UNITED STATES BANKRUPTCY COURT
District of Delaware

In Re:
Washington Mutual, Inc.
1301 Second Avenue
Seattle, WA 98101
EIN: 91−1653725

Chapter: 11

Case No.: 08−12229−MFW

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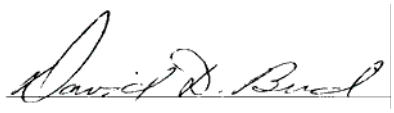

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

- -x

In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

June 3, 2010

10:34 AM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

HEARING re Debtor's First Omnibus (Substantive) Objection to Claims

HEARING re Debtors' Fifth Omnibus (Substantive) Objection to Claims

HEARING re Debtors' Sixth Omnibus (Substantive) Objection to Claims

HEARING re Debtors' Sixteenth Omnibus (Substantive) Objection to Claims

HEARING re Debtors Nineteenth Omnibus (Substantive) Objection to Claims

HEARING re Debtors' Twenty-First Omnibus (Substantive) Objection to Claims

HEARING re Debtors' Twenty-Fourth Omnibus (Substantive) Objection to Claims

HEARING re Debtors' Twenty-Eighth Omnibus (Substantive) Objection to Claims

HEARING re Motion of the Debtors Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a) for Approval of Settlement with Lumbermens Mutual Casualty Company, American Motorists Insurance Company, American Manufacturing Mutual Insurance Company, American Protection Insurance Company and JPMorgan Chase Bank, N.A.

HEARING re Motion of the Official Committee of Equity Security Holders for an Order Directing Expedited Discovery Pursuant to Fed. R. Civ. P. 34(b), Fed. R. Bankr. P. 9006, 9014, and 7034, and Del. Bankr. LR 9006-1(e)

HEARING re Motion of Debtors for an Order, Pursuant to Section 105(a) of the Bankruptcy Code Establishing Among Other Things Proceedings and Deadlines Concerning Objections to Confirmations and Discovery in Connection Therewith

HEARING re Motion of the Official Committee of Equity Security Holders for an Order Pursuant to Rule 2004 and Local Rule 2004-1 Directing the Examination of FDIC and Certain Third Parties

HEARING re Objection to Claim by Claimant(s) Michael Scott Blomquist (Claim No. 3220)

HEARING re Motion of Debtors for an Order, Pursuant to Sections 105, 502, 1125, 1126, and 1128 of the Bankruptcy Code and Bankruptcy Rules 2002, 3003, 3017, 3018 and 3020, (I) Approving the Proposed Disclosure Statement and the Form and Manner of the Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (II) Scheduling A Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Joint Plan

HEARING re Motion of the Consortium of Trust Preferred Security Holders to Compel Debtors to Produce Documents

HEARING re The Official Committee of Equity Security Holders' Petition, Pursuant to 11 U.S.C. Section 105(a), 28 U.S.C. Section 158(d)(2), and Fed. R. Bankr. P. 8001(f), for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit of Its Appeal from Order Denying Appointment of an Examiner

HEARING re Motion of the Official Committee of Equity Security Holders for an Order Pursuant to Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1 Directing the Examination of JPMorgan Chase

PRETRIAL CONFERENCE re Complaint for Declaratory Relief by Broadbill Investment Corp. against Washington Mutual, Inc. [Adversary Proceeding No. 10-50911]

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P R O C E E D I N G S

THE CLERK: All rise. You may be seated.

THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor. Brian Rosen, Weil Gotshal & Manges on behalf of Washington Mutual Inc. With me, Your Honor -- there are too many people to say, but we have a group here from Weil Gotshal to help on certain matters as well as Richards Layton & Finger and Quinn Emanuel.

Your Honor, the agenda for today picks up on page 13. And the first item on the agenda is item 19 which we filed the CNO, Your Honor, the Lumbermens. I don't know if the Court had the opportunity to enter that order yet?

THE COURT: I did.

MR. ROSEN: Okay. Thank you, Your Honor. Your Honor, there are several other items on the agenda. And I think it would be helpful if we disposed of one very quickly which would be item number 23. And that appears, Your Honor, on page 17 of the agenda which is the debtors' objection to the proof of claim filed by Michael Scott Blomquist. If you recall, Your Honor, we were here once before and the Court rescheduled it. Mr. Alexander NG is here to handle it as he did last time, Your Honor.

THE COURT: All right.

MR. NG: Good morning, Your Honor. Alex NG on behalf of the debtors. If you recall, on May 5th, I argued before the

Court that Mr. Blomquist's claim should be disallowed in its entirety because he lacks standing to bring the claim, he failed to state a claim for relief and also the doctrine of issue conclusion bars him from bringing a claim in this court.

After the Court sustained the objection and disallowed the claim, Mr. Blomquist appeared telephonically and represented to the Court that he has a contract with the debtors. The Court allowed him to -- gave him two weeks to amend his complaint and he has failed to do so. So for that reason alone, I think that his claim should be disallowed in its entirety.

THE COURT: All right. Is there anybody here on behalf of Mr. Blomquist? All right. I agree. My prior disallowance was based on what he had filed. He did not file any supplement to establish that he has a standing or any contractual relationship with the debtors. So I will sustain the objection to the claim.

MR. NG: Your Honor, I have an amended order here for you.

THE COURT: You may hand it --

MR. NG: May I approach the Court?

THE COURT: You may. All right. I'll enter that order.

(Pause)

THE COURT: Do we want to deal with 26?

MR. ROSEN: Your Honor, I thought, actually, 26 should go deeper into the batting order.

THE COURT: How about 28? The pretrial?

MR. ROSEN: Again, I thought that that's going to ducktail a little bit as to what we otherwise do. My thought, Your Honor, would be we take item 24 first which is the disclosure statement itself. And then there were --

THE COURT: Have you resolved all 650 objections to the disclosure statement?

MR. ROSEN: Well, Your Honor, I haven't been able to do all of them. Many of them, however, Your Honor, we believe in our fifty-one page response, our chart, we were able to deal with. And, of course --

THE COURT: I didn't get any chart.

MR. ROSEN: We filed it yesterday at noon.

THE COURT: Did you deliver it to chambers 'cause I don't check the docket?

MR. ROSEN: Chun? It was, Your Honor.

THE COURT: With what?

MR. ROSEN: It's called the omnibus response. It's attached -- it's Exhibit A to that.

THE COURT: I didn't get it. Which amended agenda was it with? 'Cause I did not get it. And since I had asked for a chart, I --

(Pause)

THE COURT: Let's pass this. Let's go to the discovery issues.

MR. ROSEN: Okay, Your Honor. Those are items 21 -- 20, 21, 22, 25 and 27. The reason I felt we would do it in the inverse order is just to state what I thought the obvious which is if the Court decides that there is no disclosure statement to be approved today that there was no reason to address any of the discovery issues associated with the confirmation hearing?

THE COURT: Really?

MR. ROSEN: Well, that was our theory because why would we move forward with those discovery issues, Your Honor, if, in fact, the Court was not ready to approve the disclosure statement?

THE COURT: Why would I stop discovery --

MR. ROSEN: Because they were associated with confirmation of -- and I -- excuse me -- the items that are referenced in the disclosure statement itself. If the Court wants to go otherwise, that's fine, Your Honor. We can take it up that way.

THE COURT: Yeah. I think we need to discuss the discovery issues.

MR. COLLINS: Your Honor, just so we're clear -- for the record, Mark Collins of Richards Layton & Finger on behalf of the debtors. Your Honor, we did deliver to chambers, we believe, yesterday at 12:20 a set of the pleadings that were

filed including the omnibus response. Attached to the omnibus response is the chart that goes through the various objections, lays out in summary fashion what the objections are and how we propose to deal with those. We were in touch with Ms. Capp regarding the delivery of those documents yesterday slightly afternoon.

MR. ROSEN: Your Honor, Mr. -- Adam Strochak from our office will be handling the motion of the debtors to establish the discovery procedures as well as responding to some of the objections that have been opposed. And Mr. Elsberg from Quinn Emanuel will be addressing the motion that was filed by the equity committee with respect to expedited discovery.

THE COURT: Okay.

MR. STROCHAK: Good morning, Your Honor. Adam Strochak from Weil Gotshal & Manges for the debtors. Let me start with our motion to establish discovery procedures. Your Honor, this is a framework that we've used in other cases where there are significant disputes about confirmation. We think it's wholly appropriate for the Court to exercise over the docket, to establish a framework for procedures that will allow us to proceed in a coordinated fashion, to impose some what we believe are very modest burdens on objectors to demonstrate why they need discovery, to allow us to establish a general framework where we'll provide access to a document database which will hopefully provide a lot of the basic background

material that people will want to see in connection with discovery.

There's ample authority in the Code and the Rules for this type of procedure. We are not trying in any way to impair parties' due process rights. What we're trying to avoid is an extraordinarily costly burdensome time-consuming and unmanageable process if we have a free-for-all with every party who wants to object to confirmation serving separate discovery requests on us without any basis or establishment that discovery is going to be necessary to prosecute their objection to the plan.

It's very apparent from the materials, the discovery materials and requests that we've received already --

THE COURT: How many have you received already?

MR. STROCHAK: Well, we've got discovery from the Trust Preferred. I believe we have discovery -- we have extensive discovery from the equity committee. I believe there's discovery from the bank bondholders out there.

THE COURT: So three?

MR. STROCHAK: Well, three so far, Your Honor. And what our concern is --

THE COURT: And have you responded to those?

MR. STROCHAK: We've provided information to the equity committee. We haven't formally responded to the discovery. There is obviously discovery dispute with the Trust

Preferred over confidentiality issues. And that's unresolved and it's on the docket for today.

And what we want to do, Your Honor, is avoid a situation where we have to come in to court and argue about each of the sixty-seven document requests that the equity committee served to us and all the other stuff that is out there.

THE COURT: I want to avoid that, too. That's why I told you to provide them with the information that was relevant to the settlement. Did you do that after the May 5th hearing?

(Pause)

MR. STROCHAK: Your Honor, we have been providing information to them on a rolling basis. And I'll have to defer to others who have actually been involved in the actual production to describe exactly what's been provided to date and the current status of all that. But it is certainly our intention to provide the information that the Court directed in an organized coherent fashion so that we can manage this process efficiently and effectively. And I can defer to -- what I can do is defer to Mr. Elsberg if the Court wants a specific update on exactly what's been provided to date. I'm happy to do that.

THE COURT: Yes. Let me hear that.

MR. ELSBERG: Good morning, Your Honor. David Elsberg from Quinn Emanuel for the debtors. What we've given is all

the 2004 discovery that we received. We've given all of the written discovery that's gone back and forth. They've asked for the correspondence having to do with discovery which we have given them. We have set up a data room that we've given access to their financial consultants as well as their outside counsel. What we refused, and this is one of the motions today, is asked us for our privileged and work product information. And on that, and you'll see in the motion, they say that's where we drew the line. That is where we drew the line.

THE COURT: But otherwise, you've given them everything in response to their discovery requests?

MR. ELSBERG: No, Your Honor. Their discovery requests -- they served very long discovery requests, multiple, multiple requests that are attached to one of their motions today. They served those within the last week on their shortened -- their notice was shortened. And I don't think that they really expected that by now we would have responded to all of those requests. It's upwards of, say, fifty, but we have done is, again, we've given them a data room and we have the motion that proposes a mechanism to give them broad range in discovery.

THE COURT: And what is that mechanism?

MR. ELSBERG: I believe that -- I believe that Brian Rosen or Adam Strochak will be addressing that in one of the

motions today which proposes a particular mechanism. But again, let me just reiterate, Your Honor. The requests that they served on us did not even call for a response by now. So it's not that we're late. It's not that they thought that they would get it by now. They were informal requests that they gave to us and we've tried to give them what they asked for, again, drawing the line at work product.

As for the formal official discovery requests, they don't ask for an answer by now. So --

THE COURT: Okay.

MR. ELSBERG: -- I don't think they have a complaint about that, Your Honor.

THE COURT: Okay. Thank you.

MR. STROCHAK: Adam Strochak for the debtor. Your Honor, let me walk through, if I could, what we propose to do in our motion. The key thing that we propose to do within the next couple of weeks is to establish an online repository of documents that will provide all the information that Your Honor was inquiring about. It's enumerated in our motion. We will provide the background information regarding the settlement and the various claims that are being resolved pursuant to that settlement. Our proposal is to have that data room up and running by June 23rd. And we think that that will provide access to the vast majority of the documents that are necessary to assess the settlement and evaluate these issues.

What our proposal doesn't do, Your Honor, is preclude anyone from seeking additional discovery if they find that what's in the data room is insufficient to address the matters that they're raising in their objections. We're not trying to foreclose anyone from taking additional discovery.

THE COURT: Really? Isn't there a proscription against seeking discovery that is not, quote, to use your word, permitted discovery?

MR. STROCHAK: But permitted discovery is defined broadly to cover matters that would be relevant and reasonably responsive to request --

THE COURT: And likely to lead to relevant information?

MR. STROCHAK: Yes, Your Honor. That's the intent. The intent is not to change the basic discovery obligations.

THE COURT: Then why are we even defining permitted discovery if it's not to restrict it?

MR. STROCHAK: Well, Your Honor, it was simply defined for purposes of setting up a framework in the motion. All we want to do is make sure that we're not subject to a fishing discovery -- a fishing expedition that's not related in the ways to the issues that are going to be put forward in confirmation and to the objections that parties file. That's what we're trying to drive with the definition of permitted discovery.

So, Your Honor, what we've done is we've set out a series of dates and what we did is we worked backwards from a proposed confirmation hearing beginning on August 2nd. And we've set up a series of interim dates. We'll provide access to the data room. And the trigger for access to the data room is the filing of a preliminary objection. So what we'd like is for parties to file preliminary objections so we understand what the disputed issues are going to be at confirmation. We provide access to the data room beginning on June 23rd. Any party can serve additional discovery requests with a deadline of June 28th. If there's insufficient information in the data room, to allow the party to conduct necessary discovery within the scope of their objection. We've proposed a status conference on July 8th to resolve any disputes regarding the scope of discovery including requests for depositions. The basic premise, Your Honor, I think is that we will identify a list of witnesses that we intend to present at the confirmation hearing. To the extent parties want discovery from witnesses beyond that initial list, they have an opportunity to request that. If there are any disputes about that, the Court can resolve them on July 8th at the status conference and discovery can continue.

We've proposed to respond to requests for production of documents that go beyond what's in the data room by July 6th. So we get them by June 28th and propose to respond on a

very expedited basis by July 6th. And then there's a process for supplementation of objections to confirmation. If parties learn additional things, if they have additional bases to object, if they need to flesh out their objections to confirmation based on facts that are discovered through the discovery process, they are permitted to file additional objections, supplemental objections, to confirmation by July 19th.

And that's the framework that we suggest, Your Honor, to have a process that will allow us to move efficiently through discovery, set a framework and a schedule for the resolution of any disputes regarding discovery issues, so we don't have a situation where each party who wants discovery has to come separately on a motion to compel if there's a disagreement and have a series of motions to compel heard by this Court over the course of the summer as we're working toward, you know, a short time frame for completing the confirmation process.

The objectors to the motion suggest in a variety of different ways that somehow that the debtors should be required to respond completely to full FRCP discovery procedures and there should be no limitations whatsoever. But unlimited discovery without reasonable limitations simply doesn't work in the context of a confirmation hearing where we know that we're going to have scorched earth litigation over the course of a

couple of months on a very shortened timeline.

THE COURT: Well then, let's extend the timeline and let it be fully vetted. What's wrong with that?

MR. STROCHAK: Your Honor, we want to move forward with confirmation. We don't want delays.

THE COURT: I know you want to but what is the reason that we have to move forward on an expedited basis?

MR. STROCHAK: Well, I think the best thing would be for Mr. Rosen to address the specifics of it. But we've got ongoing interest accruing. We've got creditors who have waited for a substantial amount of time as we developed the settlement and moved forward. And overall, we think moving forward as expeditiously as possible makes the most sense in the context of this case, Your Honor. Now, if Your Honor wants to consider adjustments to the schedule, we certainly will consider them as necessary. But we do think that there are good reasons to move forward as promptly as we can.

THE COURT: Let me hear from the objectors. Who wants to go first?

MR. STROCHAK: Thank you, Your Honor.

THE COURT: You're first?

MR. NELSON: Good morning, Your Honor. May it please the Court. Justin Nelson with Susman Godfrey representing the equity committee here. I want to address first some questions that Your Honor had about what we've gotten. And the answer is

shockingly little. Maybe that's it but if it's it, it raises some serious questions about what they've done so far. We know it's not it. For example, the Blackstone report, which is a key analysis, a key document, going over the assets of the estate and inventory of the estate. We asked for it. We don't even have that. We don't have a detailed analysis of the inventory of the estate or what will remain with the debtor after the reorganization.

We have numerous objections here which are laid out fully in our motion. I want to go over a few of them at a pretty high level. I'm happy to answer any questions that Your Honor has specifically about it. But I want to maybe first give an overview about what's happened since the May 5th hearing when this Court gave some instructions and admonitions to debtors and why we're here.

As this Court is aware, on May 5th, this Court denied the equity committee's motion to appoint an examiner. It ruled, however, that the debtors and the creditors' committee should cooperate with the equity committee and that the equity committee should use Rule 2004, the other discovery requests, to obtain any needed materials. The equity committee has sought to follow this Court's instructions by requesting the information Your Honor discussed at the hearing. But the equity committee has met resistance at every turn from the debtors, from the third parties, from the creditors' committee.

First, Your Honor, at the hearing, Your Honor specifically discussed the types of information that we are now seeking and that, by their motion and by their proposal, would completely wipe away. That is one thing that the debtors neglected to mention it would completely moot our discovery requests here, the Rule 2004 request to JPMorgan, to FDIC and the other third parties, and the motion to expedite discovery on the analysis. And -- so this is, Your Honor, from your transcript, page 99 of the May 5th hearing:

"I don't want to hear about obstacles being placed in their path to getting full and open access to that information, whether it's documentary or interviews with the debtors' management or others who have conducted these investigations; and the same goes [for] the creditors' committee, who's been actively involved in...this."

At the hearing, the Court also discussed using Rule 2004 as a away to gather information. Immediately after the hearing, on May 7th, the equity committee asked both the debtors and the creditors' committee for their investigation and analysis of the claims along with any other investigations they have collected. We haven't gotten it. On a telephone call just a couple weeks ago, the debtors initially agreed that we could see some of these hot documents they collected. But when we asked whether the documents were all of the hot documents or just a subset that they handpicked for us, they

put us on hold for two minutes and then said we could not receive any of the information at all.

The creditors' committee also refused to provide us with their analysis or the results of their investigation. After extended delay, the debtors did provide us with most of the third party documents they had gathered which are quite limited. There are 238 pages. This is, Your Honor -- may I approach?

THE COURT: No.

MR. NELSON: Okay.

THE COURT: I don't need to see it.

MR. NELSON: This is the enti -- the sum total of the FDIC's production in this case, 238 pages received from a FOIA request substantially blacked out. It reads like a classified version of the Kennedy assassination. This is all we have from the FDIC. From the Office of Thrift Supervision, we've gotten 650 documents. From JPMorgan, we've gotten about fourteen boxes of discovery which we've reviewed. We just got that a couple weeks ago. This, Your Honor, we got on May 25th, just last week. The debtors mention this data room that they've given us access to it. They forgot to mention they gave us access to it last night around 7 p.m. That's when we got the access to it.

So, the debtors represent to this Court on paragraph 21 of the examiner motion that with respect to JPMorgan and the

FDIC, the other settling parties here, the debtors had "successfully negotiated a confidentiality stipulation and substantially negotiated a scheduling order to govern production of documents. What the debtors evidently did not state, however, is that neither JPMorgan nor the FDIC appears to have produced any of their own documents except to the extent I just described. And in our brief on the JPMorgan Rule 2004 issue, paragraph 38 of that brief details the extensive holes in JPMorgan's production that the debtors themselves identified. That's Exhibit G to that motion. They -- the debtors said that JPMorgan was withholding documents with third parties which our review of the production confirms. For example, only nine documents were produced from the files of JPMorgan CEO who actually negotiated the agreement with the FDIC; that only about one-third of JPMorgan's relevant custodians were searched; and that in the words of the debtors themselves, JPMorgan's production was, quote, deficient.

Again, these are not our complaints; these are the debtors' complaints. We've already talked about the FDIC, the 238 heavily redacted pages. It appears that the FDIC has not produced a single document in this litigation, the adversary proceeding or the DC action. And just yesterday, in paragraph 4 of its response to the debtors' discovery plan, the FDIC indicated that going forward, it does see the need to produce any documents in this case.

The third party documents obtained by the debtors are no better. In paragraph 24 of their response to the examiner's motion, the debtors listed the third party discovery they allegedly conducted. They claim that they were in, quote, "extensive negotiations" with seven parties to obtain discovery. It appears, however, that not a single one of these seven parties produced a document. The debtors also claimed, in that same paragraph, that they "issued information requests to the FDIC, the OTS, Securities and Exchange Commission, the Department of Treasury and the OCC. With the limited exceptions below, however, the debtors appear not to have received any of these documents."

And with respect to the numerous investigations that have occurred, the debtors appear not to have obtained documents from any of them. They certainly have not produced them to the equity committee if they have.

The debtors previously represented to this Court in their reply to the January Rule 2004 motion that Moodys, the Department of Treasury and the Federal Reserve had voluntarily agreed to produce documents. Yet, it appears that the Department of Treasury and the Federal Reserve did not do so. At least, we do not have them if they did. Of the third parties to whom the equity committee issued Rule 2004 requests, here is the complete total of what the debtors received or at least what the debtors have given to us. The 238 pages from

the FDIC, just discussed, about 650 pages from the OTS and about twenty documents from Moodys that the equity committee has not even seen because Moodys has not given permission for us to see it despite requests to both Moodys' counsel and to the debtors to allow us to access this limited set of twenty documents. That's it.

Now, to be fair to the debtors, they also have that access to millions of pages to Washington Mutual's own prepetition documents. But they have not shared the analysis of which documents of those are relevant. And those documents are no substitute for the documents held by the parties to whom the debtors now propose to settle.

So that leaves us to what they now propose in their plan which is to moot all this discovery we are asking for to try to challenge the plan and figure out the analysis that the debtors appear not to have conducted or at least not to share with us and certainly have not gotten that discovery from third parties or JPMorgan. The settling parties' discovery plan is unprecedented and seriously flawed. Under the guise of coordination, the settling parties have proposed a plan that severely tilts the playing field in their favor and cuts off the equity committee's ability to conduct discovery. It limits the type of discovery. It unduly restricts the scope of discovery. It moots the equity committee's Rule 2004 request upon JPMorgan, its Rule 2004 request upon the FDIC and third

parties and its motion for expedited discovery on the debtors. It imposes severe and unnecessary time constraints that make it all but impossible to meet the deadlines. In short, it is fundamentally unfair.

The debtors' only authority, at least what they cited in their brief, for imposing these Draconian restrictions is the Enron case where a much less restrictive order was entered governing discovery. In Enron, however, two examiners spent substantial time investigating the estate and the potential claims. Here, of course, the exact opposite is true. There is literally no authority for imposing an order like this where an examiner has not previously investigated the estate and done much of the legwork. Here, the settling parties have given no valid reason why such an order is necessary and when asked again by Your Honor this morning, the only two asserted reasons I hear were, number one, the burden to respond to discovery requests, which, so far, there have been three; and the speed to confirmation. Both of these reasons, however, are not unique to this case and cannot justify an order that drastically changes the Federal Rules of Civil Procedure that are made applicable by the bankruptcy rules and that create on the debtors' proposal significant due process issues.

Indeed, by changing the discovery rules in a manner that restricts the equity committee's ability to challenge a plan without any justification unique to this case, the

proposed order violates the equity committee's due process rights and is ultra vires . This is not the case to experiment with novel discovery plans that have never been tested. The settling parties have crafted this plan to prevent any meaningful challenge to confirmation. This Court should abide by the normal discovery rules which apply in even the largest bankruptcies. The amount of parties seeking discovery here is no different from other large bankruptcies. As in all cases, the parties are capable of working out any scheduling issues by themselves and meeting and conferring.

Timing is also not especially unique here. Indeed, because WMI is not an ongoing venture, there is less urgency to hurry the plan confirmation at the risk of prejudicing the rights of the equity committee and other nonsettling parties. The settling parties' proposal recklessly speeds towards confirmation with little regard to the rights of nonsettling parties. The equity committee should have the ability to fully test the multi-billion dollar claims that the debtors are now trying to settle.

Indeed, from our perspective, it appears that the only unique timing issue in this case is that the settling parties are trying to rush through plan confirmation before the shareholders can have a new shareholder election. While trying to rush confirmation, the debtors are stalling at all opportunities the shareholder election suit that this Court

gave permission to proceed. Despite this Court's ruling that the suit could proceed in Washington State court, the debtors remove the case to bankruptcy court in Tacoma and then ask to stay, dismiss or transfer that action to this court. The plaintiffs in the shareholder action agreed to the transfer to this court to put it in front of Your Honor, but the debtors themselves then refuse the very relief that they had requested in their motion. That motion is now pending in the Tacoma bankruptcy court on June 11th. This is not the case to deviate from the normal discovery rules.

In fact, they are especially important here because the debtors have not undertaken much of the needed discovery as discussed just before. Here, given the lack of discovery and investigation by the debtors, the equity committee must undertake the investigation in order to assess the plan and a settlement on which the plan is based.

Our response to the settling parties' proposal reviews in detail the significant infirmities with the plan. To take just a few examples, the debtors would have peruse only evidence that, quote, supports their proposed plan and that they, quote, actually relied upon while allowing them to conceal adverse information that they did not rely upon. The settling parties would have substantial discretion about what other parties can discover. The settling parties have no obligation to produce particular witnesses for depositions.

Certainly that's true with respect to JPMorgan and the FDIC. The proposed plan effectively precludes any investigation into the business tort claims against JPMorgan and the dissipation claims against the FDIC that are being settled. The proposed plan does not require the debtors to produce all documents relevant to the identification and valuation of assets, rather, only those that support and that they relied on. The proposed plan contains onerous timing requirements that are all but impossible to comply with. The proposed plan creates unnecessary procedural hurdles that will, in fact, slow down the process and exacerbate any issues. As an example of the timing and procedural problems, a party must object to the plan before documents are even produced. The objections are due June 21st now. Documents are scheduled to be produced under the debtors' order on June 23rd. The plan then shifts the burden to the proponent of the request to show that any document requests additionally are, quote, reasonably necessary to the parties' plan objections. Thus, a party must decide whether and how to object before receiving any discovery and those objections would govern future productions.

Under the normal discovery rules which apply in normal large bankruptcy cases, a proponent would file a request, the opposing party could object, the parties could meet and confer and then a motion to compel would follow if necessary. The settling parties' plan simply does away with these simple and

tested procedures.

Deposition discovery is just as unfair. The settling parties have reserved for themselves the right to supplement their witness list for any reason at any time. Nonsettling parties, by contrast, would be limited in depositions to the specific person on the settling parties' witness list. If a nonsettling party can show that -- they have to show that another deposition is, quote, reasonably necessary and not duplicative. If they can show that, it has until June 28th, five days after the settling parties produce documents to request additional persons or topics. And even these depositions are limited to corporate, not individual, depositions for JPMorgan and the FDIC.

Moreover, the settling parties appear to do away with meeting and conferring with respect to the deposition schedule as the proposal gives them absolute discretion to set the time and place. The settling parties also disallow any use of interrogatories.

In many of these respects, such as the restrictions on depositions and the lack of a level playing field, the debtors have simply added clauses that do not even appear in the Enron order. In other words, it is no exaggeration to say that if this Court approves this plan, it will be the first Court in the entire country to approve such a radical plan, at least, as of what we know.

This Court should reject the settling parties' proposal in its entirety. The procedures are heavily biased toward the settling parties in both substance and procedure. Normally discovery rules have worked in even the largest of bankruptcies. There is no need to deviate from that procedure here.

Finally, given the magnitude of the issues at stake and the need for discovery into the claims the debtors are releasing, any plan confirmation should be delayed until at least November 2nd. The equity committee believes in the importance of coordination and working with all parties on a schedule. But the settling parties' proposal does not allow for a fair hearing. The equity committee has suggested a few procedures should this Court want to go beyond the federal rules. These procedures are unbiased and gear towards an expeditious and fair resolution of the case which, we believe, all parties should strive for.

If this Court has any questions on any of the particulars, I'm happy to answer them.

THE COURT: No, thank you.

MR. ELSBERG: Your Honor?

THE COURT: Yes?

MR. ELSBERG: David Elsberg for the debtors. If I might have literally one and a half minutes not to reply but just to correct certain limited factual statements that were

incorrect.

THE COURT: You may.

MR. ELSBERG: Your Honor, there, I think, was a suggestion that we have not been cooperative. I just want to focus on the specifics equity brought up and set the record straight. We've had multiple calls and meetings with the equity committee's counsel. And they've asked us to give them a lot of information voluntarily. You can see this in the correspondence they attached to one of their motions. And on a voluntary basis, Your Honor, we have given them everything that they've asked for with one exception which is our work product, our privileged information and our work product. So just to address the specifics that counsel just brought up, he says that the data room -- he didn't get access to the data room until last night. That's actually not correct at all. The truth is, Your Honor, the day after the last hearing -- the day after the last hearing when Your Honor asked us to give information, we gave them access. Their financial advisors asked for access to the data room and the next day after your hearing, they had the access. All that happened last night is for the first time, we got an e-mail from the Susman firm and one of the lawyers asked if he could have his own password and we said yes. That's all that happened last night. So the data room they've had. And I don't want a misimpression on that.

Second, with respect to the 2004 discovery, Your

Honor, we gave to the Venable firm, which was the first counsel for the equity committee, we gave them the 2004 discovery that we had months ago. We didn't wait. I don't why it is that the Venable firm didn't get it to them more quickly. But it is not the case that we waited until a week or two ago to give that to them. They've had that.

Now their other complaint about the 2004 discovery isn't that we held anything back. They can't say that and they can't say that we delayed because we didn't. Your Honor, what they're complaining about is there were parties that were saying that they would voluntarily give us information. But then after this Court ruled that we could not compel those third parties to give discovery, a number of them said well, we don't believe that we should be giving you anything voluntarily anymore. That's what happened with that. It's not that we held it back.

So, really, when you look at all of the specifics that he mentioned -- there were a lot of generalities, but when you look at the specifics, the data room, the 2004 discovery, everything they asked for voluntarily, we did give it; we did give it promptly. The one place where we did draw the line is where he said we had a phone call and we did put him on hold because what he said is we don't just want your collection of 2004 documents. He said and the question was do you have an internal set of documents that you have marked hot. And we

went on hold because the Third Circuit has made clear in the Spork (ph.) decision that an internal collection of documents prepared for litigation -- when you select documents, the Third Circuit, and also the Supreme Court in Hickman, has said that is called work product. And so, we got back on the phone and we said listen, you're saying that you want documents that are relevant to certain subjects. That's one thing. We are happy to respond to requests like discovery requests. But you are asking the specific and precise request, your internal work product, your internal hot documents. And we said, you know what, we are not going to waive or give up our internal work product.

So, with all of their requests, the truth is we've given them what they wanted. We've give it promptly. We just said not a work product and a privilege.

And the last specific item is they did serve formal discovery requests. And I don't think we've heard any complaint about that because those were served about a week ago with their expedited motion. They attached their formal discovery requests for the first time. There can't be a complaint. They're very -- they're broad, they're overbroad. But they couldn't have expected any response by now.

THE COURT: Okay. I understand. Let me ask on the work product issue because I think that's key to part of an issue I have with the debtors' proposal. I did fully expect

that the debtor would produce to the equity committee all of its work product and any document protected by attorney/client privilege because, in my view, they are your constituents as are the creditors. And in the absence of that, maybe I should reconsider my denial on the motion for an examiner and let an examiner get everybody's privileged documents.

The committee, the equity committee, is on the same side as the debtor. The equity committee is not the adversary in this issue. The FDIC and JPMorgan may be. But why aren't they entitled to those under the Garner and other common interest cases?

MR. ELSBERG: Your Honor, actually, I think that the case law that does address this question precisely is very clear that they are not entitled to this information and they're not entitled to it for several reasons. First, this is work product which is not subject to the Garner exception. And I will address that first if you'll allow me.

THE COURT: But why should it not be produced to your co-client?

MR. ELSBERG: You mean, why should we not be --

THE COURT: Work product, yes.

MR. ELSBERG: One reason is that work product cannot be, under the case law -- the standard applicable to work product is a nearly absolute protection, Your Honor. And --

THE COURT: It is from protection by the other side.

MR. ELSBERG: Okay. Let --

THE COURT: This is not the other side.

MR. ELSBERG: Okay, Your Honor. Let me address that specific question. The first Garner factor and what the cases look at -- they are acting as if they are the client here. They're getting up and they're saying look, we're the real client and so you should have to turn over your work product. But the situation here, Your Honor, is that there are multiple constituencies. And they're not even the senior constituent. They're subordinated to the creditors. So they're not really speaking out for the entire estate. And while today, Your Honor, they're saying that there's a mutuality of interest -- and this is what the cases look at. And I'll give you specific cases including Third Circuit cases. They've looked at this situation with multiple constituencies. While today they're saying there's a mutuality of interest that justifies the invasion of the privilege, they know better. What they said on January 21st, at paragraph 31 of their brief opposing the motion to disband, was "unsecured creditors and equity holders possess discordant priorities and interest. And the interest of shareholders and creditors frequently conflict during the course of the Chapter 11 proceeding. And they went on to justify their very existence by touting the fact that their interests conflict with other groups that are not representing their interests. So --

THE COURT: But you're not representing the creditors. You're representing --

MR. ELSBERG: Yes.

THE COURT: -- everybody.

MR. ELSBERG: Yes. Exactly right, Your Honor. And the cases --

THE COURT: So why are they not entitled to it?

MR. ELSBERG: They are not entitled to it because the case law that has looked at a situation like this where you have a fiduciary that has obligations to conflicting constituents has said that when you have a conflict like this, you don't turn it over. So, for example, we cite the Wachtel v. Health Net decision where the Third Circuit specifically distinguished Garner on exactly this ground. The Third Circuit said Garner was distinguishable on the ground that the corporation's management owed their fiduciary obligations to a single discreet group, a single discreet group, the shareholders of the corporation. And the Third Circuit said that, in sharp contrast, disclosure was not wanted on the facts of Wachtel where there were multiple beneficiaries of the fiduciary relationship all seeking payment from the same pool of assets and disclosure of materials was not supported by some of those beneficiaries.

And we cite the Eleventh Circuit case in Cox, Your Honor. There are cases that address this exact question. It's

not just reasoning or analogizing. These are cases that address this exact question. And the Eleventh Circuit flatly held that when you have significant stakeholder groups who are not in favor of compelling discovery, Garner simply doesn't apply because in that type of situation, you simply can't say that the true client, the one that really owns the privilege or owns the interest is the one requesting the information. The best you can say is you have a multiplicity of divergent interests. And that's exactly what we have here.

And, Your Honor, the cases have recognized, when you look at what the cases have said, when there are multiple constituents, this fits in with the general guidelines. And the Third Circuit has said this and the Supreme Court has said this, that privileged rules and work product protection rules, they need to be clear. They need to be predictable. And in a situation where you have somebody, a debtor and its counsel, who has to negotiate different factions -- they've said they don't share our interest to date.

THE COURT: This deals with the settlement of the litigation and the settlement of potential claims against JPMorgan and the FDIC.

MR. ELSBERG: Yes, Your Honor.

THE COURT: How are the shareholders and the creditors on a different side from the debtor on that litigation?

MR. ELSBERG: Your Honor, they're on a different side

in the following sense recognized by the Eleventh Circuit in Cox and the Third Circuit in Wachtel. What those cases recognize is that the fiduciary who is in the center of this -- the fiduciary needs to be able to work and to serve the best interest of the group as a collective. And so, when you have a conflict as between the constituents --

THE COURT: How is there a conflict in the litigation?

MR. ELSBERG: In the li --

THE COURT: Doesn't everybody want to pursue -- everybody's on the same side of the litigation against JPMorgan and FDIC, correct?

MR. ELSBERG: Respectfully, Your Honor, no, I don't --

THE COURT: How? How are they different?

MR. ELSBERG: This -- let me give you one -- let me give you one example. So, for example, we've seen briefs where, from time to time, the view has been expressed that what the equity committee would like to do is, quote unquote, swing for the fences because --

THE COURT: That's a different issue. That deals with the settlement. I'm talking about the litigation.

MR. ELSBERG: No, no --

THE COURT: Let's start with the litigation.

MR. ELSBERG: In a litigation -- in a litigation, certain claims that different -- when different groups right from the beginning -- and again, from its inception, the equity

committee recognized it has conflicting, not just different, interests. When you have groups with different interests, that can apply to the liti --

THE COURT: Explain to me the different interest in the litigation. Doesn't everybody want the most money?

MR. ELSBERG: Everyone wants the most money, yes.

THE COURT: Okay.

MR. ELSBERG: And then the way that you can try to get to the most money are judgment calls and strategies that could differ radically -- in fact, I think we're --

THE COURT: Yes, they can. But the debtor is suggesting we want to settle this litigation. And I think equity committee is entitled to your analysis of those claims and your analysis of why they should be settled.

MR. ELSBERG: Well, Your Honor --

THE COURT: They're your cli -- they're one of your clients.

MR. ELSBERG: Your Honor, the case law that has addressed this -- I don't think that they --

THE COURT: Is that case law exactly on point dealing with a bankruptcy case where the debtor's proposing to settle litigation that could benefit all the constituencies?

MR. ELSBERG: They are -- no. They are the closest case on point. They don't cite a single case from any jurisdiction anywhere where, over the protests of one of the

constituencies, the Court nonetheless compelled disclosure, number one. It hasn't happened that would make history and go against the circuit court cases that have considered this very issue. That's number one. And number two, I haven't gotten to this yet. But Garner, which is what we're talking about here and is an exception to the attorney/client privilege, Garner does not apply to work product at all. There's no basis to apply the Garner test when you talk about work product. The Third Circuit has said it does not apply to work product. The Fifth Circuit, the Eleventh Circuit, all the circuit courts to have addressed the question have held it does not apply to work product. And that is just about everything they're looking for.

And on top of that, Your Honor, you don't get to invoke the Garner exception even if it could apply to work product. And the circuit courts are unanimous that it does not. Even if you could apply it to work product despite the clear Rule 26 -- because Rule 26 says this is what applies to work product and it rejected the good cause standard. Even if Garner could apply, there's another prerequisite to applying Garner which is -- and Your Honor wrote this in the Teleglobe decision, that to apply Garner there needs to be a claim of breach of fiduciary duty. And that claim needs to be a colorable claim. That is what Garner said. And if it's a colorable claim then maybe you can show cause because it would

make sense to get discovery to prove that claim.

Here, all they've said is that they might want to -- they might have questions about a settlement. The fact that you might have questions about a settlement is not -- it's never been held enough to violate the privilege even under Garner. But again, Your Honor, you really don't get there.

THE COURT: How do you think that you're going to put on a case at confirmation in support of the settlement without somebody testifying as to (a)what the claims are; (b)how the debtor valued those claims; and (c)how the settlement is a reasonable resolution of those claims?

MR. ELSBERG: Your Honor, that's a good point. And if we did get to the point where we put our work product at issue, which we have not done so far -- in fact, that was the complaint, that we didn't put it at issue --

THE COURT: How are you going to prove it without?

MR. ELSBERG: Well, one way that we could prove it would be similar to the way you prove points when you put in briefs. What we would do is we would say this is the claim and we saw these are the defenses that were raised. These are the legal issues. The way that previously some of this has been done, that there have been previous hearings where claims have been put up on the board and there have been descriptions of the defenses that have been raised and then said to the Court it is reasonable for anyone looking at this to conclude this

would be the likely value. If we crossed that line, if we waive, if we put it at issue and cross that line, then, Your Honor, you've got us because we've decided to put it at issue. But we haven't. And again, I want to emphasize, we're talking a lot about Garner today but Garner does not -- the circuit courts, including the Third Circuit court of appeals, has flatly said work product cannot be invaded by Garner. That's --

THE COURT: But it can be invaded by an examiner. So maybe I should reconsider. If you're not going to produce that to one of your constituents, why should I not appoint an examiner to whom I will direct that you give everything, which I thought I had directed May 5th, that you give everything to the committee.

MR. ELSBERG: Your Honor, the reason not to do it would be the same reasons that Your Honor previously articulated. I believe the words were "This has been investigated to death." And, Your Honor, just --

THE COURT: But if it's been investigated to death, my suggestion was the fruit of that investigation should be produced to the parties.

MR. ELSBERG: Yes. And, Your Honor --

THE COURT: And it hasn't been.

MR. ELSBERG: Your Honor, let me just be clear about -- I hear what you're saying about giving them the fruit.

And let me just explain what we understood it to mean and what I think is a reasonable understanding and proposal. What the Courts have said, the Supreme Court, all the cases that talk about work product, they all say, look, of course, you could say it would be more convenient if you could get the analyses. But, Your Honor, what they -- they will do their own analysis. I'd love to think that Quinn Emanuel's internal memos and research is such hot stuff that without it they can't do their own analysis. But, of course they'll do their own analysis. They need to do their own analysis. So, Your Honor, what do they need to do their own analysis. So, Your Honor, what do they need? What is the fruit of the investigation that they need? What they need are the underlying facts. And when they get the underlying facts from these investigations that have investigated it to death, they can take all that factual information and they can draw, and they will draw, their own opinion.

Now, in their justification, Your Honor, even if Garner did apply -- even if Garner did apply, one of the prongs in Garner is need. And, by the way, under the work product doctrine, which is nearly absolute, you have to show a far stronger showing than just need and substantial hardship. Look at the part of their brief when they talk about what is their supposed need. And, Your Honor, what you see is they don't say they really need to look through my files. They don't say they

really need to look at my legal analysis. What they say is we can do -- they say they can do these analyses. They never say they can't. This isn't like a dead witness. That's when the Courts have found on rare occasions unavailability. They say they can do it but it might cost more and take a little more time. That is a plea of convenience. That is a plea of convenience. It's not a showing of need. So, Your Honor, if there were an order here requiring us to turn over work product protected materials, it would go against what the Third Circuit has flatly said which is work product is not subject -- it is not subject to the Garner exception. And it is a near absolute, a near absolute, protection and there's --

THE COURT: It's a protection from third parties not from your client. Your client can, in fact, gait attorney work product.

MR. ELSBERG: Your Honor, the case law that addresses who counts as the client are the cases that I cited, which are the Cox case, the Eleventh Circuit case, the Wachtel Third Circuit case. They do not cite a single case where there were multiple constituencies like this and, over the protest of one, it was turned over. Every single circuit court of appeals case to have addressed that has looked at this question and gone the other way. And if this were to be turned over despite the fact that it was work product -- Your Honor, in Teleglobe, Your Honor looked at Rule 26. And what Your Honor wrote is that in

order to make an exception to, or vary, the plain language in Rule 26 which says "core work product shall be protected", what Your Honor said is it would require a clear statute -- a clear statute. It is not for a Court, respectfully, to rewrite what is in Rule 26. And Rule 26, Your Honor, doesn't say this is the standard that applies unless you have a multiple beneficiary situation in which case there's an unwritten exception. And the Courts have looked at that and recognized that the rule makers considered the good cause standard. They considered it and they rejected it. And the Third Circuit hasn't said it's a nuanced rule or a rule that could be applied differently. The rule in Upjohn, the rule in Hickman, the rule in Rule 26 all says this is what applies to work product. And every circuit court of appeals that has been asked should this -- should Garner apply to it, they have all said no. So that's the standard. And they don't meet it. This isn't the extraordinary situation where there's a dead witness so there's really unavailability. This is someone saying I think it would be more convenient. And again, the cases that say well, they're one of a multiple constituency, when Your Honor looks at -- because there are cases including the Third and the Eleventh Circuit who have looked at exactly this. When they looked at this question, they have all gone the other way. And again, they cite zero cases where work product or privilege has been turned over over the objection of a protesting party.

THE COURT: Then you're suggesting that they do their own analysis after full discovery? So I guess confirmation will be next year.

MR. ELSBERG: Your Honor, as for the deadlines, that's -- I'm not saying that it'll be next year. What I am saying is that this Court, I do not believe, under the U.S. Supreme Court precedent, under Rule 26, under the Third Circuit case law that says Garner doesn't apply to work product, under all the circuit court cases that have ever addressed whether materials can be turned over despite the protest of one of the constituencies, all of it says that it cannot -- and not only cannot, should not be done where someone basically says I can do the analysis. I just think it would be more convenient. That fails every test. It fails the work product test. It fails the Garner test.

THE COURT: Yeah. And all of those cases are the other side. And Hickman v. Taylor was the other side wanted my investigation of the accident. Let them do they're own.

MR. ELSBERG: Your Honor, respectfully, that's not the case. In Wachtel -- in Wachtel, it was a multiple beneficiary case. It was not the other side, Your Honor. And in Cox -- in Cox, let me just explain what was at issue at Cox a little to give a flavor. It was not at all the other side. It wasn't the other side. In Cox, what happened is you had a union. And guess what the union was doing. You had the plaintiff union

and it was a hundred percent, a virtually one hundred percent of the union members, they sued to do what? To challenge an agreement. They said we don't like this agreement that the union representatives entered into with the company. And they said we are the client. You're our representatives. You owe this to us. You did this work for us. Right? So this was someone saying they're the client and their argument was this one. Their argument was we're on the same side. And the Court looked and the Court said you know something? When you have multiple constituencies, Garner doesn't apply. It looked at Garner and it looked at language in Garner that actually signaled it might not apply when you have multiple competing constituencies. And what the Court said is, even though this plaintiff group represents one hundred percent of the people who are opposed to this agreement, just like here -- they're opposing an agreement. The Court looked and said but this is an international union. And the fact that one faction, the local, is against it doesn't mean they can get the stuff because when you're one faction out of several and there are conflicting interests, the Courts that have looked at this question has said you don't get to raise your hand and pretend you're the client. So these are not cases where there -- it's the outsider or the adversary. And neither, Your Honor, is Wachtel, a Third Circuit case. In Wachtel, what you had is a group of companies that would provide insurance or pension

benefits. And what the holding was that when you have multiple fiduciaries who are all competing for the same set of money, you may owe duties to all of them, but none of them can stand up and say I am the client and therefore I get this. They do not, by contrast, Your Honor -- these cases are very closely on point. Their reasoning -- they look at exactly what's happening here where one out of multiple constituencies wants to say I'm the client. I am on the same side. And the Court's saying no, no, no. For work product and attorney/client privilege to work the way it ought to, the fiduciary in the middle of these varying factions has to be able to have a zone of privacy and freedom from intrusion. And you shouldn't be able to do the harm to the other constituents. Here, we have the creditors' committee who has said don't do this. We protest this. And again, there's no commonality of interest. This is not a commonality of interest. The equity committee, from the day they were born, got up and touted the conflict of interest. That was their words. I read you their brief. And the cases that have looked at this have squarely said that's when you can't invoke it. And again, even if you could, never for work product. Even -- if everything I just said about Garner was wrong and they fail every prong of Garner, you're supposed --

THE COURT: You're repeating yourself now.

MR. ELSBERG: Thank you, Your Honor.

THE COURT: Let me hear from the others.

MR. ROSEN: Your Honor, may we request a five minute break, if it's possible?

THE COURT: Sure.

MR. ROSEN: Thank you.

(Recess from 11:37 a.m. until 11:57 a.m.)

THE CLERK: All rise. Please be seated.

MR. ROSEN: Your Honor, thank you very much for allowing us to have that brief recess.

Your Honor, when we filed our motion to establish discovery procedures, it was done with the intent that we were going to try and expedite this process. But based upon what we've already seen as one person standing up -- and I know that there are others standing behind me -- it seems that that really isn't what we might be able to achieve. So, Your Honor, the debtors' suggestion is that we will withdraw our motion to establish discovery procedures and in lieu of that, we will -- we are happy to sit down and meet with everyone. Have a meet and confer. We'll have to have it in an auditorium but we'll do that. And we'll try to come up with uniform discovery dates so that we don't have one objecting party filing a discovery request that's one off from the other person. And to the extent that there are disputes among the parties, we'll be back before this Court, Your Honor, having a discovery conference as required by the local rules. And, of course, we'll deal with

that in the context of not only document production but as well as depositions or any other discovery. But we're happy to do that, Your Honor. And to the extent that it causes delay, I would only point out two things: one, Your Honor, that that accrues at thirty dollars (sic) a month.

UNIDENFITIFIED SPEAKER: Thirty million.

MR. ROSEN: Excuse me, thirty million dollars a month; I apologize. Thirty million dollars a month to the detriment of what you've heard so far from the equity committee holders. So -- that they are further in the hole thirty million dollars every month.

Your Honor, also, and by no means is this dispositive of the issue, but there is a condition with respect to the settlement agreement, it has a termination date but we'll, of course, have to speak with the parties if, in fact, that termination date is reached and there is no order confirming the plan or approving the settlement agreement.

But otherwise, Your Honor, we are okay pulling the discovery procedures that are requested to the Court at this point in time and allowing the process to unfold as it may in accordance with the federal rules of civil procedure. We don't think it's the most beneficial to the Court or the parties, but we're happy to do that, Your Honor, if it alleviates any of the concerns. So, we will continue to populate the data bank, we will make documents available, we will receive document

requests, we assume that we will receive deposition notices. We still, Your Honor, because we think it's the right way to go, we will still let the Court know who our deposition -- excuse me -- who our confirmation hearing witnesses will be so that we can try and align what the depositions will be. But if the Court wants to allow other depositions to take place, we'll have to treat that, and to the extent that there's any dispute, we'll come back to the Court and try and address that issue. But otherwise, Your Honor, we're prepared to move forward in the discovery process knowing full well that there will be costs, there will be expenses, and there will be an additional thirty million dollar burn rate.

I know that counsel for the equity committee still wants to address the Court.

THE COURT: Okay.

MR. NELSON: Weil must charge a lot more than Susman Godfrey if it's thirty million dollars a month but it is what it is.

THE COURT: I think that's just the interest increment.

MR. NELSON: Oh, I'm sorry. Fair enough. The -- first of all, on that offer, my understanding is that they are withdrawing, and Mr. Rosen can confirm, they're withdrawing their motion on their procedures, is that right?

MR. ROSEN: I believe that's what I said.

MR. NELSON: Okay. The motion to expedite a discovery on our work product is still pending. And that, I think, is core to this dispute here. And -- so, first just a couple of procedural items. There's been -- the last time I was at this podium, there's been a couple other people come up on the documents to set the record straight. We got -- Susman Godfrey lawyers got access to the document data room last night.

THE COURT: Okay. I don't need to --

MR. NELSON: Okay. Fair enough.

THE COURT: -- hear anymore on that.

MR. NELSON: Okay. Your Honor --

THE COURT: Proceed with discovery.

MR. NELSON: -- if the issue is a trade for the -- getting this analysis and work product for the examiner motion, we're happy to take that trade, Your Honor. This Court --

THE COURT: Which side do you want?

MR. NELSON: No, we'll --

THE COURT: You'll take either?

MR. NELSON: -- we will -- Your Honor, we would prefer an examiner; that was our original motion. This Court denied our examiner motion and set up some procedures by which we could get the fruits of the investigation. They are still fighting this. From what I heard just right now, Mr. Rosen stated that he's going to give us a document dump. That is going to take years, potentially. And I think that's in

nobody's interest here. And what we think is that an examiner is most appropriate. When this Court denied the examiner motion, it clearly stated that we would get the fruits of it. They're not going to give us the fruits, then let's have the examiner.

In response to the motion for what we're asking for, the analysis, they are focusing on Garner but they are ignoring the common interest, they are ignoring what they shared -- what the debtors shared with the creditors' committee, and what, indeed, what they've given us, a little bit of work product itself. Now, we're all under the same common interest work product as protected by Rule 502(d), but they've already given us some of it, they're just not giving us all of it.

Our request for this analysis, not only is consistent with what Your Honor stated at the May 5th hearing, it was part and parcel of the arguments that the debtors and creditors' committee made to this Court and that this Court relied on in denying the examiner motion.

For example, the debtors now argue in the first paragraph with their response on work product that it is, quote, "facile". That sharing analysis and work product will save time and expense. But this facile argument is the very same one that this Court accepted in response to the examiner motion.

The creditors' committee talked about the unnecessary

drain on the debtors' resources. This is quoting their brief. Essentially, the equity committee wants to start over. Such an examination would be wasteful, entirely duplicative, time consuming and distracting. But now, of course, the debtors and the creditors' committee want to put the equity committee through this same wasteful entirely duplicative time consuming and distracting process. These documents should be produced to the equity committee because a common interest privilege applies among the shareholders, the debtors, and the creditors' committee. The debtors, the creditors' committee, and the equity committee share the common interest of maximizing the value of the estate. And, in fact, the debtors concede this point.

Here's what the debtors said about their duty in paragraph 46 of their response to the examiner motion. Quote, "The debtors and the creditors' committee are fiduciaries incentivized and legally obligated to maximize the value for all stakeholders. The same is, of course, true with the equity committee." In their responses to the motion, the debtors and the creditors' committee focus on this so-called Garner exception to work product. But those cases concern attempts by one party to view work product an attorney/client privileged information when it is adverse to another party. And here, we all share the same strong thought to maximize the value of the estate and the debtors have conceded as much. And that's fatal

to their claim here. As they must concede, the analysis was on behalf of the shareholders as well as the creditors. In their responses here, both the debtors and the creditors' committee simply ignoring the cases cited in our brief such as In re Kaiser Steel which hold that there is no waiver of work product when debtors and creditors' committee counsel share litigation analysis work product. It is also separate and apart from the Garner argument and the common interest. It is also fatal to their argument of the debtors and the creditors' committee that they admit over and over again to sharing this work product among themselves.

The briefs of the responses on the examiner's motion from both the debtors and the creditors' committee are clear on this. Here are just a few examples of what they said in their responses on the examiner's motion. This is from paragraph 3 of the debtors' brief. Quote, "Almost immediately, the debtors, with assistance of their bankruptcy counsel, financial advisor and the creditors' committee, began pursuing certain identified causes of action in examining other potential undeveloped claims."

Same paragraph, "All along the way, the debtors consulted with the creditors' committee and their professionals and provided them with access to the information and discovery received."

Paragraph 28 of the debtors' brief. "The creditors'

committee has engaged in countless conversations with the debtors regarding each side's respective analysis of potential claims and causes of actions at issue."

Paragraph 40 of the debtors' brief. Quote, "The debtors and their professionals, in concert with the creditors' committee, have spent thousands of hours reviewing the events that lead to the filing of the cases and parties in connection with such events. Identifying potential claims against the FDIC and JPMC, preparing pleadings and other documents necessary to pursue certain of such claims, seeking, conducting and reviewing discovery in connection with asserted and potential causes of action and assessing the validity and strength of such claims." And, Your Honor, if you prefer, I have copies of these briefs.

THE COURT: I have them.

MR. NELSON: Okay.

Paragraph 42 of the debtors' brief. Quote, "The debtors, in conjunction with the creditors' committee" --

THE COURT: I don't think you have to give me everything.

MR. NELSON: Okay. May I just -- on the creditors' committee side, I want to just say one -- I'll give you one quote from the creditors' committee that I think sums this up. Quote, paragraph 13, "The creditors' committee also consulted regularly and repeatedly with the debtors' counsel and

financial advisors in order to examine the assets and the transactions regarding the debtors' estates and in order to collaborate on the formulation of appropriate strategies to maximize the value of the debtors' estate." They then go through and list what they've done together including capital contributions, tax analysis, etcetera

This analysis all relates to maximizing the value of the estate. They share this analysis with each other. They just do not want to share it with the equity committee. Just as fundamentally, the debtors and creditors' committee told this Court that they already had provided the equity committee with work product. The creditors' committee, for example, told this Court on page 70 on the transcript of May 5th that its counsel, quote, "personally shared our thought processes regarding those litigations and those assets with the equity committee". Likewise, the debtors stated -- would you like to speak?

MR. ROSEN: Yes. Thank you. Your Honor, I realize he has some prepared remarks, but we're happy to give to them what we've given to the creditors' committee but we've never provided work product to the creditors' committee; not once. So, we'll give them what we've shared with the creditors' committee.

MR. NELSON: Well, then, Mr. Rosen, I think that there's been some misunderstanding about what was represented

to the Court in the examiner motion because we want the fruits of the investigation so that we do not have to recreate the real here. And that's what essentially what we're trying to do is to get the analysis.

THE COURT: All right. I've heard enough. I think there are other parties that want to be heard on the work product attorney/client issue.

MR. JOHNSON: Your Honor, Robert Johnson from Akin Gump on behalf of the official committee of unsecured creditors. I think there's been a lot of miscommunication here about work product. I want to clarify that we met with the equity committee and we didn't even leave this courtroom on May 5th before I had gone over to counsel for the equity committee and I said, be in touch and let's get together.

We planned a meeting and we met on May 14th with Steve Susman of Susman Godfrey. We met with Edgar Sargent of Susman Godfrey. We met with Lauren Kruger of Esopus, one of the members of the equity committee. We sat and we talked for two hours and we talked about what documents exist. We talked about what were the theories with respect the deposits. What were the various sub-issues related to the deposits. We talked about the tax issues. And we answered their questions about tax issues. We talked about capital contributions. We talked about fraudulent transfer. We talked about trusts preferred. We talked about business tort. We talked about all of these

things and we answered their questions and we said we'd be available for additional answers. But they seem to think that we've got some body of memoranda that we've been sharing with each other and that doesn't exist.

I have never obtained internal memoranda of Weil. I've never obtained internal memoranda of Quinn and I've never provided an internal memoranda from Akin or Pepper to the debtors' counsel.

What we have done is we've sat and we've talked and we've explained our thinking. I am extremely reluctant to open the door to production of e-mails where I e-mail with my partner, Fred Hodara, or with Mr. Stratton and I said, hey, what do you think about this theory, what do you think about that, and we're e-mailing back-and-forth. That seems to me an area that's fraught with peril and that clearly with respect to the Garner doctrine, the Teleglobe case, the Wachtel case, that that's core attorney work product which is still shielded despite Garner.

I also have to say that with respect to the equity committee, I don't believe, frankly, that the creditors' committee and the equity committee are sharing common interests at this point. The equity committee has said that it wishes to elect new management, that it wants to derail the settlement agreement, and I think that we do not have an alignment of interest between the equity committee and the creditors'

committee. And I'd be extremely reluctant to go down a path of sharing our internal communications within our law firms to the equity committee when they are so clearly adverse to the interests of the equity committee -- I'm sorry -- adverse to the creditors' committee.

I also just want to underscore that with interest accruing at well over -- well over twenty million dollars a month, I believe it's thirty million a month plus the cost of this case, that further delay does not inure to anyone's benefit, it certainly does not inure to the benefit of the equity committee. And so, then, we have to look at what really is going on here and it seems to me that once again the equity committee is trying to derail the expeditious confirmation of this case and resolution of this case. Thank you, Your Honor.

MS. ESKIN: Good afternoon, Your Honor. Marla Eskin for the trust preferred security holders. A motion pro hac for James Stoll was filed yesterday; however, it has not yet been signed. I'd ask if he can address the Court.

THE COURT: He can be heard. Thank you.

MS. ESKIN: Thank you.

MR. STOLL: Thank you, Your Honor. I appreciate the courtesy of admission. I just want to follow up on one point, Your Honor, which has already been touched on but in light of withdrawal, we're still going to very quickly have a big discovery fight over privileged material.

You've already highlighted, Your Honor, in your questions with respect to debtors' counsel, which is how they going to prove their case at trial. What we're going to face is an advice of counsel, waiver of the privilege. And as the Third Circuit held in Glenn Mead when advice of counsel is used to support a position, that waives not only the advice but anything oral and written that is used to support that advice. And that's where we're going because I don't know how -- with their three employee company that's left, how they're going to put on a case that says, you know, with respect to my client's interest, we had a four billion dollar asset that we decided to give away to JPMorgan for nothing. Somebody had to tell us that that claim had no merit and therefore we thought it was good to give it away for nothing. And they're going to have to do that to prove that it was a reasonable settlement. That's advice of counsel and we're going to have to have that fight.

Now, we've got our discovery request out there. We move to compel because of the timing issue that was created by the disclosure statement. Now, I guess the timing issue has been alleviated and they'll respond on June 10th. Hopefully, they'll respond in a fulsome way which will identify the fact that with requests regarding the settlement, the settlement, who did you negotiate with, what did you rely on, how did you reach the conclusion that these claims were worthless and therefore should be given away for nothing. Hopefully, they'll

say, we're not going to give you that information, it's privileged and then they'll give us a privilege log that will identify all the documents that they have in their possession as they are required to do under the federal rules so that we can then come to you and test that assertion. That's our right under the federal rules and that's where I think we're going. And June 10th is coming quickly and so long as we're given the appropriate opportunity to vent those issues, I guess that's all I have to say. But that's the issue at the advice of counsel, I think, that's really coming down here aside from the bar on the common interest issues.

THE COURT: All right.

MR. STOLL: Thank you, Your Honor.

THE COURT: Thank you.

MR. ANKER: Philip Anker, Wilmer, Cutler, Pickering, Hale and Dorr. I often stand up and say I will be shorter than the last person and often I lie. This time I'm confident I won't.

I just rise, Your Honor -- look, we've put in a lot of detailed objections to the discovery procedure's motion in light of the withdrawal of it. They are moot. We are happy to meet and confer. I actually think a reasonable procedure for orderly discovery is sensible here. What was proposed was not. I simply rise to say this. In all the focus on the global settlement, neither the parties nor the Court should lose sight

that there are other issues with respect to confirmation frankly having nothing to do with the global settlement. By way of example, the treatment of our client's claims as compared to other creditors in this estate. Some of that is legal, some of it is factual. I will simp -- I rise more than anything but as you ask the question of the equity committee and I wanted to give you the answer from our perspective.

In connection, you may remember the debtor filed an objection to our claim, Your Honor declined to dismiss the claim at all. We served discovery in March. We have not received a single piece of paper in response to that discovery. Those issues are also going to arise, I think, in connection with plan confirmation. We are happy to work with having an orderly process and a sensible efficient process, but it's got to be a two-way street. Thank you, Your Honor.

MR. ROSEN: Your Honor, just one point of clarification. The reason that there was no response to discovery request, and by the way, we haven't received any response to the discovery request we served on Mr. Anker's clients, is because Mr. Anker proposed a discovery was scheduled that would require a hearing in 2012 and the parties are still discussing that procedure.

MR. MCMAHON: Your Honor, good afternoon. Joseph McMahon for the acting United States trustee. And I respectfully request that I be heard with respect to the

Court's comments before the break.

THE COURT: You may.

MR. MCMAHON: The discussion seemed to be proceeding on two tracks: the specific technical issues associated with the discovery procedures and work product motions filed by the parties. And second, whether or not the process that, I think, the Court and the parties contemplated was going to -- how it was going to unfold at the time the examiner motion was heard was actually occurring. And it seems in our view, Your Honor, that these cases can essentially take two paths in the short term.

First, the equity committee is going to be doing some form of investigation of its own from the ground up. Meaning regardless of how Your Honor rules on the merits, the equity committee's motion that's pending right now, what's clear from committee counsel's presentation is that there appears to be significant work that has to be done for the equity committee to get its arms around the situation.

The other path and the one that we advocated in connection with the examiner motion was for the Court to put a person in place to -- on a time frame that's both reasonable and acceptable to the Court address these issues. And we find it significant that the equity committee at this junction is still willing to stand down and have an independent party to do that investigation. So, I think it's important to note, Your

Honor, that these cases have to be in a certain posture before solicitation begins.

There are interests of completeness and transparency that have to be served in connection with the way the settlement amongst other issues are resolved. And to the extent that the Court is willing to reconsider its ruling with respect to the examiner motion, we would support the Court doing so.

We think that on balance, the cost benefit analysis favors the appointment of an examiner in the short term as opposed to miring the process immediately and what seems to be protected litigation between the parties over a host of issues. And, in fact, the cooling down period, Your Honor, may, in turn, allow the parties to get their arms around some issues, to have further discussions, and hopefully, potentially, resolve some points. But, again, to the extent that the Court's comments were -- raised the possibility that the Court would be willing to entertain such reconsideration, we fully support that path.

THE COURT: Thank you.

MR. ROSEN: Your Honor, I just want to address what Mr. McMahon said because not only is it out of the blue, I don't think it's appropriate. Specifically, Your Honor, I just want to make a point that as the equity committee has filed a notice of appeal, and the Court knows that because it took note

of what was on the docket for later on, last night Mr. McMahon also filed a notice of appeal of this Court's decision with respect to the examiner motion. And based upon the law as we understand it, Your Honor, the issue of whether or not there should be an examiner appointed is now firmly within either the district court or perhaps the Third Circuit and it's not any longer before this Court. So, despite the grandstand play by Mr. McMahon, I don't really think that that's anything to consider and we certainly shouldn't consider it on just Mr. McMahon standing it up -- standing up now and making a plea.

MR. ELSBERG: Your Honor, may I be heard on three points, less than two minutes?

THE COURT: Okay.

MR. ELSBERG: Thank you. Just three things that I'd like to leave the Court with.

One is that for all we've heard, I think there was a tacit admission that it's correct, that they don't cite a single case ever decided anywhere by any jurisdiction where Garner has been applied to force the compulsion of work product. We cite the Third Circuit, the Fourth Circuit, the Fifth Circuit and the Eleventh Circuit, every circuit that's ever considered the question has said work product is not subject to Garner. That's point one. So, they're literally asking you to make history here and defy all the circuit level

cases.

The second quick point is that they do not cite a single case ever decided anywhere by any jurisdiction where Garner was applied to require the turnover of either privileged or work product information where there are multiple constituencies and one of the constituencies protested over it. Those are the cases that analyze as closely as the cases do they're the cases that most closely analyze this very situation. They all go against what they're requesting. So, again, they're literally asking you to break with uniform circuit precedent and make history.

The -- and by the way, one of the reasons that these circuit courts are uniform is they look to Rule 26 and they say Rule 26 it's language is plain, it rejected the good cause test, we cannot rewrite Rule 26.

And the third thing that I'll mention before sitting down is that we would just ask you to keep in mind, Your Honor, that there are a lot of other proceedings -- proceedings out there. There are regulatory proceedings, investigations. There are also state court actions. And while they propose that Rule 502 would be a complete cloak and solution here, 502 is a new rule. It's relatively untested. We discussed this in our brief and we cite to commentators who have pointed out that there are serious constitutional questions that have been raised about whether 502 will hold up in challenges. For

example, if somebody in state court says, I need this evidence. Under the state court rules of evidence, I'm entitled to get it. I wasn't there in the federal court when this 502 order was entered and therefore not having notice I can't effectively be enjoined. We don't know how those fights will work out if there were a 502 order. We don't think we should get there because we don't think under the circuit case law any of this can be compelled. But if we did get there, and I hope we don't, what is certain to happen is there will be satellite litigation around the country. There are lots and lots of cases right now. And if our work product and privilege were compelled, we -- again, I don't know how those fights will turn out, but it will be inviting fight after fight after fight over and over again in all these other jurisdictions where someone will say, I wasn't there, I wasn't heard, I'm entitled to get this under state rules and that puts us at risk of waiver of our work product and our privilege and also creates expensive and burdensome litigation which cuts against the idea that what they're asking for is really something that is just efficient and will save us all some money.

Unless Your Honor has questions, I'll sit down.

THE COURT: You may sit down.

(Pause)

THE COURT: Well, let me rule on this issue. First, with respect to the production of work product, in the absence

of clear authority, I don't think I can require the production at this point. But I agree to the extent there is any issue raised at confirmation with respect to the reasonableness of the settlement. I cannot conceive how the debtor is going to meet its burden of proof without waiver of the privilege. But I'd be surprised. But given the fact that the equity committee will not have the advantage of the debtors' work product or attorney privilege, I think an extension of all the deadlines is going to be necessary. So I'm not inclined today to deal with the disclosure statement. Instead, I will direct the parties to meet and see if they can work out a consensual discovery schedule before the next omnibus, which I believe is June 17th.

MR. ROSEN: Yes, it is, Your Honor.

THE COURT: And I'd like a report at that time. In addition, between now and then, I will review the debtors' chart and make a ruling on whether, in my opinion, the debtor has satisfied all of the objections to the adequacy of the information in the disclosure statement. If I think not, I will address the issues I think still remain at that time.

With respect to the motion for an examiner, I probably do not have jurisdiction to reconsider my decision, but I'm not sure that a new motion is preempted by the fact that my denial of the original motion is on appeal. But I won't deal with that today either.

There are some additional equity committee motions regarding discovery.

MR. ROSEN: Your Honor, would it be better to attempt to try and fold those into the meet and confer rather than dealing with those on the 2004 basis.

THE COURT: Well, let me hear from the committee on that.

MR. NELSON: Well, I think we've gotten significant pushback from the FDIC, from JPMorgan, from some third parties. Your Honor, I want to address these two issues. Just briefly, Mr. Rosen said some comments about the jurisdiction of this Court. We will happily withdraw our direct appeal and a notice of appeal right now if this Court is inclined to grant the examiner motion.

Regardless, we will shortly be filing -- if this Court is not, we will shortly be filing a new motion for an examiner, so that it is on the agenda for the next hearing. With respect to the 2004 motions, and I want to address them individually, but we'll take, at a time, both JPMorgan and the third party, the FDIC and the third parties. I don't want to repeat the factual discussion we had about what we've gotten, what the debtors have provided to us. And, evidentially, that's all they have. And that is going to require a significant amount of investigation by somebody into the documents from JPMorgan and the FDIC, specifically, since they are the settling

parties.

We've also asked for documents from third parties directed specifically towards analyzing the claims that are being settled, and we think that with respect to those third parties we are in a substantially different position from where the debtors were in January. And, so, I'm sure the question that -- certainly the question that we've gotten when we've spoken to some of these third parties is the Court denied this motion in January when the debtors made it. Why should we give you any documents now? And I think there are a few answers to those questions, and each of which independently support granting these motions.

At first the circumstances here are far different. This is no end run around the discovery process, which was the reason that this Court gave for rejecting the 2004 request that the debtors made in January. Here we are using the Rule 2004 in exactly the manner suggested by the Court at the May 5th hearing, which is to obtain information and discovery about the value of the claims being settled and to investigate the assets of the estate. Now is the point where the Rule 2004 is appropriate, and in the Court's transcript in denying the Rule 2004 in January the Court specifically mentioned a couple of times that it was not appropriate at this point. But now the requested information is necessary to determine the appropriateness of the proposed settlement and the plan on

which it is based.

But we have no discovery from the FDIC. Very little from JPMorgan. And the equity committee does not understand how it's possible to settle a multibillion dollar claim without looking at your adversary's documents, but that's, evidentially, what the facts show.

THE COURT: Tell me, specifically, who the third parties other than FDIC and JPM you are seeking documents from?

MR. NELSON: We have asked specifically for the Federal Reserve and the Department of Treasury which already agreed in the January round of 2004 briefing to produce documents voluntarily but have not done so now. We are asking for the SEC. We are asking for the Office of Thrift Supervision. We are asking for Henry Paulson, who's also represented by the Department of Treasury. It's the same lawyer. I think those are the governmental entities.

We are also asking for four private parties that are, again, narrowly tailored. And, Your Honor, these subpoenas, we substantially narrowed them from the subpoenas that were at issue in the January round. The four private parties are Standard & Poor's and Moody's is one category, which are the ratings agencies, and they are very targeted requests, with four or five categories of documents to deal with the information exchanged about the analysis. The other two private parties are Goldman Sachs, which was the advisor to

Washington Mutual during the time of the bankruptcy, and when Washington Mutual was trying to find a seller, and the allegation is, is that JPMorgan was working with the FDIC during this time to, and public document suggests, was working with the FDIC at this time to not use the process through Goldman Sachs, but, instead, to buy the assets out of receivership from the FDIC. So that's why we're seeking Goldman.

The other private party is, Santander, Banco Santander, which narrowly targeted requests based upon some e-mails that were actually cited in the debtors' Rule 2004 motion discussing that there might have been a horizontal antitrust conspiracy between Santander and JPMorgan to divide the market and to not have bidding on the JPMorgan assets, and, therefore, reducing the value of the estate.

I believe that those are the parties from whom we're requesting the discovery from.

THE COURT: Well, at this stage, I'm not inclined to allow discovery of the third parties other than FDIC and JPMorgan. I'll hear from them, but appear to be, no longer to be third parties, since they are parties to the releases that are in the plan.

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

THE COURT: Let me hear from them why they should not be required to respond to discovery related to the confirmation

of the plan.

MR. CALIFANO: Well, I think the easy -- Your Honor, Tom Califano, DLA Piper, on behalf of the FDIC as receiver of Washington Mutual Bank. I think the easy answer to your question is that the requests they've propounded really don't have anything to do with the plan or the settlement agreement. And, now, Mr. Nelson says they're narrowly tailored. I don't know how he gets there. Looking at the twenty-two requests that they've made in the subpoena that they attach to their motion, the subpoena of the FDIC receive and the subpoena of the FDIC corporate.

The other thing, Your Honor, is that the document requests in the subpoena are almost identical for every party. So you'll look at the categories they're requesting of my client. They're asking, for example, documents concerning JPMorgan Chase's valuation of Washington Mutual. They're asking for --

THE COURT: Isn't that relevant to these settlements?

MR. CALIFANO: But not from the FDIC receiver, Your Honor. What I'm trying to point out --

THE COURT: If you have it, why should you --

MR. CALIFANO: Well, first of all --

THE COURT: -- not be required to produce --

MR. CALIFANO: Just to answer your question, it wouldn't be, in my opinion, because what we've heard today and

what Your Honor said today, Your Honor, I think, put out the issue very well. What are the issues on confirmation? What are the issues with respect to the settlement? What are the claims? How did the debtor value the claims? And why the settlement is reasonable? And the Trust preferred, as the lawyer said, the issue is why did you settle, and he forecast that the debtor would hide behind the attorney-client privilege.

Those issues, Your Honor, are not served by discovery of the FDIC receiver. If there is information that the debtors have that values their claims they should be getting it from the debtors. If there is information that the FDIC has that the debtors don't have it could not have possibly borne on the debtors' decision --

THE COURT: No.

MR. CALIFANO: -- whether to settle or not.

THE COURT: No, but it can bear on my decision as to whether or not that settlement is reasonable.

MR. CALIFANO: Well, Your Honor, would it?

THE COURT: Yes.

MR. CALIFANO: Let's think about it. Because the debtor is making a decision based on the information the debtor has. Not on information that the debtor doesn't have. And if the debtor hasn't done a full investigation, if the debtor -- they can argue when we get here --

THE COURT: Right.

MR. CALIFANO: -- on confirmation that the debtor hasn't done a full investigation. That goes to the reasonableness of their exercise of the business judgment.

THE COURT: But the debtor will respond we got enough and if they can --

MR. CALIFANO: And then you make a determination. And then Mr. Nelson --

THE COURT: No. If they --

MR. CALIFANO: -- can waive the 238 pages of redacted documents.

THE COURT: If they can establish that there was information that had the debtor done a more fulsome investigation information would have come to light that would establish that the debtors' evaluation is woefully inadequate or not reasonable, I think it's relevant to the issue of --

MR. CALIFANO: Your Honor I think it's --

THE COURT: -- approval of the settlement.

MR. CALIFANO: I think it's a step. I would have to say, Your Honor, to allow them to go out and do this sort of broad, overly broad search that they're trying to do, to recreate what's been going on in this case for twenty-one months just so that they can try and find a piece of paper that they can say the debtor should have gotten this. They didn't have it.

THE COURT: Well, if it's --

MR. CALIFANO: That, in my opinion, Your Honor, is outside the scope of relevant.

THE COURT: One piece of paper may not be relevant unless it's the smoking gun.

MR. CALIFANO: But even if it's the smoking gun, Your Honor, it's really not relevant. What's relevant is whether the debtor did an appropriate inquiry.

THE COURT: No, what's relevant is whether the settlement is reasonable --

MR. CALIFANO: Yes, Your Honor. That is correct.

THE COURT: -- under 9019.

MR. CALIFANO: Right. And that is correct. And the question would be whether the debtor properly exercised its business judgment, whether the debtor did an investigation, and whether the debtor pursued the claims appropriately. Okay? Even if there's a document this -- hear me out.

THE COURT: Okay.

MR. CALIFANO: If there's a document that would have been shown up two years from now and discovered that they didn't know about at the time we were settling these litigations, it still wouldn't be relevant as to whether the exercise of their business judgment at the time they entered into the settlement was appropriate. What we can't have here, Your Honor, is the equity committee going through full-blown

discovery, as if these cases were never settled, to determine whether a settlement is appropriate.

That's what we can't have here, Your Honor, and that I do not think is relevant. I don't think they get to go and get all the discovery that the debtor would have had if we litigated these cases and then look at that with hindsight to see if the settlement is reasonable. I think what they get to do is they get to look at what the debtor looked at, they get to look at what the debtor did, and to make a determination as to whether it's reasonable. Whether the debtor was exercising its business judgment properly at the time, and at the time with -- based on the information they had, in entering into this settlement. That's what is appropriate here, Your Honor. They don't get to act as if these cases were litigated and then come back and say you know what? You could have done better. That's not really the test here, Your Honor.

The issues that they are trying to get from us, the information they are trying to get from the FDIC, is, basically, every piece of paper relating to the largest bank failure that the FDIC has ever been involved in. If we have to go through that, Your Honor, this case isn't getting confirmed for years.

THE COURT: I know.

MR. CALIFANO: And the problem is, and what I've tried to do, Mr. Nelson, is tailor what we might have to what might

be relevant to the issues. But, instead, they're insistent, the equity committee is insistent on opening this thing up, as if the last twenty-one months never happened, because they're unhappy with the result.

Now, there has to be a way that they can get the information they need through the debtor to determine the issues that are relevant. But it is completely irrelevant, and it's completely improper to go searching through our files to find what they would have gotten if we litigated these cases. We're not litigating these cases. That's why we're settling. You know, yes, we were motivated to settle these cases. That's why we settled them. I can stipulate to that now. So I don't think they need to go searching through our files to find out why we were motivated. We negotiated for months. Months. This deal almost died a couple of times. But we negotiated for months. There was the requisite arm's length negotiation. I don't think they need to see whether we were vigorously contesting these cases. There was litigation in Texas, D.C. and in this court.

Now, I understand that they feel they may need to examine whether the settlement is reasonable. And Your Honor was correct. They stand in the debtors' shoes. They don't stand in our shoes. They don't get to look at why the FDIC thought this was a good deal. They don't get to see everything the FDIC had. What they get to look at is what the debtor had.

Because you're right. They are standing on the same side as the debtor. So in the settlement all they can look at is what the debtor had and what the debtor knew at the time of settlement, Your Honor.

THE COURT: I'm not sure I agree it's that limited.

MR. CALIFANO: Well, Your Honor, we can go through this, I mean, and if we went through the request, that's why if we get past and they actually serve the subpoena, there's going to be a motion for a protective order, Your Honor, I can tell you, because the subpoena that they served, the document requests are so overbroad that they are meaningless. They are no broader than if they said to us open your doors and let us go through every file you have.

I mean, for example, they've asked me for all the correspondence between all the government agencies related to Washington Mutual. They haven't even started on a good faith attempt to narrow these issues. Now, if there are issues related to the settlement agreement and confirmation that they reasonably feel they need discovery from us for, we'll talk about it. But what they have submitted, Your Honor, and I would ask that the Court talk a good look at the document request attached to the two subpoenas they've served -- they seek to serve on the FDIC. And I would tell Your Honor they are outrageous in their breadth. They don't get until the twenty-third and twenty-fourth request, they don't even get to

the settlement agreement, Your Honor, or the scope of the settlement. They go through all the allegations that were part of the American National litigation, which has been dismissed with prejudice.

So, Your Honor, what I would suggest is Your Honor deny their motion, that we have the meeting and the conference on settlement, and if there's something that they reasonably seek from us, you know, we can talk to them about it. But all they've put in their motion as the basis for the discovery against the FDIC and all the third parties that they're seeking these documents from is that they have no other source of this information. We know that's not true. All right? They may have no other source because they're fighting with the debtors on discovery, but that's just not true. They have other sources. And that the requested information is vital to determining the appropriateness of the proposed settlement and the plan which is predicated on the settlement.

I challenge Mr. Nelson to connect any of his twenty-four requests he has against the FDIC to either of those issues, Your Honor. I really do, because what he's asking for is just the broad sweeping discovery that Your Honor rejected in January that the debtors themselves sought from the FDIC and other parties. They don't need discovery from the FDIC or from any of these third parties to determine whether the debtors' settlement is reasonable. There's litigation everywhere that's

being settled. There's a number of claims, claims in the receivership that the debtor is compromising. Claims here that the FDIC is compromising. And if they get from the debtors what the debtors considered, subject to and whatever rulings Your Honor makes on privilege, that should be all they need. They don't need to do an independent inquiry into whether this litigation could have gone another way to determine whether settlement is reasonable.

MS. FRIEDMAN: Stacey Friedman from Sullivan & Cromwell on behalf of JPMorgan Chase. Not a day you want to be last. I sense, maybe I'm wrong, that you're not pleased. I think what the Court is saying is you want them to get what they need. And what I want to do is stand here before you and say we're okay giving them what they need. And there might actually be a little bit of a disagreement at the end of the day between what they need and what we think they need, but now is not the time to resolve it.

There are sixty-four requests against JPMorgan Chase, and they sort of fall into four buckets. And, Your Honor, they can have three of them. They want our settlement communications among the parties. We've told them in our papers they can have them. They want the prior Rule 2004 request. I've heard -- we got them at 7 p.m., we got them whenever, we gave them to the equity committee when they were represented by Venable on March 4th. They've got them.

They want historic WaMu documents, and maybe this goes to something Mr. Califano was saying by the -- on behalf of the FDIC. I mean, their requests really are very broad. They want every document that has to do with any deposit at Washington Mutual Bank from June of 2008 until closing. It was a bank. There were a lot of deposits. That's a lot of documents. Those are heritage WaMu documents, though. And that's the third category, and, Your Honor, the debtor has access to those documents. So if they have a dispute with the debtor about the scope of what heritage WaMu documents should go forward, whether they should get privileged documents or not, that's between them. The fact that we acquired the bank and might also have access doesn't put the burden on us to get between that fight, decide what search terms should be used, what custodians should go over. They should fight that out.

So that's three categories of the documents. And the fourth is, you know, frankly, the one the FDIC was talking about, which is to what extent are we going to allow a wholly new investigation. And I think what Your Honor said is if it's one document in the smoking gun you're giving it over. I think I might also have heard you say if it's ten years of gazillion documents and it's going to delay things unreasonably you probably wouldn't be behind that either. And I think what the debtors have proposed is that we all get together; see what can be done in a reasonable fashion. I think what we'll find in

that discussion is that three of the four categories directed to JPMorgan Chase aren't really issues of ours or have already been resolved. And I think we'll find that the equity committee will narrow its requests. And maybe we'll disagree on the scope of a new investigation, because in some ways I agree with the FDIC. I'm not sure, since we have already been the focus of an investigation, and just to make this clear. Billions of dollars. Numerous parties. Lots of interveners. One party has produced documents in this case with Bates stamps. It's us. And they may not be pleased with it, but, you know, there is a truism to what Mr. Califano was saying. If the test was well, there could have been more, then there would never be a settlement that wouldn't be subject to more investigation, because there's always more to do before verdict. So there is a -- there's a line here, and, I guess, what I'm asking Your Honor is today you should deny the requests. They are overbroad. If you want me to go through them with some specificity I'm happy to, but I don't really think that's necessary. Compel us or ask us, because we're willing to go to the meet and confer and have us report back on the 17th to the extent there's a disagreement. I think the new disagreement, if there is one, will be narrowed down to the question of whether a new investigation of JPMorgan Chase is appropriate. I sense it may not be. But we will see. And maybe there's a compromise to be had.

THE COURT: All right. Thank you.

MR. STOLL: Your Honor, James Stoll, again, on behalf of the Trust Preferred Securities. I stand up, in part, because we also have a pending motion to compel, and I just want to make sure that that doesn't get lost in the process here. It may be that we defer that for a meet and confer, but part of what I'm hearing here is parties saying I don't have a discovery obligation if you can get the information from somebody else, and I've never understood discovery obligations to be so limited.

But let me give you an example of why I think it may be important, for example, to do a third party discovery. From my client's perspective their interest, of course, is in the Trust Preferred Securities, which everyone acknowledges have a four billion dollar value. They were given away for nothing, okay? Nothing. And somebody's going to give and make a judgment as to why that was a smart decision.

Now, when the transaction was originally done, the sale of the assets, the FDIC received 1.8 billion dollars and JPMorgan bought 1.9 billion dollars in profit above that, a 3.7 billion dollar value, supposedly. But, after the case was filed they say they're entitled to four billion dollars of Trust deposit assets, five billion dollars of tax deferred credits, and four billion dollars of the Trust Preferred interest. That's thirteen billion dollars.

We ought to be able to discover what was the information that the FDIC used to send out the bids to Citibank and to JPMorgan, what the valuation was they put on that, what was intended by the sale, because when the debtor first filed its counterclaims it said we never intended and never did transfer the Trust Preferred Securities to you. You had to bid on those separately and you never did. And if you did, somehow, get them accidentally, it's a fraudulent conveyance.

Now, they've given all those things away, and we're going to do discovery as to why that is. Maybe it's advice of counsel. Maybe they won't say that. Maybe they'll refuse to give us some of that information and just have one employee stand up and say I just thought it was a good deal to give it away for nothing, but in order to determine whether that's a good deal are we not entitled to get some discovery underlying the value and the legitimacy of the claims to begin with? I think we are, and I think this blanket attempt for third parties to say wait, we may have been involved in the transaction but you can't get any information from us, is just another way of saying you can only look at what we tell you is relevant. That's all this is about. We're going to tell you what's relevant just like the discovery procedures. We're going to tell you what's relevant, and that's all you're entitled to look at. That's all that's going on. And for all of this enormous discovery that supposedly was done over the

past twenty-one months, as far as I understand it, and I'm new to the case, so maybe I'm wrong, not a single deposition of any party has been taken. Not a single one. Not a single question to follow up on whether there's more documents. And the total amount of documents, I understand, if I -- again, I may be wrong -- is 70,000 pages. 30,000 from the FOIA requests that came out of Texas litigation and 40,000 from JPMorgan, which is, essentially, copies of the deal documents. I mean, it's astounding to me that with all these billions of dollars that's the dearth of discovery that's been taken. And then to say that you don't have the right to look at that to test whether the decision to give up those claims for nothing is reasonable, I think that's overstretching it by a long margin.

And, so, if we're going to meet and confer we're happy to do that, Your Honor. We're happy to work on this with the debtor, with the parties, to be cooperative, but we're not happy to simply say nobody gets any rights to discovery except for the things that the parties have already settled and cut the deal for their benefits alone. Tell us that they're entitled to give us. Thank you.

MR. ETKIN: Very quickly, Your Honor. Michael Etkin on behalf of the Institutional lead plaintiffs and several pending securities litigations.

We did file papers in connection with the procedures motion, and obviously I didn't rise once I heard that Mr. Rosen

withdrew that motion. But two very quick points of clarification.

Number one, obviously, the scope of whatever confirmation of discovery we would seek does not approach what's taken up so much of your time today. But I did think that I heard that we would be included in any meet and confer with respect to the issues that arise out of the withdrawal of the motion that the debtors filed. That was point of clarification number one.

And, also, I heard that, Your Honor, in terms of adjourning the disclosure statement hearing to the 17th, I believe and that you would be reviewing issues relating to the adequacy of the disclosure statement. There are some serious issues with respect to voting procedures in the ballots as well, Your Honor.

THE COURT: Okay.

MR. ETKIN: And I assume that we'll have a chance to talk about that on the 17th.

THE COURT: Yes, we will discuss that on the 17th. Thank you. I don't need to hear anymore. I am going to order all the parties to go to a meet and confer and report back on the 17th regarding what specific discovery remains in dispute. I've already made it clear. I don’t think in general terms that the equity committee is limited to doing discovery related to what the debtor did in investigating and analyzing the

claims. Particularly since the debtor is not sharing that with the equity committee.

But I also agree that in analyzing a settlement the Court is not required to, nor am I willing to allow full discovery as if the litigation were pursuing a pace before considering whether a settlement is reasonable. So I would urge the equity committee and the trust preferred securities holders to look at their discovery requests and tailor them more narrowly to exactly what they need in order to do their evaluation.

MR. ROSEN: Your Honor, we're happy to do this. And we will be happy to host a meet and confer next week. I think it's better that we do it in person, so I'll try to ask what everyone's schedule permits so that we do this next week.

As far as the parties to attend that, obviously we would have the equity committee, the creditors' committee, the trust preferred, the settling parties, which the FDIC, JPMorgan and the other people. I'm not sure who else we should include, though. I know that Mr. Silverstein on behalf of Broadbill, he has a pending complaint with respect to his dime warrants, and I know Mr. Steinberg represents dime warrant holders as well. I'm happy to include them in the process because they are going to have issues, I believe, associated with confirmation. I'm happy to invite them to the party, but I don't know who else would be appropriate. Mr. Anker, as well. I apologize.

THE COURT: Okay.

MR. ROSEN: But the parties that I know of that have interposed some form of objection we're happy to invite.

THE COURT: Okay.

MR. SILVERSTEIN: Your Honor, should I hold this to item 28 in the agenda?

THE COURT: No. Go ahead.

MR. SILVERSTEIN: The pretrial --

THE COURT: Well, the pretrial can follow the same. Should we continue that to the 17th and include you in the meet and confer?

MR. SILVERSTEIN: I think I'd prefer not to be in the meet and confer. We served discovery, I think -- we have a separate adversary proceeding.

THE COURT: Right.

MR. SILVERSTEIN: And I think we should be dealt with separately. I hope we don't have to come back to you on discovery issues, but I think we'll get lost in that parade, so to speak.

THE COURT: Well, have you talked about a scheduling order then on the adversary?

MR. SILVERSTEIN: Well, we've talked about a scheduling order and Mr. Rosen said no. And so we're going to have to talk again.

MR. ROSEN: I don't think we really said no, Your

Honor. We have a motion to dismiss their complaint that is already pending. And what we suggested was that we would put off the pretrial until June 17th. Mr. Silverstein said no, he didn't want to do that.

MR. SILVERSTEIN: Correct.

MR. ROSEN: He wanted to come forward today. So we thought as appropriate, Your Honor, to have the Court rule on the motion to dismiss before we got involved in discovery. But if the Court wants us to do that, he did serve discovery, our time to answer is June 24th. We will reply to the discovery on June 24th then.

MR. SILVERSTEIN: And if we need to expedite it, I don't know what Your Honor's doing it with respect to the disclosure hearing in terms of timing.

THE COURT: I don't know either. The disclosure statement will be heard on the 17th. I'm going to look at the debtors' revisions to see if it deals with the objections and if there are any remaining objections that need to be dealt with.

MR. SILVERSTEIN: Okay. But --

THE COURT: I'll also deal with the voting procedures at that time.

MR. SILVERSTEIN: In response to one of the changes that the debtors made in their disclosure statement we had some further comments as to our objection to the disclosure

statement. I don't know if you wanted --

THE COURT: I don't.

MR. SILVERSTEIN: I suspected not.

THE COURT: All right. Well, we'll continue the pretrial until the 17th on the assumption that you are doing a scheduling order regarding -- discovery will proceed.

MR. SILVERSTEIN: And we'll have our separate meet and confer as well.

THE COURT: Okay.

MR. SILVERSTEIN: And with respect to depositions we've only served fact discovery at this point, but I trust we can work this out. If we can't I guess we'll see you on that issue.

THE COURT: Okay.

MR. STEINBERG: Your Honor, with the regard to the litigation, the Broadbill litigation -- I'm Arthur Steinberg and I represent some of the LTW holders.

It is an awkward process in that the confirmation issue and the plan talks about the rights of all LTW holders. And there's a pending motion to dismiss with only one of the parties involved as to whether the LTW holders are creditors or equity holders. In the context of briefing that there's a number of issues that were raised in the motion to dismiss. I was hoping that the debtor would have no problem if we submitted a supplemental pleading along with whatever Broadbill

would do set forth the LTW holders' position as to why they're creditors in the case, because that is the essence of --

THE COURT: Well, are you parties to the adversary?

MR. STEINBERG: I'm not a party to a declaratory judgment motion per se --

THE COURT: Right.

MR. STEINBERG: -- but the declaratory judgment motion action says on behalf of all LTW holders I want a determination from the Court that they are creditors and not equity holders. So that's why I say it's an awkward procedure. I actually am a claimant. I'm going to object to confirmation. I can have all of my issues decided separately from the Broadbill declaratory judgment action; it hardly seems to be sufficient to do it that way. But I'm happy to do it that way as well, too.

I just was wondering whether there'd be any objection in the context of -- instead of doing a formal intervention motion for that purpose to be able to file that type of --

(Pause)

MR. ROSEN: Your Honor, I think in a very roundabout way what Mr. Steinberg is saying is that he has a classification issue with respect to the plan, and he doesn't like that pursuant to the plan holders of litigation tracking warrants.

THE COURT: I think that's the same issues raised in the declaratory judgment complaint.

MR. ROSEN: That's exactly right, Your Honor.

THE COURT: So do you have any problem with him either intervening or filing a pleading?

MR. ROSEN: I'm fine if he intervenes in the litigation, Your Honor.

THE COURT: All right.

MR. ROSEN: Absolutely.

THE COURT: File a stipulation of intervention and you can file either.

MR. STEINBERG: Thank you.

MR. POTTER (TELEPHONICALLY): Your Honor, if I may be heard. This is Jim Potter from the California Department of Toxic.

THE COURT: Yes.

MR. POTTER: I'm from the California Attorney General's Office on behalf of the Department of Toxic Substances Control. We will be serving some discovery in the next few days I hope. But our issues are quite a bit more narrow than the other things before the Court today, so I'm not certain if it's been -- either any of our best interest for us to participate in the meet and confer, but I can work that out with debtors' counsel.

THE COURT: All right, thank you.

MR. POTTER: Thank you.

MS. BROWN-EDWARDS: Good afternoon, Your Honor. May

it please the Court. Terri Brown-Edwards of Potter Anderson & Corroon, on behalf of the Washington Mutual Bank noteholder group. And this is not -- does not pertain to discovery issues.

Just a quick question, our Honor. You mentioned earlier with respect to the disclosure statement that you will be reviewing the debtors' chart that they provided and making your ruling based on your review. We'd like to simply state, Your Honor, that the debtors were partly responsive to our objection in their chart, and we ask your permission, and would it be helpful to the Court if we supplement it by narrowing the remaining issues with respect to the disclosure statement and submitting that to Your Honor for review.

THE COURT: Well, I don't want to get anymore pleadings. If you established or articulated what you think the debtor left out I'll look at what the debtor says they put in, I'll base it on your original pleadings.

MS. BROWN-EDWARDS: Okay. Thank you, Your Honor.

MR. MIGLIORE: Good afternoon, Your Honor. Mike Migliore on a limited appearance here on behalf of American National Insurance Company and related companies, collectively referred to as the Texas Group.

THE COURT: Okay.

MR. MIGLIORE: Your Honor, the Texas Group consists of Washington Mutual Bank bondholders that have sued JPMorgan

Chase for injuries that were caused to them. The case is currently pending in the United States District Court for the District of Columbia. Pursuant to the plan provisions in the global settlement the claims for the Texas Group will purportedly be wiped out entirely.

THE COURT: I understand.

MR. MIGLIORE: With that in mind, Your Honor, and I don't know that the debtors will have a problem with this, we'd like to have a seat at the table at the meet and confer. We, obviously, will want to be participants in discovery in any depositions that take place too.

THE COURT: All right. Any objection by the debtor to invite them?

MR. ROSEN: I think Ms. Friedman wants to speak first.

MS. FRIEDMAN: Briefly, Your Honor. This case in Washington D.C. has already been dismissed. They're trying to get the ruling vacated. I won't suggest how I think it will come out, because I'm sure you know. But the whole of the responses that they'd like to participate in this discovery, you know, effort, to help their case in Washington D.C. As you said this is about a plan confirmation process, this is about --

THE COURT: I think they're also objecting to any release -- third party release of claims that they say they hold.

MS. FRIEDMAN: I agree. And so to the extent they want to do a Chinese wall and use these documents for the purposes of a confirmation or a plan related objection, I think that's fine. To the extent that the attorneys litigating in D.C. want to make an in-run around a case that's been dismissed, I don't think is fine.

MR. ROSEN: Your Honor, I just want to echo one point, which is not only has the case been dismissed in the District of Columbia, and I do understand that counsel is trying to get it reinstated, but it was dismissed with prejudice. But, also, before that dismissal occurred, they withdrew all the claims that have been alleged in there against WMI, asserting that WMI was not a party. They were not asserting claims on behalf of WMI, they pulled those out. So trying to get involved in --

THE COURT: But does the release in the plan of JPMorgan and the FDIC, of third party claims, release any claim they may have against those parties?

(Pause)

MR. ROSEN: I can answer that, Your Honor.

MR. FRIEDMAN: You can probably guess the effort that he's answering, not here right now --

MR. ROSEN: Right. Your Honor, to the extent that they are pursuing claims in D.C. against those parties, it is subject to what those actions are. I believe -- I believe,

Your Honor, and maybe Ms. Friedman and I have to further discuss this point, but I believe not.

MR. MIGLIORE: Your Honor, Mike Migliore again.

My understanding and co-counsel's on the line, they can confirm this if necessary, the case is not dead yet. A motion for reconsideration has been filed, it has not been acted upon by the Court. Nonetheless, the answer to your question is I think an affirmative yes. The debtor here, along with -- through the global settlement as part of the plan, is attempting to bring third parties into this case here and release our claims in their entirety. I think --

THE COURT: But the debtor shows they're not?

MR. MIGLIORE: That's their position, Your Honor.

THE COURT: Does JPMorgan agree?

MR. MIGLIORE: I think discovery is necessary for that. I mean, I think it's relevant.

THE COURT: Let me hear from JPMorgan --

MR. MIGLIORE: That's fine.

THE COURT: -- if the plan affects your claim at all.

MS. FRIEDMAN: Yeah, I think what may be part of the problem here is that their claims have evolved over time and here they're bringing them on behalf as balled over cotton. I don't think there's any dispute that to the extent they're bringing these on behalf of WMI they're being released. To the extent these are derivative of WMI, these are being released.

And I wish I could say that the case was dead, but he's right, there's still a faint heartbeat. So I can't say that we aren't releasing something they're interested in. But I can say for the moment the docket reflects it was dismissed with prejudice. They're trying to get that overturned. And the purpose of the coordinated discovery that we're talking about today is about a plan, and about confirmation. If they want to come in and challenge those releases I think it's fine for them to have separate attorneys who are not involved in the separate litigation, do so. But to have to make an in-run in an effort to get --

THE COURT: But why? Why separate attorneys?

MS. FRIEDMAN: Because at the end of the day the one thing I think we've all envisioned is proper for the scope of discovery, is what is necessary to the various parties to challenge the plan and the confirmation process. I don't think it's supposed to be a back door for people who are litigating in another court for claims that aren't released -- if there are claims that aren't released by a separate party for them to get in discovery. This isn't supposed to be a back door for people to get Wall Street Journal articles. This isn't supposed to be a back door for people to bring other litigations in other forums. And just because there's a pending case that they've already had dismissed doesn't mean that they can backdoor into this discovery. It should be

limited to plan and confirmation uses. And I'm just suggesting if they can find a different way to limit their access to the document so it's only used for those purposes I'm not going to tell them how to go about it. It seems to me one way to go about it would be a Chinese wall.

THE COURT: All right. Well I will direct a separate meet and confer --

MR. MIGLIORE: That's fine.

THE COURT: -- with the Texas Group and see if you can work out this.

MR. ROSEN: That's fine.

MR. MIGLIORE: Your Honor, the one response, however. We have entered a limited appearance. We think jurisdiction is appropriate in the district court, with all due respect.

THE COURT: Well --

MR. MIGLIORE: I would say that the back end here that's trying to be done is by the debtor, trying to bring third parties into this case.

THE COURT: I understand you'll be filing an objection to confirmation on that point.

MR. MIGLIORE: We will indeed. Thank you, Your Honor.

THE COURT: All right.

MR. BOUCHARD: Good afternoon, Your Honor. Andy Bouchard, Bouchard Margules & Friedlander for Goldman Sachs.

I understood from Your Honor's earlier comments that

you were not inclined to permit the discovery against third parties other than JPMorgan and the FDIC. I just briefly spoke to Mr. Rosen just to confirm that that meant we were not going to be part of this meet and confer process. I just wanted to get confirmation of that fact.

THE COURT: Yes, you're not.

MR. BOUCHARD: Thank you.

MR. RUDERMAN: Good afternoon, Your Honor. Joel Ruderman on behalf of the Pension Benefit Guaranty Corporation.

As you may know we have filed an objection to the disclosure statement relating to third party releases in this case. And the debtor has suggested that's a plan confirmation issue.

Notwithstanding, we think it's a straight legal issue that can be dealt with, with regard to the disclosure statement hearing. To the extent that this becomes a confirmation issue we would like to participate in a meet and confer and deal with this issue with regard to any discovery.

THE COURT: What -- I mean, is there a meet and confer issue with respect to them?

MR. ROSEN: Your Honor, we've all -- we've been baffled by the PBGC's position throughout, especially because the pension plans are being assumed by JPMorgan and these are overfunded pension plans. And that there is no issue.

We've asked the PBGC to let us know what their

calculations were of the pension plan on a termination basis, which is the only way they have an opportunity to stand up here. They have declined to give us that information. So I'm not sure what we would be giving them, especially because the pension plans are going to be whole and being passed over, or why they have any reason to stand up here at all.

MR. RUDERMAN: Your Honor, Joel Ruderman.

With respect to our claims we have filed claims for thirty-five million dollars I believe, in this case. They have not been objected to in this case.

THE COURT: Okay.

MR. RUDERMAN: So for him to assert that they are underfunded would be inappropriate at this time. If they want to file an objection they're entitled to do so in the case.

THE COURT: Yeah, but what discovery are you contemplating?

MR. RUDERMAN: It's my understanding under the third circuit they need to show that there are extraordinary circumstances that exist with regard to nondebtor releases. And to the extent that they're going to make some sort of factual assertion as to what those extraordinary circumstances are that make these releases fair and necessary under the test in the third circuit, I think that we should be able to take discovery with regards to those issues.

THE COURT: All right, they should be included.

MR. RUDERMAN: Thank you, Your Honor.

MS. MURRAY: Good afternoon, Your Honor. Milissa Murray on behalf of the BKK PRP Group relating to the BKK Superfund site in California.

I just want to make sure I understand that the parties-in-interest will have an opportunity to be heard on the disclosure statement issues at the next hearing. We don't necessarily need to be involved in the meet and confer on discovery so long as there's clarification at the disclosure statement hearing as to the scope of the releases; the third party releases as they relate to the BKK Group.

We read the plan as suggesting that BKK releases JPMorgan and the FDIC for all claims relating to the site. And apparently there's some dispute about that with the debtor that can't be gleamed from the disclosure statement.

THE COURT: I'm not going to hear any argument on the objections to disclosure statement on the 17th, hopefully. I'm going to rule that before then. And if there's an issue that I want to hear oral argument on I'll alert the parties before then.

MS. MURRAY: We would then, Your Honor, like to participate in the meet and confer on discovery. In the event that they releases aren't clarified, we'll need to take discovery on whether the debtors and the JPMorgan and FDIC's understanding of the plan is that all the claims regarding the

BKK site are released.

THE COURT: All right.

MS. MURRAY: Thank you.

THE COURT: You should confer with her on that issue.

MR. ROSEN: Fine, Your Honor.

MS. MURRAY: Thank you, Your Honor.

MR. MCMAHON: Your Honor, Joseph McMahon for the acting United States Trustee.

We would like the opportunity to participate if you deem it appropriate.

THE COURT: They should also, since I suspect their objection to confirmation would deal with the third party releases as well.

MR. STEINBERG: Your Honor, Arthur Steinberg again.

Your Honor just said something that I thought would warrant clarification. When the debtor filed its second amended plan and disclosure statement everybody had the opportunity to object. And then the debtor filed on -- yesterday a further third amended plan and disclosure statement, which raised with respect to certain people some additional issues. Your Honor, has said you're not going to entertain any further pleadings on that, and we actually have a potential understanding with one of the additions that have were made, and I'm trying to figure out how -- if we can communicate that to Your Honor, if we can't submit a pleading

or a highlight if we don't have an agreement what the issue was that was raised, and you don't want to hear that today.

So I'm not trying to be --

THE COURT: Do you have an agreement on this?

MR. ROSEN: No. I've never spoken to Mr. Steinberg about anything, Your Honor --

MR. STEINBERG: Well, I --

MR. ROSEN: -- with this case.

MR. STEINBERG: I will say what we talked about just before the Court and maybe that will trigger Mr. Rosen's --

MR. ROSEN: Oh, if your -- two minutes beforehand, yes, he did make a comment to me. But, Your Honor, I'm happy to talk with Mr. Steinberg between now and the 17th to clear up any issues that he may have.

To the extent, Your Honor, that we didn't satisfy the objections as you indicated, you'll tell us what additional items we need to give.

MR. STEINBERG: Well, Your Honor, it's not a real mystery and I'm surprised Mr. --

THE COURT: It's in your -- it's in your objection already?

MR. ROSEN: Not really.

MR. STEINBERG: No, it's not. And I don't know why Mr. Rosen is being coy. In page 48 of the third amended disclosure statement he added the sentence which reflected

progress in the case with respect to our objection. It said that to the extent that Broadbill wins its declaratory just action then Broadbill will be treated as a general unsecured creditor in the case. I simply ask Mr. Rosen did he really mean to limit the relief just to Broadbill individually or whether it would apply to all liquidation trust warrant holders -- litigation trust warrant holders?

Mr. Rosen said I'm not trying to hurt you and, therefore, I would assume we would cover you as well. Now, have I got it wrong, and if you didn't say that, and we didn't have that discussion then you should tell me now. But --

MR. ROSEN: I'll talk to Mr. Steinberg later. I don't think it's appropriate here. He --

MR. STEINBERG: But, Your Honor, if he's not going --

MR. ROSEN: Again --

THE COURT: Is it meant to apply to all or not?

MR. ROSEN: Your Honor, we focused on Broadbill because they filed the declaratory judgment. That's what we were responding to. You just now said stipulation to intervene. I look forward to it we're happy to have the discussion with him subsequently.

MR. STEINBERG: I don't -- but, Your Honor --

THE COURT: Put it all parties in the Broadbill litigation.

MR. ROSEN: That's fine.

MR. STEINBERG: That's fine. If that's what he's going to do then that's fine. But that was the reason why I rose because --

THE COURT: Okay.

MR. STEINBERG: -- we didn't have the opportunity to reflect that understanding, which was only caused by a change that was made yesterday. So I'm glad we were able to clarify it.

MR. SILVERSTEIN: But, Your Honor -- it's Paul Silverstein for the record.

It goes a little bit deeper because, again, on Broadbill, obviously, Mr. Steinberg represents his clients, there may be other litigation warrant -- others who would like to be similarly affected based on that change. I mean, the change again was progress. Progress was that if Broadbill --

THE COURT: All right.

MR. SILVERSTEIN: -- Broadbill wins --

THE COURT: I'm continuing the disclosure statement till the 17th, I'll hear anybody's argument.

MR. SILVERSTEIN: Thank you, Your Honor.

MR. STEINBERG: Thank you, Judge.

THE COURT: File any additional objections by the 11th.

MR. STEINBERG: Thank you, Judge.

THE COURT: All right. I think we've dealt with

everything?

MR. ROSEN: No, Your Honor. We now have the motion for the direct certification --

THE COURT: Oh, yes.

MR. ROSEN: -- on the examiner motion. And -- it's your motion.

MR. NELSON: Good afternoon now, Your Honor. I want to try to keep this relatively short.

THE COURT: Well, answer their arguments. Is this a missed question of fact and law, or is this, in fact, only a question of law?

MR. NELSON: It is a pure question of law, and we can see that, Your Honor, from -- if you go to the debtors' examiner's brief. The very first heading under the phrase objection, talks about how the bankruptcy court has discretion, and the quote is "appointment of an examiner is not mandatory under Section 1104(c)," that is a pure issue of law decided by statutory construction about whether the discretion exists.

The creditors' committee in their brief talks about how while there is discretion because of statutory construction, but again, it's an issue of statutory construction.

THE COURT: Well, did you also appeal whether the exercise of discretion was an abuse or --

MR. NELSON: Well, Your Honor, under the way the

statute works we have to appeal an order.

THE COURT: Uh-huh, I know.

MR. NELSON: So we are appealing the order of this Court denying the appointment of an examiner. And so there are certainly an application of law to the facts. But in terms of whether the threshold issue that is dispositive of this case is whether the appointment is mandatory. That is a pure issue of law. And if you -- if the answer is there is discretion, well, then that leaves you to one path. If the answer is there's no discretion then there are legal questions about the scope but those are still legal questions. And so the answer is yes, it is a pure issue of law.

Now, of course, like in any case, there is an application of the issue of law to the facts. But that's no different than, for example, in the Purland (ph.) case, which is the Third Circuit case that did rule on 158(d) and accepted the appeal, accepted the direct appeal, where the issue was the bad faith of the Chapter 7 petition. And it went through and addressed whether it was in bad faith. That is an application of the standard. But it's still the same thing, what is the standard? And so that's why we think that there is the property pure issue of law here.

THE COURT: Okay.

MR. NELSON: I don't think there's any dispute about conflicting authority or the fact that the third circuit hasn't

ruled the importance of the issue, and I'll reserve until the debtors and creditors' committee, unless this Court has other questions that it would like me to address.

THE COURT: No, thank you.

MR. SILBERGLIED: Good afternoon, Your Honor. For the record, Russ Silberglied, Richards Layton & Finger on behalf of the debtors.

Let's start with that point, Your Honor. There are three issues that the equity committee has raised. And we know that, actually, because last night they filed pursuant to the rules a designation of record on appeal and statement of issues on appeal. I've brought some copies of that with me if Your Honor would like to see it, or I can read the relevant ones, whichever Your Honor would prefer.

THE COURT: You can hand it up.

MR. SILBERGLIED: Thank you, Your Honor.

THE COURT: Thank you.

MR. SILBERGLIED: Your Honor, I'd like to start with number 3 on them. Obviously, as these things typically go the designation of the record comes first, the statement of the issues follow at page 3. And I'm looking at number 3. There's a lot of, you know, assuming this, that and the other thing that starts in here. And when you cut through that and get to page 4 it says, "did the bankruptcy court err in denying appointment of an examiner in light of the facts and

circumstances on record in these Chapter 11 cases?" Clearly, that is not a pure issue of law. It's exactly the opposite of a pure issue of law. It even uses the words facts and circumstances. It even uses the words these Chapter 11 cases. Even if it were somehow considered to be a mixed question of facts and law, which by the way, it isn't. But even if it were considered that, Judge Gross in the Nortel case explicitly stated "the appeal disputes the application of existing controlling law to specific facts and, therefore, does not first satisfy this certification criteria." That simply is not something that you can do on a direct appeal.

And the second circuit in the Webber decision; the leading case on certification, said "Congress believed direct appeal would be most appropriate where it is called upon to resolve a question of law, not heavily dependent on the particular facts of the case. But an appeal of the exercise of discretion is exactly that and they have so admitted."

By the way, they once again in argument just now just like they did in the papers criticized our reliance on Webber as opposed to third circuit law. They mischaracterized what we said which was -- we didn't say that the third circuit has never taken a case on certification, all we said is the third circuit has not discussed the standards on certification, it has not. The case that they cited is simply a case where the third circuit noted in passing it had accepted a case on

certification, didn't say why and then went ahead and decided the case on the merits. The leading case is Webber, Your Honor.

But be that as it may it would make absolutely no sense, and that's probably why it's the question asked out of the box, it would make absolutely no sense to have one issue pending in the third circuit and a second issue pending in the district court that are related to one another. But that's exactly what you'd have here because issue number 3 in their statement is not something that is appropriate to certify.

Now, they say in their reply that this is a purely legal issue, and it also necessarily encompasses the criteria for when a court must appoint an examiner and any constraints that a court may impose on the scope of the investigation. But it doesn't say why that's necessarily encompassed. And, frankly, I can't figure it out. Constraints have to do with the facts of the case.

At best, maybe that argument is actually looking at their appeal point number 2, not appeal point number 3. Appeal point number 2 says what is the amount of discretion granted to a bankruptcy court under 11 U.S.C. Section 1104(c) with respect to the scope of an examiner's investigation. But even that one while using words that try to make it sound like a legal issue, frankly, is not a pure issue of -- a pure legal issue. That one maybe gets closer to an application of facts to law, but I

don't know how you can ever figure out what is the amount of discretion completely divorced from the facts of a particular case. What is the appropriate discretion, probably is different in every single case. So that's with respect --

THE COURT: They're saying that the question is what legal standard in determining the discretion, not the application of that standard to the facts.

MR. SILBERGLIED: Well, I -- but, again, I don't know how you can have a legal criteria saying this is the amount of discretion Your Honor has --

THE COURT: A lot of discretion or a little discretion?

MR. SILBERGLIED: And what would that mean without facts. So, you know, again, I think the bigger point, though, is -- number 3 is clear on its face and is not something that is a pure legal question.

THE COURT: Well, clear for the first issue, though, is a pure question of law.

MR. SILBERGLIED: Yes. So let's get back to the first question. Again, I mean -- you know, to me having cases pending in two different courts is a reason in and of itself not to certify, but let's get back to appeal point number 1.

Their argument is that the Court lacks any discretion whatsoever. If it's a legal question and third circuit has never considered it Your Honor lacks any discretion and must

certify it. They don't even mention let alone try to distinguish three cases we cited in our brief. Two of which are from this very district, that have held exactly to the contrary.

The Motor Coach case, where the issue was the doctrine of necessity. The third circuit has not directly considered the doctrine of necessity since the advent of the Bankruptcy Code in 1978, and, frankly, much before that. But three's no dispute in this circuit on the point. And the Motor Coach opinion said it need not certify that issue.

Goody's, another opinion from the Delaware District Court, where the issue was stub rent. The district court actually noted in its written opinion on certification that the appellant's argument had not been considered by the third circuit and nevertheless denied certification. And a District of Massachusetts opinion called Miramar, which specifically stated, "there is no controlling case law in this circuit," and it denied certification. All three of those cases considered whether there was an serious dispute in the case law in that -- and the district, and the bankruptcy court in that district concluded there was none and decided not to certify. And that's exactly what we have here.

The equity committee doesn't only admit that there's no dispute in the bankruptcy court in Delaware on the interpretation of 1104(c) it affirmatively pleads it and puts

it into its papers. Your Honor has already considered the issue as well.

Again, they don't even mention, much less attempt to distinguish Motor Coach, Goody's or Miramar, but they want this Court to take the opposite interpretation of the statute.

Your Honor, in addition, I think there's a reason why the cases come out this way. I think there's a reason why Motor Coach and Goody's come out this way. Congress couldn't have intended that the overburdened circuit courts of appeals not only would hear extra appeals, obviously it didn't intend that, but that it would also wind up having to spend all of its time with an additional administrative hurdle, which is basically spending the time like the Supreme Court spends time deciding which cases it's going to hear in the first place liked certiorari, without any gate keeping function by this Court whatsoever. Because under their interpretation of it did something that the third circuit hasn't precisely decided that issues Your Honor should act like a robot and mechanically certify it and punt it to the third circuit for it to decide whether it's going to take the appeal. The third circuit would become the U.S. Supreme Court. It would spend all of its time deciding what cases it's going to hear.

THE COURT: Well, yeah, there is the second, they can refuse to hear it. Whether or not it's mandatory for me to send it to them to decide.

MR. SILBERGLIED: Absolutely, Your Honor. And my point simply is that there's a gate keeping role for this Court as well, and that's the reason why these other opinions have come out the way they did, Goody's, Motor Coach and Miramar, saying that this Court does not need to apply a robotic type of test.

THE COURT: And what is the test?

MR. SILBERGLIED: Your Honor, in all --

THE COURT: It's got to set forth in the statute.

MR. SILBERGLIED: Your Honor, in all three of those cases; Goody's, Motor Coach and Miramar, the court expressly considered whether there is a serious dispute in the bankruptcy court for that district, whether it had been considered before and how it came out. I think --

THE COURT: Well, that's not in the statute, though, is it?

MR. SILBERGLIED: Your Honor --

THE COURT: The statute says whether it involves a question of law where there's no controlling decision of the Court of Appeals or Supreme Court.

MR. SILBERGLIED: It is in all three of those cases, Your Honor. And I'd like to go from here to something that he second circuit said. Because it's very interesting when you think about it this way.

This is a direct quote once again out of Webber. It

said, "in many cases involving unsettled areas of bankruptcy law review by the district may be most helpful. Courts of appeal benefit immensely from reviewing the efforts of the district court to resolve such questions. Permitting direct appeals too readily might impede the development of a coherent body of bankruptcy case law."

So one of the very factors that the second circuit, which by the way has been echoed in every circuit court that's considered it since then. One of the very factors that the circuit courts consider in deciding whether to take a certified appeal is whether the issue is unsettled with unsettled areas being the ones less likely to be accepted by the circuit court. And the reason is, quoting the very next paragraph of Webber, so that the issues can "percolate through the normal channels."

It makes no sense whatsoever to certify a question on the sole basis that it's not an issue that the circuit court had addressed, only to have the circuit court to use that very factor against taking the appeal. All that does is it sets up two layers of busy work. One layer of busy work for Your Honor certifying something that's not going to ultimately get heard, and another layer of busy work for the third circuit which is ultimately going to turn down the appeal for the very reasons set forth in Webber.

Your Honor, moving to the public importance prong. The equity committee's reply did not attempt to distinguish

Nortel on this point either. Nortel said that "to constitute a matter of public importance the issue on appeal must transcend the litigants and involve a legal question the resolution of which will advance the jurisprudence to a degree that is un -- that is usually not the case." And a similar quote we made in Collier, also not mentioned or distinguished. The bar for certification under the public importance standard should be set high.

Instead, what the equity committee argues is that "the magnitude and importance of this bankruptcy case, itself, warrants appellate action." Not surprisingly, nothing at all is cited for that proposition nor could it be. The issue is not whether this is a high profile Chapter 11 case. The issue is not whether there are lots of dollars at stake in this Chapter 11 case. It's what about this issue that needs to be appealed.

In fact, what's ironic, is after saying that what should be important to the Court is that this is a high profile case with lots of dollars at issue, three lines later the only case that they cite in that paragraph is an individuals Chapter 7 case proving the point that that -- that high profile the case is has nothing to do with the issue.

Similarly, their statement that "if an examiner is not appropriate in this case, a substantial question exists about when appointment of an examiner is ever appropriate," simply

ignores Your Honor's ruling on the subject. And I know we've heard a lot about that today, so I'm not going to get it further. But it ignores what Your Honor already said on that subject.

Finally, the equity committee attempts to prove the public importance prong by arguing that this issue could come up in every large Chapter 11 case. But the only case they cite for that proposition is the case that was certified because the underlying issue was a brand new BAP CPA issue. And two paragraphs later when they're talking about related issues, again, they cite mostly the cases that we're saying this could come up again and again, and they were all -- not all, but most of those cases were new BAP CPA provisions. It means testing things like that.

That's not 1104(c), Your Honor. 1104(c) was adopted in 1978; that's thirty-two years ago. This has been around for a long time. We served -- we did research, we surveyed internally, we're not aware of a single time that this issue has ever been appealed before. The Judge Balik opinion that we cited in the underlying papers; the Webcraft opinion, which was at least as far as we know, the first one in this bankruptcy court holding that 1104(c) is not mandatory, that case was decided in 1993; seventeen years ago.

So empirically, we know for a fact that appeals of Section 1104(c) are not happening in "every large bankruptcy

case", history has demonstrated this.

With respect to subsection (2) of Section 158(d)(2)(A) which is the "question of law requiring resolution of conflicting decisions prong," similar to the other prong, frankly, so first we make the same arguments about not all of these are areas of law at all. But here, again, is another area where they didn't mention, much less distinguish, what we cited for this. They do take issue without our statement that the job of the third circuit is not to resolve conflicts among the various circuits. But what they don't do is they don't distinguish Goody's; a case of our own district court. Where the Goody's court said "the third circuit is not empowered to resolve conflicting decisions between circuits. Certainly no split of authority exists within the third circuit." And on that basis, again, denied certification.

That takes us to whether direct appeal will materially advance the case. It will not. And this will be the last point that I raise. The reality is that if they want to pursue this appeal it's going to be in of two courts. It's just simply an issue of which Court it's going to be in.

What they're really trying to do is they're really trying to delay confirmation. And delaying confirmation is the antithesis of advancing a Chapter 11 case. Indeed, it's very similar to what Judge Gross was faced with and rejected in Nortel. In fact, an issues that he said "strange reason" an

argument that he rejected. Judge Gross held that rather than the delay engendered by appeal "the logical and certain way to advance the bankruptcy case is permit the allocation process to proceed." That was what was at issue there. In other words, you don't stop the essence of a Chapter 11 case in the name of advancing the Chapter 11 case. And what could possibly be more at essence or central to a Chapter 11 case than plan confirmation, a very similar issue to the one considered in Nortel.

THE COURT: They have not filed a stay of the confirmation pending this appeal.

MR. SILBERGLIED: That's correct, Your Honor. They have not filed the stay -- but that is clearly what they intend to do. And, actually, it raises an interesting issue. I mean, obviously at this point timing of the plan confirmation process is a little bit uncertain given what happened earlier today.

THE COURT: Yes.

MR. SILBERGLIED: If Your Honor were to schedule confirmation within a few months it would take one of two things for the third circuit, or the district court for that matter, to be able to decide this in a manner that would even help them, right? I mean, we've been talking about what's at the end of 1104(c), you have to remember what's in the beginning of 1104(c). What's in the beginning of 1104(c) says that a motion can be made or an examiner can be appointed at

any point prior to confirmation. Right. So if the third circuit is a very busy court this would require two separate decisions by the third circuit. One to decide the appeal -- decide to take the appeal. Then it would first ask for briefing on the appeal itself. Then it would have to render a ruling. Even if the third circuit expedited both of those that's a lengthy process. Confirmation very likely could overtake that. It's not a point I was going to focus on today, but since Your Honor asked, it is quite clear the way the equity committee would attempt to get around that. And it is exactly that they would ask for a stay.

Thank you, Your Honor.

THE COURT: Thank you.

MR. NELSON: Your Honor, I want to address a few issues. Let me take the last one first on the issue of a stay. Obviously, one of the reasons why we're asking for a direct appeal is so that we can have a ruling from the third circuit before confirmation. If it goes to the district court and then it goes up to the third circuit I assume either side is likely to appeal any decision from the district court. We're trying to -- that is the very reason why it's in the material interest and would materially advance the progress of this case. We know that both sides are going to appeal from any district court ruling. We don't know how long the district court's going to take to rule.

We are happy to join the debtors and the creditors' committee in any expedited appeal to the third circuit. And so on that issue, I think, it's very -- I think evident that we're trying to speed up the appeals process here.

And on Webber, the second circuit case that they cite, actually the language of the opinion I think establishes why a direct appeal certification is necessary here. The reason why this hasn't come up a lot, certainly in the sixth -- there's one appellate court on it in the sixth circuit, there's some district court opinions on it, it's because it is difficult to review a procedural issue such as this. And the Webber case specifically talks about in that situation that if in the public interest if an issue might disappear in light of a complete and final which it very well might here, that it is important to certify for the public interest. And the debtors say that we don't cite any decisions about this or that or the other of the importance in large bankruptcies. I don't think that's true.

In our reply brief, Your Honor, we cited the Pacific Lumber case from the fifth circuit that came out within the last twelve months. And in that Pacific Lumber decision they specifically certified a very large bankruptcy that dealt with a -- legality of a confirmed Chapter 11 plan and this is the quote from the fifth circuit in that case that "the twin purposes of the provision of the direct appeals provision that

is, were to expedite appeals in significant cases, and to generate binding appellate precedent in bankruptcy whose case law has been plagued by indeterminacy."

That's exactly what we have here. This is a large case. The briefing on the actual merits of discretion, as Your Honor knows, there are cases all over the board on this issue. And there has not been any ruling by the third circuit here. This is exactly the situation that the direct appeal statute is designed to address. Again, this is from the Webber case that they cite. Which they state that the reason that Congress enacted the statute is "because of the paucity of settled bankruptcy law precedent." This is, again, exactly what we have here. The paucity of settled bankruptcy law precedent.

With respect to at least the second issue, Your Honor, of the amount of legal discretion. It is a legal issue. What does 1104(c) provide? There's 1113 and 1114 that are there. And what are the constraints, what are the legal constraints on the amount of discretion that a bankruptcy court has? That is fundamental. If the answer to that question, Your Honor, if we arrive it's a legal issue, if the answer to the question is that there is no discretion there is no need as a legal issue to get to the third issue. And so that is why it is a pure issue of law here. The -- they cannot dispute that the resolution of this case and of this issue and order depends entirely on a pure issue of law. And because of that it meets

the first part of the first clause that there is no controlling third circuit precedent regardless of other decisions by other district courts, this Court has an obligation to follow the statute which we submit is perfectly clear. And there -- by the way, literally in the past twelve months along, we found in published opinions six different circuits ruling on direct appeal. So this is not some uncommon practice. The issues that were certified in those cases, they're addressed in our reply brief, but they are all on similar-type issues where there is an issue of law, and then the application of law to those facts. And that's, again, exactly what we have here. What is the standard? Is there discretion? And then applying that if, you know, if there is -- if there is no discretion then obviously the Court was in error.

We'd address public importance. On the issue of controlling precedent, Your Honor, and conflicting decisions, I would just point you to the In re Murkowski (ph.) case, from the sixth circuit, where they accepted an appeal. Where the precedents and the conflicting decisions did not come, there is no indication that the precedents came from within the district and within the circuit, rather the court specifically appointed -- looked at all the different conflicting decisions here.

It's fair to say, Your Honor, that in this area the rulings of the various courts that have looked at the issue are

all over the board, are a mess. This is the exact reason why Congress enacted the statue as recognized by the Webber case, as recognized by the Pacific Lumber case. And that's the reason why these cases are being accepted by the Court of Appeals.

And they say that it would be anomalous for the Court of Appeals to act as some type of discretionary review body before accepting the appeal. Well, that's how the status is set up. And, in fact, if you look at the -- we did a Westlaw search recently. And if you look at the opinions, there are many that have granted a direct appeal, there are some that refused a direct appeal. And that's how the statute -- and many, by the way, accept a direct appeal like the third circuit did in the actual opinion itself. And so, you know, that's why we think it's purely within this Court's duty to certify the issue, either prong of clause 1, or prong 2, or prong 3.

And I'm, again, happy to answer any questions about anything the Court may have on this issue.

THE COURT: No, thank you.

MR. NELSON: Thank you, Your Honor.

MR. SILBERGLIED: Three quick points, Your Honor. Again, for the record, Russ Silberglied.

I want to start with that very last point where there are apparently cases accepting the appeal in the opinion on the merits, itself. I'm now aware of what cases those are. But

procedurally I can take a guess. Because the parties can agree, or the court can sua sponte, send something up to the appellate court.

Here's there's no question that there would be an opposition. And the third circuit in order to do what counsel has suggested would have to accept briefing of both points at the same time, all the while not having determined whether it's even going to take the appeal in the first place. I suppose it's theoretically possible, it just doesn't sound very likely to me.

Two other quick points, Your Honor. They say that one reason for a direct appeal is to have a decision before confirmation, because either side could appeal a district court ruling. Your Honor, if we lost in the district court, if the district court reversed this Court --

THE COURT: Uh-huh.

MR. SILBERGLIED: -- and we tried to appeal then we'd have to get a stay pending appeal. Querulous to whether we would try, but to me all they're talking about is we would need a stay pending appeal. So -- I'm not sure really why that is even relevant. In other words, let me try that one differently.

THE COURT: Okay.

MR. SILBERGLIED: If we were to lose, Your Honor, an examiner would be appointed and would start work and the only

way we would be able to pursue that appeal is if we were moving for a stay pending appeal in the district court which might not even grant it. So they'd get the examiner if the district court agreed with them, just like they'd get the examiner if the third circuit agreed with them. Unless the stay pending appeal happened to be granted.

Last point, Your Honor. A direct quote was resolution of this case rests entirely on an issue of law. That is not correct. Resolution of appellate argument, number one, rests entirely on a legal issue but they are not content to rest on appellate argument, number 1, that's why they've raised numbers 2 and number 3. They will not give up the appeal if they lose, number 1, and that was the whole point of my argument. Thank you, Your Honor.

THE COURT: All right. Thank you.

Well, let me rule on this. I am inclined to certify this as a direct appeal to the circuit, because I think certainly the issue of whether or not the bankruptcy court has any discretion to deny appointment of an examiner, or the threshold of the five million in unsecured public debt is met, is a pure issues of law. There is no controlling decision in this circuit or the Supreme Court on that issue. So I think it clearly falls within (i) of the statute. It also falls within Romanette ii, there are conflicting decisions, albeit not in this circuit. But it would certainly be helpful to this Court

if the court would tell us whether we're doing it right or wrong. Because this issue does come up in a lot of cases. And I've had three or four of them myself. So it is an issue I'd like to have a decision on.

I think it is a matter of public importance. Congress, in writing the examiner statute, expressed the opinion that examiner should be filed under certain circumstances albeit leaving to the court the appropriateness of any investigation by the examiner. But it would be helpful to have some clarification on that. And I think for that reason, I will grant it under 158(d)(2)(A).

MR. NELSON: We have an order.

THE COURT: You may hand it up.

MR. SILBERGLIED: Can we take a look at it, Your Honor, I don't think we've seen it yet.

(Pause)

MR. SILBERGLIED: I mean my only comment would be, Your Honor, this is the order apparently that was attached to the motion, it has Your Honor specifically finding two of the things that Your Honor did find, which is no controlling decision, and matter of public importance. It further has Your Honor finding that this Court hereby further finds that an immediate appeal from the final order to the third circuit would materially advance the progress of the above-captioned Chapter 11 case. I don't know that that changes anything,

because Your Honor only needs to find one of them. Your Honor didn't explicitly make that part of your ruling, it doesn't really matter to us, but I just point it out for the record.

THE COURT: Yeah, I'll strike that, because I'm not resting my ruling on that specific finding.

UNIDENTIFIED SPEAKER: Maybe changes that are requested to the second --

THE COURT: You may. Do you want to file this under a certification of counsel, then?

UNIDENTIFIED SPEAKER: Yes, Your Honor. Thank you.

THE COURT: Okay. And they'll add that it's under both clause one and two of 11 -- excuse me, 158(d)(2)(A).

MR. NELSON: Thank you, Your Honor.

THE COURT: Okay.

MR. ROSEN: Your Honor, I think that completes then the agenda for today.

THE COURT: Just in time. We'll stand adjourned.

MR. ROSEN: Thank you.

(Whereupon these proceedings were concluded at 1:54 p.m.)

I N D E X

R U L I N G S

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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.

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Date: June 4 2010