there were
15 discussions, were there not, about litigation strategy and
16 litigation approach between the debtors' litigation counsel at
17 Quinn Emanuel and some of the individuals at the funds?

18 A. Yes. There were discussions with the settlement
19 noteholders directly that revolved around public information.

20 Q. And there were discussions directly with the settlement
21 noteholders in the January or February 2010 period about a
22 prospective plan of reorganization. Do you recall testifying
23 about that?

24 A. I do. That was the settlement noteholders' idea for plan
25 of reorganization structures that they wanted to tell the

1 debtor about some of their ideas that they have.

2 Q. And the debtor wanted the settlement noteholders' input on
3 these issues because the settlement noteholders held such large
4 shares of each of the tranches of debt the debtor had. Isn't
5 that fair?

6 A. I think there was some input that we wanted from the
7 settlement noteholders and there was a lot of input that we got
8 from them that we didn't want.

9 Q. Well, in the instances when you did want it, Mr. Kosturos,
10 why did you want the views of the holders of such large shares
11 of the debtors' capital structure?

12 A. I think it's important in a Chapter 11, when you're
13 conducting negotiations, that you understand the point of view
14 of several of the large holders of credit, the creditors, of
15 some of their input. I think it's important to ground yourself
16 in negotiations to make sure that you understand where people
17 are. You don't have to agree with them but you probably should
18 be listening to some of their input.

19 Q. And why? How do you use the information that you learn?
20 Why is that important?

21 A. Well, some of it's important that when you go to propose a
22 plan of reorganization you'd like to have some idea of what
23 votes you might obtain in some of the creditor classes, whether
24 they will vote yes or no. It's not important to have them all
25 on board but it's -- you know, you don't want to be able to

1 propose a plan that just is going to get voted down by the
2 creditors.

3 Q. Based on your experience from other bankruptcies, is it
4 typical for a debtor to seek the views of significant creditors
5 on important issues that affect the estate?

6 A. Yes.

7 Q. And so investors who have acquired large amounts of the
8 debtors' bonds can expect to be consulted by the debtor on
9 major issues, is that a fair statement?

10 A. Not necessarily.

11 Q. Why not?

12 A. I wouldn't term it to be -- major issues, I -- there's
13 been so many major issues in this case that we didn't seek the
14 input of settlement noteholders on.

15 Q. Well, that wasn't my question. I was trying to ask more
16 generally --

17 A. Oh.

18 Q. -- if major significant creditors can expect to be
19 consulted by the estate when significant issues arise in the
20 bankruptcy?

21 MR. SLACK: Your Honor, I object to the form of that
22 question as it calls for the witness to understand what others
23 were thinking and expecting.

24 THE COURT: Overruled. He can answer from his
25 experience in bankruptcy cases.

1 A. Well, first of all, you have an unsecured creditors'
2 committee who represents the interests of all of the creditors.
3 So you certainly can seek advise from them, of which we did
4 throughout this case, number one.

5 Number two, there were certain creditors, both Fried Frank
6 and the settlement noteholders, but let's not limit it to that
7 because we certainly got a lot of input from a lot of other
8 creditors.

9 So there were settlement noteholders who certainly voiced
10 their opinion regularly. There was a lot of people throughout
11 this case who have always -- and quite frankly, I think that's
12 very typical that you might see in many other Chapter 11s.
13 Take, for instance, the Lehman case, there has been multiple
14 plans of reorganization filed by creditors that were not in the
15 same -- that didn't agree with the debtors' plan. So lots of
16 conversations going on.

17 Q. And when you take input from an investor or creditor like
18 the settlement noteholders, you have some idea what portion of
19 the capital structure they hold, what percentage, don't you?

20 A. No.

21 Q. Then how do you know whether or not to take their input,
22 whether or not what they think is potentially significant?

23 A. Well, usually they will make a statement or they begin
24 with a call and say I hold a large position. They usually
25 don't tell you precisely how much it is unless, I believe -- is

1 it a 2019 that they file in this case? I believe it's a 2019.
2 That would be one way of really getting empirical evidence of
3 how much of a position they held. But other than that, it's
4 usually based on their representations.

5 Sometimes in this case our lawyers reached out to the
6 Fried Frank group and White & Case to have them confirm how big
7 a position they had. An example of that is Mr. Gropper's
8 letter to me at, I believe, the end of April, of which he
9 suggested that himself and Owl Creek and Elliot had had X
10 position of senior notes, subnotes, junior notes. So that's
11 typically how it usually works in a Chapter 11.

12 Q. Okay. I want to move to November 2009 when you entered
13 into confidentiality agreements with four of these funds, the
14 four settlement noteholders, in order for them to be able to
15 participate in the JPMorgan negotiations, is that right? And
16 at that time did you have an estimate in mind of what portion
17 of, let's start with the senior notes, that group of four funds
18 held?

19 A. I don't recall the percentage of senior notes that they
20 said they owned.

21 Q. Can you give the Court an estimate of the percentage?

22 A. I don't believe it was a blocking position but I just
23 don't remember.

24 Q. So those four funds, your recollection is that it was
25 something less than a third? Is that a blocking position,

1 thirty-three percent?

2 A. Yes. I believe it was less than a third, but again,
3 that's complete recollection. I could be wrong on that.

4 Q. Do you have a recollection for the senior subordinated
5 notes at that time for that group?

6 A. I believe that they said that they owned around sixty
7 percent.

8 Q. And how about the peers?

9 A. I believe that they said they had about the same size
10 position in the peers.

11 Q. So over fifty percent -- your recollection is that they
12 represented -- in that time frame, November 2009, they owned
13 more than fifty percent of both the senior sub notes and the
14 peers?

15 A. I believe so.

16 Q. Could you turn in your binder to EC-203, please? Do you
17 have that in front of you?

18 A. Yes, I do.

19 Q. And this is an e-mail on which you were copied, isn't that
20 right?

21 A. Yes, I was copied on this.

22 Q. And it was from Brian Rosen to Brian Pfeifer at Fried
23 Frank, Gerry Uzzi of White & Case, Fred Hodara at Akin Gump,
24 correct?

25 A. That's correct.

1 Q. And I asked you about this at your deposition and you said
2 there are certain things in this case that you remember and
3 this was one of them, is that right?

4 A. That was one of them.

5 MR. SARGENT: I'd like to move for the admission of
6 203.

7 MR. SLACK: We have not objection, Your Honor.

8 THE COURT: It's admitted.

9 (Equity Committee's Exhibit EC-201, E-mail from Brian Rosen to
10 Brian Pfeifer, Gerry Uzzi, Fred Hodara on which William
11 Kosturos was cc'd, was hereby received into evidence as of this
12 date.)

13 Q. Now, Mr. Kosturos, do you recall the FDIC trying to become
14 involved in the settlement process at about this time, June of
15 2009?

16 A. I don't think that the FDIC was necessarily engaging with
17 us at this point. What they were trying to do was to talk to
18 individual creditors and try to gauge at what level these
19 creditors might be willing to settle.

20 Q. So the answer to my question is yes, is that right? You
21 do recall the FDIC attempting to get involved in the settlement
22 process between Washington Mutual and JPMorgan at about this
23 time? They did it by contacting the major creditors, correct?

24 A. I wouldn't term it that they were getting involved in
25 negotiations because they certainly weren't willing to engage

1 the debtor directly in negotiations.

2 Q. So that was actually my next question is if you look at
3 the e-mail, the first sentence is: "Through some discussions
4 with Tom Califano," Mr. Rosen says. Do you recall if you
5 participated in any of those discussions with Tom Califano at
6 about that time?

7 A. No. No, I did not.

8 Q. You did not. You understood at the time, though, that the
9 FDIC was contacting individual creditors?

10 A. I did.

11 Q. And you knew that Califano was contacting White & Case
12 counsel for some of the settlement noteholders?

13 A. I believe I knew this from talking to my counsel, Brian
14 Rosen, about this.

15 Q. It was your understanding. You also understood that the
16 FDIC was contacting Fried Frank?

17 A. Well, I presume if they -- Mr. Califano's a very
18 experienced bankruptcy lawyer, very well respected. He
19 certainly knew all the parties. I don't know directly that he
20 was reaching out to Fried Frank or White & Case. I presume he
21 was, but I don't know that for a fact.

22 Q. Did you have an understanding that he was also reaching
23 out directly to some of the creditors themselves?

24 A. I believe that's what Mr. Rosen writes here in his e-mail.

25 Q. Did you have that understanding yourself at this time?

1 A. I did.

2 Q. Do you know which creditors Mr. Califano had reached out
3 to?

4 A. I don't recall.

5 Q. And you didn't think the FDIC's involvement in this way
6 was constructive at this time, is that right?

7 A. No.

8 Q. But you understood from this or from other facts that the
9 FDIC had seen the debtors' settlement proposals with JPMC from
10 March and April, correct?

11 A. I know that they heard the settlement offer that we made
12 in Sullivan & Cromwell's office on March 10th because they were
13 there.

14 Q. Okay.

15 A. I don't know if they got any other term sheets. I don't
16 believe we sent any directly to them.

17 Q. So as you sit here today, you don't recall whether or not
18 the FDIC had seen the April exchange of term sheets?

19 A. Right. I don't know.

20 Q. You understood at the time, though, that from the meeting
21 at Sullivan & Cromwell March 10th, that the FDIC was on board
22 with the White & Case offer, correct?

23 A. On board?

24 Q. They agreed with it, they thought it was -- what are Mr.
25 Rosen's words? Just a second. The FDIC says that WMI's

1 proposal was eminently reasonable. Was that your understanding
2 at the time?

3 A. I don't remember if that's the White & C -- I don't know
4 really what offer he's referring to there.

5 Q. One of the -- it was your understanding that at least one
6 of the offers that the debtor had made before June 17, 2009,
7 the FDIC thought was eminently reasonable. Wasn't that your
8 understanding at this time?

9 A. That's what the document says so it must be what we
10 thought at the time.

11 Q. I'm asking if that's what you knew, apart from this
12 document, Mr. Kosturos.

13 A. I can't remember, at this time, having a lot of
14 conversations with the FDIC. They're not the easiest person to
15 talk to directly. Most of the conversations that we were going
16 to have with the FDIC probably would have been between Mr.
17 Rosen and Mr. Califano. That was the easiest way to have a
18 discussion with the FDIC. We didn't have a lot of
19 relationships with them or much communications with them at
20 this point.

21 Q. Was it also your understanding, as Mr. Rosen goes on to
22 say in the e-mail, that the FDIC wanted the parties, meaning
23 the debtor and JPMC, to lower their demands for the tax refunds
24 so that a portion of that money could go to the FDIC or the WMB
25 bondholders? Is that your recollection?

1 A. I think this is the first time that we hear from the FDIC
2 about this issue, approximately around this time period.

3 Q. But this document is consistent with your recollection
4 from the time that that was the FDIC's view, correct?

5 A. Yes.

6 Q. And it was your understanding that the FDIC had
7 communicated that to Frank Fried or White & Case, correct?

8 A. I don't know what they communicated to them.

9 Q. Okay. You didn't have an understanding at the time if
10 that was something that the FDIC had shared with the counsel
11 for the settlement noteholders?

12 A. I can only testify to what the debtor knew.

13 Q. I'm asking you what Mr. Kosturos knew for now. Did Mr.
14 Kosturos know or have an understanding at least that this
15 communication had occurred?

16 A. Again, I'm just reading the same e-mail you are about -- I
17 don't know what Mr. Califano specifically said to individual
18 creditors nor do I know what he talked about to Frank Fried or
19 to White & Case. I can only testify as to what my knowledge
20 is, as you said, and this e-mail is helpful to make me remember
21 some of the details of this.

22 Q. So you do remember that. You remember you had an
23 understanding at the time -- and I'm sorry, I don't mean to
24 badger you about this, I'm just trying to get a clear answer to
25 my question about your recollection. Do you recall at the time

1 understanding that the FDIC had contacted counsel for the
2 settlement noteholders with information such as laid out in Mr.
3 Rosen's e-mail?

4 MR. SLACK: Your Honor, I object. This has been asked
5 time. This is the third time.

6 THE COURT: Overruled. Can you answer?

7 A. Again, I -- my general knowledge is consistent with what's
8 in this e-mail, but I do not know precisely what Mr. Califano
9 would have said to Frank Fried or White & Case or individual
10 noteholders. We are getting this idea of what was going on in
11 the marketplace. That was really, I think, what the essence of
12 what Mr. Rosen's e-mail is really talking about here.

13 Q. Thank you. We'll move on.

14 I want to turn to November 2009. Frank Fried again
15 approached the debtors, you were approached by counsel for the
16 settlement noteholders about having their clients, the hedge
17 funds, enter into confidentiality agreements. Isn't that your
18 recollection?

19 A. Yes.

20 Q. And that was so the hedge funds could participate in
21 settlement negotiations, correct?

22 A. Yes.

23 Q. And you thought at the time that it would be a good idea
24 to get the hedge funds involved again because of the progress
25 that had been made based on the term sheets that Appaloosa and

1 Centerbridge exchanged with JPMC in August. I think you
2 testified about this some on your direct, is that correct?

3 A. That's correct.

4 Q. And you had learned about those August negotiations from
5 Jim Bolin after they had in fact occurred.

6 A. That's right. I had learned that from Mr. Bolin sometime
7 in mid September. And I believe also at that point that JPM
8 had withdrawn their last term sheet.

9 MR. SARGENT: Could we have Exhibit EC-212, please?

10 Q. If you could turn to that in your binder?

11 A. Okay.

12 Q. And do you see this is an e-mail you're forwarding to
13 Brian Rosen and others, and the e-mail that's being forwarded
14 by you is from Jim Bolin to you. Is that right?

15 A. That's correct.

16 Q. And is this in fact the e-mail -- the e-mail from Mr.
17 Bolin, the second e-mail in the chain, from Mr. Bolin to you,
18 is this the e-mail in which he provided you a copy of the terms
19 that had been exchanged between Appaloosa, Centerbridge and
20 JPMC in August?

21 A. Yes.

22 Q. And this e-mail is dated October 28th. When did you say
23 you first learned of the negotiations between Appaloosa,
24 Centerbridge and JPMC?

25 A. I believe there was a meeting in September where Mr. Bolin

1 verbally told me that.

2 Q. And at the time did he tell you any of the terms that had
3 been included?

4 A. Broadly.

5 Q. Did he explain to you the percentages of tax refunds that
6 were being proposed by each party?

7 A. I would -- I can't precisely remember but I'm sure he did.
8 That would have been really the key to the proposal, so --

9 Q. Why do you say that that would be the key to the proposal?

10 A. Well, that's really the big value drivers that separate
11 the offers is the splitting of the taxes as well as a number of
12 other things, but usually most of those negotiations are
13 focused on the splits of the taxes.

14 MR. SARGENT: Your Honor, we move for the admission of
15 EC-212.

16 THE COURT: It's admitted.

17 (Equity Committee's Exhibit EC-212, October 28th e-mail from
18 Jim Bolin to Brian Rosen and others detailing the terms that
19 had been exchanged between Appaloosa, Centerbridge and JPMC in
20 August, was hereby received into evidence as of this date.)

21 MR. SARGENT: Thank you.

22 Q. You were encouraged when you saw this by the progress that
23 had been made since your own negotiations in April, correct?

24 A. I'm sorry, could you repeat that, please?

25 Q. Sure. I was saying you were encouraged by the progress

1 that had been made, comparing this proposal with your own
2 negotiations with JPMC from the previous spring, from April,
3 isn't that right?

4 A. I think after I got over the fact that I was very upset
5 with them for negotiating directly with JPM, and not including
6 the debtors or the unsecured creditors' committee, I probably
7 then looked at it a little bit more objectively and then looked
8 that they had made some progress.

9 Q. And you identified progress in particular in the
10 allocation of these tax refunds, as you were just discussing,
11 correct?

12 A. Yes, because at this point the existing tax refunds,
13 obviously, the 2.6 to 3 point -- the 3 billion is the main
14 negotiating item. There is no second NOL existing. There has
15 been talk about Congress. It hasn't been filed yet. But I was
16 encouraged by the fact that JPM had raised their offer to
17 seventy-five/twenty-five.

18 MR. SARGENT: Can we turn to EC-118, please? This
19 exhibit has already been admitted.

20 Q. And do you see that the bottom e-mail on this chain is
21 from Don McCree at JPMorgan to you?

22 A. Yes.

23 Q. And do you recall negotiating with Mr. McCree on behalf of
24 JPMorgan at about this time, November 20, 2009?

25 A. I do.

1 Q. And you received this e-mail, in fact, on November 20th,
2 do you recall receiving it?

3 A. I do.

4 Q. And you forwarded it to Jim Bolin at Appaloosa and Viv
5 Melwani at Centerbridge, is that right?

6 A. Yes. We were in the confidential period with them and I
7 forwarded it to, yes, I did.

8 Q. Do you consider this information from JPMC and this e-mail
9 confidential?

10 A. Yes.

11 Q. And you would not have provided this to the settlement
12 noteholders if they had not been under a confidentiality
13 agreement, would you?

14 A. No.

15 Q. Now, you understood Mr. McCree to be saying here that JPMC
16 was willing to negotiate a resolution based on a split of the
17 first tax refund seventy/thirty. That -- I know that's only
18 one item in the general -- in the global settlement agreement
19 but on that particular line he was willing to negotiate on that
20 basis, isn't that what he's saying.

21 A. That's what the email says.

22 Q. In other words, JPMC would accept this proposal for that
23 provision if the debtors would, is that what this means?

24 A. No. As I testified earlier in my direct, we had had
25 another party, the Paulson Group, which had also put forth an

1 offer to JPM without our knowledge. That offer had reset the
2 expectations of the bank bondholders such that they believed
3 that they were entitled to 1.1 billion dollars of a claim in
4 our estate.

5 So we're -- and I've tried to explain this before, is that
6 prior to the September, October time period, we had been trying
7 to negotiate a two-way deal between the debtors and JPM. It
8 became very obvious after the new tax law had been implemented
9 and the bondholders' expectations had been set to very, very
10 high levels, that this was no longer a two-way agreement, this
11 was going to have to be at least a three-way agreement to
12 either include the bank bondholders or the FDIC. So while Mr.
13 McCree was saying there might be a thirty/seventy split of
14 taxes, we were -- we had new issues to encounter in
15 negotiations that would only drive us farther apart.

16 Q. I understand that there may have been additional issues
17 that needed to be negotiated, but with regard to the dispute
18 between WMI and JPMC, those two parties, isn't this e-mail a
19 statement that if the debtor will agree to a thirty/seventy
20 split, JPMC will agree to the same split?

21 A. I would not agree to a thirty/seventy split with JPMorgan
22 at this time period unless I was able to definitively contain
23 the bank bondholder claims and the FDIC claims and get
24 certainty, because at this point they had now been engaged -- I
25 think everyone remembers how active the bank bondholders'

1 counsel was in court. They had been granted -- I can't
2 remember the right word; I think standing is the right word.
3 They had been granted standing in this court. They had been in
4 this court all the time, and they clearly were gaining momentum
5 that they were going to be a party we had to negotiate with.
6 So while Mr. McCree would love to have taken a two-way
7 agreement with us, washed his hands of the bank bondholder
8 problems and the FDIC problems and say good luck, those are
9 your issues now, we would not enter into an agreement with him
10 at this level.

11 Q. Sorry, my question may not have been clear. I wasn't
12 asking about your view of this proposal; I was asking about Mr.
13 McCree's. Didn't you understand this e-mail, when you received
14 it --

15 A. Yes.

16 Q. -- to be a statement by JPMC that if the debtor would
17 agree to a thirty/seventy split, JPMC would also agree with a
18 thirty/seventy split as between those two parties. Isn't that
19 what this e-mail means?

20 A. Mr. McCree is a very seasoned negotiator from JPMorgan,
21 represented by very, very competent counsel in Sullivan &
22 Cromwell. What JPMorgan wanted to do was to try to figure out
23 a way to agree to things with the debtor only and get out of
24 the way. And we would not, at this point in time, agree to a
25 two-way, which is what this is suggesting. There's no two-way

1 to be had at this time frame. It has to be broadened into a
2 three-way or a four-way.

3 So Mr. McCree can say all he wants about what he's willing
4 to do, and in his subsequent offer to us he makes it very
5 clear: Those are your problems, not mine. And of which we
6 say there's no deal to be had and there's not much to talk
7 about if that's all you want to do.

8 Q. I'm going to try a third time, Mr. Kosturos. I'm just
9 trying to ask a fairly straightforward question which I think
10 can be answered yes or no. Did you understand this e-mail when
11 you received it to be a statement that JPMC would agree to a
12 thirty/seventy split with the estate if the estate would agree?
13 I'm not asking if you would agree. I'm asking if that's what
14 this e-mail meant.

15 A. The one thing I've learned about Mr. McCree is because he
16 says one thing on one line item doesn't mean he's going to not
17 change five others. And Mr. McCree is very good at that. So
18 this doesn't really help that much. It's an e-mail; it's a
19 data point. But without a term sheet attached to it and what
20 all his other terms and conditions were, I would not agree to
21 that.

22 Q. I'll move on. Did you tell the settlement noteholders at
23 this time that you believed JPMC would be willing to settle
24 with the estate on this basis, thirty/seventy split of taxes?

25 A. Well, I forwarded this e-mail to them, so I presume they

1 had that information.

2 Q. They had the information that JPMC was willing to settle
3 on a thirty/seventy split of taxes if the estate would settle
4 on that basis?

5 A. Well, the estate wouldn't settle on that basis, so let's
6 be clear.

7 Q. I think you've made that very clear --

8 A. Thank you.

9 Q. -- Mr. Kosturos. But what I still don't feel clear on is
10 the answer to the other question I was asking, which is whether
11 or not you let the settlement noteholders know that you
12 believed JPMC would settle with the estate at a thirty/seventy
13 split?

14 MR. SLACK: Your Honor, I object as asked and
15 answered. What's embedded in that question is the same
16 question that the witness was asked three times before which is
17 whether --

18 THE COURT: Please limit your objection. Sustained.
19 I think you've beaten this to death.

20 MR. SARGENT: Can we have EC-119? 119. This has
21 already been admitted.

22 Q. Do you recognize this as an e-mail forwarding the term
23 sheet that you provided to JPMC on November 23, 2009?

24 A. Yes.

25 Q. And was this the next formal settlement proposal that the

1 debtor made to JPMC?

2 A. Yes.

3 Q. And at the time you prepared this, did you have in mind
4 Mr. McCree's e-mail that we just looked at, EC-118?

5 A. I did.

6 Q. And in this term sheet the debtor is offering to split the
7 taxes at thirty-nine percent WMI, sixty-one percent JPMC, is
8 that right?

9 A. That's correct. But the key to this is the la -- is a
10 couple bullet points down when we say that this all will be
11 agreed upon but a settlement with the bank bondholders needs to
12 be in place where we'll split fifty/fifty with JPM. And this,
13 again, is where the negotiations now start to include a
14 three-way. So there's no longer a two-way. Unless this
15 condition can get done there's no agreement.

16 Q. I want to focus for a moment, though, just on the narrower
17 issue, if you don't mind, Mr. Kosturos, of the allocation of
18 the tax refund that you previously testified was the key to
19 this negotiation. Do you recall what the allocation of the tax
20 refund was in the offer that Centerbridge and Appaloosa made to
21 JPMC at either the end of July or the very beginning of August?

22 A. That would be Appaloosa and Centerbridge's offer?

23 Q. Yes.

24 A. I think it was sixty/forty.

25 Q. Sixty/forty. So this offer from the debtor three months

1 later represented a one percent move, is that right?

2 A. Yes.

3 Q. Was that your idea to make that move, one percent?

4 A. I can't remember whose idea. Obviously we had sought
5 their input on this term sheet so -- but I think the key -- the
6 bigger key, again, I might direct you to is the three-way that
7 we're trying to figure out.

8 Q. You --

9 A. At this point also, I might add, is that the tax refunds,
10 the first of the tax refunds which is a thirty-nine/sixty-one
11 split, in our mind is a much firmer number. We have already
12 put the tax refunds in for the most part. We know what those
13 numbers are. The second NOL still, at this point, is -- it's
14 in its early stages so this one, at this point in time when
15 this offer was put forth, is a little bit more speculative.

16 Q. My question was whether the one percent -- the move of
17 only one percent between July and November, these two offers,
18 was that your idea?

19 A. I --

20 Q. Do you recall?

21 A. Ultimately if it's in the term sheet at this point then it
22 is something that I'm agreeing to because this is the debtors'
23 term sheet.

24 Q. You knew when you prepared this, didn't you, that JPMC's
25 August offer had been seventy-five/twenty-five, correct?

1 A. I did.

2 Q. And when you got the e-mail three days before this offer
3 went out, from JPMC's in-house counsel, Mr. McCree, he had
4 moved five percentage points, hadn't he, from seventy-five to
5 seventy?

6 A. Yes.

7 Q. And yet you were moving only one percentage point here,
8 correct?

9 A. I -- first of all, just to be clear, Mr. McCree is not an
10 internal counsel; he's an executive vice president. I don't
11 believe he's counsel but just to --

12 Q. Okay.

13 A. -- set that straight. But I think subsequent to this term
14 sheet I believe that Mr. McCree would point that out to me.

15 Q. Do you recall that conversation?

16 A. I do.

17 Q. Can we turn to EC-120? There's already been a lot of
18 testimony about this one. I don't want to spend very much time
19 on it. This is the resetting the bookends offer. You recall
20 that?

21 A. I do.

22 Q. And in this JPMC was offering to go to a 100 percent for
23 its zero percent for Washington Mutual's split of the first tax
24 refund?

25 A. Yes.

1 Q. And when you received this, Mr. Kosturos, you didn't
2 believe that the negotiations with JPMC were over, did you?

3 A. I believed they had certainly taken a turn for the worse.
4 There's been many times in this, up to date, you know, from the
5 start of these negotiations till here where we had certainly
6 start and stopped, but this was going to add a new twist to the
7 negotiations and I think that in a way Mr. McCree was letting
8 me know that he was not pleased with my previous offer and he
9 was going to put together an offer that really didn't make
10 sense and he knew I would not be too interested in.

11 Q. But you knew this wasn't the end of the game, right?

12 A. At that point one can -- in retrospect, obviously it
13 wasn't the end of the game. At the time, you never know. I
14 mean, he's suing us, they're being very aggressive in court,
15 they're certainly making headway on a lot of issues, whether
16 that's -- I couldn't be certain that these negotiations were on
17 or off.

18 Q. You told the settlement noteholders, though, didn't you,
19 that you didn't think that the negotiations were off. You
20 thought that it was worth putting together another settlement
21 proposal, in fact, didn't you?

22 A. I'm not sure that I told the settlement noteholders that I
23 was going to make another proposal, nor am I completely sure
24 that they ever knew about the next proposal.

25 Q. Well, were you in the courtroom the other day for Mr.

1 Gropper's testimony from Aurelius?

2 A. On his direct I was. I don't --

3 Q. On is cross?

4 A. I don't remember if I stayed for all of his cross or not.

5 Q. Well, he testified that the creditors' group and the
6 debtor discussed this offer from JPMC and they developed a
7 further counter-offer to it. Is that consistent with your
8 recollection?

9 A. I would be surprised -- I don't know for sure.

10 Q. You don't remember whether or not after receiving the
11 resetting the bookends offer that changed the playing field you
12 continued to work with the settlement noteholders to develop
13 another offer. You don't remember?

14 A. I don't know.

15 Q. It was under the term of the confidentiality agreement,
16 wasn't it, sir?

17 A. It was, but one factor I will point out is that the next
18 offer that we make is seventy/thirty so we go from
19 sixty-one/thirty-nine to seventy/thirty.

20 Q. Um-hum.

21 A. That would be a big move for them to make at this point in
22 time, considering their positions of where they were. So I
23 cannot with any certainty tell you that they'd seen that offer,
24 knew about that offer. I just don't know.

25 Q. Well, we can -- let's turn to EC-305. It's another

1 document that's already been admitted.

2 A. Oh, way back here.

3 Q. I believe, in fact, this was admitted under testimony by
4 Mr. Gropper who testified that he recognized it, based on the
5 terms in the attached term sheet, as being the next offer that
6 he participated in developing and providing to JPMC in early
7 December. So you're not disagreeing with his testimony, are
8 you?

9 A. I just can't be certain of that. I mean, if Mr. Gropper
10 said it that's Mr. Gropper's knowledge, and I just don't
11 remember whether they had seen this or not.

12 Q. And this term sheet -- you do agree, don't you, that this
13 term sheet was prepared and provided to JPMC December 8, 2009,
14 correct?

15 A. 2008, yes.

16 Q. 2009, I think.

17 A. Am I reading that wrong? Chad Smith to Don McCree,
18 December 2008.

19 Q. No, it's got to be 2009. I'm not sure if --

20 A. I'm just reading the e-mail.

21 Q. Okay. In any event, the tax allocation -- I think you've
22 already testified about this -- in this proposal is
23 seventy/thirty between Washington Mutual and JPMC, correct?

24 A. Yes.

25 Q. And this was sent not much more than a week after the

1 resetting the bookends e-mail? I think I may have just asked
2 you that --

3 A. Yes.

4 Q. -- but just to confirm it. And was this offer sent to the
5 FDIC, Mr. Kosturos, do you know?

6 A. I don't know.

7 Q. You don't recall.

8 A. No, I'm sorry, I don't recall. I don't know.

9 Q. In any case, when you sent this offer you didn't believe
10 negotiations with JPMC were dead, did you?

11 A. I sent them a term sheet.

12 Q. Meaning, no, you didn't think they were dead.

13 A. At this point, no.

14 Q. JPMC actually agreed to settlement on these terms based on
15 this term sheet -- I mean, not all of the terms, but I'm asking
16 specifically about the split of the first tax refund at
17 seventy/thirty. Didn't they agree to that?

18 MR. SLACK: I object to the form of that question.

19 THE COURT: Sustained.

20 Q. Did JPMC agree to the settlement term seventy/thirty split
21 of the first tax refund after receiving this term sheet?

22 A. It's my recollection that they did. But again, I just
23 want to -- on the record, this was all conditioned on could we
24 get the bank bondholders on board using second NOL dollars
25 only, up to 500 million dollars. If the bank bondholders did

1 not agree to that, there was nothing to discuss.

2 Q. And it's not too surprising that JPMC agreed to that
3 provision because it's the same provision that they put in that
4 e-mail to you November 20th, correct? seventy/thirty split of
5 the first tax refund.

6 A. Well, again, this is all conditioned upon a further
7 negotiation with the bank bondholders which ultimately will
8 be -- we were not able to get done.

9 Q. Thank you. Would you turn to EC-306 in your binder,
10 please?

11 A. Yes.

12 Q. And do you recognize this as an e-mail that you sent to
13 Mr. McCree December 11th, which would be about three days after
14 the last term sheet?

15 A. Yes.

16 Q. And it represents further negotiations off that term sheet
17 from December 8th of certain provisions, isn't that fair?

18 A. Yeah. I just don't have -- yes, I think it's fair.

19 Q. And you see that in the very first sentence you say, "I
20 spoke to my major creditors" --

21 A. Um-hum.

22 Q. -- "about this issue." Does that refresh your
23 recollection about whether or not, particularly given that this
24 is within the confidentiality period --

25 A. Yeah.

1 Q. -- you were continuing to discuss these negotiations with
2 the creditors?

3 A. I don't know because I will tell Mr. McCree -- you see,
4 the one thing about -- the wonderful thing about having the
5 settlement noteholders involved is that when I talk to Mr.
6 McCree I can say that the settlement noteholders will or won't
7 do things, that not necessarily he can confirm.

8 Q. So your testimony is this might not be true.

9 A. This might not be true.

10 Q. Okay. Let's go to the next document, please, EC-122.

11 Actually, I'm sorry, I need -- I had one more question for
12 you on the last document, but I do want to ask it. It's EC-306
13 again.

14 MR. SLACK: Can I get a copy? We do not have a copy
15 of EC-306. Can I get a copy of that?

16 MR. SARGENT: Sure.

17 MR. SLACK: Okay. If I could have just one second to
18 look at it, Your Honor?

19 THE COURT: Well, if you want your fellow to make his
20 plane ride I think we need to move.

21 MR. SLACK: No, I -- that's fine. I looked at it and
22 we have not objection.

23 MR. SARGENT: Oh, actually, that reminds me, thank
24 you, that I should move it into evidence. Move EC-306 into
25 evidence.

1 THE COURT: It's admitted.

2 MR. SLACK: No objection.

3 (Equity Committee's Exhibit EC-306, e-mail from Mr. Kosturos to
4 Mr. McCree December 11, was hereby received into evidence as of
5 this date.)

6 Q. Do you see that you say a little further down in this
7 e-mail, "Their agreement to proceed with my previous
8 offer --"? Does that statement refresh your recollection that
9 the settlement noteholders had in fact agreed on the terms of
10 the December 8th offer, or is that again something that you may
11 have just been making -- or inventing for purposes of this
12 e-mail?

13 A. You know, I can't be sure, again.

14 Q. Now let's please go ahead to 122. The bottom e-mail in
15 this chain is from you to Jim Bolin and Viv Melwani. Do you
16 see that?

17 A. Yes.

18 Q. Do you recall sending this e-mail to them?

19 A. No, but I'm sure I did.

20 Q. Do you recall giving them updates at around this time,
21 Thursday December 17th?

22 A. I don't recall.

23 Q. Would that have been an update about the status of JPMC
24 negotiations?

25 A. Could be. I don't know. It could be a lot of things. I

1 mean, I wouldn't -- again, they're in a confidential period so
2 I mean, I certainly could have. I just don't specifically
3 recall the conversation.

4 Q. And you certainly don't recall not telling them about
5 settlement negotiations when you were in this confidentiality
6 period, do you?

7 A. I will say that yes, I -- it's not that I recall or not
8 recall what I told them.

9 Q. Do you know if you actually had this update phone call?

10 A. I don't know.

11 MR. SARGENT: I move for the admission of EC-122.

12 MR. SLACK: No objection, Your Honor.

13 (Equity Committee's Exhibit EC-122, e-mail chain between Mr.
14 Kosturos and Jim Bolin and Vivek Melwani, was hereby received
15 into evidence as of this date.)

16 MR. SARGENT: It may already be admitted.

17 EC-296, please? This is a bigger one. We may be able
18 to skip this.

19 Q. Your earlier testimony, Mr. Kosturos, was that JPMC, with
20 regard to the one provision in the settlement negotiations, the
21 allocation of the first tax refund, JPMC agreed, based on your
22 December 8th term sheet, to that term, isn't that correct?

23 MR. SLACK: Objection to the form of the question.

24 A. That's not true. They didn't agree to a bunch of the
25 other asset splits --

1 Q. I'm as -- I'm sorry.

2 A. -- the asset splits, including the litigation, Visa
3 shares, I don't believe they had agreed to the inter-company
4 paying off of the loans either. So there was still a number of
5 moving parts within the term sheet of who got what in assets.

6 Q. And I'm not try -- I'm trying to focus solely on the one,
7 on the seventy/thirty split.

8 A. Oh.

9 Q. They agreed on that term, isn't that your testimony?

10 A. My understanding is that they had -- for the time had said
11 yes that they would go with that, but for the bank bondholders
12 not being able to get them on board.

13 Q. And I was going to show you this just to show you that
14 this includes a seventy/thirty split of taxes as of January 10,
15 2010. But that doesn't surprise you --

16 A. No.

17 Q. -- based on your earlier testimony.

18 A. No.

19 Q. And at this point you had gotten to the point where you
20 were drafting -- you weren't just exchanging one or two-page
21 term sheets, you had drafted a complete settlement agreement
22 with JPMC, isn't that right?

23 A. This was a first draft of hundreds -- I wouldn't say
24 hundreds; hundreds is too many.

25 Q. But --

1 A. Many.

2 Q. -- it was a draft of a complete settlement agreement with
3 JPMC as of January 10th. I'm not misreading it, am I?

4 A. No. This is our first draft, I believe, that we delivered
5 to them.

6 Q. Do you know when counsel for the debtors started drafting
7 a settlement agreement with JPMC?

8 A. I have no idea.

9 Q. Would it surprise you if it was as far back as November
10 2009?

11 A. No. It's a pretty thorough document.

12 MR. SARGENT: Sorry, Your Honor. Can we go to EC-211?

13 Q. Do you recognize this document, Mr. Kosturos?

14 A. Yes.

15 Q. Is this an e-mail you sent to Donald McCree on about March
16 3, 2010?

17 A. Yes.

18 MR. SARGENT: I move the admission of this document.

19 MR. SLACK: No objection, Your Honor.

20 THE COURT: It's admitted.

21 (Equity Committee's Exhibit EC-211, e-mail from Mr. Kosturos to
22 Donald McCree, March 3, 2010, was hereby received into evidence
23 as of this date.)

24 MR. SARGENT: EC-304, please.

25 Q. This is an e-mail from Brian Rosen --

1 A. Oh, a different one?

2 Q. Yeah, I'm sorry, 304 -- EC-304.

3 A. Oh, I thought you were on 211. I'm sorry.

4 Q. I'm already done with 211.

5 A. Oh, that was quick.

6 Q. Yeah. I'm trying to move quickly.

7 Did you find EC-304?

8 A. Yep.

9 Q. This is an e-mail -- do you recognize this as an e-mail
10 from Brian Rosen to Chad Smith and yourself from January 12,
11 2010?

12 A. Yes.

13 Q. And he's forwarding an e-mail from Stacey Friedman of
14 Sullivan & Cromwell, is that correct?

15 A. Yes.

16 Q. She was an attorney representing JPMC?

17 A. She was.

18 MR. SARGENT: I'd move the admission of EC-304.

19 MR. SLACK: No objection.

20 Q. And do you see this --

21 THE COURT: It's admitted.

22 (Equity Committee's Exhibit EC-304, e-mail dated 1/12/10 from
23 Brian Rosen to Chad Smith and Mr. Kosturos, was hereby received
24 into evidence as of this date.)

25 MR. SARGENT: Oh, I'm sorry, Your Honor. Thank you.

1 THE COURT: I think you want that in there.

2 MR. SARGENT: I do.

3 Q. There's an attachment to this which is a draft term sheet
4 dated 1/12/2010. Do you see that, Mr. Kosturos?

5 A. I do.

6 Q. Is that a term sheet that was prepared by the debtor or is
7 that something that was prepared by Sullivan & Cromwell and was
8 part of what was being forwarded? Do you know?

9 A. I believe that this was a JPM term sheet back to us
10 because they had left open the amount of dollars that they
11 would be willing to contribute to the cap of the bank
12 bondholder settlement, whereas ours previously had had a
13 number.

14 Q. I think you testified on direct about a meeting on January
15 12th with some of the settlement noteholders. Do you recall
16 that testimony?

17 A. Yes.

18 Q. That's the same date as this e-mail. Do you see that,
19 EC-304?

20 A. Same date.

21 Q. Was this information shared with the settlement
22 noteholders at that meeting?

23 A. No.

24 Q. The FDIC and the -- you've already testified about this a
25 number of times. Turn to it now. The FDIC and the WMB

1 bondholders were involved in the settlement negotiations at
2 this point in January of 2010, is that correct?

3 A. Yes. We had met with the bank bondholders in December
4 with a meeting that they had asked for with the debtor of which
5 they brought their new law firm, Boies, to explain to us that
6 it was their position that the FDIC receivership owned the
7 second NOL and it did not sell the second NOL to JPMorgan and
8 that they were going to proceed with litigation and that they
9 wanted a significant portion of that NOL which would be -- or
10 that tax refund which would be in excess of two billion dollars
11 and that I believe that they had said that they had begun
12 lobbying in efforts to make sure that we are unable to get the
13 second NOL ourselves.

14 Q. You needed -- I think your testimony has been that you
15 needed to reach a three-way settlement for this to be final,
16 and the three parts being the debtor, JPMC and then the FDIC
17 and the WMB bondholders together, is that right?

18 A. That's correct.

19 Q. I think you testified -- is it -- did you -- were counsel
20 for the settlement noteholders involved in your negotiations
21 with the FDIC and the WMB bondholders in this period, January
22 and February of 2010?

23 A. I don't believe they were.

24 Q. Could you turn to EC-277, please?

25 THE COURT: What number?

1 MR. SARGENT: 277. This has already been admitted.

2 Q. This is an e-mail. The top e-mail in the chain is from
3 Brad Scheler -- he's at Fried Frank, correct? To Brian Rosen
4 and yourself --

5 A. Yes.

6 Q. -- and some other parties. And do you see that Mr.
7 Scheler is talking about negotiating with the FDIC?

8 A. Yes.

9 Q. Does this refresh your recollection, sir, about whether or
10 not counsel for the settlement noteholders was involved with
11 the discussions with the FDIC at this period?

12 A. Well, I believe that the period that you asked for earlier
13 was unclear. I thought you were referring to the January and
14 early February time period. But this is an e-mail at the end
15 of February that says that they would like to get an update of
16 what's going on. So I apologize, but --

17 Q. At what point in time did you involve Fried Frank in
18 negotiations with the FDIC, sir?

19 A. I can't be sure but I thought it was sometime in late
20 February.

21 Q. Okay. Certainly it had happened by the time of this
22 e-mail, correct?

23 A. Yes.

24 Q. And prior to actually getting them involved in the
25 discussions, you were updating them on the status of

1 negotiations with the FDIC, weren't you?

2 A. No.

3 Q. Would you turn to EC-126, please?

4 A. I'm sorry?

5 Q. EC-126. It's an e-mail string that begins with an agenda
6 for a meeting. Mr. Rosen's e-mail indicates that the clients,
7 the settlement noteholders themselves, will be attending this
8 meeting. Do you recall this meeting?

9 A. I have somewhat of a recollection of this meeting -- this
10 isn't one of those that sticks out to me, but I'll do my best.

11 Q. Okay. And do you recall a meeting at about this time when
12 negotiations with the FDIC were discussed with the settlement
13 noteholders themselves and not just their counsel?

14 A. Well, as Mr. Rosen says in his e-mail, that we will -- I
15 want to make sure I get this one right -- we will only be
16 disclosing public information to the settlement noteholders,
17 and this is something that Mr. Rosen had done throughout
18 meetings with both counsel and the noteholders when they were
19 in non-confidential periods, so Mr. Rosen had laid the ground
20 rules to the meeting that only public information could be
21 discussed if the settlement noteholders were in the room.

22 So my recollection of this meeting was they were in
23 the room for a period of time, which only public information
24 was disclosed. They were then excused and then the meeting
25 continued.

1 Q. And who else was at the meeting?

2 A. I think the unsecured creditors' committee counsel and
3 advisors were there as well, besides the -- like, Mr. -- you
4 know -- besides Fried Frank and their clients.

5 Q. JPMC was not there?

6 A. Not to my recollection.

7 Q. FDIC?

8 A. No. The FDIC rarely left Washington, D.C.

9 Q. Do you recall a meeting at about this time that JPMC
10 attended and when they learned that they were going to be
11 attendees -- the settlement noteholders, who were not going to
12 be restricted -- JPMC left the meeting?

13 A. I do remember a meeting like that taking place; I don't
14 remember if it was this meeting or another meeting.

15 Q. It was about this time, though?

16 A. I think so, yeah.

17 Q. How frequently were you meeting with the settlement
18 noteholders, not their attorneys, but the clients, in this time
19 period?

20 A. With the clients?

21 Q. Yeah.

22 A. I can't remember meeting with the clients only.

23 Q. I mean -- their attorneys may have been present also, but
24 we now have testimony that this is a meeting, which not just
25 White & Case or Fried Frank attended, but representatives of

1 the funds attended, correct? This meeting on February --
2 referenced in EC-126?

3 A. Yeah, the February 20 -- was it 25? Yeah.

4 Q. And there was also a meeting in which JPMC attended and
5 left when they learned that the settlement noteholders were not
6 going to be restricted?

7 A. Yeah, I just can't remember if that was the same meeting,
8 in a different meeting -- I don't recall.

9 Q. If you look over this agenda, what are the items on here
10 that would not require clients to be restricted? In other
11 words, what are the items on here that involve publically
12 available information? Let's just go through them.

13 A. Sure.

14 Q. Communications with the FDIC, WMB bond holders and JPMC.
15 Is that publically available information?

16 A. We would not be discussing any of Section 1 with them.

17 Q. Section 2, the plan of reorganization, the debtors' view
18 on the plan of reorganization?

19 A. So this one -- there's a lot of confusion going on in our
20 e-emails and documents. This meeting was set up for their
21 ideas on the plan of reorganization, so 2(a), the debtors' view
22 of their term sheet, not -- see, again, "term sheet" gets
23 thrown around in this case too much -- this is their idea of
24 that very complicated certificate A, B and C and D issues, so
25 they are -- they want to have a discussion with us to tell us

1 what they think of it and what our response is.

2 Q. Right. Was that publically available information, the
3 debtors' response to that term sheet?

4 A. Well, it's their document.

5 Q. Where was it -

6 A. I --

7 Q. -- was that publically available information, their
8 document, their report?

9 A. We're just responding to their document. I would presume
10 that's public.

11 Q. You presume it was public?

12 A. Sure.

13 Q. And would you presume that your response to it was public?

14 A. That we didn't like it?

15 Q. I'm not sure what your response was --

16 A. That was our -- our response was we didn't like it. And
17 we had no interest in pursuing it.

18 Q. Was the litigation update provided under number 3? Was
19 that publically available information?

20 A. There certainly could be portions of the litigation
21 update, if you referred only to publically filed motions, a
22 summary of that. But otherwise, it would be nonpublic
23 information. I don't know if we covered that or not with the
24 settlement noteholders.

25 Q. In your experience, do investors managing hundreds of

1 millions of dollars in funds typically devote time to going to
2 meetings where pleadings that they can read online are
3 described?

4 A. Well, there was a lot of frustration with the settlement
5 noteholders here, because they -- you know, we would exclude
6 them from those types of things. They were very interested in
7 what was going on. They participated in the part of the
8 meeting that they could and they were excused. They completely
9 understood why they had to leave.

10 Q. Let's move on to another document. EC-279, please. This
11 has already been admitted. This is an e-mail exchange between
12 yourself and Jim Bolin discussing a meeting that you invited
13 him to attend at JPMC on or about March 1st, 2010. Do you
14 recall that meeting?

15 A. I do.

16 Q. Were you keeping Mr. Bolin abreast of developments in the
17 settlement negotiations with JPMC at this point?

18 A. No. Their -- I believe their counsel had requested this
19 meeting and we set it up.

20 Q. Their counsel -- Appaloosa's counsel?

21 A. Fried Frank.

22 Q. Fried Frank had set up this meeting?

23 A. Fried Frank had requested this meeting, we set -- the
24 debtor set it up.

25 Q. What was your --

1 A. And that --

2 Q. Go ahead. I'm sorry.

3 A. That's all I have to say.

4 Q. Okay. What was your understanding about the purpose for
5 this meeting, Mr. Kosturos?

6 A. I believe that Mr. Bolin and Mr. Scheler wanted to impart
7 some information to Mr. McCree. Impart's probably a lousy
8 word -- they wanted to tell them that they were -- they wanted
9 to tell them where they were -- if a deal could be struck -- be
10 struck. They wanted to register a point of view with JPM.

11 Q. And Mr. Bolin could contribute to this despite his lack of
12 knowledge about the state of negotiations at this point?

13 A. Sure.

14 Q. How?

15 A. Mr. Bolin had very strong views of the size of the value
16 that should be received to WMI for them to be able to agree to
17 this. And I think that it had been some time since Mr. Bolin
18 and Mr. Scheler had talked to JPMorgan and they wanted to
19 register their thoughts on the negotiations.

20 Q. Do you recall if this meeting was before or after the
21 meeting that JPMC left because they found out that attendees
22 would not be restricted?

23 A. Don't know.

24 Q. Turn to EC-282, please?

25 THE COURT: Give me that number again?

1 MR. SARGENT: 282, Your Honor. Sorry.

2 Q. You recall receiving this e-mail from Mr. Scheler?

3 A. I do.

4 MR. SARGENT: I move the admission of EC-282, please?

5 THE COURT: It's admitted.

6 (Equity Committee's Exhibit EC-282, e-mail from Mr. Scheler to
7 Mr. Kosturos, was hereby received into evidence as of this
8 date.)

9 Q. Do you see that this is cc'd to certain e-mail aliases,
10 WaMu Appaloosa, WaMu Aurelius? You understand that those -- I
11 mean, that the clients are actually being copied on this
12 e-mail?

13 A. I do.

14 Q. And Mr. Scheler is talking about his client's interests in
15 the first sentence and actually throughout the paragraph, isn't
16 that fair?

17 A. That's fair.

18 Q. Do you recall discussions along these lines being shared
19 with the clients and the settlement noteholders in this
20 timeframe, March 4th?

21 A. What I do recall is there was a very important hearing
22 coming up of which potentially Your Honor could read the
23 summary judgment motion and to deal with the 9.5 issue. And
24 Mr. Scheler wanted to use that as a negotiating sword. I don't
25 know what the right word is but what he wanted to do was to put

1 our feet to the fire to either have a deal and read it into the
2 record or, from his point of view, he wanted us to go forward
3 with the summary judgment and the 9.5.

4 Q. Please turn to 284, EC-284? This is an e-mail from you to
5 Mr. Scheler, at least the second e-mail in the string is. Do
6 you recog -- do you recall sending that e-mail?

7 A. I do.

8 Q. Do you see that Mr. Scheler forwarded it to his client,
9 Jim Bolin?

10 A. I do.

11 Q. Was it your understanding when you sent this e-mail that
12 the information that it contained would be forwarded by Mr.
13 Scheler to his clients?

14 A. It was not.

15 Q. Was this public information that you were sharing with Mr.
16 Scheler at this time?

17 A. No. I might add that -- oh, never mind.

18 Q. Can we have EC-297? So if you could just take a quick
19 look at 297 and 298, I believe they're both cover e-mails
20 forwarding draft settlement agreements from you to various
21 other parties. And we just wanted to move their admission. I
22 don't have any questions for you. So I ask you about the
23 content of the documents. I ask you if you recognize these and
24 then move their admission.

25 A. From Mr. Rosen to other people?

1 Q. Yes. I believe you're copied on them.

2 A. Yes.

3 MR. SARGENT: Move the admission of EC-297 and 298.

4 Any objection?

5 MR. SLACK: Well, I have no objection. I just want to
6 make sure I understand. 298 looks like it's an exhibit with
7 more than a cover letter.

8 MR. SARGENT: Both of these have our cover e-mail and
9 an attached draft settlement agreement.

10 MR. SLACK: It's just my binder at 297. That may be
11 the case but my binder doesn't have that. We have no
12 objection.

13 THE COURT: All right, they're admitted.
14 (Equity Committee's Exhibits EC-297 and 298, cover e-mails with
15 attachments forwarding draft settlement agreements from Mr.
16 Rosen to various other parties, were hereby received into
17 evidence as of this date.)

18 MR. SARGENT: And I have two other documents that I'd
19 like to get admitted and then I have a couple more questions.
20 I'm almost done.

21 BY MR. SARGENT:

22 Q. Could you take a look at EC-229 and EC-230? I believe
23 they're in your binder. They're fairly large. They're fee
24 applications from Weil Gotshal, in this case for the months of
25 November and December 2009.

1 MR. SARGENT: If you'll just stipulate to their
2 admissibility, we don't have to ask any questions about them.

3 MR. ROSEN: Your Honor, we're okay with the Court
4 considering the entire docket of the case, including fee
5 applications.

6 MR. SARGENT: So we'll move --

7 THE COURT: I'm not considering the entire docket in
8 this case. So I will admit 229 and 230.
9 (Equity Committee's Exhibits 229 and 230, fee applications from
10 Weil Gotshal for November and December 2009, were hereby
11 received into evidence as of this date.)

12 MR. SARGENT: Thank you.

13 BY MR. SARGENT:

14 Q. Mr. Kosturos, what efforts has the debtor undertaken to
15 estimate the value of -- well, let me ask you if you understand
16 what I mean by the term "510(b) claims"?

17 A. I do understand what the 510(b) means.

18 Q. And what efforts has the debtor undertaken to estimate the
19 size of the 510(b) Class?

20 A. It's my understanding that the 510(b) class consists of
21 several unliquidated claims that have been through various
22 points in this case. I believe some of them have just been
23 relegated to sit in the 510(b) class until any value will
24 proceed past the PIERS, and at which that case, some of those
25 cases will be reinstated or go forward and we will have to go

1 through a process of dealing with those claims.

2 MR. ROSEN: Your Honor, at this point, I just want to
3 register our objection that this is now going back to tranche
4 one type of issues. And the Court said it would consider
5 objections on a question by question basis.

6 THE COURT: Well, I'll allow it.

7 MR. SARGENT: It's just a few questions, Your Honor.

8 Q. Does the --

9 MR. SARGENT: Thank you.

10 Q. Does the estate have an estimate on the value of the
11 510(b) class?

12 A. No.

13 Q. And does the estate have an estimate on the value of any
14 of the component litigations in the 510(b) class?

15 A. No.

16 Q. None whatsoever?

17 A. To my recollection, those cases remain on the docket in
18 whatever status that they are. But I am not aware of any
19 estimates of what's to the value of those litigations in the
20 510(b) claims.

21 Q. Formal or informal?

22 A. Sorry?

23 Q. Formal or informal estimates?

24 A. I'm not aware of any.

25 Q. I would like to ask you some questions about the D&O

1 claims --

2 MR. SARGENT: Do you want to register an objection to
3 this or want me to go ahead and ask?

4 MR. ROSEN: Same objection, Your Honor, outside the
5 scope of this module.

6 THE COURT: I'll allow it.

7 Q. One of the topics that we identified in the deposition
8 notice that we sent was claims, or potential claims, that the
9 estate might have against its present and former officers and
10 directors. Do you recall that that was in the notice for the
11 deposition where you testified?

12 A. I do.

13 Q. And the -- isn't it your understanding that the debtor
14 objected to that and told us they would not provide a witness
15 on that subject?

16 MR. ROSEN: Your Honor, I would like to rise just to
17 let the Court be aware that we did file a 30(b)(6) objection.
18 And we said that we would not be presenting a witness in this
19 particular issue. The equity committee chose to ignore each
20 and every one of those objections, never requested a meet and
21 confer. When we got to the deposition, Your Honor, consistent
22 with the objection that was filed, Mr. Kosturos was not
23 tendered for that purpose.

24 Q. I'd like to ask you some questions about it now, if I may?
25 You understand that when Washington Mutual filed for

1 bankruptcy, WMI held at least potential claims against the
2 management that oversaw the company's failure, correct?

3 A. Yes.

4 Q. And it might have had claims against former directors,
5 correct?

6 A. Yes.

7 Q. And present directors who were sitting on the board prior
8 to the bankruptcy?

9 A. That's correct.

10 Q. Same with officers who had been in place prior to the
11 bankruptcy?

12 A. Yes.

13 Q. And it could have claims -- preference claims -- against
14 those individuals, correct?

15 A. It could have a wide range of claims against those types
16 of individuals.

17 Q. Preference claims, correct?

18 A. Preference would be one of many, potentially. Obviously
19 that the Ds and Os have many types of defenses to those, but
20 yes, we could have claims.

21 Q. And there are claims against them for breaches of various
22 duties that they had to the company too, correct, potential
23 claims?

24 A. Potential.

25 Q. And you understood that these claims may well be assets of

1 the estate, correct?

2 A. Yes. They could be to the extent that we had determined
3 that there was value and colorable arguments to that, yes.

4 Q. And you understood that the estate had -- that the debtor
5 had insurance policies covering these claims, correct?

6 A. Yes, we do.

7 Q. And the policy had a limit per year of 250 million
8 dollars, isn't that right?

9 A. I believe that's correct.

10 Q. And a number of claims have been asserted against the
11 policy for the 2007-2008 year, isn't that right?

12 A. Yes.

13 Q. And it's the debtors' understanding and expectation that
14 the entire 250 million dollar limit in that policy will be used
15 to pay those claims and attorneys' fees that were expended in
16 defending those claims; isn't that the estate's understanding?

17 A. I don't know if that's been filled up yet or not.

18 Q. Is the expectation that it's going to be though --

19 A. At some point.

20 Q. -- shortly? Soon, correct?

21 A. I don't know about -- I don't know soon is the right way I
22 would term that.

23 Q. In any case, the estate has never asserted a claim against
24 that policy, the '07-'08 policy, has it?

25 A. I'm not sure if had filed notices on the 2007/08 policy.

1 I know we have filed noticed on the 2008/2009 D&O policy.

2 Q. When were those notices filed?

3 A. Off the top of my head, I don't know.

4 Q. Is it within the past month?

5 A. I don't know.

6 Q. It might be within the past month, so it's not more than a
7 year ago?

8 A. I don't know.

9 Q. It was in 2011, wasn't it, sir?

10 A. I don't know how many times I should answer, I don't know.

11 Q. I'm just trying to see if you have any idea when it --
12 could you estimate when the date was? It sounds like you just
13 don't have any idea. Is that right?

14 A. Yes.

15 Q. Okay. It's your understanding, isn't it, that no party
16 has yet successfully asserted a claim against the '08-'09
17 policy?

18 A. That is my understanding.

19 Q. The full 250 million dollar policy limit remains
20 available?

21 A. That is my understanding.

22 Q. Did the debtor make a conscious decision at some point,
23 not to pursue claims against any of its former officers or
24 directors?

25 A. The effort that the debtor undertook on the Ds and Os, was

1 to my knowledge as follows: in 2010, we discussed many times
2 with the unsecured creditors' committee about pursuit of Ds and
3 Os. Also in that time period, at the beginning of formation of
4 the equity committee, we shared that information with Venable.
5 Subsequent to that, at the urging of the Court, we sent all of
6 our privileged information to the equity committee as well.

7 Throughout the summer of 2010, we had weekly meetings
8 amongst the creditors' committee, the equity committee and the
9 debtor as we went through potential claims against the Ds and
10 Os. Towards the end of that period, we were entered into
11 tolling agreements, I believe 150 or so, that have a signature
12 of the creditors' committee, the equity committee and the
13 debtor.

14 So, to my knowledge, we have preserved a great many, if
15 not all, of the claims against the Ds and Os and those claims
16 will be set forth in the liquidation trust posteffective date
17 and can be pursued.

18 Q. A couple of things in there I want to ask you about. Is
19 it your testimony that over the summer of 2010 there were
20 weekly meetings on D&O claims involving the equity committee?

21 A. I believe Mr. Taylor was participating in those meetings.

22 Q. So has anyone on behalf of the debtor done an analysis
23 into the potential statute of limitations issues for the D & O
24 claims?

25 A. It's my understanding that all parties and attorneys

1 during that period, had discussions about statute of
2 limitations, yes.

3 Q. And did -- the debtor has recently retained counsel to
4 investigate the D&O claims, is that right?

5 A. Klee Tuchin has put forth an application here, yes.

6 Q. Okay. What's the scope of the investigation that Klee
7 Tuchin has been retained to conduct?

8 A. It's in their application. I believe that they are to
9 continue or supplement the investigation into the Ds and Os as
10 well as third parties who aren't released. Those third parties
11 would include investment bankers, auditors, rating agencies.

12 Q. You testified a moment ago that tolling agreements were
13 entered into with at least some directors or former directors,
14 is that correct?

15 A. Yes, they -- in fact that's ongoing as we speak. And I
16 can report that we have entered into tolling agreements with
17 all nine post-petition directors. Previous to that, we had two
18 directors on tolling agreements that the equity committee
19 signed, as well as approximately 140-ish tolling agreements
20 with Ds and Os, as well as tolling agreements with all the
21 unreleased third parties that I just mentioned.

22 Q. So your testimony is that you've now entered into tolling
23 agreements with all nine of the current directors?

24 A. That's correct.

25 Q. And do you know when those agreements were entered into,

1 sir?

2 A. I believe they were the last day or so.

3 Q. Over the last day or so?

4 A. Yes.

5 Q. Within the last -- is it your understanding that those
6 tolling agreements are retroactive so that claims that were
7 alive as of two years from the filing date of the petition date
8 of this bankruptcy, those claims would still -- also be tolled
9 by that agreement?

10 A. I don't. That's outside of my knowledge. Our outside
11 counsel has been negotiating those and our general counsel.

12 Q. Do you have an understanding that the Bankruptcy Code
13 provides for a two-year tolling of all causes of action held by
14 the debtor?

15 A. Personally, I don't. Our lawyers, obviously, are well
16 aware of that fact as well as the unsecured creditors'
17 committee.

18 Q. And is it your recollection that the effort that you just
19 discussed, these weekly meetings, to enter into tolling
20 agreements coincided with the running of that two-year tolling
21 resulting from the filing of the bankruptcy petition?

22 A. I'm sure it did. I mean, we have counsel from the equity
23 committee; we have counsel from the creditors' committee; we
24 have counsel from the debtor. Absolutely. I would presume
25 that as they went through that process, they absolutely

1 understood the potential claims and actions as well as the
2 defenses that they all had and I'm sure they did a thorough
3 job.

4 Q. Well, do you know that the equity provided you an e-mail
5 at the time, don't you, sir, indicating that the equity
6 committee had not conducted an investigation or had the
7 opportunity to conduct an investigation to any of these claims
8 and that the equity committee considered that the debtors'
9 responsibility to enter into tolling agreements with those that
10 it believed had -- it might have claim, correct?

11 A. I can only look at the tolling agreements of which the
12 equity committee signed so I am not aware of your e-mail. But
13 you certainly -- the equity committee was certainly involved in
14 the tolling agreement.

15 Q. There were no tolling agreements entered into with current
16 directors at that point in time, is that right?

17 A. That's not true.

18 Q. Who were the then current directors with whom tolling
19 agreements were entered into in September 2010?

20 A. Alan Fishman.

21 Q. Only one of the nine?

22 A. That's correct.

23 MR. SARGENT: That's all the questions I have, Your
24 Honor.

25 THE COURT: Can we take a five minute break? And how

1 long does counsel think you're going to be?

2 MR. COFFEY: Your Honor, unfortunately we tried to
3 come to an agreement on a couple of documents and were unable
4 to do so. So I think it's going to take longer than the thirty
5 minutes I had hoped.

6 THE COURT: How long is Mr. Kosturos available?

7 MR. ROSEN: Your Honor, I think based upon his
8 rejiggering (sic) his airplane schedule, he will be able to go
9 beyond 4:00, probably till 5:30.

10 THE COURT: I'd like to finish by 5, so -- let's take
11 a five minute break though.

12 (Recess from 3:09 p.m. until 3:18 p.m.)

13 THE COURT: All right, you may proceed.

14 MR. COFFEY: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. COFFEY:

17 Q. Good afternoon, Mr. Kosturos. Jeremy Coffey with Brown
18 Rudnick on behalf of the trust preferred security holders. Mr.
19 Kosturos, I'd like to pick up a line of questioning that Mr.
20 Sargent touched on right before the end of his cross-
21 examination. And this deals with the claims.

22 Mr. Kosturos, whose responsibility is it to preserve stay
23 claims?

24 A. Well, the debtor. In this case, the unsecured creditors'
25 committee had taken a role in this by court order in September

1 of 2010.

2 Q. But you're not saying it's the creditors' committee's
3 responsibility to properly preserve claims, are you?

4 A. I think that they have a fiduciary responsibility to it,
5 yes, in the -- as well as the equity committee, as well as
6 myself -- or not myself, but the debtor.

7 Q. You don't have fiduciary responsibility to preserve
8 claims?

9 A. I am the chief restructuring officer.

10 Q. You're aware that in the confirmation opinion -- the
11 opinions on confirmation, the court made mention of a possible
12 failure by the debtors to properly preserve the business store
13 claims against JPMorgan, are you not?

14 A. I'm sure that -- if that was what was in the opinion.

15 Q. Okay. It sounds like perhaps there's a failure to
16 properly preserve estate claims now as well?

17 A. We don't believe so.

18 THE COURT: Save it for argument.

19 MR. COFFEY: Okay.

20 Q. Mr. Kosturos, you're the chief restructuring officer, you
21 just said. You've also been designated as a trustee for
22 liquidating trust that will be created pursuant to the plan, is
23 that correct?

24 A. That is in the document, yes.

25 Q. Okay. It's in the document but is that your understanding?

1 A. That's my understanding.

2 Q. Okay. And that trust will be vested with certain estate
3 claims, is that correct?

4 A. Yes.

5 Q. All right. And the recoveries from those claims will go
6 to the beneficiaries of the trust, is that your understanding?

7 A. Yes, which is -- will be the creditors of the estate and
8 will fall down the waterfall.

9 Q. That's right. Once the PIERS are paid in full, the trust
10 interest will move on to the next Class, is that right?

11 A. That's correct.

12 Q. All right. And eventually, once all Classes are paid in
13 full, they'll go to Classes 19 and Classes 20, is that your
14 understanding?

15 A. That would be a great result.

16 Q. But they wouldn't go to all members of Class 19 and Class
17 20, correct?

18 A. What members would they not go to?

19 Q. Well, they wouldn't go to the members who voted against
20 the plan, is that correct?

21 A. I think that was the deal. If you vote no and don't give
22 us a release, you don't get a distribution.

23 Q. Right. So they wouldn't go to anyone who voted against
24 the plan. So if we look at Class 20 -- are you familiar with
25 how the vote came in on Class 20?

1 MR. ROSEN: Your Honor, against, we've let this go.
2 Same objection as with respect to Mr. Sargent. Beyond the
3 scope of module 3.

4 THE COURT: I'll allow a little bit.

5 MR. COFFEY: Your Honor, Mr. Kosturos testified
6 through his declaration at the first confirmation hearing --

7 THE COURT: I'm allowing it.

8 MR. COFFEY: Okay, I just -- trying to address --

9 THE COURT: Okay? Go ahead.

10 MR. COFFEY: -- the objection.

11 BY MR. COFFEY:

12 Q. Mr. Kosturos, you're aware of how the vote came in in
13 Class 20?

14 A. Not off the top of my head.

15 MR. COFFEY: Okay. Can we pull up the Klamser
16 declaration? Could we could go to the vote results for Class
17 20?

18 Q. All right. So if we look at Cass 20, 19.61 percent voted
19 in favor of the plan, is that your understanding?

20 A. I believe that's what the document says.

21 Q. Okay. So eighty percent of Class 20 will never see a dime
22 out of this estate no matter how much comes in on that
23 litigation, is that correct?

24 A. Apparently that's how they voted. They still have their
25 rights.

1 Q. Right. And so in Class 19, you're aware that -- well,
2 Class 19 didn't get to vote on this plan, correct?

3 A. That's correct.

4 Q. Okay. So the last time around, Class 19, only thirty-four
5 percent voted in favor of the plan, is that your understanding?

6 A. I don't have a recollection of that. I'm sorry.

7 MR. COFFEY: Can we bring up the prior Klamser
8 declaration?

9 Q. This is the voting results from the last plan. Thirty-
10 four percent voted in favor of the plan, meaning sixty-five
11 percent will never see a dime from this case, is that correct?

12 A. Well, I don't know if they'll never see a dime. They
13 certainly have not granted releases and are free to pursue
14 whatever claims they will pursue. So I presume that they had a
15 reason to vote no.

16 Q. Okay. So of that thirty-four percent, is it your
17 understanding that the settlement noteholders hold
18 approximately twenty-five percent of Class 19?

19 A. I have no idea.

20 MR. COFFEY: Okay. Can we go to the Fried Frank 2019?

21 (Pause)

22 MR. COFFEY: Do you have it?

23 (Pause)

24 THE COURT: Do you have a docket number for this?

25 MR. COFFEY: Yes, Your Honor. It is 3761, Your Honor.

1 This is the last 2019 filed by Fried Frank.

2 Q. If we go to the second page, paragraph 2, looking at Fried
3 Frank's represented holdings of their clients, approximately
4 955,665 shares of preferred stock issued by WMI -- are you
5 aware of how large the PIERS class is?

6 A. No.

7 Q. Okay. If I told you it was four billion in liquidation
8 preference, would that refresh your recollection?

9 A. I think that's approximately my understanding.

10 Q. Okay. So we don't know exactly what they hold, but they
11 say they hold approximately 955,665. That would be about a
12 quarter of Class 19, is that your understanding?

13 A. I'm confused of this -- what you have up here. It says
14 "Preferred Stock". How do I know that's just Class 19?

15 Q. We don't know, but is it your understanding?

16 A. No.

17 Q. Okay. Mr. Kosturos, the plan imposes caps on recoveries
18 of certain classes like the PIERS, is that correct?

19 A. Caps?

20 Q. Caps. There -- you know, once they receive a hundred
21 percent, the trust interest would move down to the next class.
22 Is that your understanding of how it works?

23 A. That's generally how it works in Chapter 11, yeah, in the
24 plan.

25 Q. Okay. But it doesn't work like that in Class 19 or Class

1 20, does it?

2 A. I believe that in Class 19, you were to vote yes or no,
3 whether you wanted the fifty million dollar recovery from
4 JPMorgan. And then after that, you didn't get to vote again on
5 the fifty million after the outcome of your litigation.

6 Q. So the twenty percent of Class 20 and the thirty-four
7 percent of Class 19 that voted for the plan and will receive
8 some distribution on account of litigation proceeds, is there
9 any cap on their recovery under the plan?

10 A. Whatever would be left, then they'd have the face value of
11 their stock -- of their preferred stock.

12 Q. All right. So Classes 19 and Classes 20, they're
13 preferred stock, is that your understanding?

14 A. I think so. Again, if you put a plan in front of me, I
15 guess I could tell you.

16 Q. Okay. Well, I'll represent to you they're preferred
17 stock --

18 A. Thank you.

19 Q. -- and they have liquidation preferences, is that correct?

20 A. Yes.

21 Q. Okay. So there's no limitation on how much above that
22 liquidation preference they could receive on account of their
23 trust interest, is that correct?

24 A. You know, you're -- you're way outside of my --

25 MR. ROSEN: Your Honor, again, Mr. Kosturos is not

1 here for the 1129 aspect. That was what Mr. Goulding is all
2 about.

3 THE COURT: Well, doesn't --

4 MR. ROSEN: Mr. Coffey --

5 THE COURT: -- the plan speak for itself?

6 MR. ROSEN: It does, Your Honor.

7 MR. COFFEY: It does, Your Honor. But --

8 THE COURT: Why don't we stay the --

9 MR. COFFEY: -- if I could address the objection?

10 THE COURT: If he doesn't know --

11 MR. COFFEY: Okay. If I could address the objection,
12 Your Honor -- and this may be a way to resolve what I think
13 will be future objections as we go along. Mr. Kosturos was
14 proffered at the first hearing. And we've learned today we're
15 going to incorporate that by reference through his declaration.
16 His declaration spoke to all the 1129 factors, including best
17 interest, cramdown. So he already has on his direct testimony,
18 in the record of this case, testified to things squarely within
19 the scope of my examination.

20 MR. ROSEN: And Your Honor, at the first confirmation
21 hearing, the TPS folks crossed Mr. Kosturos ad nauseam with
22 respect to that declaration.

23 MR. COFFEY: Your Honor, I'll move on.

24 BY MR. COFFEY:

25 Q. Mr. Kosturos, I'd like to talk more about the claims that

1 we'll go into, liquidation trust that you're going to oversee.
2 You're aware the debtors just filed an application to retain
3 Klee Tuchin, is that correct?

4 A. I'm aware.

5 Q. Okay.

6 MR. COFFEY: Your Honor, may I approach the witness?

7 THE COURT: Yes.

8 (Pause)

9 THE COURT: Do you have the docket number for this?

10 MR. COFFEY: Yes, Your Honor. It's docket number
11 8111.

12 Q. Mr. Kosturos, what I've handed to you is docket number
13 8111. You heard Mr. Goulding's testimony that he had not
14 reviewed the Klee Tuchin retention application. You were here
15 for that?

16 A. Yes.

17 Q. Okay. But you've reviewed the application?

18 A. Yes.

19 Q. Okay. You approved of its filing?

20 A. Yes.

21 Q. All right. Let's turn, if you would, to paragraph 12 --
22 and let me know when you're there, sir.

23 A. I am.

24 Q. Okay. I want to read it to you. It says "Importantly,
25 KTBS' services are not duplicative of the services provided by

1 other professionals presently retained in these Chapter cases."

2 Do you agree with that representation?

3 A. Yes.

4 Q. You'd make that representation today?

5 A. I think I just said yes.

6 Q. Okay. Turn, if you would, to paragraph 6? And so, let's
7 talk about those nonduplicative services Klee Tuchin will
8 provide. And at the end of paragraph 6, it appears they're
9 being retained to "investigate, assess, and, if requested,
10 potentially prosecute claims of the WMI estate against former
11 officers and directors and other third parties, including
12 former auditors, investment banking advisors, rating agencies
13 and others that may be identified with potential claims." Did
14 you approve that scope of engagement?

15 A. I did not negotiate this paragraph that you just
16 discussed.

17 Q. All right. But you approved of the filing of the
18 application?

19 A. Yes.

20 Q. So you approved the scope of the engagement?

21 A. Sure.

22 Q. Okay.

23 MR. COFFEY: Your Honor, I move for the admission of
24 the Klee Tuchin application.

25 THE COURT: It's admitted.

1 (TPS' Exhibit 5, the Klee Tuchin application, was hereby
2 received into evidence as of this date.)

3 Q. It's accurate, sir, isn't it, that the claims that Klee
4 Tuchin will be investigating, assessing and, if requested,
5 potentially prosecuting are the same claims that will vest in
6 the liquidation trust?

7 A. That's correct.

8 Q. All right. So since Klee Tuchin will be the first estate
9 professional to investigate and assess these claims, sitting
10 here today, it's fair to say you've never investigated or
11 assessed these claims, is that correct?

12 A. No, that's not correct.

13 Q. Where do I have it wrong? You said that you agreed that
14 these are nonduplicative services, no estate professional has
15 ever done them, but now you're saying you've investigated and
16 assessed them?

17 MR. ROSEN: Your Honor, I think that mischaracterizes
18 what Mr. Kosturos' testimony was.

19 THE COURT: Overruled. You can answer.

20 THE WITNESS: Should I answer that?

21 THE COURT: Yes.

22 A. So, as I testified earlier before, the debtor, the
23 creditors' committee and the equity committee entered into
24 tolling arrangements with a great many of the Ds and Os;
25 preserving a great many, if not all -- in fact, all, as I'd

1 been led to believe, of the types of things that we can bring
2 forth going forward.

3 Now, that work had been done. What we've done there is
4 look at potential claims, potential defenses, of which there
5 are significant defenses. And then Klee Tuchin will be hired
6 to supplement the effort that's been done already and will lead
7 that process going forward.

8 Q. All right. So if Klee Tuchin's been hired to investigate
9 and assess the claims, sitting here today, you can't tell the
10 Court the value of the claims that'll be vested in the
11 liquidation trust, can you?

12 A. I'm not in the business of valuing litigation.

13 Q. And you can't tell the Court what insurance may be
14 available to pay the claims if you're successful in prosecuting
15 them, can you?

16 A. Sure I can. 2008/2009 policy is completely open, 250
17 million dollars. I'm not exactly sure how much is left on the
18 2007/2008.

19 Q. Okay.

20 A. And then last time I checked, I believe the third parties
21 all had significant potential ability to pay. That would be
22 the rating agencies, the investment banks and the auditors --

23 Q. Okay.

24 A. -- which we all have tolling agreements with.

25 Q. When you say significant -- I'm sorry. You said they have

1 the ability to pay significant judgments?

2 A. I would believe they do.

3 Q. Okay. In your mind, what is significant?

4 A. I don't know.

5 Q. Could it be a billion dollars in claims?

6 A. I don't know.

7 Q. Hundred million?

8 A. Stand by my previous answer.

9 Q. Mr. Kosturos, during your testimony at the confirmation
10 hearing, you testified that it was the debtors' job to maximize
11 value for stakeholders.

12 A. Are you referring to this one or another one?

13 Q. The December testimony. Do you recall saying that?

14 A. Could you repeat what I said?

15 Q. Sure. You testified that it is the debtors' job to
16 maximize value for stakeholders. Do you agree with that?

17 A. Agreed.

18 Q. Okay. It's still your job to do that?

19 A. Last time I checked.

20 Q. Would you say you have a fiduciary duty to maximize value?

21 A. I don't know how many times you want me to answer that,
22 but yes.

23 Q. Okay. As a fiduciary, Mr. Kosturos, you wouldn't approve
24 of putting fifty to seventy-five million dollars in the
25 liquidation trust unless you thought the creditors would get

1 some significant recovery in excess of that, would you?

2 A. Well, let's talk about the fifty to seventy-five and put a
3 little bit more detail behind that number.

4 So, the liquidating trust will have to operate for three
5 years, so they'll be operating expenses involved in that. As
6 we all well know, there'll be claims that the liquidating trust
7 will have to continue to defend itself against. There are many
8 claims that are unresolved here: employee claims, Mr.
9 Steinberg's LTW claims, 510(b)s, should we need to get that
10 far. So there'll be a number of dollars that need to be
11 expended to just continue that process.

12 There will also be some dollars set aside to potentially
13 pursue the D&O claims and the third party claims to the extent
14 that the liquidating trust determines that there won't be --
15 there isn't anything to pursue, there's not colorable claims
16 and there's not potential defenses. Then any unused dollars
17 could be returned to the creditors and will be paid back
18 through the waterfall.

19 Q. Okay. What portion of that fifty to seventy-five million
20 will be dedicated to prosecuting claims?

21 A. That's just an estimate. We haven't really finalized any
22 of those budgets yet. It's hard to tell when these Chapter 11s
23 will end. So we haven't finalized that budget. I think the
24 estimate that Mr. Goulding gave was -- Mr. Goulding gave on --
25 in his testimony was twenty-five million dollars.

1 Q. Okay. But you wouldn't invest twenty-five million dollars
2 pursuing claims unless you thought you'd get some significant
3 amount in excess of that in return for your creditors, would
4 you?

5 A. That's generally the idea.

6 Q. Okay. What would be a significant return? Ten times
7 that?

8 A. I think you've asked me to previously define
9 significant --

10 Q. You don't know?

11 A. -- which -- in excess of twenty-five.

12 Q. Okay.

13 A. Although, obviously, there'll be some money that one would
14 need to spend to continue to develop some of those claims.

15 Q. Right. Speaking of those claims, Mr. Kosturos, you're
16 aware, are you not, that the Senate Subcommittee on permanent
17 investigations, conducted an extensive investigation into the
18 financial crisis of 2008. Are you aware of that?

19 A. I'm barely aware of that, yes.

20 Q. Okay. And there was a focus on Washington Mutual in their
21 investigation. You're aware of that, are you not?

22 A. Yes.

23 Q. Okay. They called it a case study, right?

24 A. I don't remember.

25 Q. Okay. You're aware that as part of their investigation,

1 the Senate Subcommittee conducted over 150 interviews and
2 depositions?

3 A. I'm not aware of that.

4 Q. Okay. But you're aware they deposed and interviewed
5 former Washington Mutual officers and directors?

6 A. I am aware of that.

7 Q. Okay. Was your team interviewed?

8 A. Not to my knowledge.

9 Q. Okay. The Senate Subcommittee reviewed tens of millions
10 of pages of documents. Are you aware of that?

11 A. No.

12 Q. Okay. But you provided millions of pages of documents to
13 them, did you not?

14 A. I don't remember if we did that. I know we had sent many,
15 many documents as part of the U.S. attorney investigation that
16 they were looking into the bank. Certainly, JPMorgan or the
17 FDIC could have provided those documents directly. Those now
18 belong to the FDIC and JPMorgan. Those documents do not belong
19 to WMI.

20 Q. You're aware, are you not, that the Senate Subcommittee's
21 investigation included a review of the conduct of the former
22 Washington Mutual officers and directors, correct?

23 A. Conduct. Could you please tell me -- was that at the
24 bank?

25 Q. I would assume so, would you not?

1 A. I would assume so as well.

2 Q. Okay. So it's an investigation into the financial crisis,
3 focusing on Washington Mutual's collapse, you'd assume that it
4 was of their conduct at the bank, would you not?

5 A. Yeah. I would just like to continue to make sure that --
6 obviously, there's two entities with Washington Mutual. I
7 think there's an important distinction. There's Washington
8 Mutual, Inc., which is what we are, the holdingco. And there's
9 Washington Mutual Bank, which is what the FDIC receivership now
10 took over and sold to JPM. So I think there's a big difference
11 today.

12 Q. All right. And so you're aware that the investigation
13 covered both officers and directors of WMI and WMB, are you
14 not?

15 A. I would -- my understanding was that it went through WMB.

16 Q. Okay. We'll come back to that. You're aware, are you
17 not, the Senate Subcommittee also reviewed the conduct of
18 certain third parties, like investment banks and rating
19 agencies, who may have had a role in the collapse of the
20 financial system?

21 A. I wasn't aware of that. In related to the WMB. In
22 general, yes, I was aware of that broadly in the financial
23 crisis.

24 Q. Okay. You would agree then that if the Senate
25 Subcommittee conducted 150 depositions and reviewed tens of

1 millions of pages of documents and had certain findings
2 regarding the collapse of Washington Mutual that those findings
3 would be relevant to your review of the claims in your
4 litigation trust?

5 A. There potentially could be some data points there. But
6 again, it's the bank. The FDIC is pursuing all of those claims
7 as receiver of the bank. We certainly think that there may be
8 some data points in that. But again, the allegations of
9 officers at the bank level could, for the most part, be FDIC
10 receivership claims, whether in WMI claims. But we will
11 absolutely look at those data points.

12 Q. Okay. They'd relevant to your consideration of the value
13 of the claims?

14 A. Potentially.

15 Q. You'd agree that the results of the Senate Subcommittee's
16 investigation into the conduct of officers and directors of WMI
17 and WMB, and also the conduct of certain third parties, would
18 be relevant to the Court's consideration of whether to approve
19 the funding of the liquidation trust with fifty to seventy-five
20 million dollars to pursue litigation or some subset of that.

21 A. I would not agree -- I don't know whether this relevancy
22 is -- the Senate body is a political committee. I do not know
23 how thorough their reviews were. They clearly -- I don't
24 dispute any facts that you said. But whether that's a legal
25 conclusion, I don't know. Data points, I would agree.

1 Q. Relevant data points, correct?

2 A. Could be.

3 Q. Okay. Now just so we're clear, WMI owned WMB?

4 A. Yes.

5 Q. Okay. And there was overlap on the boards, is that your
6 understanding?

7 A. Yes.

8 Q. Okay. Mr. Kosturos, you're aware, are you not, that the
9 Senate Subcommittee held public hearings and issued an initial
10 report in April, 2010?

11 A. I'm aware.

12 Q. Okay.

13 MR. COFFEY: Your Honor, may I approach the witness?

14 THE COURT: You may.

15 THE WITNESS: Are we done with the Klee --

16 THE COURT: Yes. What are we going to mark this for
17 this hearing?

18 MR. COFFEY: I think we're at TPS-3 for the Klee
19 Tuchin --

20 THE COURT: All right.

21 MR. COFFEY: I'm sorry, no -- they have extras.

22 THE COURT: Give me a number, somebody.

23 MR. COFFEY: TPS-4 --

24 UNIDENTIFIED SPEAKER: No. 5.

25 MR. COFFEY: TPS-5. Sorry Your Honor.

1 UNIDENTIFIED SPEAKER: Jeremy, which date?

2 MR. COFFEY: April 2010.

3 THE COURT: All right. That's TPS-5. Go ahead. Go
4 ahead.

5 BY MR. COFFEY:

6 Q. Mr. Kosturos, turn, if you would, to page six of that
7 document. And let's focus on the paragraph titled "Findings".
8 Last sentence reads "Based on the Subcommittee's investigation
9 to date, we make the following findings of fact related to
10 Washington Mutual Bank and its parent holding company,
11 Washington Mutual, Inc." Do you see that?

12 A. I do.

13 Q. Okay. Let's talk about some of those findings.
14 "Washington Mutual, WaMu, executives embarked in a high-risk
15 lending strategy." You see that finding?

16 A. I'm a little confused of the definition of Washington
17 Mutual. Is that Washington Mutual Bank or Washington Mutual
18 Inc.?

19 Q. Well, it's up to the Senate.

20 MR. ROSEN: Your Honor, at this point I'm going to
21 renew my prior objection. Besides, I don't understand what the
22 relevance of this could be, but the leeway that you offered to
23 Mr. Coffey --

24 THE COURT: Yeah. Why are we getting into this?

25 MR. ROSEN: -- I think is well beyond.

1 MR. COFFEY: Thank you, Your Honor. The relevance of
2 this, Your Honor, is that Mr. Kosturos is the CRO of the
3 company. He's been overseeing this claims management process
4 for the course of his engagement. He's been proposed as the
5 liquidation trustee of a trust that's going to be vested with
6 fifty to seventy-five million dollars in estate value to pursue
7 the very claims the predicates of which have been described in
8 this report. And so Your Hon --

9 THE COURT: Okay. So?

10 MR. COFFEY: Well, Your Honor, the importance here is
11 that that liquidation trust does not go to all creditors. It
12 goes to just those favored few who voted in favor of the plan.

13 THE COURT: I know that point.

14 MR. COFFEY: Okay.

15 THE COURT: So what does all this go to?

16 MR. COFFEY: Your Honor, it's relevant in that to
17 assess the value of the claims that were vested in that trust,
18 we need to have some sort of record as to whether there's any
19 support for or viability of these claims. If they're worth
20 nothing, they're worth nothing. But, Your Honor, we think
21 they're very valuable claims. And so, we point to this report,
22 Your Honor --

23 THE COURT: I don't know that you're going to get from
24 this witness any of this, though.

25 MR. COFFEY: I may not, Your Honor.

1 THE COURT: Why are you getting it from him?

2 MR. COFFEY: Your Honor, what I'd like to do is go
3 through him what certain --

4 THE COURT: I don't want you to go through the
5 different findings that Congress came up with. You can ask him
6 what investigation he did.

7 MR. COFFEY: Okay.

8 THE COURT: All right?

9 BY MR. COFFEY:

10 Q. Mr. Kos --

11 MR. STARK: Just a moment please, Your Honor?

12 MR. COFFEY: Your Honor, maybe we can streamline this.
13 The object of the exercise here is to lay a foundation to get
14 these reports into the record, Your Honor. And why we think
15 that's proper is that, again, you're being asked to approve a
16 plan that vests these claims in a liquidation trust, funds that
17 trust with estate funds to pursue. And we don't know the value
18 of the claims. Your Honor, he can have whatever view he thinks
19 of the Senate findings. I agree that's his point of view.
20 But, Your Honor, as far as data points, which he agrees they
21 are relevant data points to the assessment of the claims, we
22 think it's important for the Court to have a proper record
23 before it in deciding, one, whether or not the trust should be
24 funded with the money; but, two, for purposes of the 1129(b)
25 cramdown standard --

1 THE COURT: I understand your argument --

2 MR. COFFEY: Okay.

3 THE COURT: -- legal argument. Any objection to their
4 admission?

5 MR. ROSEN: Yes, Your Honor. We do have --

6 THE COURT: Why?

7 MR. ROSEN: Well, Your Honor, it's interesting that
8 these people who -- I think it was on November 30th --

9 THE COURT: You have to talk into a microphone, Mr.
10 Rosen.

11 MR. ROSEN: Thank you.

12 THE COURT: You know.

13 MR. ROSEN: I think it's quite interesting, Your
14 Honor, that these people who are standing up here today asking
15 for the admission of these documents, on November 30th, 2010 --
16 almost at the stroke of midnight, Your Honor -- filed a motion
17 a motion in limine to exclude the examiner's report under the
18 theory that they did not have the opportunity to take any
19 discovery of all of the countless witnesses that the examiner
20 looked at, all of the millions of pages that the examiner
21 looked at. And we, Your Honor, said we thought it was
22 appropriate but the Court excluded it. Now they have this PSI
23 report. We have not taken discovery of any of these witnesses.
24 This is a political document, Your Honor, that obviously people
25 put together for a particular purpose. I can't say whether

1 it's true or not. All I can say is that Washington Mutual
2 certainly disputed many of the things that were said in the PSI
3 report.

4 I have no reason to say why this could be relevant to
5 this matter. If in fact Mr. Coffey does not want money to go
6 to the liquidating trust to pursue claims, Mr. Kosturos has
7 already testified that if the claims have no merit, the money
8 will flow back through the waterfall.

9 So, I would rather not have a double-triple-hearsay
10 document admitted into the record under a hearsay exception
11 when, as the Court overruled before, or excluded the examiner
12 report, for the very same reason.

13 MR. COFFEY: Your Honor, if I may respond?

14 THE COURT: Yes.

15 MR. COFFEY: Your Honor, there are numerous
16 differences between a report generated by an official Senate
17 Subcommittee tasked with the purpose of investigating the
18 source of the financial crisis. Compare that to an examiner's
19 report. Your Honor --

20 THE COURT: Aren't they both hearsay?

21 MR. COFFEY: No. And here's two reasons --

22 THE COURT: Why?

23 MR. COFFEY: Your Honor, first of all, on the hearsay
24 point, this is a public document. It's a report by an official
25 agency. There's an exception from the hearsay rule for this.

1 Your Honor, if I may?

2 Your Honor, it's Federal Rule of Evidence 803(8),
3 which says "not excluded by the hearsay rules are records,
4 reports, statements or data compilations in any form of public
5 officials or agencies setting forth (a) the activities of the
6 office or agency; or (b) matters observed pursuant to a duty
7 imposed by law as to which there was a duty report".

8 Clearly, Your Honor, this was a report that was
9 commissioned by a special committee of the Senate. It's -- so
10 it clearly falls within 803(a) or (b).

11 Second, Your Honor, we don't need this to be offered
12 for the truth of the matter asserted. Rather, we just want to
13 know -- we want the record to reflect the Senate's
14 investigation into the very types of claims and activities that
15 this trust is going to be asked to pursue.

16 So if I could liken this to -- Mr. Rosen talks about
17 November 30th. Let me liken it to December 6th. Your Honor,
18 that was a Monday morning. At 3:30 that morning, we got
19 seventy-five documents dumped on us. These were the pleadings.
20 These were the proofs of claims. These were all the data
21 points the debtors wanted in the record for purposes of the
22 Court's consideration of the fairness of the plan.

23 Your Honor, we just want this in the record. Your
24 Honor can give it whatever weight you want. You can take or
25 ignore any of the findings and conclusions. But certainly,

1 it's a relevant data point for considering the viability of the
2 claims that will be vested in this trust for purposes of
3 determining the value of that trust.

4 MR. ROSEN: Your Honor, if you look at -- excuse me.
5 I'm sorry. If you -- and I know you don't have the PSI report
6 in front of Your Honor, nor should you. But if you were to
7 look at this report, you would see that there are countless
8 pages of hearsay discussion within the report itself, Your
9 Honor.

10 THE COURT: What is the PSI report you're using?

11 MR. COFFEY: It's the Permanent Subcommittee
12 Investigation.

13 MR. ROSEN: I'm sorry. Permanent Subcommittee --

14 THE COURT: The entire report?

15 MR. COFFEY: I'd be happy to hand up a copy, Your
16 Honor?

17 THE COURT: No.

18 MR. ROSEN: That's what they're trying to get in, Your
19 Honor, the Permanent Subcommittee on Investigations report, as
20 well as --

21 THE COURT: Or this.

22 MR. ROSEN: No. That's a different document. This is
23 the document that he really wants. But he would like that,
24 too, because he wants to read the findings again into the
25 record, Your Honor. But the point is, Your Honor, this is

1 chockfull of hearsay.

2 MR. COFFEY: And Your Honor --

3 MR. ROSEN: And the -- excuse me.

4 MR. COFFEY: Go ahead.

5 MR. ROSEN: It's chockfull of hearsay, Your Honor.

6 Previously, before the break, Your Honor, they said we want it
7 all in and we want it for the truth of the matter which is
8 asserted therein. I understand that they're changing their
9 position here on the fly, Your Honor. But the point is, this
10 is all hearsay. And for the same reason that you excluded the
11 examiner's report, these two memos, the report as well as memo,
12 should be excluded.

13 MR. COFFEY: Your Honor, we're happy to have it
14 included in the record for whatever purpose Your Honor thinks
15 appropriate. Whether it's for the truth of the matter
16 asserted, I think there's a hearsay exception, if Your Honor
17 wanted to do that. But if Your Honor is not comfortable with
18 that, certainly it's a public record. It's self-
19 authenticating. It is what is. It's a thorough investigative
20 report by a bipartisan commission -- this isn't some partisan
21 effort one way or the other. Your Honor, it's clearly relevant
22 to what Your Honor has to consider in connection with approval
23 of the plan.

24 MR. JOHNSON: Your Honor, Robert Johnson from Akin
25 Gump for the creditors' committee. I think the hearsay issues

1 have been adequately addressed. But I'm going to object on the
2 grounds of relevance as well. Mr. Coffey's purported probity
3 of this piece of purported evidence would be to establish
4 valuation of litigation claims. There's been no showing of
5 that. This seems to me a classic example of prejudice
6 outweighing probity. And so, I object on the grounds of
7 relevance.

8 MR. COFFEY: Your Honor, I question the prejudice of
9 knowing more about the claims that'll be vested in this trust.
10 But Your Honor, let me make another comparison between --

11 THE COURT: How is the report going to tell me the
12 value of those claims?

13 MR. COFFEY: Your Honor doesn't have any record --

14 THE COURT: Is it going to tell me whether they're
15 worth more than fifty million or less than fifty million?

16 MR. COFFEY: Well, that's part of the problem, Your
17 Honor. Mr. Goulding said he had no idea what the claims are
18 worth. Mr. Kosturos has now testified he has no idea --

19 THE COURT: Okay. Okay.

20 MR. COFFEY: -- what the claims are worth. So if Your
21 Honor's going to make some assessment as to what the claims are
22 worth, you need data points. And, Your Honor, I think this is
23 a data point, that's all it is. And if I --

24 THE COURT: And what will it tell me? What will it
25 tell me about the worth of the claims?

1 MR. COFFEY: Your Honor -- and I understand Your Honor
2 doesn't want us to go through line by line. But there are
3 provisions in the report that talk about the investigation --
4 the depositions under oath that were taken --

5 THE COURT: Let me assume that the report says there
6 are lots of good claims against the D&Os. Does it tell me that
7 those claims are worth 250 million dollars? I mean, what --
8 you want it for the value of the claims.

9 MR. COFFEY: I think Your Honor needs it to assess --
10 to make an assessment as to the value of the claims. There's
11 nothing in the record as to what that value might be whether
12 it's 250 million dollars for the D&O policy, whether it's an
13 E&O policy --

14 THE COURT: What do you think it's worth?

15 MR. ROSEN: Your Honor, may I be heard just for a
16 moment, please?

17 THE COURT: No, no. What do you think the claims are
18 worth?

19 MR. COFFEY: That's part of the problem, Your Honor.
20 We think they're worth significantly in excess of the ninety-
21 seven million dollar hurdle.

22 THE COURT: All right.

23 MR. COFFEY: Okay. For instance, Your Honor, there
24 certainly are discussions as to the potential recoveries here.
25 There's a finding on page 40: WAMU-Long Beach, Goldman Sachs

1 had collaborated on at least fourteen billion dollars in loan
2 sales and securitizations." Some portion of that may be
3 recoverable.

4 Your Honor, again, it's a data point. Your Honor can
5 do with it what you will. But it's certainly relevant to your
6 consideration of the propriety, the fairness, the equitability
7 of the plan.

8 MR. ROSEN: Your Honor, just two additional points.
9 First, Mr. Coffey mischaracterized what Mr. Goulding said,
10 because he did say, Your Honor, that in the liquidation
11 analysis, it didn't matter whether it was on the 11 side or the
12 7 side because it would flow up on either side. It didn't --
13 so the valuation did not matter to him at that point in time.

14 Additionally, Your Honor, if Mr. Coffey is focused on
15 getting ninety-seven million dollars just to get down to the
16 510 subordinated, as the Court will take some judicial notice
17 of things that were filed, the Court will note that there's a
18 thirty-nine billion dollar 510 subordinated claim that's
19 sitting out there. So a ninety-seven million dollar recovery
20 isn't really going to do much here in this case.

21 So, I think just standing up here and saying, geez,
22 I'm going to try and steal a WMB claim, assert it when I know
23 that the FDIC has had that in its sanctuary and is not going to
24 let me do that, and try and recover on it, I think Mr. Coffey
25 is somewhat misleading the Court.

1 MR. COFFEY: And Your Honor, if we're talking about
2 judicial notice, I would ask the Court to take judicial notice
3 of the thirty-second omnibus objection to claims where they
4 said that thirty-nine billion dollar claim is worthless, the
5 motion to estimate claims for purposes of plan reserves where
6 they said that MARTA claim is worthless.

7 So it's cute to say take judicial notice of a thirty-
8 nine billion dollar claim, saying that everyone's out of the
9 money, too far to think about those issues. But it's a little
10 too cute by half. They've already taken the position these
11 claims are worth zero. So it is what it is.

12 THE COURT: Well, let me do this. I am not going to
13 read the entire Senate report.

14 MR. COFFEY: Nor would I expect you to, Your Honor.

15 THE COURT: But I do agree that to the extent the
16 issue of what is the value of those claims is an issue that I
17 have to consider, I will allow you to give me a summary of it.
18 And if the findings on TPS-5 are a summary of that report, or
19 if there is a short summary no longer than ten pages --

20 MR. COFFEY: We can certainly do that, Your Honor.

21 THE COURT: -- I will allow that to be included as a
22 public record.

23 MR. COFFEY: We can do that, Your Honor.

24 MR. ROSEN: Excuse me, Your Honor? Your Honor, one
25 thing -- or two things. One, they have already stated that

1 it's not for the truth of the matter asserted and I assume the
2 Court will take it in that light, that it is just a document.

3 THE COURT: That somebody found that there were
4 potential claims.

5 MR. ROSEN: The problem with doing what you're
6 suggesting, Your Honor, is that you're now going to be asking
7 somebody to say what could be the downside to these claims.
8 And we do --

9 THE COURT: I'm not asking anybody anything.

10 MR. ROSEN: Well, Your Honor, you can't -- with all
11 due respect --

12 MR. COFFEY: Your Honor, might I suggest that if Mr.
13 Rosen --

14 MR. ROSEN: Can I finish, please?

15 MR. COFFEY: -- has a problem with what we submit,
16 perhaps he can submit a counterdesignation of things he thinks
17 are relevant from the report?

18 THE COURT: From the report.

19 MR. ROSEN: Well, that's the problem, Your Honor. The
20 report didn't look at these things. They didn't look at the
21 difficulties associated with the claims.

22 THE COURT: You can save that for argument.

23 MR. ROSEN: Your Honor, I have a feeling what we're
24 going to be designating, just so the Court is aware, are
25 perhaps all of the motions to dismiss that were just recently

1 filed in the FDIC action that was filed against only three
2 officers -- three direc --

3 THE COURT: I don't know what you're going to put into
4 the record. I'm allowing them to put this in --

5 MR. ROSEN: That's fine, Your Honor.

6 THE COURT: -- the findings of this report to the
7 extent it does not exceed ten pages that may be relevant to the
8 value of those claims.

9 MR. COFFEY: Your Honor, can I have one moment?

10 THE COURT: Yes.

11 BY MR. COFFEY:

12 Q. All right, Mr. Kosturos, with the report going in, in that
13 fashion, I think we can cut back quite a bit here.

14 MR. COFFEY: And that was our goal, Your Honor --
15 was --

16 THE COURT: Okay.

17 Q. Mr. Kosturos, you're aware, are you not, of the ANICO
18 litigation that was filed in Texas?

19 A. I am aware.

20 Q. You know that the plaintiffs in the action allege that
21 there was a premeditated plan by JPMorgan to damage Washington
22 Mutual Bank?

23 A. I -- whatever their complaint says, it says. I think
24 generally that's my understanding.

25 Q. And in your December declaration of support of

1 confirmation, you noted that FIRREA blocked the claims in the
2 ANICO suit. Do you recall that?

3 A. I do.

4 Q. Okay. You're aware, are you not, that the ANICO
5 decision that dismissed those claims on a FIRREA basis has been
6 overturned? Are you aware of that?

7 A. I'm aware of that.

8 Q. Okay. And so there is no longer a FIRREA bar to the
9 estate's asserting claims against JPMorgan for business torts
10 or the like, is that correct?

11 A. I don't know if the decision in ANICO relates to anything
12 of this case.

13 Q. Okay. But you've not gone back and done any analysis or
14 investigation as to potential claims you might have now against
15 JPMorgan that you thought you didn't have before?

16 A. I believe that was a very recent opinion. So, no, we have
17 not, since that date, gone back and looked at that, no.

18 Q. Okay.

19 MR. COFFEY: No further questions, Your Honor.

20 (Pause)

21 THE COURT: Come on. Anybody else?

22 MS. ABAR: Thank you, Your Honor. I wasn't going to
23 take the stand, but my name is Dorothy Abar. I was on the EC
24 formerly.

25 CROSS-EXAMINATION

1 BY MS. ABAR:

2 Q. Mr. Kosturos

3 MS. ABAR: May I ask questions?

4 THE COURT: You may.

5 MS. ABAR: I only have four.

6 Q. Mr. Kosturos, do you remember us talking some time back,
7 my question to you at the time was, why aren't you sharing
8 information with the EC? After these hearings today, and the
9 previous days, we've seen that a lot of settlement information
10 has been shared. Was any of it shared with the EC?

11 A. The judge had, I believe, urged us to share all of our
12 privileged information with the EC prior to the appointment of
13 the examiner to determine whether we could get over the issues
14 of the examiner. And we've done that.

15 Q. No. That was not necessarily my point in time that I was
16 talking to.

17 A. I'm sorry.

18 Q. Right around the time that the EC was formed, the EC came
19 into existence, and then you tried to disband the EC. There
20 was a move to disband the EC. All that time, settlement
21 negotiations had been going on. Had you disclosed anything or
22 opened up negotiations with the EC at all?

23 A. No.

24 Q. Why? Do you have a reason why?

25 A. Why?

1 Q. Um-hmm.

2 A. At that point, there was no value that was going to go
3 down to the EC. And at that point, we hadn't discussed
4 negotiations with the EC.

5 Q. Okay. It's my notice that everybody that was at the
6 table, that was settling at the table, is being compensated.

7 A. Um-hmm.

8 Q. They're being compensated with payment, attorneys fees,
9 tax fees. So is it from that implication that if the EC had
10 been at the table, perhaps the negotiations would have carried
11 down to the shareholders as well, that negotiations would have
12 continued to include the shareholders?

13 A. You may be unaware of the settlement that we read into the
14 record.

15 Q. No. I'm aware of it.

16 A. Well, let me just finish. That if -- was able to be
17 documented and go forward, that we were trying to get value to
18 the EC. I think that's on the record. And that was an
19 opportunity for the EC to try to get value as well as to take
20 over the litigation claims. Unfortunately, that negotiation
21 was never able to be completed, but the offer was on the table.
22 We read it into the record.

23 Q. But --

24 A. For whatever reasons which I cannot tell, unfortunately, a
25 deal could not be struck.

1 Q. So your negotiations for the tax dollars that went to
2 JPMorgan, the sixty/forty split discussion, the sixty-
3 one/thirty-nine split discussion, the seventy/thirty split
4 discussions, those, in your mind, would not have continued on
5 if the EC had not been at the table negotiating?

6 A. Well, as I've said, in my --

7 Q. In your opinion?

8 A. As I've said in my testimony, my job -- our job as the
9 debtor is to maximize value for the estate. There's no data
10 point on the right side of the waterfall of where we choose to
11 stop and not stop. That was the maximized value that we could
12 get. That's what we did.

13 Q. Did you?

14 A. Yes.

15 Q. You gave seventy percent of the tax dollars to JPMorgan.
16 Did you maximize the value of the estate, honestly? You
17 believe you did?

18 A. I'm not sure if you perhaps read the tax sharing
19 agreement. You might think about that, of which --

20 Q. I did, actually.

21 A. Good.

22 Q. And I hold a lot of the same positions that the settlement
23 noteholders did. And that's why I'm asking you, do you really
24 believe that you maximized the value of the estate?

25 A. That is my testimony, yes.

1 Q. Thank you. One more question. Do any of the settling
2 parties hold short positions on the preferred and common
3 equities that would benefit from the cancelation of those
4 equities?

5 A. Could you repeat that?

6 Q. Do any of the settling parties in this case, to your
7 knowledge, hold short positions on preferred and common equity
8 that would benefit materially, economically, financially, from
9 the cancelation of equity?

10 A. I wouldn't know.

11 MS. ABAR: All right. That's my last question. Thank
12 you, Your Honor.

13 MR. BERG: Your Honor, James Berg, Series R preferred
14 shareholder, appearing pro se.

15 CROSS-EXAMINATION

16 BY MR. BERG

17 Q. Mr. Kosturos, to the extent I ask any tax-related
18 question, I'm not seeking a legal conclusion, only your
19 understanding of the issues involved. Understanding that you
20 are not a tax expert, are you generally familiar with the
21 Internal Revenue Code?

22 MR. SLACK: Your Honor --

23 THE COURT: Yeah. I don't think asking tax --

24 MR. BERG: Okay.

25 THE COURT: -- questions --

1 MR. BERG: Thank you.

2 THE COURT: -- of this witness is going to be --

3 MR. BERG: I'll skip that then.

4 Q. All right. A point raised yesterday. Mr. Bolin confirmed
5 that his firm, Appaloosa, was in violation of the trading
6 restrictions intended to protect the NOLs. Do you recall that
7 any -- that situation?

8 MR. SLACK: Your Honor, I object to the -- no
9 foundation to the question.

10 MR. SHER: I object as well, Your Honor, as
11 mischaracterizing the record.

12 THE COURT: Sustained.

13 MR. BERG: Thank you. No further questions.

14 THE COURT: Anybody else have any cross?

15 MR. DUKE: Yes, Your Honor. William Duke, shareholder
16 pro se. Four quick questions regarding testimony today.

17 CROSS-EXAMINATION

18 BY MR. DUKE:

19 Q. To your knowledge, sir, did the debtors seek guidance from
20 the IRS regarding where -- whether any of the tax refunds
21 turned to -- returned to WMI would be allowed to go to JPMC, a
22 former TARP recipient?

23 A. I don't believe that we had any communication with the IRS
24 on that subject, that question you just asked.

25 Q. Was there an agreement of any kind between debtors and any

1 creditors to not seek clarification from the IRS?

2 A. There was no agreement.

3 Q. The same question in regard to the debtors and JPMorgan
4 not seeking clarification from the IRS?

5 A. There was no agreement.

6 Q. Why did debtors choose to not explore whether an option of
7 removing the tax refunds from JPMC's grasp entirely was
8 available? If you could have removed that object of dissention
9 why would you not seek guidance as to whether that was
10 possible?

11 A. I'm not sure I understand your question.

12 Q. The main point of contention was the tax refunds and
13 various we'll divide it this way, we'll divide it that way.

14 A. Yeah.

15 Q. If it had been possible for the debtors, through guidance
16 from the IRS, to say JPMorgan this is not available to you at
17 all, we just take that off the table completely, why would you
18 have not sought guidance regarding that option?

19 A. The tax sharing agreement is what governs tax refunds
20 within an entity. Whether WMI receives that or not and then
21 potentially must allocate to the payor or the person who's
22 entitled to those refunds, that's how a tax sharing agreement
23 works.

24 So if WMI had been able to get the tax refunds directly in
25 to WMI without JPM or even the FDIC, which again there's no

1 evidence to suggest we could have, right now it's in an escrow
2 agreement, the tax sharing agreement still applied.

3 Q. That's for WMI but JPMC may have been prohibited, by being
4 a TARP recipient, from being allowed to participate in any of
5 that refund at all. Did you not look into that?

6 A. That's certainly a fact in law of the tax legislation.
7 But the FDIC receiver still exist with potential rights to WMB.
8 It -- you know, those issues exist.

9 Q. It's my understanding that the IRS decided that the refund
10 could go to WMI, outside of the FDIC receiver --

11 MR. SLACK: Objection to the form of the question.

12 THE COURT: Overrule. Go ahead and ask.

13 Q. So as the refunds would have come to WMI but potentially
14 not gone to JPMorgan, you never bothered to explore whether
15 that possibility was available to you, to tell JPMorgan these
16 tax refunds are outside of your purview, you cannot have these?

17 MR. SLACK: I'm sorry, Your Honor. I object to the
18 form.

19 THE COURT: I think it's been asked and answered.

20 MR. DUKE: Thank you very much. Thank you, Your
21 Honor.

22 THE COURT: All right.

23 MR. SHER: Your Honor, Barry Sher on behalf of
24 Appaloosa. Just a couple of questions for you, Mr. Kosturos.
25 Light the ELMO, please.

1 CROSS-EXAMINATION

2 BY MR. SHER:

3 Q. Mr. Kosturos, I want to talk to you for just a minute
4 about the May 2010 period. Do you recall you were asked a few
5 questions about that by the EC counsel?

6 A. Yes.

7 Q. Okay. This is Exhibit EC-284 that you were shown and it
8 shows Mr. Scheler forwarding information to Mr. Bolin of
9 Appaloosa, do you see that?

10 A. Yes.

11 Q. And you were asked a couple questions about that. I just
12 want to show you a couple documents and see if I can refresh
13 your recollection.

14 First, I want to show you EC-309, which has been
15 previously admitted into evidence.

16 THE COURT: Say it again. 309?

17 MR. SHER: EC-309.

18 Q. This is from the same day, Friday, May 14, from Ms. Nagel
19 at Fried Frank to Mr. Rosen. It says, "Bill K., Brad and Bolin
20 were on the phone yesterday afternoon and talking about a
21 proposal." Bill K. is you, to your understanding?

22 A. Yes.

23 Q. Brad is Brad Scheler and Bolin is Jim Bolin of Appaloosa.
24 Is that your understanding?

25 A. Yes.

1 Q. And then it goes on to talk about the FDIC asked about
2 particular terms and your questions being asked. Do you see
3 all that?

4 A. Yes.

5 Q. Okay. And then EC-308. I'm showing you down at the
6 bottom. Is that Sunday, May 16 where you're sending an e-mail
7 directly to Brad and to Jim Bolin and to Mr. Rosen talking,
8 again, about the terms, the eighty/twenty split that was
9 referred to in EC-284, et cetera.

10 So having seen those, does this refresh your recollection
11 that during this period you had reached out to Fried Frank to
12 enlist the assistance and engage the settlement noteholders
13 again, and get their input in a revised plan and disclosure
14 statement?

15 A. Yes. We filed our amended plan of reorganization that
16 Sunday, May 16th, with the court.

17 Q. Right. And you had reached out to counsel for the
18 settlement noteholders, to get their input on those documents?

19 A. I believe I -- that's what the e-mails say.

20 Q. And you understood that they had agreed to work with you
21 and be in discussions and get restricted at that time?

22 A. I did.

23 Q. So did you also understand, by the way, that under the
24 March global settlement agreement that the settlement
25 noteholders, who were signatories at that time, had consent

1 rights to changes to the deal? In other words, under the March
2 global settlement agreement that if changes were going --
3 material changes were going to be made to the settlement, that
4 the signatories, the settlement noteholders, had the right to
5 consent?

6 A. That's correct. As long as they were signators to the
7 global settlement agreement they had consent rights.

8 Q. So going back to EC-284, having been refreshed here, is
9 there anything surprising about during this period when the
10 settlement noteholders had agreed to be restricted, that Mr.
11 Scheler is forwarding information to Mr. Bolin of Appaloosa?

12 MR. SLACK: I object to the form of the question.
13 Foundation.

14 THE COURT: Well, save it for argument. Sustained.

15 MR. SHER: Okay.

16 Q. Then let me ask you it this way; would there, in your
17 mind, be anything wrong with -- at this timeframe, having been
18 refreshed as to what was going on, with Fried Frank forwarding
19 this information to its client?

20 A. Well, the time of the e-mail, I think, is of note. Is
21 that it's 6:38 east coast time, which this e-mail is sent. And
22 by Sunday night, May 16th, we will have filed the plan and the
23 global settlement agreement and its contents.

24 Q. So on Friday -- are you saying in the days leading up to
25 Sunday you would expect to have had discussions -- that you had

1 discussions with the settlement noteholders about it?

2 A. You know, I can't remember. The e-mails that you've shown
3 me have, you know, I'm just reading those. So I would presume
4 that there was discussions over the weekend to complete the
5 deal Sunday night.

6 Q. So again, there would be nothing wrong with this kind of
7 exchange, given everything that you've been refreshed about,
8 right?

9 A. Not to my knowledge.

10 Q. Okay. And you're saying that-- the reason you point out
11 the timeframe is that it's after trading hours --

12 A. That's correct.

13 Q. -- on Friday? Okay. Thank you. Nothing further. Oh,
14 I'm sorry. I've been reminded that there is -- there is a
15 document that we'd like to move into the record. It is CB-38.
16 May I approach?

17 THE COURT: You may.

18 MR. SHER: This is an e-mail from Brian Rosen to Brad
19 Scheler, copying several people, including Mr. Kosturos. Under
20 the same protocol we were using previously, we'd like to move
21 this into evidence, it just completes the e-mail chain that was
22 shown earlier.

23 THE COURT: Any objection?

24 UNIDENTIFIED ATTORNEY: No objection, Your Honor.

25 UNIDENTIFIED ATTORNEY: No objection, Your Honor.

1 THE COURT: It's admitted.

2 (Centerbridge's Exhibit CB-38, e-mail from Mr. Rosen to Brad
3 Scheler, was hereby received into evidence as of this date.)

4 MR. SHER: Thank you, Your Honor.

5 THE COURT: Any redirect?

6 MR. ROSEN: Your Honor, could I ask for a five minute
7 recess, at most, just to see if there is anything we want to
8 ask.

9 THE COURT: All right. It's your time. We'll stand
10 adjourned.

11 MR. ROSEN: Thank you.

12 (Recess from 4:13 p.m. until 4:19 p.m.)

13 THE COURT: All right. Please be seated. Any
14 redirect?

15 MR. ROSEN: Your Honor, we were going to ask a
16 question of Mr. Kosturos but during the break we've been able
17 to reach an agreement with the creditors committee -- excuse
18 me, the equity committee, with respect to the admission of two
19 documents. And, Your Honor, they've been placed up there for
20 you. It's Debtors' Exhibit 429 and Debtors' Exhibit 430.

21 429, Your Honor, is a tolling agreement that was
22 executed by the debtors, the equity committee and the
23 creditors' committee with respect to Mr. Allan Fishman, and
24 that was spoken about earlier. And rather than taking Mr.
25 Kosturos through redirect and having him acknowledge the

1 tolling agreement with Mr. Kerry Killinger, we have agreed that
2 Debtors' Exhibit 430 will be entered into evidence and that is
3 the tolling agreement with Mr. Killinger, signed by the
4 debtors, Mr. Killinger, the equity committee and the creditors'
5 committee.

6 THE COURT: Okay.

7 (Debtors' Exhibit 429, tolling agreement that was executed by
8 the debtors, the equity committee and the creditors' committee
9 with respect to Mr. Allan Fishman, was hereby received into
10 evidence as of this date.)

11 (Debtors' Exhibit 430, tolling agreement with Mr. Killinger,
12 signed by the debtors, Mr. Killinger, the equity committee and
13 the creditors' committee, was hereby received into evidence as
14 of this date.)

15 MR. ROSEN: So we would have no redirect for Mr.
16 Kosturos.

17 THE COURT: All right. Thank you. You may step down
18 then.

19 MR. ROSEN: May we release Mr. Kosturos?

20 THE COURT: Yes.

21 MR. ROSEN: Thank you, Your Honor.

22 MR. SLACK: Your Honor, Richard Slack for the debtor.
23 I wanted to take up again the housekeeping on a couple of
24 documents. In the meantime, since we spoke last about them, we
25 have given a list of exhibits that we would offer by judicial

1 notice that come from the docket. And I have a list of those.
2 And we have agreement with the equity committee that these can
3 be admitted, subject to Your Honor's admitting them. Can I
4 approach?

5 THE COURT: You may.

6 MR. STARK: Your Honor, if I may?

7 THE COURT: Yes.

8 MR. STARK: Robert Stark from Brown Rudnick on behalf
9 of the TPS consortium. I don't want to stand in the way but
10 they seem to be having agreements with one of the objectors,
11 forgetting about the others. We haven't seen these documents
12 nor have we agreed to it. I'm not saying we will, but I'd like
13 to sort of make sure that we're doing this the right way.

14 THE COURT: All right. As I understand it, these are
15 all documents that are docketed in the main case and you're
16 identifying which ones you want as part of the record.

17 MR. SLACK: That's right, Your Honor. If you look,
18 after each description there is a docket number --

19 THE COURT: All right.

20 MR. SLACK: -- next to them.

21 THE COURT: All right. They will be admitted.

22 MR. ECKSTEIN: Your Honor, would this be an
23 appropriate time to mention some additional similar documents
24 that we were going to introduce as well?

25 THE COURT: Yes. Is the debtor through with its case?

1 MR. SLACK: Yes, Your Honor.

2 THE COURT: Okay. I'll hear the other parties, if
3 they have more.

4 MR. ECKSTEIN: Your Honor, thank you. Kenneth
5 Eckstein on behalf of Aurelius Funds. We have two pleadings
6 that are in the court record that we wanted to specifically
7 admit. I have mentioned them to counsel for the equity
8 committee. One is document 2132 which was the motion to
9 disband the equity committee January 2010 that was referenced
10 in the Gropper redirect. In addition, 2223, which was the
11 debtors' reply pleading filed in connection with that motion.
12 And I believe that there is no objection from the equity
13 committee to either of those documents going into evidence.

14 THE COURT: All right. They will be admitted.
15 (Debtors' Exhibit 2132, motion to disband equity committee, was
16 hereby received into evidence as of this date.)

17 (Debtors' Exhibit 2223, debtors' reply pleading filed in
18 connection with motion to disband equity committee, was hereby
19 received into evidence as of this date.)

20 MR. ECKSTEIN: Your Honor, in addition, I had provided
21 to the equity committee two research reports that we had
22 proposed that also be admitted into evidence as reports that
23 are prepared and are widely disseminated. I don't believe the
24 equity committee is agreeable to those but we did want to
25 request the right to introduce two research reports that are

1 prepared by the CRT Capital Group, one dated March 9th -- one
2 dated March 4th, 2009 and one dated January 13th, 2010, merely
3 for -- for the fact that they're in the marketplace, not for
4 the facts -- not for the accuracy of the contents of the
5 documents.

6 THE COURT: I'll hear the equity committee on that.

7 MR. FOLSE: Yes, Your Honor. I'm afraid we do have to
8 object to these two because there has been no testimony offered
9 about to whom these reports are circulated. There's just been
10 a representation by counsel that they're widely circulated.
11 There's no evidence of that. I don't really know where they
12 came from, who saw them, whether they were buy subscription by
13 one person or two person. One is forwarded by an e-mail. I
14 can't even tell where it comes from. That's the second
15 document.

16 So I think on these two, it would have been necessary
17 to have testimony to establish what they are and whether they
18 are relevant to the case which would be, in part, a function of
19 how widely circulated they would be. Mr. Gropper was here and
20 they could have introduced these and discussed them. We would
21 have had a chance to question him about them.

22 MR. ECKSTEIN: I do appreciate, Your Honor, these are
23 being presented in rebuttal to the issue that goes to whether
24 or not the existence of settlement negotiations were or were
25 not in the marketplace, and these would be going to that issue.

1 THE COURT: Well, I'm going to sustain the objection.
2 I think I needed some testimony that they are in fact what you
3 purport them to be, that is reports that are widely
4 disseminated in the industry.

5 MR. ECKSTEIN: Fine, Your Honor. We'll just simply
6 admit the two pleadings that we referred to earlier.

7 THE COURT: Okay. They will be admitted.

8 MR. SARGENT: Edgar Sargent on behalf of the equity
9 committee, Your Honor. I have two documents also: AOC-058,
10 which is docket number 2518, it's a transcript.

11 THE COURT: Start over again. AOC --

12 MR. SARGENT: AOC-58, 058. It's just the transcript
13 of the proceedings on March 12th when the settlement terms were
14 first announced. There's been a lot of testimony about that.
15 We think it would be helpful to have in the record. We move
16 its admission.

17 MR. ROSEN: Your Honor, the debtors have no objection
18 to that at all. I would ask if we could also add, though, the
19 transcript of the March 4th hearing when we reported the
20 discussions to the Court and we adjourned everything.

21 MR. SARGENT: We have no objection to that.

22 MR. ROSEN: Your Honor, we'll get you the docket
23 number. I apologize for that.

24 THE COURT: I'm going to tell you how to get me all
25 these documents in a minute. All right. They'll both be

1 admitted.

2 (Owl Creek's Exhibit AOC-058, transcript of the proceedings
3 dated March 12th, was hereby received into evidence as of this
4 date.)

5 (Debtors' exhibit, transcript of March 4th hearing, was hereby
6 received into evidence as of this date.)

7 MR. SARGENT: And we also, Your Honor, wanted to move
8 the admission of designations from the deposition testimony,
9 Mr. Abster (ph.) testified on behalf of JPMC prior to the last
10 confirmation hearing. It's about four or five pages of
11 designated testimony, we've provided it to the other parties
12 prior to this hearing. The same testimony was designated last
13 time and we'd like to have it admitted to the record this time.

14 MR. GLUECKSTEIN: Your Honor, Brian Glueckstein,
15 Sullivan & Cromwell, on behalf of JPMorgan Chase. We do have
16 an objection to this. We filed an objection prior to the start
17 of the hearing. At no point, and with respect to this
18 confirmation hearing or these issues, were we contacted, was
19 there any indication by the equity committee that they tried or
20 were interested in calling Mr. Epes or anybody else from
21 JPMorgan. We don't see that there's -- this is not in the
22 record from -- it was designated but our understanding is it
23 was not in the record from the first confirmation hearing.

24 THE COURT: It's not in the record from the last
25 hearing?

1 MR. GLUECKSTEIN: There was no testimony from Mr. Epes
2 at the first confirmation hearing.

3 THE COURT: Well, was his deposition designation
4 incorporated into the record, is that what I just heard?

5 MR. SARGENT: My understanding is that it was, Your
6 Honor, but I would want to confirm that. I shouldn't represent
7 it to the Court because I haven't confirmed it personally.

8 MR. SLACK: Your Honor, Richard Slack for the debtors.
9 To the extent that there were deposition excerpts already put
10 in in the first confirmation hearing that were admitted, that's
11 one thing. But to the extent they would like to put in a
12 transcript of a deposition now that would be hearsay with
13 respect to this hearing, anything additional.

14 THE COURT: All right. If it was already incorporated
15 it's already part of the record. So if it wasn't --

16 MR. GLUECKSTEIN: Agreed, but if it's not we would
17 object to the moving into evidence at this time.

18 THE COURT: And why?

19 MR. SARGENT: Well, we would move it into evidence.
20 We believe it's admissible under Federal Rule of Civil
21 Procedure 32 which governs admissibility of deposition
22 testimony; deposition testimony of an adverse party is
23 admissible for any purpose. It's admissible against any party
24 who was present or given notice to attend the deposition.

25 In this situation we're admitting it against

1 settlement noteholders and the debtor, both of whom were
2 present at the deposition. It's not hearsay. There are
3 actually two layers of potential hearsay at issue with this
4 testimony. The first layer is the deposition itself, which I
5 believe is addressed under Federal Rule 32, as I just
6 explained.

7 The second layer is that Mr. Epes is testifying, in
8 part, about things that he heard from settlement noteholders,
9 communications that he received from settlement noteholders
10 during the negotiations and that layer of hearsay is plainly a
11 party admission and admissible on that ground, Your Honor.

12 MR. GLUECKSTEIN: Again, Your Honor, Brian
13 Glueckstein, if I may. There's been no indication from the
14 equity committee that this is being offered against JPMorgan
15 Chase in the context of this hearing. And so, similarly, we
16 don't see that there's any exception to the hearsay rule.
17 Again, there was no indication that testimony from JPMorgan was
18 sought by the equity committee with respect to the things at
19 issue at this hearing.

20 MR. SARGENT: And Your Honor, again, I would say that
21 the difference is they could have, potentially, called the
22 witness. They haven't said this witness is unavailable. They
23 haven't tried to get this witness. And now, to bring in
24 testimony at the last minute, that was taken in connection with
25 the last confirmation hearing and not admitted then, certainly

1 does not give the debtor any of the other parties any
2 opportunity to put on a case or cross examine this witness with
3 respect to those statement.

4 MR. SHER: Your Honor, Barry Sher for Appaloosa. Also
5 one additional point. The issues, as I understand it, in that
6 earlier confirmation were very different from the ones here.

7 It also seems that there is at least a thought on Mr.
8 Sargent's part that there really may be no dispute here. He
9 thinks the -- he believes, he's going to check, but he thinks
10 the portions he wants to put in are already in the record. If
11 they're already in the record, there's no issue. If they're
12 not, he ought to circulate them to everybody and we ought to
13 have a chance to look at what he's planning to designate
14 because we haven't seen it.

15 THE COURT: All right. Let's do that and I'll make a
16 ruling at the hearing next week.

17 MR. SARGENT: Just to be clear though, we did
18 circulate these designations to the parties two weeks ago, in
19 advance of the hearing, according to the schedule that the
20 parties agreed. This was on our initial designations, it
21 hasn't changed. We just waited till now to offer it because we
22 understood that some parties were going to object and we were
23 waiting till the end of the hearing to offer a complete package
24 of evidence.

25 THE COURT: All right. I'll look at it.

1 MR. SARGENT: Thank you, Your Honor.

2 MR. SIEGEL: Just two more quick procedural issues,
3 Your Honor. I don't know if you're intending to close the
4 record but obviously --

5 THE COURT: I am.

6 MR. SIEGEL: -- we have the right to submit that ten-
7 page and we need to make sure -- the ten-page report. And
8 also, Your Honor, we need to -- we submitted a chart, today, to
9 counsel for some of the other parties of the issue regarding
10 the federal judgment rate. And they suggested, rather than the
11 date we picked which was just July 15th, that they prefer us to
12 give them a schedule that goes from the last date, EC-301 ended
13 at 6/17 and they wanted us to submit the other information.

14 I have no problem in doing that, but we want to make
15 sure the record stays open or to ask you to take judicial
16 notice of the federal judgment rate on July 15th, which is the
17 day we did our waterfall schedule.

18 MR. ROSEN: Your Honor, counsel did provide us with
19 this just before the lunch break. We did suggest that in as
20 much as the equity committee had put together that list that we
21 had looked at and verified the rates.

22 THE COURT: Yes.

23 MR. ROSEN: And the Court said you will just take
24 that, we would suggest just adding the dates that they want to
25 this particular list. And we'll verify the same rates and then

1 we'll allow that to go through.

2 MR. SIEGEL: As long as the record stays open for us
3 to do that, Your Honor.

4 THE COURT: For admission of that document, yes.

5 MR. ROSEN: Your Honor, that's fine. And also, in as
6 much as the TPS folks are going to be submitting a document
7 with respect to purported claims and you had told me that we
8 could do the same, in order for us to do that, Your Honor, we
9 actually have to see what they want to do. So if we would have
10 a period after they submit that to us to be able to put that
11 together and submit it to the Court.

12 Lastly, Your Honor --

13 THE COURT: When will the TPS holders think they'd be
14 getting that?

15 MR. SIEGEL: Your Honor, I guess we could do that. I
16 don't really have a problem. You know, to me it all comes down
17 to the fact that we're going to take some quotes out of the
18 report and put it before Your Honor. They should take out some
19 quotes that they think they like and put it before Your Honor.

20 THE COURT: Right.

21 MR. SIEGEL: I don't really know what the big issues.
22 You can tell me a date and I'll deliver it.

23 THE COURT: When is it going to be done?

24 MR. SIEGEL: I can do it Tuesday.

25 THE COURT: And the debtor wants to take their quotes.

1 MR. SIEGEL: I guess twenty-fours.

2 MR. ROSEN: We'll do it by Friday, Your Honor.

3 MR. SIEGEL: I mean, it's, sort of, not that big of a
4 deal.

5 THE COURT: Are we having oral argument on Thursday?

6 MR. ROSEN: I don't know, Your Honor.

7 MR. SIEGEL: We certainly would hope so, Your Honor.

8 MR. ROSEN: That's something that a lot of people want
9 to talk about, Your Honor.

10 The other thing I want to just ask is, one counsel has
11 asked if we could ask -- could have one other transcript
12 included, which would be May 24th, 2011. And we will have that
13 one included as well, Your Honor, in the list.

14 MR. JOHNSON: Your Honor, Robert Johnson from Aiken
15 Gump for the creditors' committee. We would just ask the
16 admission of DX-405, that was the plan supplement that was used
17 during a cross examination and it is docket index 8120 on the
18 Court's docket.

19 THE COURT: All right. That'll be admitted as well.
20 (Creditors' Committee's Exhibit DX-405, transcript of
21 5/24/2011, was hereby received into evidence as of this date.)

22 MR. STARNER: Your Honor, this is Greg Starnier of
23 White & Case on behalf of the WMI noteholders. We had about
24 seven exhibits which we had included in our objection and about
25 three of those, I believe, were entered into evidence last time

1 around. These are indenture and subordination agreements which
2 we'd like to get into the record. We'd circulated to the
3 parties; we have not received any objections. I have a copy of
4 the exhibits here. I'd like to hand them up to the court.

5 THE COURT: Any objection to those being admitted?

6 MR. ROSEN: No, Your Honor. We don't have an
7 objection, Your Honor.

8 THE COURT: All right. They will be admitted.
9 (WMI Noteholders' Exhibits, indenture and subordination
10 agreements, were hereby received into evidence as of this
11 date.)

12 MR. STARNER: Thank you, Your Honor. May I approach?

13 THE COURT: You may. Thank you. Anything else that
14 parties want part of the record?

15 MR. FOLSE: This is not another offer on the record,
16 I'm sorry.

17 THE COURT: All right.

18 MR. FOLSE: Different issue.

19 THE COURT: Then with the exception of those couple of
20 documents that I'm going to be getting, I think the record
21 should be closed. I do want the debtors to prepare a or some
22 binders that include the exhibits of these additional
23 documents, both from the debtors' list and from the other
24 parties, of pleadings and transcripts that are part of the main
25 case, that are going to be incorporated into the record in this

1 matter.

2 MR. ROSEN: We will, Your Honor.

3 THE COURT: All right. All right. You had another
4 matter.

5 MR. FOLSE: Yes. The Court's comment this morning
6 about the availability on your calendar for next Thursday led
7 to discussions among various parties here. I think we assumed
8 that what you were contemplating would be closing argument on
9 that day, although you didn't say that and we weren't sure if
10 that's what you had in mind.

11 THE COURT: That's what I said. I didn't -- well, I
12 was unclear. I'm sorry.

13 MR. FOLSE: Okay. And so I'm not speaking for
14 possibly even very many parties but we have had discussions, as
15 counsel for the equity committee, with counsel for the
16 settlement noteholders as well as with Mr. Rosen. And I think
17 that it's -- I think I'm being accurate in saying that all of
18 those parties believe that there would be value to us and to
19 the Court by submitting a written closing argument, that would
20 attempt to pull together our views and structure of the
21 evidence that's gone in, and of course there's been quite a lot
22 of evidence that has come in since the hearing began. That
23 then opens the question of what would happen next Thursday. I
24 think most of us who believe that written submissions would be
25 of value have talked about how much time we think,

1 realistically, we would need in order to get this done. I have
2 a proposal to make, which I think will wind up being supported
3 by the debtors and by the settlement noteholders, but much
4 depends on the Court's timetable for reaching a decision.

5 What we suggest is that we would file our written
6 submissions by one week from next Wednesday, which I think is
7 August the 3rd, that it would be a simultaneous filing by
8 parties who wish to present their closing, in writing. And
9 then if the Court found it helpful to have oral argument,
10 following those written submissions, that would be at whatever
11 date the Court chooses, of course.

12 We also have on next Thursday, currently on the
13 calendar, the equity committee's motion for leave to file the
14 complaint. Because of the interconnection between the record
15 in this hearing and that matter, our proposal is that that be
16 taken off calendar, that there be, again on August the 3rd,
17 simultaneous submissions by the settlement noteholders and by
18 the equity committee, but only to the extent that that motion
19 raises some sort of discrete issue, legal issue, that is not
20 common to what goes on here.

21 We would waive our right to file a reply if the Court
22 chooses to have oral argument at some subsequent date, either
23 to have an oral argument on closing, based on the written
24 submissions, or oral argument on the equity committee's motion
25 because we could make our reply points then.

1 If the Court decided that it was not necessary to have
2 oral argument, we would like to have some opportunity to file a
3 reply, which we would have now, under the rules governing the
4 pending motion.

5 So I think what that leaves open, there are certainly
6 parties in the court, the TPS --

7 THE COURT: And there are parties who aren't in the
8 court who thought we were going to have oral argument.

9 MR. FOLSE: Yes.

10 THE COURT: And that was my concern.

11 MR. FOLSE: And that's where I was headed. And there
12 are parties in court who do, very much, want oral argument.
13 The proposal that I'm suggesting would not preclude that if the
14 Court set a subsequent date, after August 3rd, for parties to
15 present oral argument, as a supplement to whatever written
16 submissions they make or to try to deal with conflicts that may
17 appear from the simultaneous submission. I think if they are
18 going to be written submissions, it probably, at least to my
19 way of thinking, doesn't make sense to try to go forward next
20 Thursday with oral closing.

21 And so, I should sit down and let other people say
22 whether they support or oppose what I've just suggested and
23 obviously it's up to the Court. This will prolong this a bit.

24 THE COURT: Yeah.

25 MR. ROSEN: Obviously I'm the one that stands in

1 making a passionate plea for closings, Your Honor. There's an
2 awful lot that's in -- at issue here that has not been the
3 subject of an evidentiary presentation for days. Some of us
4 have sat watching, with interest, but it hasn't really involved
5 the nature of our particular objections.

6 We've submitted dozens of pages, hundreds of cites,
7 lots of very complicated principles to be discussed. Some of
8 them are very cutting edge, Stern vs. Marshall, divestiture
9 rule, best interest test and how one calculates and values
10 estate causes of action; these matters are very intertwined,
11 very difficult and they do require, I think -- well, I
12 shouldn't be so presumptuous.

13 I think Your Honor would benefit from some discussion
14 about it, some presentation with some slides, an opportunity to
15 ask questions of counsel so that we can debate and ferret out
16 the right answer and go through the cases because they are, in
17 fact, very complicated. And to a certain extent some of this
18 may even be warranted to certify up to the Third Circuit.

19 THE COURT: Uh-huh.

20 MR. ROSEN: So it does warrant considerable
21 discussion. The 10(b)(5) insider trading stuff, that's other
22 people's issues, mine are complicated legal issues and I'd like
23 an opportunity to talk to you about them.

24 THE COURT: Well, do you have any objection to talking
25 to me about it after they all brief the other issues?

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

2 THE COURT: Okay.

3 MR. HALPERIN: Your Honor, Alan Halperin, Halperin
4 Battaglia Raicht on behalf of Normandy Hill. We have a small
5 piece, I just don't know where we fit into the grand structure
6 that's been set up and I'll take guidance from Your Honor.

7 THE COURT: Well, I have read your papers. Do you
8 want to submit anything more or do you want to participate in
9 oral argument?

10 MR. HALPERIN: I think there were -- there was a reply
11 or two to some of the stuff we've said. I think we do need to
12 supplement. I'm happy to do it either way. I don't know
13 whether oral argument is required or not, but I do think that
14 there is something that we have -- procedures -- the local
15 rules wouldn't have permitted a reply, therefore we didn't file
16 one. We expected to deal with it in oral argument, I'm happy
17 to deal with it by way of writing, though.

18 THE COURT: I think I expressed to others, I'm more a
19 visual learner than an audio learner. So my preference would
20 be writing and if you can submit that by the August 3rd
21 deadline I'll permit you to file a reply.

22 MR. HALPERIN: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. GLUECKSTEIN: Your Honor, Brian Glueckstein,
25 Sullivan & Cromwell on behalf of JPMorgan Chase. We have filed

1 with equity committee's proposal closings in writing. And if
2 the Court wants to hear anything on additional issues after
3 that, we're obviously available for that as well.

4 MR. DUKE: Your Honor, William Duke, pro se.

5 THE COURT: Yes.

6 MR. DUKE: If you decide that written submissions are
7 the proper format, I see assurance from the Court that these
8 submissions will be accepted from shareholders and that some
9 leeway regarding the format of these submissions will be
10 granted.

11 THE COURT: Well, without seeing it I don't know what
12 you're talking about but I appreciate that you're acting pro se
13 and I will consider what you file.

14 MR. DUKE: Thank you, Your Honor.

15 MR. HODARA: Good afternoon, Your Honor. Fred Hodara,
16 Akin Gump for the official creditors' committee. Your Honor,
17 we will be guided by what will be most helpful to the Court.
18 The only concern we have with what's been laid out, in and of
19 itself, is the timing. I know the Court is aware, all the
20 parties here are aware of the cost of time and there may also
21 be an issue of Your Honor's own schedule and I want to make
22 sure that there's enough time for Your Honor to review what's
23 been submitted to render a decision, before any vacation
24 schedule or other matters that might be on your calendar. And
25 if that is an issue, then we would submit that perhaps August

1 3rd is too late.

2 I believe that for many of the parties we can
3 certainly submit earlier than that, and perhaps the equity
4 committee could as well, if in fact there is a timing issue.
5 And perhaps the oral argument, subsequent to submissions, can
6 be dispensed with if that would cause a timing problem as well.

7 THE COURT: Well, I have no vacation planned, however
8 I have been called for jury duty. So -- August 22nd and 23rd
9 and I can't imagine I'll be actually picked for a panel. So
10 that is the reason that that week is blocked off. But -- I
11 would like to get written submissions by August 3rd, that will
12 be helpful.

13 As far as when oral argument could be held, that that
14 might be problematic. I have a trial scheduled for the 15th,
15 16th, if it comes off I'll have a day. But otherwise getting a
16 day for the parties -- excuse me, it goes through that entire
17 week. Let me see what this matter is.

18 (Pause)

19 THE COURT: I can have Ms. Kapp check on the status of
20 the matter that is scheduled for the week of August 15th. I'd
21 like to have it the week before but I just don't have a full
22 day that is available.

23 MR. STARK: And boy, it pains me to say that I will be
24 on vacation.

25 THE COURT: I'm sorry. What?

1 MR. STARK: And boy, it pains me to say I will be on
2 vacation. I suppose if Your Honor tells me to cancel my
3 vacation, I will.

4 THE COURT: No, I will not. The week of August 15th?

5 MR. STARK: That's the week I'm out, Your Honor.

6 THE COURT: That's the week you're on vacation.

7 MR. STARK: I will accommodate the Court.

8 THE COURT: Well, I do note that August 12th -- are
9 you on vacation that day?

10 MR. STARK: I don't know what Monday is of the --

11 THE COURT: That's a Friday.

12 MR. STARK: No, that's fine. If that's --

13 THE COURT: I see Washington Mutual has an omnibus on
14 August 12th? I should have checked this earlier. August 12th,
15 would that be -- where is my --

16 MR. ROSEN: Your Honor, that will work for us. I know
17 the omnibus is --

18 MR. STARK: Apologies, Your Honor. August 15th
19 actually does work for me, August 12th does not. It's the
20 second week in August that I'm out. I apologize.

21 THE COURT: Oh. So the 12th you're out.

22 MR. STARK: Yes. But the 15th sounds like it might
23 work.

24 THE COURT: I will do this. I know, Mr. Rosen, you
25 have to consult with all of the other parties that were hoping

1 for oral argument at the conclusion of the hearing. Check
2 everybody's availability for August 15th. I will have Ms. Kapp
3 contact your local counsel and tell you whether that is in fact
4 available.

5 MR. ROSEN: We will do that, Your Honor.

6 THE COURT: Check that entire week because that whole
7 week is blocked off for this trial and maybe, even if it's not
8 settled, maybe it will be shortened. We'll try and get some
9 information o that. And then I'll ask debtors' counsel to
10 circulate a notice of the hearing on oral argument, okay. Does
11 that work?

12 MS. HAPER: Bettina Haper, pro se. I just wanted to
13 state for the record, on behalf of similarly situated
14 shareholders, that we would be in agreement with Mr. Stark and
15 TPS that we would -- our preference would be for oral argument.

16 THE COURT: All right. It looks like we're going to
17 pick a date. All right. I'll --

18 MR. ECKSTEIN: Your Honor, if I may, just one point.
19 I'm -- we're comfortable with the process, we think it makes
20 sense for all parties and I appreciate Mr. Folse presenting the
21 outline.

22 The one item that I do want to try to clarify relates
23 to the motion for the authority to bring an adversary
24 proceeding, which we've agreed to fold into the timetable.

25 What I had understood and what I think would be most

1 appropriate in connection with this, would be that the
2 settlement noteholders are released, I guess in this case
3 Aurelius and Centerbridge who I believe right now are the
4 parties involved in that, would file a submission that deals --
5 that responds to the legal issues and are factual discussion,
6 which will go in in connection with the written submission on
7 confirmation, will be referred to, I assume, so we will not
8 duplicate the legal submission.

9 THE COURT: That's what he's --

10 MR. ECKSTEIN: My understanding is that since there's
11 now going to be argument that to the extent there is a need to
12 reply, my understanding was Mr. Folse was going to use the
13 argument to address any reply issues, so I was assuming that
14 there wasn't going to be another submission by the equity
15 committee on the 3rd.

16 MR. FOLSE: What he said is correct. If I said
17 something different I was wrong.

18 THE COURT: Okay.

19 MR. ECKSTEIN: With that clarification, we think this
20 is a sensible way to proceed. Thank you, Your Honor.

21 MR. ROSEN: Your Honor, I rose before and I forgot to
22 mention this when Mr. Folse was laying out his schedule. The
23 one name that he did not include, though, in replying on August
24 3rd to the motion, was the debtors. And I just want it to be
25 known, the debtors are planning to file a pleading with respect

1 to the motion that was filed by the equity committee.

2 THE COURT: Okay.

3 MR. ROSEN: And we will do it in the same timeframe.

4 MR. JOHNSON: Your Honor, there were two names. The
5 creditors' committee plans to put in a short submission as
6 well.

7 THE COURT: All right. Are we done?

8 MR. ROSEN: I think we are, Your Honor. Thank you
9 very much for your time.

10 THE COURT: All right. We'll stand adjourned. Thank
11 you.

12 (Whereupon these proceedings were concluded at 4:50 p.m.)

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I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Vivek Melwani	Mr. Kaplan	21	12
Vivek Melwani	Mr. Owens	78	12
Vivek Melwani	Mr. Sargent	86	12
William Kosturos	Mr. Slack	94	5
William Kosturos	Mr. Sargent	139	17
William Kosturos	Mr. Coffey	211	15
William Kosturos	Ms. Abar	245	1
William Kosturos	Mr. Berg	248	15
William Kosturos	Mr. Duke	249	17
William Kosturos	Mr. Sher	252	1

E X H I B I T S

DEBTORS'	DESCRIPTION	ID.	EVID.
253A	Attached exhibits to revised supplemental disclosure statement (prior disclosure statement)		90

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I N D E X, cont'd

E X H I B I T S

DEBTORS'	DESCRIPTION	ID.	EVID.
2532B	Attached exhibits to revised supplemental disclosure statement (modified sixth amended plan)		90
253C	Attached exhibits to revised supplemental disclosure statement (chart of modifications to modified sixth amended plan)		90
253D	Attached exhibits to revised supplemental disclosure statement (liquidation analysis)		90
253E	Attached exhibits to revised supplemental disclosure statement (analysis of enterprise valuation of reorganized debtors)		90
255A	Attached exhibits to the modified sixth amended joint plan of reorganization (CCB-1 GUARANTEES CLAIMS)		91

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I N D E X, cont'd

E X H I B I T S

DEBTORS'	DESCRIPTION	ID.	EVID.
255B	Attached exhibits to the modified sixth amended joint plan of reorganization (CCB-2 GUARANTEES CLAIMS)		91
255C	Attached exhibits to the modified sixth amended joint plan of reorganization (PIERS CLAIMS)		91
255D	Attached exhibits to the modified sixth amended joint plan of reorganization (SENIOR NOTES CLAIMS)		91
255E	Attached exhibits to the modified sixth amended joint plan of reorganization (SENIOR SUBORDINATED NOTES CLAIMS)		91
255F	Attached exhibits to the modified sixth amended joint plan of reorganization (BENEFIT PLANS)		91

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I N D E X, cont'd

E X H I B I T S

DEBTORS'	DESCRIPTION	ID.	EVID.
255G	Attached exhibits to the modified sixth amended joint plan of reorganization (WATERFALL RECOVERY MATRIX)		91
255H	Attached exhibits to the modified sixth amended joint plan of reorganization (GLOBAL SETTLEMENT AGREEMENT)		91
408	Confidentiality agreement between debtors and Fried Frank		93
427	Form 8K filed by Washington Mutual with the SEC filing its March monthly operating report		114
428	Form 8K filed by the debtors on 12/30/09 with the SEC and the Court which filed the 11/09 monthly operating report		128

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I N D E X, cont'd

E X H I B I T S

DEBTORS'	DESCRIPTION	ID.	EVID.
429	Tolling agreement that was executed by the debtors, the equity committee and the creditors' committee with respect to Mr. Allan Fishman		257
430	Tolling agreement with Mr. Killinger, signed by the debtors, Mr. Killinger, the equity committee and the creditors' committee		257
2132	Motion to disband equity committee		259
2223	Debtors' reply to motion to disband equity committee		259
---	Transcript of March 4th hearing		262
EQUITY COMM.	DESCRIPTION	ID.	EVID.
EC-115	E-mail from Don McCree to J. Aron re JPMorgan's response to the proposal by Centerbridge and Appaloosa		32

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I N D E X, cont'd

E X H I B I T S

EQUITY COMM.	DESCRIPTION	ID.	EVID.
EC-103	Centerbridge internal compliance manual		77
EC-11	Sullivan & Cromwell draft of the WMI 4/16/09 proposal with the JPMC Response lined up next to it to show the comparison		112
EC-201	E-mail from Brian Rosen to Brian Pfeifer, Gerry Uzzi, Fred Hodara on which William Kosturos was cc'd		161
EC-212	E-mail from Jim Bolin to Brian Rosen And others on 10/28		168
EC-306	E-mail from Mr. Kosturos to Mr. McCree on 12/11		184
EC-122	E-mail chain between Mr. Kosturos and Jim Bolin and Vivek Melwani		185
EC-211	E-mail from Mr. Kosturos to Mr. McCree on 3/3/10		187

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I N D E X, cont'd

E X H I B I T S

EQUITY COMM.	DESCRIPTION	ID.	EVID.
EC-304	E-mail from Brian Rosen to Chad Smith and Mr. Kosturos on 1/12/10		188
EC-282	E-mail from Mr. Scheler to Mr. Kosturos		198
EC-297	Cover e-mails with attachments forwarding draft settlement agreements from Mr. Rosen to various other parties		200
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

LISA BAR-LEIB (CET**D-486)
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