

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

	)	Chapter 11
In re:	)	
WASHINGTON MUTUAL, INC., <i>et al.</i> ,	)	Case No. 08-12229 (MFW)
Debtors	)	Jointly Administered

**TPS CONSORTIUM’S SUPPLEMENTAL MOTION IN LIMINE TO STRIKE AND PRECLUDE ALL TRIAL EVIDENCE OF ANALYSIS THAT WAS WITHHELD FROM DISCOVERY ON THE BASIS OF THE ATTORNEY-CLIENT PRIVILEGE**

The Consortium of Trust Preferred Securities Holders (the “TPS Consortium”),<sup>1</sup> by and through undersigned counsel, hereby files this supplemental motion (the “Supplemental Motion”) in conjunction with TPS Consortium’s *Motion In Limine To Strike And Preclude Evidence Of Analysis That Was Withheld From Discovery On The Basis Of The Attorney Client Privilege* (the “Original Motion”)<sup>2</sup> [D.I. 6132], seeking an Order striking and precluding all of the Debtors’ and their proxy, the Creditors’ Committee’s (collectively, with the Debtors, the “Settlement Proponents”) evidence through declaration and live testimony related to analyses and information withheld during discovery based on the assertion of the attorney-client privilege. The Debtors asserted the shield of the attorney-client privilege for months and months, blocking discovery on the likelihood of success of the claims of the settlement. Now, the Debtors impermissibly seek to use the sword of independent analysis of the likelihood of success of the

<sup>1</sup> As set forth in the *Verified Third Amended Statement of Brown Rudnick LLP and Campbell & Levine LLC Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure*, dated October 29, 2010 [Docket No. 5712], the TPS Consortium is comprised of parties: (a) who have been classified for treatment under Class 19 of the *Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code*, dated Oct. 6, 2010 [Docket No. 5548] (the “Plan”); and (b) who each hold interests in securities described by the Debtors as constituting the REIT Series under the Plan.

<sup>2</sup> The Original Motion, in its entirety, is incorporated into the Supplemental Motion.



claims of the settlement, previously hidden from the parties. All the evidence that should be stricken is set forth in the chart, attached hereto as Exhibit A. In support of the Motion, the TPS Consortium represents as follows:

1. For months, the Debtors have repeatedly told this Court that they will not rely on the advice or analyses of counsel to establish the reasonableness of the global settlement (the “Settlement”) that is the crux of the proposed plan of reorganization. After three days of trial, it is clear that the Debtors are seeking to do the exact thing that they promised this Court they would not do – attempt to prove the reasonableness and confirmability of the Plan and Settlement relying on the very analyses they had previously refused to produce. The Settlement Proponents have admitted into evidence multiple declarations setting forth, as the direct testimony evidence to support confirmation of the Plan, conclusions based on the “privileged” analyses the Debtors have shielded from discovery.

2. The trial testimony of the Settlement Proponents confirms that the Settlement Proponents seek to impermissibly use attorney-client privilege as a sword and shield. When asked whether WMI put “any sort of range of assessment of risk on any particular claim,” William Kosturos (“Mr. Kosturos”), the chief restructuring officer of WMI and lead negotiator for WMI on the Settlement, replied that “[i]t’s difficult to put an attorney work product privilege in to a public document so I’m following you, but we didn’t put our work product in here.” But, when asked if he disregarded what “Weil Gotshal had to say when it came time for [Kosturos] to assess the weaknesses and strengths of the claims for the purpose of evaluating the settlements,” Mr. Kosturos replied: “I don’t think you can erase that from your mind.” see December 2, 2010

Confirmation Hearing Transcript (“December 2<sup>nd</sup> Confirmation Hearing Tr.”) at 488:7-20<sup>3</sup>; see also December 3, 2010 Confirmation Hearing Transcript (“December 3rd Confirmation Hearing Tr.”), at 652:12-16 (testimony of Mr. Goulding, the treasurer of WMI) (“For the purposes of determination for your support for the debtors as to whether or not the settlement was fair and reasonable, we would have discussed it with counsel”)<sup>4</sup>; id. at 858:9-11 (testimony of Mr. Simms, the designee of the Creditors’ Committee) (“The conclusion of our likelihood of success on these claims is something that we have asserted privilege on, yes”).<sup>5</sup> While WMI is perfectly comfortable talking out of both sides of its corporate mouth, it is this type of behavior for which the sword and shield doctrine was designed. See, e.g., In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (“In other words, a party cannot partially disclose privileged

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<sup>3</sup> December 2, 2010 Confirmation Hearing Transcript (“December 2nd Confirmation Hearing Tr.”), p. 338:12-13, 339:13-17, 480:20-481:5. A copy of the Confirmation Hearing Tr., with relevant testimony highlighted, is attached hereto as Exhibit B. The yellow highlighting indicates testimony to be stricken. The blue highlighting indicates testimony where the witness asserted attorney-client privilege related to the analysis of the strengths and weaknesses of the claims underlying the Settlement.

<sup>4</sup> December 3, 2010 Confirmation Hearing Transcript (“December 3rd Confirmation Hearing Tr.”), p. 338:12-13, 339:13-17, 480:20-481:5. A copy of the Confirmation Hearing Tr., with relevant testimony highlighted, is attached hereto as Exhibit C. The yellow highlighting indicates testimony to be stricken. The blue highlighting indicates testimony where the witness asserted attorney-client privilege related to the analysis of the strengths and weaknesses of the claims underlying the Settlement.

<sup>5</sup> See also id. at 713:5-8 (testimony of Mr. Goulding) (“[W]e thought it would be prudent to involve counsel in the conversation to make sure we understood all the legal issues”); id. at 787:25-788:6 (testimony of Mr. Goulding) (“Q. You then did consult with counsel about the underlying legal claim as to who owned which assets as part of the disputed resolution, correct? A. Sure, we – we discussed with counsel on – on those types of issues”); id. at 883:14-24 (testimony of Mr. Simms) (“Q. If anybody asks you today whether you are going to testify about the actual legal investigation done for the creditors committee, you’re going to refuse to answer that question on the grounds of attorney-client privilege?”...A. As far as legal conclusions, I said I can’t give legal conclusions as they are based on counsel advice, that’s correct.”).

communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party”).

3. At the same time that WMI shields the analysis of the likelihood of success of the myriad claims necessary to establish the reasonableness of the Settlement, Mr. Kosturos and others repeatedly admitted that its so-called “business judgment,” ostensibly gleaned from simply reading public filings and sitting in settlement meetings, was inextricably bound up in the advice of counsel. See December 2nd Confirmation Hearing Tr., 489:8-492:15 (testimony of Mr. Kosturos).<sup>6</sup> And because not a single witness has testified in any way about the results of their purported analyses of the merits of the various claims (only that such an analysis was conducted), how can the Court accept the testimony as representing anything other than the reliance on the advice of counsel? Since Mr. Kosturos and others had previously stated that the likelihood of success of the claims underlying the settlement was based on privileged information and even noted it at trial, the Settlement Proponents cannot rely on any evidence to the contrary. See Synalloy Corp. v. Gray, 142 F.R.D. 266, 269 (D. Del. 1992) (“[T]he attorney-client privilege cannot at once be used as a shield and a sword”) (citations and quotations omitted). Therefore, this Court must strike the trial testimony on the topics in Exhibit A because the Settlement Proponents have invoked the attorney-client privilege on those topics. See, e.g., Galaxy Computer Servs., Inc. v. Baker, 325 B.R. 544, 558-559 (Bankr. E.D. Va. 2005) (witness

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<sup>6</sup> Id. at 492:7-15 (“Q. And you based that on communications with your counsel as to the assessment of the likelihood of success of the merits; isn’t that right? A...I could not erase that from my memory and we used our business judgment in looking at all these strengths and weaknesses”); see also December 3rd Confirmation Hearing Tr., at 669:18-23 (testimony of Mr. Goulding) (“I think that there’s enough information in the pleadings that I don’t think you need to know what those conversations were in order to determine whether or not the settlement is reasonable”); id. at 840:18-21 (testimony of Mr. Simms) (“Analysis at the end that included counsel with regard to the merits of winning arguments, but there was extensive analysis done by FTI independently”).

who invoked the attorney-client privilege to refuse to testify regarding the substance of her handwritten notes at her deposition precluded from testifying to it at trial because the privilege cannot be both “a shield and a sword”).

4. This Court has already stricken Mr. Kosturos’s testimony on the BOLI/COLI claims’ analysis because he first stated that counsel participated in the analysis, December 2nd Confirmation Hearing Tr., p. 383:17-23, and then moments later stated that the BOLI/COLI claims’ analysis was also done with WMI employees, WMI experts, and A&M experts. Id. at 383:23-384:5 This Court struck that testimony, see id. at 384:5-385:6, and should strike all of the trial testimony and declaration testimony in Exhibit A for the same reason. Mr. Goulding asserted that he did not think that the Debtors were “putting any privileged information into the declaration.” December 3rd Confirmation Hearing Tr., at 714:14-15. Mr. Goulding’s assertion does not excuse the fact that underlying analysis of the likelihood of success of the claims of the Settlement was privileged and based on counsel as Goulding himself testified. See id. at 713:5-8 (“[W]e thought it would be prudent to involve counsel in the conversation to make share we understood all the legal issues.”).

5. The above testimony represents only a sampling of the assertions of privilege by Settlement Proponents and the current attempt to rely on the concealed information to prove up the Settlement and Plan. Having misrepresented their intentions to the Court and having repeatedly raised the privilege as a “shield” to all meaningful discovery, the Debtors and the Creditors’ Committee must be precluded from offering any evidence or conclusions based on the undisclosed analyses regarding the likelihood of success of the claims in the Settlement and the fairness and/or reasonableness of the Plan and Settlement. See, e.g., Engineered Prods. Co. v. Donaldson Co., 313 F. Supp. 2d 951, 1022-1023 (N.D. Iowa 2004) (finding that the plaintiff

“cannot rely, for its own purposes, on documents as to which [the plaintiff] may now wish to waive the privilege, but which [the plaintiff] did not allow [the defendant] to explore in [previous] deposition[s]”). Therefore, the Settlement Proponents should be precluded from offering, by way of live testimony or by declaration, the information contained in Exhibit A.

6. The reason for the Debtors’ end-run is clear: they must now use the sword of the attorney client privilege as their only possible way to prove the reasonableness of the Settlement. In order to satisfy the reasonableness standard under Rule 9019 of the Federal Rules of Bankruptcy Procedures, the Debtors must claim to have relied on *some* analysis. See In re Spanion, Inc., 2009 WL 1531788 at \*9 (Bankr. D. Del. June 2, 2009) (refusing to approve a settlement based on the “largely conclusory record with which I am presented to evaluate likelihood of success” because “there is not enough evidence before me to conclude whether the proposed settlement amount is within the ‘range of reasonableness.’”); Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.), 336 B.R. 87, 93 (Bankr. D. Del. 2005) (“[T]he Debtors have the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved.”). Without the impermissible trial testimony that the Settlement Proponents relied on business judgment and public filings, which must be stricken for the reasons set forth above, they are asking this Court to approve a multi-billion dollar settlement with absolutely no analysis.

### **CONCLUSION**

WHEREFORE, for the reasons stated above, the TPS Consortium respectfully requests that the Court enter an order: (i) precluding the Settlement Proponents from offering, by way of live testimony or by Declaration, any evidence of the likelihood of success of any claims under the settlement and striking the information contained in the third and fifth columns of Exhibit A;

(ii) striking the Mastando Declaration in its entirety; and (iii) granting such other relief as is appropriate.

Dated: Wilmington, Delaware

December 3, 2010

Respectfully submitted,

**CAMPBELL & LEVINE LLC**

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Exhibit A

<b>Topic</b>	<b>Deposition Cite</b>	<b>Declarations Paragraphs Addressing Topic That Must Be Stricken</b>	<b>Trial Testimony Asserting Privilege On Topic</b>	<b>Trial Testimony Addressing Topic That Must Be Stricken</b>
The Debtors' analysis of the strengths and weaknesses of the claims they seek to settle	Kosturos Tr., 122:1–123:12; 130:21–131:7  Goulding Tr., 88:15–90:19; 125:13–127:21; 129:22–134:18	Kosturos Decl., ¶¶ 30-90  Goulding Decl., ¶¶ 16-17 & 130	<u>Kosturos</u>  Trial Tr., 377:20-378:7, 480:16-481:5, 483:23-484:6, 488:7-489:7  <u>Goulding</u>  Trial Tr., 669:5-17, 669:24-670:23, 713:3-8, 787:25-788:6	<u>Kosturos</u>  Trial Tr., 343:4-6, 375:3- 377:19, 378:8- 379:6, 381:25- 382:7, 478:25- 480:15, 481:10- 482:3, 483:19- 20, 484:7- 488:6, 489:8- 492:15, 535:24- 536:5, 591:15- 592:4  <u>Goulding</u>  Trial Tr., 645:11-649:3, 669:18-23, 711:13-713:2, 714:4-15, 767:15-772:21, 776:23-777:10, 787:20-24
Whether the Debtors performed an analysis on the likelihood of success on its claims against JPM relating to the ownership of the Trust Preferred Securities	Kosturos Tr., 128:15–129:11		<u>Kosturos</u>  Trial Tr., 379:23-381:25	<u>Kosturos</u>  Trial Tr., 373:20-375:2, 501:14-502:4
Whether the			<u>Kosturos</u>	<u>Kosturos</u>



Debtors performed an analysis on the likelihood of success on the BOLI/COLI claims			Trial Tr., 383:17-23  <u>Goulding</u>  Trial Tr., 758:24-759:9	Trial Tr., 383:10-16, 383:23-385:6  <u>Goulding</u>  Trial Tr., 759:10-764:9, 777:22-779:4
Whether the Debtors performed an analysis on the likelihood of success of the business torts claims	Kosturos Tr., 190:8-192:23	Kosturos Decl., ¶ 64-66, 71	<u>Kosturos</u>  Trial Tr., 452:18-24	<u>Kosturos</u>  Trial Tr., 452:12-17, 452:25-454:8, 496:6-22
Whether the Debtors determined that they would be likely to succeed on its claims to tax assets settled pursuant to the settlement	Kosturos Tr., 128:3-8	Kosturos Decl., ¶ 50, 52	<u>Carreon</u>  Trial Tr., 801:13-20, 806:15-807:10	<u>Kosturos</u>  Trial Tr., 428:6-429:10  <u>Carreon</u>  Trial Tr., 802:5-804:5
The Debtors' analysis of WMI's claims against JPMorgan that it seeks to settle	Kosturos Tr., 123:23-124:7	Kosturos Decl., ¶¶ 30-32, 43, 44, 46, 48-50, 63, 64-71, 72- 80		
The Debtors' analysis of the strengths of its claims against the FDIC, including the claims' dollar value and whether the Debtors ever performed a valuation of	Kosturos Tr., 124:8-125:6; 252:19-257:19	Kosturos Decl., ¶¶ 30-32, 43, 44, 46, 47, 48- 50, 62, 63, 85- 90		

such claims				
Whether the Debtors determined the likelihood of success on the disputed accounts claims	Kosturos Tr., 129:22-130:8,	Kosturos Decl., ¶ 50, 53-61		<u>Kosturos</u>  Trial Tr., 493:11-495:13
Whether the Debtors determined the likelihood of success on the DC claims		Kosturos Decl., 85-90		<u>Kosturos</u>  Trial Tr., 501:4-501:13
Whether the Debtors determined the likelihood of success on fraudulent conveyance claims	Kosturos Tr., 253:19-254:4	Kosturos Decl., ¶ 72-80		<u>Kosturos</u>  Trial Tr., 496:23-499:3
Whether the Debtors determined the likelihood of success on the preference claims		Kosturos Decl., ¶ 81-84		<u>Kosturos</u>  Trial Tr., 499:24-501:3
The reasonableness of the settlement	Goulding Tr., 37:23-39:3 ; 87:18-91:16; 129:2-130:11; 135:7-136:13; 139:16-141:4; 142:10-143:22	Goulding Decl., ¶¶ 16-127	<u>Goulding</u>  Trial Tr., 649:24-650:6, 713:16-25	<u>Goulding</u>  Trial Tr., 644:25-645:10  <u>Goulding</u>  Trial Tr., 650:6-652:19, 713:25-714:3
The likelihood of success on the litigation claims	Goulding Tr., 8:9-9: 2; 125:13 - 127:23	Goulding Decl., ¶ 16		
The likelihood of success on Intellectual	Goulding Tr. 152:6-19	Goulding Decl., ¶¶ 19-24	<u>Goulding</u>  Trial Tr.,	<u>Goulding</u>  Trial Tr.,

Property Claims			653:19-22, 657:22-658:4	653:12-18, 653:23-657:21
The likelihood of success on the deposit claims	Goulding Tr., 34:14-20; 35:23-36:17 ; 87:18-91:16	Goulding Decl., ¶¶16, 18-19		<u>Goulding</u>  Trial Tr., 671:20-677:21, 779:5-781:4
Value of pension plan liabilities			<u>Goulding</u>  Trial Tr., 666:10-13, 666:18-667:21	<u>Goulding</u>  Trial Tr., 665:15-666:9, 666:13-17, 667:22-669:4
WMI's board approval of plan was based on advice of counsel			<u>Goulding</u>  Trial Tr., 697:7-698:5	
Creditors' Committee's analysis of likelihood of success of claims underlying the settlement	Simms Tr., 92:21-95:7	Simms Decl., ¶¶ 11, 12, 13, 20, 22 & 23	<u>Simms</u>  Trial Tr., 858:3-11, 863:7-23, 874:21-24, 883:14-24	<u>Simms</u>  Trial Tr., 838:2-840:21, 841:6-16, 849:4-10, 849:15-24, 851:10-857:20, 858:11-17, 858:21-859:19, 861:21-863:4, 899:5-904:18, 907:12-908:2, 909:15-911:13
Creditors' Committee's analysis of likelihood of success on deposit accounts	Simms Tr., 27:5-28:6, 28:21-29:23	Simms Decl., ¶¶ 12-13, 18, 20 & 23	<u>Simms</u>  Trial Tr., 848:5-21	<u>Simms</u>  Trial Tr., 841:17-842:12
Creditors' Committee's analysis of likelihood of success on TPS claims	Simms Tr., 31:24-33:14, 95:8-19	Simms Decl., ¶¶ 20 & 23	<u>Simms</u>  Trial Tr., 846:10-15	<u>Simms</u>  Trial Tr., 845:7-846:9
Creditors'	Simms Tr.,	Simms Decl.,	<u>Simms</u>	<u>Simms</u>

Committee's analysis of tax claims	31:8–33:14, 95:20–96:8	¶¶ 20 & 23	Trial Tr., 847:18-848:4	Trial Tr., 842:13-843:4, 846:16-847:17
Creditor's Committee's analysis of likelihood of success on disputed accounts claims	Simms Tr., 96:9–23	Simms Decl., ¶¶ 20 & 23		
Creditor's Committee's analysis of likelihood of success on Anchor Savings litigation			<u>Simms</u> Trial Tr., 888:5-25, 889:6-15	<u>Simms</u> Trial Tr., 884:5-886:10

# **EXHIBIT B**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In Re:  
WASHINGTON MUTUAL, INC., Chapter 11  
Et al.,  
Case No. 08-12229(MFW)

Debtors.  
Jointly Administered)

-----)

BLACK HORSE CAPITAL LP,  
et al.,

Plaintiffs,  
vs.

Adv. Proc. No. 10-5138(MFW)

JP MORGAN CHASE BANK, N.A.,  
et al.,

Ref. Nos. 105, 106, 108,  
109, 110, 118, 139, 149  
Defendants.

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924 N. Market Street, Courtroom 5

Wilmington, DE

UNOFFICIAL TRANSCRIPT PROCEEDING

Thursday, December 2, 2010

BEFORE: Hon. Mary F. Walrath

Reported by:

SHAUNA STOLTZ-LAURIE, RPR, CLR

CSR NO. 810490

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25 PROCEEDINGS

Page 275

1  
2 THE DEPUTY: All rise. You may be  
3 seated.  
4 JUDGE WALRATH: Good morning.  
5 MR. ROSEN: Good morning, your  
6 Honor. Brian Rosen, Weil Gotshal &  
7 Manges, on behalf of the debtors  
8 Washington Mutual and WMF Investment  
9 Corp.  
10 Your Honor, we have quite a full  
11 agenda and quite a full courtroom here  
12 today and what I'd like to do very  
13 briefly is set out what I think we're  
14 going to be doing and then leave it to  
15 the court to take us in whatever path  
16 the court desires.  
17 Specifically, your Honor, it's our  
18 goal today to handle first an item which  
19 was a motion that we filed a Certificate  
20 of No Objection for, which was a  
21 stipulation approving a 3018 voting  
22 motion. The Certificate of No Objection  
23 was filed last evening. I don't know if  
24 you court saw it yet. This was with  
25 respect to a stipulation and agreement

Page 276

1  
2 among the debtors and JPMorgan Chase  
3 with respect to the allowance of the  
4 JPMC claims solely for the purpose of  
5 voting on the debtor's plan.  
6 JUDGE WALRATH: I did see it this  
7 morning, and I (inaudible) --  
8 MR. ROSEN: Thank you very much,  
9 your Honor.  
10 Next, your Honor, you have several  
11 items over for this morning for 9:30,  
12 and obviously those were the various  
13 motions to strike motion in limine,  
14 motions with limine, or with respect to  
15 actually emptying the courtroom for one  
16 of them. I assume, your Honor, that  
17 we'll be handling those immediately.  
18 And then after that, that will tell us  
19 what your rulings are, based on your  
20 rulings, as to how we will proceed with  
21 the balance of the day.  
22 As the court is aware, we have  
23 filed the declarations over a week ago  
24 for the direct testimony. We've spoken  
25 with the court and other parties about

Page 277

1  
2 those, and they are the focus of those  
3 motions.  
4 Depending upon how the court rules  
5 will tell us, your Honor, whether we can  
6 move forward with those declarations as  
7 direct or with respect to then putting  
8 on witnesses in lieu of that. We have  
9 counsel who will be handling those  
10 respective motions, your Honor, from the  
11 debtors' side, and I'm sure other  
12 parties who will be stepping up.  
13 JUDGE WALRATH: Well, first, with  
14 respect to the confidentiality and the  
15 sealing the courtroom as well as the  
16 record I guess is what the suggestion  
17 is, let me hear the parties on that.  
18 I'm reluctant to seal a courtroom  
19 and not have the evidence in support or  
20 in opposition to the debtors'  
21 confirmation of its plan not be a matter  
22 of public record, so let's talk about  
23 how we can do that.  
24 MR. ROSEN: Your Honor, from the  
25 debtors' side and that's not a motion --



1 from the debtors' side, Mr. Elsberg will  
2 be handling that matter.

3 JUDGE WALRATH: All right.

4 MR. NELSON: Good morning, your  
5 Honor. If it may please the court,  
6 Justin Nelson from Susman Godfrey for  
7 the Equity Committee.

8 We have no objection to having an  
9 open courtroom. We're trying to comply  
10 with protective orders, and it's not  
11 just the documents that we have received  
12 from the debtors on the work product.  
13 We expect that to be very, very narrow  
14 and limited and, frankly, we don't think  
15 there's a need for what we're planning  
16 to use it for, but the debtors and other  
17 parties have also designated as  
18 confidential a whole bunch of deposition  
19 testimony and there are exhibits that  
20 are marked as confidential. And so  
21 we're at the court's pleasure and  
22 guidance on the issue.

23 MR. ELSBERG: Good morning, your  
24 Honor, David Elsberg from Quinn Emanuel  
25

1 bring this up so we haven't had a chance  
2 over the last month or so to work it out  
3 but I think that there are a few ground  
4 rules that we may be able to agree to  
5 that will avoid any disruption.  
6

7 One that I would suggest is that to  
8 the extent any documents like this come  
9 up, they should be brought in camera.  
10 Instead of asking this number of people  
11 to leave the courtroom, we could go in  
12 camera, just the Equity Committee, the  
13 debtors and your Honor, to look at any  
14 of the documents as they come up.

15 I would also suggest to the extent  
16 possible it should all be done at once  
17 instead of piecemeal. It sounds as if  
18 there are just a few of these documents  
19 that we need to deal with. So instead  
20 of interrupting the trial a few times,  
21 we might be able to hammer a deal with  
22 them all at once.

23 Second, we would just want to make  
24 sure that there is not going to be any  
25 waiver. The Equity Committee was given

1 for the debtor.

2 It sounds like we actually have a  
3 fair amount of agreement here. We have  
4 no problem with the Equity Committee at  
5 least proffering our privileged  
6 documents and then your Honor can  
7 determine whether they should be  
8 admitted or not or given any weight or  
9 not, and whether there is any need or  
10 justification to call any witnesses  
11 about those types of witnesses or not.

12 We think your Honor may conclude  
13 there is no reason to admit those types  
14 of documents since we're not proffering  
15 anything privilege to justify the  
16 settlement. So we think you may  
17 conclude they're irrelevant anyway. But  
18 in the event you do decide you want to  
19 consider any documents of that type,  
20 privileged documents, we just want to  
21 make sure it's done in a way that, A,  
22 avoids disruption of the rest of the  
23 trial and, B, protects our privilege.

24 They waited until the trial to  
25

1 some of our privileged materials under a  
2 502(d) order. Again, we're happy if  
3 they want to try to proffer them and you  
4 can decide how to use them in camera.  
5 It would be just us, the debtors, the  
6 Equity Committee counsel and your Honor,  
7 and there would be an understanding that  
8 there is no waiver of any the parties  
9 including of course our adversaries in  
10 the litigation, JPMorgan and the FDIC.

11 Third, we've asked for the Equity  
12 Committee to identify for us the  
13 specific documents that they're speaking  
14 about on some type of exhibit list so we  
15 can lodge any objections to these  
16 documents and also prepare witnesses.  
17 They've refused to do this. I  
18 understand it was just for impeachment.  
19 They may not know about some of them,  
20 but it sounds like they do know about  
21 others, and we would request  
22 identification of those.

23 And similarly, I think they said  
24 that they may want to call witnesses to  
25

1  
2 talk about some of these documents, and  
3 we would ask for identification of those  
4 witnesses so that we might want to  
5 object or we might want to prepare them,  
6 or your Honor might say there is no need  
7 to have a witness, again, especially  
8 since we are not going to proffer any  
9 privileged information as a basis to  
10 justify the settlement.

11 And the last note is that I don't  
12 know if one of the witnesses they would  
13 plan to call is outside counsel, since  
14 outside counsel participated in putting  
15 together some of this work product and  
16 privilege. We can cross that bridge  
17 when we get there, but that would  
18 obviously raise some special issues that  
19 we would need to address.

20 So it's unfortunate that we need to  
21 address all this at the last minute, but  
22 those are some of the ground rules that  
23 we propose.

24 MR. NELSON: I assure the debtors  
25 and the court that we do not plan on

1 calling any outside counsel, first of  
2 all.

3 With respect to the order of how to  
4 do this, at least with respect to the  
5 work product documents that we may  
6 introduce with respect to a witness,  
7 what I would suggest is not to close the  
8 courtroom, to approach the bench before  
9 using any of the documents, with just  
10 the debtors and the Equity Committee  
11 approaching the bench. Then the court  
12 may examine the documents, we can  
13 explain whether it should or should not  
14 be used at that point, and then whether  
15 we should then have it in a closed  
16 courtroom or an open setting.

17 The only place, anticipated place,  
18 that this will come up is in a very  
19 limited section of Mr. Golden's  
20 cross-examination. With respect to any  
21 of the other witnesses, we do not expect  
22 this to be an issue at all. And we do  
23 expect it to be -- again, we're talking  
24 about literally a few documents that  
25

1  
2 we're discussing here. So that sounds  
3 fine to us, your Honor.

4 JUDGE WALRATH: Let's deal with it  
5 when they get there.

6 MR. BRADLEY: Good morning, your  
7 Honor. Charles Bradley (ph.) on behalf  
8 of Daniel Hoffman.

9 Your Honor, with respect to this  
10 issue I did file a response to the  
11 Equity Committee's motion late last  
12 night. Your Honor probably didn't have  
13 a chance to review it. Largely the  
14 response said that there would be an  
15 objection to sealing the courtroom.  
16 Your Honor already indicated (inaudible)  
17 to do that.

18 So until the documents get  
19 produced, I really don't think there is  
20 anything more I can add to it at this  
21 point. So I just want to the make your  
22 Honor aware that was an issue that was  
23 pretty near to my client's heart and,  
24 you know, you might hear from me in the  
25 future.

1 JUDGE WALRATH: Let's see if we can  
2 do this before too much --

3 MR. BRADLEY: Thank you.

4 JUDGE WALRATH: -- of a (speaking  
5 simultaneously).

6 Let's see whatever preliminary  
7 matters we can get rid of.

8 How about the TPS consortium motion  
9 to elimination of the examiner's report?

10 MR. NELSON: Your Honor, if can  
11 make the suggestion, the TPS and the  
12 Equity Committee have submitted very  
13 similar motions, so it might make sense  
14 to have both of them argue at once and I  
15 can respond.

16 JUDGE WALRATH: That's fine.

17 MR. STOLL: Your Honor, James Stoll  
18 from Brown & Rudnick representing the  
19 Trust Preferred Security Holders.

20 If I could suggest, your Honor,  
21 the motion in limine with respect to the  
22 examiner's motion (sic) as well as the  
23 motion in limine with respect to the use  
24 of privileged materials to prove their  
25

1  
2 case that have not been disclosed during  
3 the course of the case, they intersect  
4 with one another and I think if I could  
5 actually address them both in tandem, I  
6 think that would be more efficient, if  
7 it please the court.

8 JUDGE WALRATH: All right.

9 MR. STOLL: Your Honor, as you  
10 know, we were here last summer  
11 discussing that very issue. We had  
12 submitted a series of admissions we  
13 sought responses for regarding the  
14 issues of reliance on counsel to  
15 discharge the responsibility that the  
16 party would have, that the debtor would  
17 have, to prove (inaudible) settlement.

18 That motion was opposed. Your  
19 Honor agreed with the debtors that they  
20 would not be required to produce  
21 privileged material at that time, but  
22 also admonished the debtors that they  
23 could not rely on privileged materials  
24 to prove their case when the time came  
25 at confirmation.

1  
2 they say precisely that "We reviewed the  
3 claims, we assessed the merits, the  
4 relative strengths and weaknesses of the  
5 merits" --

6 JUDGE WALRATH: Well, I don't want  
7 to interrupt you but I think there's a  
8 disagreement on that factual premise.

9 MR. STRATTON: Well, I'm going to  
10 get there. I'm going to walk you  
11 through just a couple of questions.

12 JUDGE WALRATH: I don't see how I  
13 can analyze that motion without going to  
14 each and every witness, so maybe we  
15 should deal when we get to each witness  
16 and you can identify, as you have in  
17 your motion, the specific paragraphs.  
18 They can point to the areas of the  
19 deposition where they say the witness  
20 did answer your question, and then I can  
21 analyze it.

22 I thought the examiners's report  
23 was easier to deal with than that.

24 MR. STRATTON: Well, okay, so let  
25 me at least move then to the examiner's

1  
2 And sadly, your Honor, in our view  
3 that's exactly what they've done. We've  
4 now come full circle, and what the  
5 debtors have done is submit a half a  
6 dozen affidavits, all of which tell the  
7 court that substantial investigations of  
8 claims have been undertaken and that the  
9 relative strengths and weaknesses of the  
10 claims have been evaluated, and that is  
11 part of their assessment as to why the  
12 settlement is a reasonable settlement.

13 In depositions that occurred over  
14 the past month, every single witness of  
15 the debtors as well as the Creditors  
16 Committee testified that any analysis of  
17 the likelihood of success on the merits  
18 of any claim was conducted solely by  
19 counsel. Every witness was instructed  
20 by counsel at their deposition not to  
21 answer a single question, and every  
22 witness in fact agreed and they did not  
23 answer a question on the investigations  
24 surrounding the likelihood of success on  
25 the merits. But in their affidavits

1  
2 report, your Honor, because I think the  
3 examiner's report --

4 The reason I bring this up, your  
5 Honor, is that the examiner's report  
6 attempts to do through the back door  
7 what the debtors said they would not do  
8 with their own witnesses, and that is  
9 provide the examiner with privileged  
10 materials upon which the examiner would  
11 rely in conducting his report and then  
12 try to seek to have that report admitted  
13 into evidence for its conclusions and  
14 its assessment of the reasonableness of  
15 the settlement.

16 As the court will recall, the  
17 examiner's report at the time that the  
18 court issued a work order, the  
19 examiner -- the order said that the  
20 examiner could receive privileged  
21 materials from any party and not  
22 disclose those privileged materials and  
23 the party would not lose the privilege  
24 by providing the materials to the  
25 examiner, and the examiner was insulated

1 from any discovery, okay?  
 2 The examiner then issued a report,  
 3 and repeatedly throughout the examiner's  
 4 report he says that he relied on the  
 5 privileged materials.  
 6 For example, at page 13 of the  
 7 examiner's report the examiner states  
 8 the debtors and the Creditors Committee  
 9 provided the examiner with numerous  
 10 attorney work product documents  
 11 outlining their analyses of potential  
 12 claims, defenses, damages and discovery  
 13 materials relating to the claims against  
 14 JPMC, as well as other entities and  
 15 individuals. The examiner reviewed and  
 16 utilized this work product in planning  
 17 his investigation.  
 18 On page 187 of the report with  
 19 respect to the one of the particular  
 20 claims, the so-called fraudulent  
 21 transfer claims, the examiner stated the  
 22 examiner extensively reviewed publicly  
 23 available information pending litigation  
 24 documents produced in connection with  
 25

1 the 2004 discovery and work product  
 2 provided to the examiner by the parties  
 3 in interest and their respective  
 4 professionals.  
 5 On page 229 of the examiner's  
 6 report, addressing potential claims  
 7 against JPMC, the examiner wrote, based  
 8 on the examiner's review of the  
 9 discovery materials, the debtors'  
 10 substantial work product briefs filed  
 11 with the courts and independent  
 12 analyses, the examiner identified  
 13 potential causes of action, et cetera.  
 14 There's no place in the examiner's  
 15 report where he then parses out from  
 16 that state of reliance which of his  
 17 conclusions and which of his assessments  
 18 are based on privileged material and  
 19 which are not.  
 20 Now, when the examiner was  
 21 originally appointed by the court,  
 22 nobody said to the court, "We want to  
 23 use the examiner as a testimonial  
 24 witness." That was never requested.  
 25

1 And if his report were to come in as an  
 2 expert report, what is the hallmark of  
 3 expert reports? That the expert has to  
 4 set forth the bases for his conclusions  
 5 and all material that he receives,  
 6 including all work product material, any  
 7 communications with counsel. That is  
 8 all the subject of proper discovery in  
 9 order to test the expert's opinion.  
 10 None of that happened in this case.  
 11 This examiner's report was never  
 12 designated, never sought to be  
 13 designated as a testimonial witness.  
 14 And I don't even believe Mr. Hoffberg is  
 15 here or intends to testify. So they  
 16 simply want to use his report, which of  
 17 course is rank hearsay as to any facts.  
 18 And the conclusions based on privileged  
 19 material only make that -- those  
 20 conclusions just completely unreliable  
 21 and untestable.  
 22 And again, your Honor, in bringing  
 23 it back to the motion in limine  
 24 vis-a-vis the privileged material, this  
 25 is the precisely what they say they're  
 26 not doing with their witnesses. Not one  
 27 of our witnesses they say are going to  
 28 testify about any privileged  
 29 communication but we know the examiner  
 30 has that privileged communication, we  
 31 know the examiner used it to formulate  
 32 his investigation and we know he used it  
 33 to reach some of these conclusions. We  
 34 don't know precisely which ones.  
 35 So that examiner's report should  
 36 not be admitted into the evidence. And  
 37 with respect to the witnesses, your  
 38 Honor, I'll take them up one at time as  
 39 they testify.  
 40 JUDGE WALRATH: Thank you.  
 41 MR. NELSON: Good morning again,  
 42 your Honor.  
 43 I'm in the somewhat uncomfortable  
 44 position of moving to strike the very  
 45 report that we asked for, and we  
 46 recognize that, but there is a  
 47 difference between what the examiner --  
 48 what the statute requires the examiner

1  
2 to do and to investigate and what can be  
3 admissible evidence for plan  
4 confirmation.  
5 And the examiner did examine the  
6 claims and did some factual  
7 investigation and reached some  
8 conclusions that appeared to be, as we  
9 lay out in our motion, much more similar  
10 to what the debtors wanted in their  
11 request for an examination than we did,  
12 but the debtor reach some conclusions.  
13 It was based upon unsworn  
14 interviews, it was based upon documents,  
15 attorney-client work product information  
16 that was given to the examiner without  
17 our participation or knowledge of what  
18 was being disclosed.  
19 It appears from the debtors'  
20 response that they are not trying to  
21 admit some of the underlying facts, only  
22 the conclusions that the examiner has  
23 reached. But that only makes it worse  
24 because we aren't able to test the  
25 underlying factual basis of what is

1  
2 the examiner at the time. And that just  
3 is an example of the factual basis on  
4 which is hearsay and, of course, work  
5 product that then the examiner uses to  
6 reach his conclusions.  
7 So if we had more time the proper  
8 remedy I think we would be, and we would  
9 have no objection, if there were free  
10 and open disclosure of what was given to  
11 the examiner, but the debtors have not  
12 provided that. Indeed, in their  
13 depositions they have refused even to  
14 discuss the nonprivileged information,  
15 the nonprivileged discussions that they  
16 have had with the examiner, asserting I  
17 guess that is examiner privilege. So we  
18 are completely unable to test that.  
19 And given where we are, we believe  
20 that the references should be stricken,  
21 any references to the examiner's report.  
22 JUDGE WALRATH: Thank you.  
23 MR. NELSON: Thank you.  
24 MR. ELSBERG: David Elsberg from  
25 Quinn Emanuel, your Honor.

1  
2 occurring. And what we're trying to do  
3 is say that can the debtors meet their  
4 burden of proof? And can they do it by  
5 using an expert report based upon the  
6 very thing that they say that they're  
7 not trying to use, namely the work  
8 product?  
9 So they've also shifted and said --  
10 well, actually the examiner is a  
11 court-appointed expert under Rule 706,  
12 but the case law is clear that, first of  
13 all, as Mr. Stoll pointed out, that was  
14 never the intention of the examiner.  
15 But second of all, as we state in our  
16 reply brief, that process has to be  
17 open, and that, again, we have not had  
18 the ability to test the validity of the  
19 examiner's assertions.  
20 For example, it does appear -- and  
21 we cite this in our opening brief. It  
22 does appear that at least one of the  
23 major witnesses on which the examiner  
24 relies was a paid consultant to the  
25 debtors, and that was not disclosed to

1  
2 I'll start briefly on the privilege  
3 issue. We agree with the way that your  
4 Honor proposed to address it, but I want  
5 to respond to some of the statements  
6 that were made to frame the issue and  
7 how it's likely to proceed.  
8 Just to be clear, the entire  
9 premise of the motion that the TPS group  
10 has made in favor of preclusion is a  
11 completely false premise, as I think  
12 your Honor will see as the day goes on  
13 and you see the witnesses testifying.  
14 They say in the depositions we  
15 supposedly blocked our witnesses from  
16 testifying about privileged information.  
17 JUDGE WALRATH: I know you dispute  
18 the facts. I don't need the argument on  
19 it.  
20 MR. ELSBERG: If you don't need the  
21 argument I'll move on to the next one,  
22 your Honor.  
23 On the examiner, your Honor, this  
24 motion brings to mind the old saying:  
25 "Be careful what you ask for.

1  
2 I was in this courtroom when they  
3 were fighting tooth and nail, tooth and  
4 nail, because I was on the other side of  
5 it and I remember it, and they were  
6 saying that an examiner has to be  
7 appointed, must be appointed to help  
8 this court assess the reasonableness of  
9 the settlement. And they won that  
10 battle, they got exactly what they  
11 wanted, and the examiner was appointed.

12 But it didn't turn out the way that  
13 they'd hoped. The examiner concluded  
14 that the settlement is in fact  
15 reasonable, and so now all of a sudden  
16 they think that the examiner that they  
17 asked for isn't such a good idea after  
18 all. Now all of a sudden they're saying  
19 your Honor should simply erase any  
20 thought of the examiner from your mind.  
21 They call it hearsay, they call it rank  
22 hearsay, they call it unreliable.

23 But, your Honor, this is not a  
24 motion based on the law, which I'm going  
25 to discuss. It's not based on fairness.

1  
2 This is based on sour grapes and it  
3 should be denied.

4 Now, even putting aside the  
5 hypocrisy here and the question of  
6 whether they should be judicially  
7 estopped because they got exactly what  
8 they asked for, the most fundamental  
9 problem with their motion is that it  
10 misconstrues the report and what we're  
11 saying should be done with the report.

12 There is a difference between the  
13 evidence on the one hand and conclusions  
14 on the other; and to be clear, it's only  
15 the conclusions in the examiner report  
16 that we're saying can be considered by  
17 your Honor for whatever they're worth,  
18 similar to the way a court might  
19 consider oral argument or opinions by an  
20 expert. That's it. It's a very modest  
21 position. We're saying your Honor can  
22 take it for whatever it's worth.

23 We're not saying that the facts  
24 recited in the report should be taken as  
25 established evidence. We're saying that

1  
2 we will prove the facts independently.

3 JUDGE WALRATH: Well, let's go  
4 back. It's not the same as an expert  
5 report because, as they point out, an  
6 expert cannot testify, nor can an expert  
7 report be introduced into evidence  
8 unless they are given full discovery  
9 regarding the bases for the expert's  
10 conclusions.

11 A VOICE: You're right, your Honor,  
12 it is not exactly like an expert report.

13 JUDGE WALRATH: And it's not really  
14 oral argument because it's not based on  
15 the record that has been presented  
16 before the court.

17 MR. ELSBERG: That's true too, your  
18 Honor. It's not. I said similar to.  
19 And let me explain what I mean.

20 The way that this report, the  
21 conclusions in this report, can be  
22 considered is not exactly -- it's not an  
23 oral argument, you're right, and it's  
24 not an expert report in the classic  
25 sense. You're right.

1  
2 But there is a way that it can and  
3 should be considered, and the way that  
4 it can and should be considered is in  
5 the way it was considered in the Enron  
6 case, which they cite, where the expert  
7 report was admitted; in the Fibermark  
8 case where the expert report, its  
9 conclusions, was admitted; and in the  
10 Third Circuit case, TWF Holdings, where  
11 the expert reports were admitted.

12 In fact, your Honor, they don't  
13 cite any case from any jurisdiction  
14 where a court appointed an examiner and  
15 then that same court refused to admit  
16 the conclusions from the examiner which  
17 was appointed by that same court. They  
18 cite some cases that have nothing to do  
19 with this case where one court appointed  
20 an examiner and in a different case a  
21 different court had a problem with it.  
22 But the courts have recognized, and we  
23 cite these cases, that it would be an  
24 exercise in futility to appoint a  
25 examiner --

1  
2 Which, by the way, here this  
3 examiner that they wanted and got cost  
4 the estate \$6 million. And now they're  
5 saying let's throw that in the garbage.  
6 They don't cite a single case that  
7 stands for the proposition that there  
8 should be that type of waste.  
9 Having asked for it, knowing the  
10 case law and the background which all  
11 says it's perfectly appropriate even  
12 thought it might not be a classic  
13 expert, knowing with that case law in  
14 the background that says the conclusions  
15 are to be admitted, we believe -- again,  
16 it's a modest request -- this court  
17 should follow all of the precedents  
18 cited by both sides. It can and should  
19 be, it can and should be considered.  
20 And the arguments, by the way, that  
21 there ought to be more discovery or that  
22 there's been some sort of impediment to  
23 getting all the information that they  
24 wanted, they participated in this  
25 process. The TPS group had their expert

1  
2 doesn't have the expertise to do this,"  
3 nor could they. He was chosen by the  
4 U.S. trustee precisely because he does  
5 have much more than the required  
6 expertise to do this job and reach  
7 conclusions that will aid this court.  
8 So, your Honor, again, in the end  
9 what they are asking for is something  
10 that has not been accepted by any of the  
11 courts in any of the cases that they  
12 cite. All of the cases that they cite,  
13 all of the cases that we cite say that  
14 when you've gotten an examiner, millions  
15 of dollars have been spent, the product  
16 shouldn't be thrown away in the garbage  
17 just because you decide now we don't  
18 like the conclusions that have been  
19 reached.  
20 We respectfully submit that your  
21 Honor can and should consider the  
22 conclusions in that report for whatever  
23 they're worth. They can argue they're  
24 not worth anything, but to wholesale  
25 strike them all from the record goes too

1  
2 explain their theory to the examiner in  
3 all its full glory. The Equity  
4 Committee got to meet with the examiner,  
5 point the examiner to whatever they  
6 wanted to, and the report says the  
7 examiner -- paid, quote, special  
8 deference to the examiner. And they're  
9 now, on the day trial is beginning,  
10 saying "Wait a second, we want more  
11 discovery." Well, it's a little late  
12 for that. They could have asked for  
13 discovery a month ago. If they don't  
14 have it, it's because they chose to try  
15 to wait and make it a tactic now.  
16 In addition, the key witnesses who  
17 gave information to the examiner will be  
18 called. They can question those  
19 witnesses about the facts. But again,  
20 your Honor, this is a process that they  
21 asked for. Mr. Hochsberg's (ph.)  
22 credentials are unquestioned. They  
23 never objected that he lacks the  
24 requisite expertise. Not once did they  
25 get up and say, "Wait a second. He

1  
2 far. We should be able to refer to a  
3 particular conclusion. They can argue  
4 why that conclusion makes no sense, but  
5 it may help your Honor with an  
6 understanding of the facts.  
7 Thank you, your Honor.  
8 JUDGE WALRATH: Well, let me make  
9 this ruling.  
10 I am going to exclude the examiner  
11 report from the record in the  
12 confirmation hearing. I don't think  
13 it's admissible as an expert report or  
14 oral argument for the reasons I just  
15 said.  
16 I don't think it's a futile gesture  
17 to appoint an examiner and then not use  
18 the report. The parties did not object.  
19 It could be admitted. I think that the  
20 potential advantage of having an  
21 examiner is to have a third party review  
22 the facts and perhaps allow all the  
23 parties to reach a consensual resolution  
24 because they at least had a third party  
25 testing the debtor's species. But I

1  
2 think once we get to court and  
3 litigation, I don't think it's  
4 appropriate to enter and I think it's  
5 hearsay. So I will exclude the  
6 reference to the examiner's report from  
7 the record.

8 All right, what other preliminary  
9 motions do we have?

10 MR. ROSEN: This is before the  
11 first witness, your Honor. We would  
12 just ask that the rule be invoked for  
13 any of the witnesses who may be  
14 cross-examined.

15 JUDGE WALRATH: Okay.

16 MR. MASTANDO: Good morning, your  
17 Honor. John Mastando from Weil Gotshal  
18 on behalf of the debtors.

19 Most of the witnesses who are here  
20 have been deposed. We indicated our  
21 intention to call them at confirmation  
22 several weeks ago so they could have  
23 been deposed. I don't think there's a  
24 need, that it is necessary to have them  
25 leave the room, but I would just note

1  
2 As we argued yesterday, defendant's  
3 summary judgment motion is in substance  
4 a Motion to Dismiss under Rule 12(b)(6),  
5 and that demoted it, obviously. After  
6 the 11/29 call, scheduling call with the  
7 court, late that afternoon -- and I know  
8 that because I was in this courtroom on  
9 another matter -- the debtor defendant  
10 filed in this case, but not in the  
11 adversary proceeding, an affidavit of a  
12 so-called expert, Dr. Chamberlain, which  
13 in reality appears to be an affidavit of  
14 a fact witness being proffered as an  
15 expert witness. Again, that's not for  
16 this moment and we'll see that.

17 There are really four open  
18 confirmation issues with respect to the  
19 litigation tracking warrants, none of  
20 which affect the timing of confirmation  
21 because the issue of as to whether the  
22 LPWs are debt or equity are not germane  
23 in terms of the timing for today. The  
24 four issues are, one, the amount of the  
25 reserve for the LTWs disputed claims.

1 that for the record, your Honor.

2 JUDGE WALRATH: Well, I think  
3 there's no reason not to exclude them.  
4 So I think that they should be excluded  
5 from the room during the testimony of  
6 other witnesses.

7 MR. SILVERSTEIN: Your Honor, this  
8 is Paul Silverstein from Andrews Kurth  
9 for Broadbill Investments. I got the  
10 call from yesterday. We have a motion.  
11 Would now be the right time?  
12

13 JUDGE WALRATH: Yes.

14 MR. SILVERSTEIN: Thank you.  
15 Again, for the record, Paul  
16 Silversteein for Broadbill Investments.  
17 My co-counsel in the class action,  
18 Mr. Steinberg, will also have some  
19 comments as well.

20 Your Honor, on November 29th the  
21 court scheduled oral argument in the  
22 summary judgment motion in the adversary  
23 proceeding for December 1. The  
24 confirmation hearing was set for today,  
25 December 2.

1  
2 The debtors initially said 183 million.  
3 Now in their motion estimate they upped  
4 the number to 250 million. We believe  
5 it will be higher. I believe that  
6 motion is on for December 7th but at  
7 minimum they're acknowledging 250 as  
8 (inaudible).

9 And secondly, whether or not  
10 nonconsensual releases should be opposed  
11 on the LTW Holdings.

12 Third, whether the --

13 JUDGE WALRATH: Say the second one  
14 again.

15 MR. SILVERSTEIN: Whether the  
16 nonconsensual releases should be imposed  
17 on a nonvoting class that didn't have an  
18 opportunity to check the box, so to  
19 speak.

20 JUDGE WALRATH: Understood.

21 MR. SILVERSTEIN: Third, whether  
22 the purported sale of the Anchor  
23 litigation being (inaudible) under  
24 Section 363F is proper.

25 And fourth, whether the 510(b)



1  
2 argument by the debtors in fact  
3 destroyed their ability to pay  
4 (inaudible) plus interest which we  
5 discussed briefly yesterday. So whether  
6 or not the LTWs are decided by your  
7 Honor to be debtor equity in the  
8 adversary proceeding doesn't delay  
9 confirmation at all. Again, the  
10 substantive issue is as to whether LTWs  
11 are debtor equity, is the subject of the  
12 adversary proceeding.  
13 Moreover, the debtors filed the  
14 list of witnesses for confirmation on  
15 November 15th. Dr. Chamberlain was not  
16 listed. They filed a declaration with  
17 respect to those witnesses on or about  
18 November 24th. No Chamberlain  
19 declaration was filed, obviously for the  
20 reason because -- the reason she was not  
21 listed as a witness, the witnesses  
22 solely relevant to the adversary  
23 proceeding because it relates directly  
24 to the disputed facts concerning the  
25 intent of the agreement.

1  
2 Significantly in that declaration,  
3 and I'll just be very brief on this,  
4 Dr. Chamberlain does not even  
5 acknowledge the existence of Article 4  
6 of the warrant agreement which is a  
7 critical part of the agreement because  
8 it's the operative contractual position  
9 that ensures the LTW holders get the  
10 value --  
11 JUDGE WALRATH: You don't have to  
12 get into the particulars of her  
13 testimony that you disagree with.  
14 MR. SILVERSTEIN: Okay, but I do  
15 want to get into very briefly some of  
16 the things that we would like to address  
17 with her.  
18 She is germane to the Summary  
19 Judgment Motion and she is germane to  
20 the adversary proceeding and, frankly,  
21 we suspect why the debtors didn't, when  
22 they filed their Motion For Summary  
23 Judgment, annex her declaration is  
24 because that would have enabled us to  
25 depose her and that would have enabled

1  
2 us to proffer or introduce our own  
3 witness with respect to the things that  
4 they would want to testify about today  
5 with respect to intent and the like and  
6 other disputed facts. We definitely  
7 want to examine this witness.  
8 And, interestingly, she calls her  
9 so-called expert report a preliminary  
10 report that she says is subject to  
11 modification and amendment. And then  
12 she mentions that it's subject to change  
13 based on, you know, what she might --  
14 based on future work, and she says that,  
15 you know, she's been asked to offer her  
16 preliminary thoughts. I've never seen  
17 an expert report like that, frankly, but  
18 that's again for a later day when we do  
19 get to depose her and take her testimony  
20 and hopefully reduce that testimony on  
21 cross at trial.  
22 But that has to be done properly in  
23 the adversary proceeding, not by a  
24 back-door ambush on 24 hours notice in  
25 connection with confirmation. Let us

1  
2 depose her, let us introduce our own  
3 witnesses in opposition to her  
4 statement. That's not a confirmation  
5 issue. That's what the adversary  
6 proceeding is about. Let her be subject  
7 to normal discovery.  
8 And, frankly, again we did in our  
9 motion to strike talk about some of the  
10 things that we would ask her and some of  
11 the things we noted that were, in our  
12 view, absurdities in our approach. And  
13 just for example and very, very briefly,  
14 she doesn't even acknowledge that she's  
15 read Article 4 of the form agreement,  
16 and it raises a whole host questions.  
17 For example, I understand that in 2007  
18 TPG was looking to acquire the debt. It  
19 was going to be a going private  
20 transaction. Clearly in the agreement  
21 cash would have been required.  
22 JUDGE WALRATH: I understand there  
23 are lots of variations that you are  
24 talking about. I don't need to get into  
25 that.

1  
2 MR. SILVERSTEIN: Okay. But,  
3 again, in addition with respect to how  
4 many shares, the whole notion of we're  
5 entitled equity, what's the numerator?  
6 You know, does the debtor have to go on  
7 the market and buy shares? I think you  
8 know where I'm going on that. There's a  
9 lot of issues.  
10 JUDGE WALRATH: I do.  
11 MR. SILVERSTEIN: We believe that  
12 it's absolutely inappropriate to allow  
13 her to testify as a back-door ambush and  
14 that she does properly -- I'm sorry, as  
15 a back-door ambush in connection with  
16 the confirmation hearing, because  
17 confirmation is not about whether the  
18 LTWs are debt or equity. That's the  
19 adversary proceeding. Confirmation as  
20 to the LTWs are the four issues I  
21 mentioned earlier, and therefore we  
22 would request our motion will be  
23 granted.  
24 MR. STEINBERG: Your Honor, unlike  
25 yesterday I'll try to really be brief.

1  
2 So the debtor has tried, in a sort  
3 of a gamesmanship way, to have a trial  
4 on the merits on two days notice on an  
5 issue which is not a showstopper issue  
6 for them to confirm their plan for  
7 reorganization. If they can confirm the  
8 plan we will be a disputed claim being  
9 outside to be resolved like there are  
10 hundreds of disputed claims that will  
11 get resolved post-confirmation. In  
12 fact, they set up an estimations  
13 proceeding on no reserves for us to take  
14 place post-confirmation. So why is this  
15 witness being called?  
16 JUDGE WALRATH: All right. Thank  
17 you.  
18 MR. SCHIFFMAN: Your Honor, this  
19 witness is being called because in the  
20 event summary judgment is not granted,  
21 we would like the opportunity to show  
22 that the litigation tracking warrants  
23 are equity. It's not a full trial of  
24 the merits but the narrow issue of the  
25 litigation --

1  
2 The debtor said in its response to  
3 this motion that it was not intended to  
4 deal at all with the Summary Judgment  
5 Motion and they would only be interested  
6 in if the Summary Judgment Motion wasn't  
7 granted. So that means only one logical  
8 thing: They want this witness to be a  
9 witness because they want to have a  
10 trial on the merits of the litigation  
11 tracking warrants as part of the  
12 confirmation hearing. That's the only  
13 logical explanation.  
14 We believe that with an adversary  
15 proceeding out there with 10 depositions  
16 still scheduled, with the ability to  
17 want to take a deposition of an expert,  
18 the ability to bring our own expert, the  
19 notion that we're going to bog down this  
20 confirmation hearing with a trial on the  
21 merits on this very short notice when  
22 there's been nothing scheduled is  
23 preposterous. And if that is not their  
24 intention, then why is this witness  
25 being called?

1  
2 JUDGE WALRATH: Why do you need  
3 that for confirmation?  
4 MR. SCHIFFMAN: We would like, in  
5 connection with confirmation, to provide  
6 as generous a distribution to the  
7 creditors as possible. That's in the  
8 best interest of the estate. And we  
9 could -- and if the Summary Judgment  
10 Motion is not granted and we can show  
11 the litigation tracking warrants are  
12 equity, then there is no need to reach  
13 any of the intent issues that  
14 Mr. Steinberg wants to discuss. They're  
15 equity, all the claims are subordinated  
16 under the 510(b) and the debtor can  
17 provide as generous a distribution to  
18 the creditors as possible.  
19 JUDGE WALRATH: Isn't that one of  
20 the issues in the adversary?  
21 MR. SCHIFFMAN: Right, but we would  
22 maintain it's a gateway issue: Is their  
23 equity, all their breach of contract  
24 claims to be subordinated --  
25 JUDGE WALRATH: I understand but

1  
2 you raise that now.  
3 MR. SCHIFFMAN: That is correct.  
4 We submitted this both to the adversary  
5 and for confirmation.  
6 JUDGE WALRATH: A report was  
7 submitted with respect to the adversary  
8 as well?  
9 MR. SCHIFFMAN: For both.  
10 MR. SILVERSTEIN: Actually, your  
11 Honor, that is absolutely false. It was  
12 not filed in the adversary --  
13 JUDGE WALRATH: You can't be heard  
14 on the record.  
15 MR. SILVERSTEIN: I'm apologize.  
16 Paul Silverstein.  
17 That is absolutely false. It was  
18 not submitted in connection with the  
19 adversary. It was filed in the case, it  
20 was not filed in the adversary. When we  
21 had a scheduled conference call on the  
22 29th, it wasn't even mentioned. So it's  
23 definitely not in the adversary  
24 proceeding.  
25 MR. SCHIFFMAN: It is --

1  
2 MR. SILVERSTEIN: If it was in the  
3 adversary proceeding we should have  
4 had -- it should have been filed in  
5 connection with a Motion For Summary  
6 Judgment and we should have had an  
7 opportunity to depose that witness as  
8 one properly does. This is ambush.  
9 MR. SCHIFFMAN: This is not an  
10 ambush. It has nothing to do with  
11 summary judgment. The court can rule on  
12 summary judgment without any reference  
13 to the expert report whatsoever.  
14 This is only --  
15 MR. SILVERSTEIN: (Inaudible) are  
16 identical.  
17 MR. SCHIFFMAN: It is not  
18 identical. As was discussed in summary  
19 judgment as the argument yesterday, it  
20 could be granted based on the papers  
21 alone.  
22 JUDGE WALRATH: Well, I'm not going  
23 to decide any issue dealing with the LTW  
24 adversary other than what I heard on  
25 summary judgment.

1  
2 So I'm not going to consider her  
3 report in connection with confirmation.  
4 I do think it's a back door around what  
5 I should have heard yesterday. If it  
6 was relevant to the Summary Judgment  
7 Motion, I should have heard it. If it's  
8 not relevant to the summary judgment and  
9 I deny the Summary Judgment Motion, then  
10 I'll hear it at trial.  
11 MR. SCHIFFMAN: Thank you, your  
12 Honor.  
13 MR. STEINBERG: Your Honor, I know  
14 we just won but --  
15 (Laughter).  
16 MR. STEINBERG: But I do want to  
17 correct the statement that counsel has  
18 made so there is no confusion.  
19 The plan is written that a disputed  
20 claim will have a cash reserve until  
21 there's a final and non-appealable order  
22 that is entered with respect to the  
23 claim that totally disallows it.  
24 Therefore, the notion that they want to  
25 be -- his word was generous to other  
  
1 creditors to make a distribution, they  
2 have to have a cash reserve and we have  
3 to go through the appeal process before  
4 there's an appeal from either side until  
5 there's a distribution.  
6 JUDGE WALRATH: I understand.  
7 MR. SILVERSTEIN: Thank you, your  
8 Honor.  
9 JUDGE WALRATH: We've done all the  
10 preliminary motions, I hope.  
11 MR. STROCHAK: Just a couple more,  
12 your Honor. This is Adam Stochak from  
13 Weil Gotshal for the debtors.  
14 I believe item 2 on the agenda was  
15 our motion to seal Exhibits 1, 2 and 2,  
16 the declaration of Mr. Smith, submitted  
17 in support of confirmation. Those three  
18 documents are documents that the Office  
19 of Thrift Supervision takes a position  
20 are confidential. From the debtors'  
21 perspective we're agnostic as to whether  
22 they're part of the public record or  
23 actually should be filed under seal.  
24 The OTS would like those documents to

1  
2 sort of remain under seal in order to  
3 preserve the confidentiality of  
4 communications between the regulator and  
5 regulated entities.

6 The three documents are a letter  
7 from the OTS regarding the conditional  
8 exchange, a letter back from the debtors  
9 to the OTS regarding the conditional  
10 exchange and a memorandum of  
11 understanding entered in early September  
12 of 2008. Again, the debtors' position  
13 is we're fine with these being part of  
14 the public record but we did feel  
15 obligated to move to seal them, given  
16 the confidentiality designation that the  
17 OTS requested.

18 JUDGE WALRATH: Is the OTS here?

19 MR. STROCHAK: We spoke with them  
20 by telephone last week and the position  
21 I articulated was the position they  
22 articulated to us.

23 JUDGE WALRATH: Well, again, in the  
24 furtherance of my statement earlier, I'm  
25 inclined to not seal that or not keep

1  
2 first one, we have no objection as the  
3 corporate representative. He may  
4 remain.

5 But with respect to anyone who may  
6 testify if the debtor plans on calling  
7 them, then they should not be able to  
8 hear prior witness testimony and see how  
9 it's developing. Just like the other of  
10 direct witnesses, they should not be  
11 able to discuss what has occurred in the  
12 courtroom or discuss the testimony of  
13 others. If the debtor wants to call  
14 them, then they should be removed from  
15 the courtroom until such time as the  
16 debtor decides not to call them.

17 JUDGE WALRATH: I've never heard of  
18 rebuttal witnesses being excluded,  
19 though. That's the point, they're  
20 rebutting testimony that's being  
21 presented.

22 A VOICE: Well, I think, your  
23 Honor, the issue is, is that we don't  
24 really know who they are. The debtor  
25 has a pretty good idea about what the

1  
2 that confidential. If it's being  
3 offered, and I understand it is part of  
4 the debtors' proffered testimony, I  
5 think it should be made part of the  
6 public record.

7 MR. STROCHAK: Thank you, your  
8 Honor.

9 One more procedural matter while I  
10 have the podium, just to clarify on the  
11 order of witnesses. Mr. Smith is the  
12 company's general counsel and we'd ask  
13 that he be permitted to remain in the  
14 courtroom hearing testimony as the  
15 corporate representative of Washington  
16 Mutual. And then we do have some people  
17 in the courtroom who are potential  
18 rebuttal witnesses. I did not  
19 understand the court to be excluding  
20 those witnesses as well but, obviously,  
21 I want to make sure I do whatever the  
22 court wishes on that.

23 JUDGE WALRATH: What are the  
24 parties' views on that?

25 MR. NELSON: With respect to the

1  
2 case may be, and --

3 JUDGE WALRATH: They know what  
4 you're going to present?

5 A VOICE: No, your Honor. That's  
6 fair enough, fair enough.

7 JUDGE WALRATH: And since largely a  
8 part of your case I understand is going  
9 to be on cross.

10 A VOICE: In fact, your Honor, our  
11 entire case will be through cross,  
12 that's correct.

13 MR. STOLL: Your Honor, if I might  
14 insert, that was pretty much our point.  
15 If the case is through cross, what are  
16 they going to rebut? Will they be  
17 rebutting their own witness's testimony?  
18 That shouldn't be appropriate. It's one  
19 thing to rebut our case in chief if we  
20 have an affirmative witness, but the  
21 real witnesses, to rebut people who are  
22 impeached or otherwise cross-examined,  
23 that sounds to us inappropriate.

24 MR. STROCHAK: The  
25 cross-examination is their case, your

1  
 2 Honor. I don't know what they're going  
 3 to ask about. You know, I can certainly  
 4 speculate as to what they're going to  
 5 ask about, but I don't know. And you  
 6 know, it would be in our view  
 7 appropriate for the rebuttal witnesses  
 8 to be able to observe the proceedings.  
 9 And we'll obviously abide by whatever  
 10 decision the court has on this.  
 11 I mean, to be perfectly candid  
 12 there's no mystery. Mr. Filinger (ph.)  
 13 is the witness who we would ask to be  
 14 admitted to remain. He's a former  
 15 employee of Washington Mutual, he's a  
 16 consultant to the company now and has  
 17 come a long distance to be able to be  
 18 here in the event that we need him to  
 19 testify. He was originally designated  
 20 as a witness when we were contemplating  
 21 a potential full trial on the Trust  
 22 Preferred issue. So we don't think that  
 23 we need him on as part of our case in  
 24 chief, given the court's ruling on the  
 25 scope of the trial, but we do want to

1  
 2 have him available to address any issues  
 3 that come up on rebuttal.  
 4 A VOICE: Actually, the Equity  
 5 Committee has no objection. I think it  
 6 will help us {inaudible} our case.  
 7 And with respect to Mr. Filinger in  
 8 particular, the Equity Committee is  
 9 comfortable with him staying in the  
 10 room.  
 11 MR. STOLL: Then I just don't  
 12 understand the (inaudible) of trying to  
 13 rehabilitate your own witnesses and  
 14 calling it rebuttals. If the rebuttal  
 15 witness is somebody who is not offered  
 16 in the case in chief now is going to  
 17 comment on somebody that was  
 18 cross-examined and out -- who was  
 19 prepared to testify, and all these  
 20 witnesses have been proposed to by  
 21 affidavit and by direct, their direct  
 22 case is canned, cross-examined. So they  
 23 bring in another witness and we don't  
 24 even know what they're going to say. To  
 25 rehabilitate that witness, that's not

1  
 2 rebuttal.  
 3 MR. SACKS: Your Honor, I'm Robert  
 4 Sacks for JPMorgan Chase. I just want  
 5 to address what we are not offering.  
 6 We are hearing both approval of the  
 7 global settlement agreement as part of  
 8 confirmation of the plan. We don't  
 9 believe there is going to be any reason  
 10 to put on any witnesses of our own as  
 11 part of the direct case.  
 12 These people, the objectors, are  
 13 going to offer evidence that they're  
 14 asking you to consider. They're  
 15 offering it through the witnesses who  
 16 happen to be called by the debtors as  
 17 part of the case. But it is still  
 18 evidence, it is still being considered  
 19 by your Honor, and it's still may give  
 20 rise to a right to rebuttal.  
 21 So I don't have anyone here,  
 22 nothing on this issue of witnesses being  
 23 in or out of the room, but that is the  
 24 issue that it is undoubtedly possible  
 25 there could be rebuttal evidence based

1  
 2 upon the examination by objectors of  
 3 witnesses that are being put on in the  
 4 case. It's not simply just disavowing  
 5 the witness and undermining that  
 6 witness. They're asking your Honor to  
 7 consider their evidence that they're  
 8 going to put on through that witness,  
 9 and it may be or it may not be subject  
 10 to rebuttal.  
 11 JUDGE WALRATH: Well, I'm going to  
 12 allow them to stay in. But to the  
 13 extent he's offered as a witness, it  
 14 will be only to rebut any evidence that  
 15 comes in through cross, not -- evidence  
 16 when it comes to cross, not simply  
 17 impeachment of the original witnesses.  
 18 MR. STOLL: Thank you, your Honor.  
 19 MR. BROWN: Your Honor, Daniel  
 20 Brown on behalf of the TPS. One very  
 21 minor issue.  
 22 We had filed a motion to strike  
 23 deposition designations of witnesses  
 24 that are going to be here live. It  
 25 appears as though the debtors may have

1  
2 actually withdrawn those designations.  
3 I'm not sure. It's not very clear to  
4 me. I just want to make sure they're  
5 not putting in witnesses through  
6 affidavit, then having them testify live  
7 and also designated deposition  
8 testimony. It's inappropriate to have  
9 three levels of testimony for the same  
10 witness. So I stand just for that  
11 purpose.  
12 MR. MASTANDO: Good morning, your  
13 Honor. John Mastando from Weil Gotshal  
14 on behalf of the debtors.  
15 We did agree to withdraw those  
16 designations since the witnesses will be  
17 testifying through declaration and/or  
18 live.  
19 And one other minor housekeeping  
20 matter. Item 3 on the agenda was a  
21 motion for an order authorizing us to  
22 file under seal two exhibits to  
23 Mr. Gouling's deposition that are  
24 referenced in paragraph 29 of his  
25 declaration. They are net asset value

1  
2 summary and settlement liability per  
3 cash balance pension plan reports. They  
4 are subject to confidentiality  
5 restrictions and we have not yet been  
6 able to obtain the authority to release  
7 those publicly, so we filed a motion  
8 under seal. We would request that they  
9 be under seal. If your Honor is not  
10 inclined, we would be willing to  
11 withdraw the exhibits.  
12 JUDGE WALRATH: And under what are  
13 they confidential, on what basis?  
14 MR. MASTANDO: With the -- pursuant  
15 to the agreement pursuant to which they  
16 were done by an outside entity called  
17 Towers Perrin. They're reports of an  
18 outside entity and we just didn't have  
19 the authority to release them.  
20 JUDGE WALRATH: What's the parties'  
21 position on that?  
22 A VOICE: (Inaudible). I believe  
23 Tower was hired by the debtors to  
24 perform this report.  
25 MR. MASTANDO: I don't think that

1  
2 changes, your Honor, that just as of now  
3 we didn't have the authority to release  
4 them publicly. Perhaps we can deal with  
5 it when Mr. Goulding's testimony comes  
6 up and see if we can get a resolution of  
7 it before then. He won't be the first  
8 witness so perhaps we can defer it until  
9 his testimony.  
10 JUDGE WALRATH: Well, the debtors  
11 hired somebody to give them a report and  
12 want to offer that in evidence. I don't  
13 know what basis Towers Perrin would have  
14 for keeping its report that it's  
15 produced for a debtor in possession  
16 confidential. We may want to talk about  
17 that before we get to that.  
18 MR. MASTANDO: All right, we'll do  
19 that, your Honor. Thank you.  
20 Your Honor, at this point the  
21 debtors are prepared to offer their case  
22 in chief on confirmation, if there are  
23 no other preliminary matters.  
24 JUDGE WALRATH: Go ahead.  
25 MR. MASTANDO: Okay.

1  
2 JUDGE WALRATH: Well, let's talk  
3 about how we're going to do that, the  
4 order. Maybe we'll take a short break.  
5 MR. MASTANDO: Your Honor, the  
6 debtors filed approximately two weeks  
7 ago a notice of our intention to call  
8 witnesses at confirmation. It was filed  
9 on November 15th and it lists the  
10 witnesses that we intend to call.  
11 As we've indicated, your Honor, we  
12 would like to proceed by submitting the  
13 declarations of the witnesses as their  
14 direct testimony and then offering the  
15 witnesses for cross-examination.  
16 The first witness that we would  
17 offer will be Mr. William Kosturos, the  
18 chief restructuring officer of WMI. I  
19 have his original signed declaration  
20 here if the court requires. I also have  
21 a copy for your Honor and counsel.  
22 JUDGE WALRATH: I guess --  
23 In what order are you going to go  
24 with your witnesses?  
25 MR. MASTANDO: Okay. It will be

1 William Kosturos --

2 JUDGE WALRATH: The order listed in  
3 your list of witnesses?

4 MR. MASTANDO: Unfortunately, I  
5 don't think that's the exact order. It  
6 will be Mr. William Kosturos first, then  
7 it will be Mr. Jonathan Goulding, then  
8 Mr. James Carreon, then Mr. Charles  
9 Smith, then it will be Mr. Steven Simms,  
10 Steven Zelin, Mr. Robert Klamsner, and  
11 Mr. David Sharp.

12 JUDGE WALRATH: Okay. All right.  
13 Well, let's take a five-minute break and  
14 we'll start with the witnesses.

15 MR. MASTANDO: Thank you, your  
16 Honor.

17 (Recess taken.)

18 THE DEPUTY: All rise.

19 You may be seated.

20 MR. STOLL: Your Honor, one last  
21 point of order or question, actually.

22 Given your Honor's ruling this  
23 morning on the examiner motion, certain  
24 of the affidavits have certain  
25

1 JUDGE WALRATH: That might be  
2 easier than me finding it in the  
3 binders.

4 MR. MASTANDO: May I approach, your  
5 Honor?

6 JUDGE WALRATH: You may.

7 MR. MASTANDO: (Handing.)

8 Your Honor, I would like to call  
9 Mr. Kosturos to the stand.

10 And your Honor, if I may briefly, I  
11 would just like to ask Mr. Kosturos a  
12 few questions just to introduce him to  
13 the court and then turn him over for  
14 cross.

15 JUDGE WALRATH: You should stand to  
16 be sworn.

17 (Whereupon, witness was duly  
18 sworn.)

19 THE CLERK: Please state your full  
20 name and spell your last name.

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

23 THE CLERK: Thank you. You may be  
24 seated.  
25

1 paragraphs in which they actually make  
2 reference to and characterize the  
3 examiner's report and factors that went  
4 into their presentation. Would it be  
5 appropriate for us to provide, tonight  
6 or tomorrow or late tonight, a proposed  
7 order that strikes those particular  
8 paragraphs that make reference to a  
9 reliance on the examiner's report?

10 JUDGE WALRATH: That's fine and  
11 I'll ask counsel to coordinate that.

12 MR. STOLL: Thank you, your Honor.

13 MR. MASTANDO: Good morning, your  
14 Honor. John Mastando from Weil Gotshal  
15 again on behalf of the debtors.

16 Your Honor, at this time the  
17 debtors would like to offer the  
18 declaration of Mr. William Kosturos into  
19 evidence as his direct testimony in  
20 support of confirmation. I have an  
21 original signed copy. If your Honor  
22 would like, I also have a copy for your  
23 Honor and counsel that I could hand up  
24 if needed.  
25

1 WILLIAM KOSTUROS , called.  
2 as a witness, having been duly sworn by  
3 a Notary Public, was examined and  
4 testified as follows.

5 DIRECT EXAMINATION

6 BY MR. MASTANDO:

7 Q. Good morning, Mr. Kosturos.

8 A. Good morning.

9 Q. Can you describe your educational  
10 background for the court?

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

14 Q. And where are you currently  
15 employed?

16 A. Alvarez & Marsal.

17 Q. And how long have you been at  
18 Alvarez & Marsal?

19 A. Approximately eight and a half  
20 years.

21 Q. And where did you work prior to?

22 A. Prior to that I worked at Arthur  
23 Andersen.

24 Q. And how long were you there?  
25

1  
2 A. Approximately 17 years.  
3 Q. Okay. And what is your current  
4 position at Alvarez & Marsal?  
5 A. I'm a managing director as well as  
6 the co-head of the west region for  
7 restructuring and I'm a member of the  
8 executive committee for restructuring as  
9 well.  
10 Q. And do you have any current  
11 position at WMI?  
12 A. Yes. I'm the chief restructuring  
13 officer at WMI.  
14 Q. And, now, have you worked and  
15 restructurings in the past?  
16 A. Yes, I have.  
17 Q. Can you briefly describe for the  
18 court some of the matters you worked on?  
19 A. Sure. I was chief restructuring  
20 officer of Movie Gallery as well as interim  
21 CEO and chief restructuring officer at  
22 Spiegel, Inc. and then I was the CFO of a  
23 private aircraft cargo carrier. And that's  
24 about my role as A&M. And then previous to  
25 A&M at Arthur Andersen I was a financial

1  
2 advisor to PG&E Corp., Hexcel, Clothestime,  
3 Spreckels Industries, just to name a few.  
4 Q. And when did you become chief  
5 restructuring officer of WMI?  
6 A. It was in October of 2008.  
7 Q. Okay. And can you briefly describe  
8 your responsibilities as chief restructuring  
9 officer.  
10 A. Sure. I'm -- I oversee the  
11 Chapter 11 process and I oversee the  
12 day-to-day operations at Washington Mutual.  
13 Q. Were you involved in the  
14 negotiation of the global settlement  
15 agreement that is the subject of --  
16 A. Yes, I was. I was the lead  
17 negotiator for WMI.  
18 MR. MASTANDO: Okay. Thank you,  
19 Mr. Kosturos.  
20 Thank you, your Honor.  
21 JUDGE WALRATH: All right.  
22 Cross?  
23 CROSS-EXAMINATION BY  
24 MR. NELSON:  
25 Q. Good morning.

1  
2 MR. NELSON: First, your Honor, the  
3 Equity Committee has two binders of  
4 which the court has a copy. We've given  
5 a copy to the debtors and tried to give  
6 a copy to most of the other parties. If  
7 it's okay, I'd like to approach the  
8 witness and give him a set of two  
9 binders. These will be the two binders  
10 we intend to use with respect to all of  
11 our witnesses today, with the exception  
12 if there are any of the confidential  
13 documents.  
14 JUDGE WALRATH: All right.  
15 MR. NELSON: (Handing.)  
16 MR. MASTANDO: Your Honor, John  
17 Mastando on behalf of the debtors. I'd  
18 just like you to know we received the  
19 binders right before the testimony  
20 began.  
21 JUDGE WALRATH: Okay.  
22 MR. NELSON: Your Honor, subject to  
23 objection, of course, and for the  
24 debtors to review it, we would move to  
25 admit these documents.

1  
2 JUDGE WALRATH: Well, let's wait  
3 until the conclusion.  
4 MR. NELSON: Of course, your Honor.  
5 Q. Good morning. Mr. Kosturos, is it  
6 fair to say that this settlement happened  
7 because of the 2009 tax break that put more  
8 money on the table for the parties to divide  
9 up?  
10 A. I would say that it certainly  
11 helped the negotiations. That would be a  
12 correct statement. It created much more  
13 value for the parties, sure.  
14 Q. I think in your declaration in  
15 paragraph 35 you state that the new tax law,  
16 that gave this \$3 billion tax break be  
17 divided, reinvigorated the negotiations.  
18 Is that a fair assessment of how  
19 you believe about the effect of the 2009  
20 so-called Homeowners Act that gave this  
21 five-year tax break?  
22 A. Those were the words I used in my  
23 declaration. I stand by them.  
24 Q. This tax break is costing the  
25 U.S. government approximately what, 2.7 to 3



1 billion dollars; is that right?

2 A. I think we have estimated at  
3 \$2.8 billion.

4 Q. This additional money to be divided  
5 was not due to a sudden improvement in your  
6 analysis of the strengths and weaknesses of  
7 your claims, was it?

8 A. Could you repeat that?

9 Q. Sure.

10 You state that the tax break  
11 reinvigorated the negotiations. The fact  
12 that we now have a proposed settlement and  
13 the additional money that was divided was not  
14 due to some new assessment that you made in  
15 between the time that you first started  
16 negotiating the settlement agreement and the  
17 time that the tax break became law in  
18 November 2009?

19 A. Well, I think that, you know, you  
20 have to look at those separately.

21 The negotiations between the  
22 parties were, from the debtors' standpoint,  
23 to try to maximize the value of the estate,  
24 and whether we looked to one -- one pile of  
25

1 claims change from March till November of  
2 2009? Without getting into what that  
3 analysis was.

4 MR. MASTANDO: Your Honor, I'd hate  
5 to interrupt and object. I note this is  
6 coming perilously close to the line of  
7 privileged information and the question  
8 seems to be confusing topics.

9 JUDGE WALRATH: You have to speak  
10 up.

11 MR. MASTANDO: I'm sorry, I  
12 apologize for interrupting.

13 I just want to note I think this is  
14 coming perilously close to discussing  
15 privileged information and as we all  
16 know, that's a sensitive issue and I  
17 just want to remind the witness to --

18 JUDGE WALRATH: I think the witness  
19 knows that.

20 Q. I'll rephrase my question.

21 Without revealing any privileged  
22 information, did your analysis of the  
23 strengths and weaknesses of any of your  
24 claims change between the time you started  
25

1 money versus another pile of money, I think  
2 that the most important thing is that we  
3 maximized the value of the estate as well as  
4 we balanced our assessment of whether our  
5 claims -- strengths and weaknesses were.  
6

7 Q. I'm sorry. I'm just looking for a  
8 yes or no answer here. The new money that  
9 came in to be divided up was --

10 And just to be clear, the estate  
11 and WMI is getting a portion of that new tax  
12 refund, correct?

13 A. Yes, I think it's plainly laid out  
14 in our papers at what percentages they get,  
15 yes.

16 Q. That extra portion was not due to  
17 some revelation that WMI's strengths against  
18 JPMorgan and FDIC improved over the interim,  
19 correct?

20 A. I think the global settlement  
21 statement, you know, stands for itself.  
22 We -- at the end of the day, we're maximizing  
23 the value and we were giving up those claims  
24 as part of the releases.

25 Q. Did your analysis of any of the

1 the settlement agreement in March 2009 or  
2 early 2009 and November 2009?

3 A. Well, of course the claims were  
4 being developed. A lot of things happened  
5 between March 2009 and November 2009. Chief  
6 among them was we hired Quinn Emanuel in  
7 April 2009 and we continued to have discovery  
8 through 2009. So, of course, those claims  
9 were being developed throughout 2009 and up  
10 until we entered into the settlement.

11 Q. Once the new tax break was enacted,  
12 you'll agree that there was significantly  
13 more money available via the tax refunds to  
14 distribute in the settlement; isn't that  
15 right?

16 A. I think I testified to that  
17 already. Yes. Well, it created, again,  
18 different -- different potentials for  
19 recovery from the negotiations, yes.

20 Q. The answer to my question was yes?

21 A. I stand by my answer.

22 Q. Let's look at your deposition. You  
23 had your deposition taken on November 16th,  
24 2010; is that right?  
25

1  
2 A. Yes.  
3 Q. You were designated as the estate's  
4 corporate representative on numerous topics  
5 including settlement negotiations; is that  
6 right?  
7 A. Yes.  
8 Q. Do you stand by that testimony?  
9 A. Yes.  
10 JUDGE WALRATH: Is that in your  
11 binder, or do you have a copy?  
12 MR. NELSON: Excuse me.  
13 Yes, your Honor, we at least have a  
14 copy for the court.  
15 Can I approach?  
16 JUDGE WALRATH: You may.  
17 MR. NELSON: (Handing.)  
18 Q. I point your attention,  
19 Mr. Kosturos, to page 290, which is the upper  
20 left corner. The line 21, you state --  
21 The question I believe starts  
22 on-line 11 and you go on and then the new  
23 paragraph on-line 21:  
24 Answer: Once that new tax law  
25 became enacted there was significantly

1  
2 getting copies to the extent that we  
3 can.  
4 JUDGE WALRATH: Well, let's  
5 proceed. But I'd like to have copies  
6 for the parties. Let's see what you can  
7 do about it.  
8 MR. NELSON: Of course, your Honor.  
9 Q. Mr. Kosturos, this is a summary  
10 essentially from the liquidity analysis, at  
11 least with respect to the gross estate  
12 proceeds and the net estate proceeds. You  
13 would agree with that?  
14 MR. MASTANDO: Your Honor, I'm  
15 going to note my same objection. That  
16 wasn't provided in advance and we just  
17 don't have copies.  
18 JUDGE WALRATH: All right, that's  
19 been noted.  
20 Can the witness answer.  
21 What was the question?  
22 Q. The question is, the gross and net  
23 and estate expenses numbers are as they  
24 appear on the liquidity analysis; is that  
25 right?

1  
2 more money available via the tax  
3 refunds.  
4 Do you stand by the testimony?  
5 A. Yes.  
6 Q. I'd like to go over with you  
7 briefly so we understand the lay of the land  
8 the assets that are going to be distributed  
9 on the proceeds of the estate.  
10 MR. NELSON: May I approach, your  
11 Honor? We have a chart.  
12 JUDGE WALRATH: You may.  
13 MR. NELSON: (Presenting chart.)  
14 MR. MASTANDO: Your Honor, John  
15 Mastando, Weil Gotshal on behalf of the  
16 debtor.  
17 We haven't seen this before. We  
18 don't have a copy. It wasn't given to  
19 us in advance. I just want to note that  
20 for the record. We have no way of  
21 verifying that.  
22 MR. NELSON: We will try to get  
23 copies. I thought we had copies.  
24 We do not have copies of the  
25 second. We're at the pleasure of people

1  
2 A. I'm not sure what you mean by  
3 liquidity analysis. I'm sorry.  
4 Q. Excuse me. The liquidity and  
5 recovery analysis that appear in your  
6 disclosure statement.  
7 JUDGE WALRATH: Which exhibit to  
8 the disclosure statement?  
9 MR. NELSON: We're looking at  
10 Exhibit C, I believe. Let's see.  
11 JUDGE WALRATH: That's not in your  
12 exhibit binders, exhibits to the  
13 disclosure statement.  
14 Is the disclosure statement in the  
15 debtors' exhibit binder?  
16 MR. MASTANDO: It is, your Honor.  
17 JUDGE WALRATH: What number?  
18 MR. MASTANDO: Exhibit 5.  
19 JUDGE WALRATH: Thank you.  
20 Q. Excuse me. This is Exhibit C, very  
21 well. Liquidation analysis for the debtor;  
22 do you see that?  
23 A. (Perusing document.)  
24 JUDGE WALRATH: Can you see it on  
25 the screen?

1  
2 THE WITNESS: Yeah, I can see it on  
3 the screen. I don't seem to have it in  
4 the binder. There's no exhibits.

5 Q. Okay. We have another  
6 demonstrative that is a blowup of the  
7 recovery analysis.

8 A. I see what you mean, yes.

9 MR. NELSON: (Presenting  
10 demonstrative).

11 Q. You agree that this is an accurate  
12 representation of the recovery analysis  
13 that's included in your papers to approve the  
14 plan and settlement?

15 MR. MASTANDO: Your Honor, again I  
16 just object that we were not provided  
17 with the demonstrative in advance and  
18 I'm not sure where counsel is pointing  
19 the witness to.

20 JUDGE WALRATH: It looks like it's  
21 the left side of page C-3.

22 MR. NELSON: Correct.

23 JUDGE WALRATH: Of the liquidation  
24 analysis.

25 Q. And, Mr. Kosturos, you agree that

1  
2 actually and gross estate proceeds should be  
3 grossed up by 12 and a half million dollars;  
4 is that right?

5 A. Yes.

6 Q. Okay, so thank you.

7 You would agree then that the  
8 funding of the estate is coming from --

9 If the large part of the red circle  
10 is the deposits and representing  
11 approximately \$4 billion, would you agree  
12 that the deposits are representing about  
13 4 billion of the proposed recovery?

14 A. Yes.

15 Q. The small pie in the red is the  
16 intercompany loans that is between 180 and  
17 190 million. Do you see the little dotted  
18 line? You'll agree that is an accurate  
19 representation of the intercompany loans?

20 A. I presume you're referring to a  
21 part of the settlement agreement that JPM  
22 will be paying.

23 Q. But that was an asset that was on  
24 WMB's books at the time of the seizure,  
25 correct?

1  
2 the total proceeds, expenses and net proceeds  
3 in the first demonstrative are coming from  
4 this C-3, correct?

5 A. I unfortunately don't have this --

6 MR. MASTANDO: I just object, your  
7 Honor, because he doesn't have the  
8 document in front of him.

9 A. -- that's all.

10 You can put that back on the  
11 screen. I can verify that for you.

12 Q. This is Exhibit 37 in our binder as  
13 well.

14 Okay. My question was intended to  
15 be quite simple, which is: The numbers on  
16 the liquidity analysis and -recovery  
17 analysis, excuse me, are represented  
18 accurately in the big block box on the  
19 right-hand side of the demonstrative we are  
20 looking at?

21 A. The only slight update is the  
22 reorganized WMI that's listed at 145 million,  
23 I believe that lacks enough data in their  
24 evaluation for 157.5.

25 Q. So the net estate proceeds should

1  
2 A. It was an inter-co loan to WMB.  
3 There seems to be some question of whether  
4 that's with the FDIC receivership or whether  
5 that is JPMorgan. So to clarify that, yes.

6 Q. Okay. It was an asset of WMI on  
7 the books of WMB at the time that WMB was  
8 seized, correct?

9 A. That's correct. It just -- it --

10 There seems to be -- in our  
11 discussions between JPMorgan and the FDIC  
12 there seemed to be some dispute over who was  
13 the obligor on the other side of it once the  
14 FDIC seized the bank.

15 Q. Your opinion was that it was an  
16 asset of WMI and therefore belongs to WMI,  
17 right?

18 A. Oh, yes. That -- that -- without  
19 question, it's WMI's. The only question is,  
20 you know, with the complicated matter of the  
21 FDIC's receivership and JPM, the question is  
22 just who was going to pay it. And obviously  
23 if the FDIC is going to pay that out of  
24 receivership, their liabilities are  
25 significantly greater than their assets, so

1  
 2 that would not be necessarily a  
 3 dollar-for-dollar payment if we had to go  
 4 through the FDIC receivership process.  
 5 Q. The preexisting cash, there have  
 6 been references to approximately  
 7 \$900 million. Do you agree that there are  
 8 approximately \$900 million of preexisting  
 9 cash being used to define the settlement?  
 10 A. I think we phrased that  
 11 \$900 million was a combination of things, it  
 12 wasn't necessarily all cash. So there was a  
 13 few other non-disputed assets, I would agree  
 14 with that, that totalled \$900 million. I did  
 15 not believe that those are all in cash.  
 16 Q. The BOLI/COLI policies that you are  
 17 receiving title to as a result of the  
 18 proposed settlement is separate from the  
 19 preexisting cash, right?  
 20 A. On your chart it is, yes.  
 21 Q. I mean in terms of how the  
 22 settlement is funded. When you say  
 23 \$900 million, you're not talking about the  
 24 money that is BOLI/COLI policies, are you?  
 25 A. No.

1  
 2 Q. The goodwill litigation of  
 3 \$55 million that is being used to fund the  
 4 settlement, that's not included in the  
 5 \$900 million; is that right?  
 6 A. That's also correct.  
 7 Q. Going then to the upper left, tax  
 8 refunds is being used to fund approximately  
 9 \$2.195 billion of the proposed settlement; is  
 10 that right?  
 11 A. (Reading).  
 12 Q. I'll just turn your exhibit back to  
 13 Exhibit 37 C-3. I think that number comes  
 14 directly from there.  
 15 A. Yes.  
 16 Q. The reorganized WMI, you've already  
 17 stated that instead of 145 million that  
 18 number should be \$157.5 million; is that  
 19 right?  
 20 A. Yes.  
 21 Q. The investment in subsidiaries and  
 22 others is an additional \$25 million used to  
 23 fund it?  
 24 And again I'll point your attention  
 25 to Exhibit C-3.

1  
 2 A. (Reading).  
 3 Q. Is it true that the \$25 million  
 4 represented in the pie chart is from the  
 5 investment in other subsidiaries category?  
 6 A. Yes.  
 7 Q. And then finally there's a JPMorgan  
 8 payment for Visa shares of \$25 million; is  
 9 that right?  
 10 A. That would be right, yes.  
 11 Q. Looking at this, the only  
 12 out-of-pocket payment that JPMorgan is  
 13 contributing to the settlement that did not  
 14 already belong to WMI was \$25 million,  
 15 correct?  
 16 A. Oh, I would disagree with that  
 17 statement. It's vastly more complex, the way  
 18 that it -- of how the tax refunds work and  
 19 probably each and every asset on this, so I  
 20 would disagree with your general statement.  
 21 Q. I'm sorry, we just went over every  
 22 single category of those. The tax refunds  
 23 are not coming from JPMorgan's pocket, is it?  
 24 A. Well, let's -- let's -- let's talk  
 25 about the tax refund for a minute.

1  
 2 Q. Well, first answer my question.  
 3 The actual payment of the --  
 4 MR. MASTANDO: Objection, your  
 5 Honor.  
 6 JUDGE WALRATH: Overruled.  
 7 Q. The actual payment of the tax  
 8 refunds is coming from United States  
 9 government, correct?  
 10 A. Yes, that's where tax refunds come  
 11 from.  
 12 Q. The only out-of-pocket money that  
 13 JPMorgan is contributing to this proposed  
 14 settlement is \$25 million, correct?  
 15 A. Again, that -- that is -- is not  
 16 correct, because for various reasons. If you  
 17 would like me to answer I will. I'd like to.  
 18 Q. Well, my question is: In terms of  
 19 out-of-pocket outlays, we have gone over --  
 20 let me phrase it this way.  
 21 In terms of everything else on the  
 22 pie chart, where else is JPMorgan  
 23 contributing out-of-pocket money that's being  
 24 used to fund the estate besides the  
 25 \$25 million?

1  
2 THE WITNESS: Your Honor, JPMorgan  
3 is releasing various claims that clearly  
4 have significant value here, and I  
5 certainly can go through those and  
6 describe on Mr. Nelson's pie chart how  
7 those amounts really would be looked at  
8 in the entirety.

9 JUDGE WALRATH: I know, but he's  
10 asking were they writing a check.

11 THE WITNESS: Well, they were  
12 giving up their claims.

13 JUDGE WALRATH: Were they writing a  
14 check?

15 THE WITNESS: Were they writing a  
16 check? Well, they're going to write us  
17 a check for the \$4 billion because the  
18 \$4 billion is at JPMorgan cash deposits  
19 so they'll have to wire that money to us  
20 in some form or fashion as well as  
21 releasing their claims. They will be  
22 writing the check for the \$25 million of  
23 Visa shares, and for the other ones  
24 they'll be turning over assets but not  
25 necessarily having to write us checks.

1  
2 A. The dollar values that they're  
3 getting out of it is an incredibly complex  
4 question because, again, they are giving up  
5 significant claims in our estate. We  
6 certainly can go through each and every line.  
7 I believe in your deposition you asked me the  
8 totality of the value, of which I think I  
9 testified is a very complex question.

10 Q. Shall we go to your deposition and  
11 see what you said? Let's go to page 194, 23:

12 "Question: Do you have a ballpark  
13 of what value Chase is getting out of  
14 it?"

15 "Objection to form. I'll instruct  
16 the witness not to answer.

17 "Answer: I don't know what dollar  
18 values that JPMorgan is getting out of  
19 this."

20 Correct?

21 A. Right. As a follow-on question to  
22 the previous question, of which I said the  
23 FDIC and JPMC is very hard to put a dollar  
24 value on what precisely is JPM putting into  
25 this.

1  
2 Q. So it's true that besides your  
3 assets that are already on WMI's books  
4 that -- held by WMB that went to either FDIC  
5 or JPMorgan, the only contribution and  
6 out-of-pocket cash is the \$25 million that  
7 JPMorgan is paying for the Visa shares,  
8 correct?

9 A. That's incorrect, because the tax  
10 refunds themselves are not necessarily on our  
11 books. There are significant amounts of  
12 liabilities that they're giving up as well.  
13 So -- but just to be clear, the 2.195 tax  
14 refund is not on their balance sheet.

15 Q. Excuse me. Would you repeat that?

16 A. It's not on our balance sheet. I  
17 thought you said it's on their books and  
18 records. I'm just clarifying it is not on  
19 their books and records.

20 Q. Okay, I think let's move on. Okay.  
21 I'd like to go over the assets that  
22 JPMorgan is receiving as part of this  
23 settlement. You don't know the dollar values  
24 that JPMorgan are getting out of the  
25 settlement, do you?

1  
2 Q. Correct. And then your answer was  
3 you don't know the dollar values that  
4 JPMorgan is getting out of it, right?

5 A. On the precise basis, we certainly  
6 can go through the settlement agreement. In  
7 fact, I think JPM has done a very nice job in  
8 their briefing. They have a graph of what  
9 they say we're getting, and what they're  
10 getting and what they're giving up, so I  
11 think that's a wonderful summary of the  
12 transaction.

13 Q. Okay. Well, let's put the next  
14 demonstrative up.

15 MR. MASTANDO: Sorry to interrupt,  
16 your Honor. John Mastando, Weil Gotshal  
17 on behalf of the debtors.

18 Again, I know this is another  
19 demonstrative that was not given to us  
20 in advance. It would be -- we have no  
21 idea how it was prepared, what it's  
22 based on and we're now seeing it for the  
23 first time yet again.

24 Q. You would agree, Mr. Kosturos, that  
25 with respect to the tax refunds JPMorgan is

1  
2 receiving approximately \$2.36 billion of the  
3 allocation of the tax refunds?

4 A. I would agree to it, but should we  
5 put it in context, if they have ownership of  
6 it prior to this agreement? Or do you just  
7 want to go -- we're just going to add up what  
8 they already owned?

9 I just wanted to make sure that --  
10 it's easy to have a bunch of numbers that  
11 shouldn't be added up. And I see the  
12 direction you're going, but if we want to  
13 talk about that, whether those assets  
14 actually belong to them prior to the  
15 settlement, I think that's really probably a  
16 more fruitful discussion, if you're going to  
17 try to value what it is that they received.

18 Q. You in litigation disputed who  
19 owned the tax refunds, correct?

20 A. In the litigation what we said was  
21 specifically we are the consolidated payor of  
22 the tax refund. We believe that we should be  
23 entitled to receive the entire tax refund.  
24 Then the tax-sharing agreement governs that  
25 and then you have to allocate the tax refunds

1  
2 to who generated those tax attributes or tax  
3 losses. In almost every respect, the WMB was  
4 the generator of those losses. Therefore, it  
5 was entitled to the majority of the tax  
6 refunds, whether that was JPM or FDIC.

7 So if we're going to talk about the  
8 five and a half billion dollars of tax  
9 refunds and what potentially WMI owned, we  
10 can talk about that, but certainly the vast  
11 majority of those tax refunds belonged  
12 through the tax-sharing agreement to WMB, not  
13 WMI.

14 Q. Yes or no, in the litigation the  
15 tax refunds and the ownership of the tax  
16 refunds was a disputed issue?

17 A. Yes.

18 Q. As part of the settlement JPMorgan  
19 is receiving \$2.36 billion of the tax  
20 refunds, correct?

21 A. That is correct.

22 Q. You are aware, by the way, that due  
23 to the law of the second tax refund  
24 prohibiting any bank who has received bailout  
25 money from participating in the second refund

1  
2 that whether JPMorgan could receive any of  
3 the second refund was very much an open  
4 question, correct?

5 A. Whether JPM could receive that  
6 certainly was an open question. The other  
7 question you had to ask was: Did the FDIC  
8 receivership own it? And they are not bound  
9 by TARP and could receive it.

10 Q. The difference between the  
11 allocation and the first March proposed  
12 settlement and the later announced settlement  
13 in May was due essentially to a reallocation  
14 of this tax refund money between the first  
15 refund and the second refund; isn't that  
16 right?

17 A. Well, there was two things.

18 First of all, yes, there was a  
19 reallocation of the first tax NOLs from WMI  
20 receiving 30 percent, 20 percent. And then  
21 there was also an increase in WMI's  
22 allocation of the second NOL, going from 40.6  
23 to approximately 65 percent.

24 The other thing that was very  
25 important along with that was that JPM no

1  
2 longer was giving up their indemnification,  
3 the FDIC receivership and corporate, and the  
4 FDIC was no longer funding a priority claim  
5 within the receivership. So that kind of all  
6 went together.

7 But WMI got substantially more  
8 value in the second amendment, yes.

9 MR. NELSON: Your Honor, may  
10 approach?

11 I have copies of the demonstratives  
12 for the court. We're trying to get it  
13 for the witness. And excuse me for one  
14 second.

15 (Discussion off the record.)

16 MR. NELSON: I apologize, your  
17 Honor. The slide given out referred in  
18 part to some of the highly confidential  
19 information and so, therefore, we're not  
20 using that. It's not up on the screen  
21 but we'll getting all the slides.

22 May I approach, your Honor?

23 JUDGE WALRATH: You're only giving  
24 me what's up on the screen?

25 MR. NELSON: No, your Honor. I'm

1 giving you everything.  
 2 MR. SACKS: Sorry, your Honor.  
 3 Robert Sacks for JPMorgan Chase.  
 4 We object to them giving you slides  
 5 that are not yet being offered to be  
 6 used. Why don't they give them to you  
 7 and let us be heard when that happens.  
 8 MR. NELSON: No objection, your  
 9 Honor.  
 10 JUDGE WALRATH: Okay.  
 11 MR. NELSON: (Handing to the  
 12 judge.)  
 13 Q. Mr. Kosturos, the change between  
 14 the March and May settlement that we just  
 15 discussed, WMI did not request that change,  
 16 correct?  
 17 A. I'm not sure how to answer that.  
 18 What happened is that the FDIC was  
 19 unable to get court approval of the deal that  
 20 we filed in March. We therefore had to  
 21 continue negotiations which ultimately led to  
 22 the amended settlement agreement. So I'm not  
 23 sure how to answer your question WMI  
 24 requested that.  
 25

1 Q. The dispute that led the FDIC board  
 2 not to approve the March settlement was a  
 3 dispute between the FDIC and JPMorgan,  
 4 correct?  
 5 A. I do not know that.  
 6 Q. You described the two issues: One  
 7 was the allocation of tax refunds, the second  
 8 was the indemnity between JPMorgan and the  
 9 FDIC. Correct?  
 10 A. That's correct.  
 11 Q. You did not have an issue with the  
 12 allocation of the tax refunds in the first  
 13 announced settlement, correct?  
 14 A. We -- we had agreed to that  
 15 settlement yes.  
 16 Q. You also did not have an issue with  
 17 the indemnification provisions between  
 18 JPMorgan and the FDIC.  
 19 A. Correct. But whatever was filed in  
 20 the settlement agreement, yes, we did not  
 21 have an issue with the March settlement  
 22 agreement.  
 23 Q. The end result of the changes  
 24 actually were to benefit the estate by an  
 25

1 additional 270 to 300 million dollars,  
 2 correct?  
 3 A. I think that's approximately the  
 4 ballpark, yes.  
 5 Q. And the change was accomplished by  
 6 reallocating the tax refunds so the estate  
 7 would take a smaller portion of the first tax  
 8 refund and receive a larger portion of the  
 9 second tax refund. Is that a fair statement?  
 10 A. Yes. What -- what -- the  
 11 allocations of the second NOL were largely  
 12 changes to the splits between the FDIC and  
 13 WMI. In fact, they weren't largely; they  
 14 were 100 percent. We just changed the  
 15 allocation of the second NOL between the FDIC  
 16 and WMI.  
 17 Q. The change had nothing to do with  
 18 the merits of WMI's right to the first tax  
 19 refund versus its right to the second tax  
 20 refund, correct?  
 21 A. No. It was -- it was -- it was  
 22 part of the negotiations.  
 23 Q. To be clear, you believe that the  
 24 March settlement that was between 270 million  
 25

1 to 300 million dollars lower than the May  
 2 settlement also maximized the value of the  
 3 estate, correct?  
 4 A. I think the March settlement was a  
 5 very good settlement. The May settlement was  
 6 a better settlement, yes.  
 7 Q. But you didn't seek to renegotiate  
 8 the March settlement. The FDIC and JPMorgan  
 9 did. Correct?  
 10 A. Again, I will -- the -- the fact of  
 11 the matter, to my knowledge, is that the FDIC  
 12 was unable to get board approval. Therefore,  
 13 I did not have an agreement with the FDIC and  
 14 we were back to the negotiating table.  
 15 Q. The TPS securities, that is an  
 16 asset that the estate has disputed that is  
 17 going to JPMorgan in the proposed settlement?  
 18 A. Well, not to go over that again,  
 19 I'm sure your Honor had enough of that  
 20 yesterday, but there are -- there are certain  
 21 claims that we believe we have to the TPS.  
 22 The facts clearly at least are that the  
 23 conditional exchange occurred, it was  
 24 automatic. That night we made an assignment  
 25

1  
2 agreement. We issued a press release. Those  
3 are facts in evidence that were discussed  
4 yesterday.

5 We believe we have potential claims  
6 against that. We also believe that JPMorgan  
7 has significant claims back against us. In  
8 fact, if we still have it, they may very well  
9 indeed have a corresponding \$4 billion  
10 priority claim against us. We might be able  
11 to seek it back through --

12 Q. Sorry to interrupt. Is that  
13 statement based on your reliance of counsel?

14 A. No. Those were in discussions,  
15 settlement discussions with JPM for which  
16 they have continually said that they have a  
17 potential priority claim, that we didn't  
18 transfer it for \$4 billion under 365 O, and  
19 if we did transfer it we believe that we have  
20 potential ways of getting back that security  
21 through fraudulent conveyance if that can be  
22 proven, but if we did go through that track  
23 we'd still owe them a claim. So it's a very  
24 complicated situation. It certainly isn't  
25 sorted out at this point.

1  
2 A. I agree with the caveat that there  
3 are significant liabilities with each and  
4 every one of those claims, that adding up the  
5 assets and not deducting the claims or the  
6 liabilities --

7 I'm not sure you're going to have  
8 another slide that maybe maps it all out.  
9 You know, I don't see we have a couple more  
10 to go. But I certainly wouldn't  
11 characterize -- you know, I'm not sure that I  
12 would agree with your characterization on  
13 your board.

14 Q. You don't agree with the  
15 characterization that under the settlement  
16 agreement, all of these are assets going to  
17 JPMorgan?

18 A. But if they owned them in the first  
19 place, what --

20 You know, my -- my question is:  
21 Who owned them in the first place? So, yes,  
22 you can add it up like this, but -- but are  
23 you going to make a determination whether  
24 they owned it before the settlement  
25 agreement?

1  
2 Q. You are not here to testify about  
3 the strengths or weaknesses of your claim to  
4 the TPS, the estate's claim to the TPS  
5 securities, correct?

6 MR. MASTANDO: Objection. Your  
7 Honor, I have to object because I think  
8 counsel is asking the witness questions  
9 about these things. He's trying to  
10 answer and he's trying to do it without  
11 revealing privileged information and it  
12 sounds like counsel doesn't want him to  
13 answer that because he's cutting him off  
14 as well.

15 JUDGE WALRATH: Yeah. I think that  
16 last question seeks to characterize his  
17 testimony and I don't think it's  
18 appropriate.

19 MR. NELSON: Okay. Thank you, your  
20 Honor.

21 Q. You do agree -- and I'm just  
22 looking for a yes or no answer. You do agree  
23 that the TPS securities are a disputed asset  
24 that in the allocation of the settlement is  
25 going to JPMorgan?

1  
2 Q. Have you made a determination of  
3 who owned it?

4 MR. MASTANDO: Objection, your  
5 Honor. Sorry to interrupt. I just  
6 object again --

7 JUDGE WALRATH: Talk into the mic.

8 MR. MASTANDO: I'm sorry.

9 I would just object again and note  
10 it's coming perilously close to the  
11 privileged information.

12 JUDGE WALRATH: Your witness knows  
13 that.

14 You can answer only without  
15 considering attorney-client privileged  
16 deposition.

17 A. Mr. Nelson, I'm trying to do my  
18 best to answer the questions and put it in  
19 context.

20 Q. My question is: Without revealing  
21 what the underlying analysis is, have you  
22 done an analysis of these disputed assets?

23 JUDGE WALRATH: And by "you" you  
24 mean?

25 MR. NELSON: I'm sorry. WMI.



1 JUDGE WALRATH: Or the debtor?  
 2 Okay.  
 3 A. I think as I go through this I'm  
 4 giving you my analysis as we're going.  
 5 So I think I've stated on the  
 6 record what we believe the taxes are. We  
 7 believe that we have a debtor/creditor  
 8 relationship there. We believe that we owe a  
 9 significant amount of the tax refunds to WMB.  
 10 So we talked now about TPS and the issues as  
 11 it relates to TPS. I guess if we can go on  
 12 to BOLI/COLI.  
 13 Q. Well, your analysis that you're  
 14 giving right now comes from counsel and  
 15 you're not relying on counsel; isn't that  
 16 right?  
 17 A. I -- I have -- I told you what the  
 18 source of the TPS negotiation --  
 19 My knowledge in that was settlement  
 20 negotiations with JPMorgan. I've just merely  
 21 stated what -- what is clearly in the claims,  
 22 what is the counterclaims, and what I learned  
 23 from discussions, I have not taken a position  
 24 of anything that my counsel has told me or  
 25

1 I've relied on.  
 2 Q. Well, let's go to your deposition.  
 3 Please turn to page 124, line 8.  
 4 "Question: Is and was there any  
 5 analysis conducted by WMI with respect  
 6 to the strengths and weaknesses of WMI's  
 7 claim against the FDIC receiver and FDIC  
 8 corporate that did not involve counsel?"  
 9 Repeated question. Answer begins  
 10 on line 20.  
 11 A. I'm sorry, what page are you on?  
 12 Q. Page 124 at the bottom. Do you see  
 13 that?  
 14 A. Yes, thank you.  
 15 Q. Line 20.  
 16 "Answer: I think all the analysis  
 17 that we prepared was at the direction of  
 18 counsel.  
 19 "Question: And you are refusing to  
 20 answer any questions regarding the  
 21 substance of that analysis based on the  
 22 privilege.  
 23 Answer, top of 125, line 6: "Yes."  
 24 Is that right?  
 25

1 MR. MASTANDO: Your Honor, I  
 2 apologize. If I may object.  
 3 If you look at the deposition  
 4 transcript first, I don't believe it's  
 5 inconsistent with what Mr. Kosturos has  
 6 testified to already.  
 7 And second, if you look at the page  
 8 before that on 123, Mr. Kosturos  
 9 explained in response to the question  
 10 exactly what he was saying, which is  
 11 what he explained just now: He was not  
 12 revealing strengths and weaknesses  
 13 because those were privileged, he was  
 14 discussing claims, counterclaims and  
 15 other things raised by the parties.  
 16 So I don't believe that this is  
 17 inconsistent in any way with his  
 18 testimony and it's improper to cite it  
 19 and I think the prior page needs to be  
 20 read to put it into perspective.  
 21 MR. NELSON: The testimony speaks  
 22 for itself.  
 23 Q. The question was asked, correct,  
 24 Mr. Kosturos? Was there any analysis  
 25

1 conducted by WMI with respect to the  
 2 strengths and weaknesses of WMI's claims  
 3 against the FDI receiver and FDI corporate  
 4 that did not involve counsel.  
 5 "Answer: I think all the analysis  
 6 we prepared was at the direction of  
 7 counsel.  
 8 That is your position, correct?  
 9 MR. MASTANDO: Your Honor, I note  
 10 the same objection. This is not  
 11 inconsistent.  
 12 JUDGE WALRATH: You can raise it on  
 13 cross. Please.  
 14 MR. MASTANDO: Thank you, your  
 15 Honor.  
 16 A. I don't believe we're talking about  
 17 the FDIC as the things that we've talked  
 18 about so far (sic).  
 19 Q. Let's go to page 122 of your same  
 20 transcript.  
 21 "Question: What analysis did WMI  
 22 conduct with respect to the likelihood  
 23 of success on its claims?  
 24 "Answer: Well, my discussions with  
 25

1  
2 my counsel obviously are privileged and  
3 confidential, but primarily we had  
4 several discussions amongst the legal  
5 team."

6 Is that your answer?

7 A. That's my deposition.

8 Q. You stand by that answer?

9 MR. MASTANDO: Your Honor, I just  
10 note the same objection in that the  
11 following question --

12 JUDGE WALRATH: All right. Raise  
13 it on cross, please.

14 MR. MASTANDO: Thank you, your  
15 Honor.

16 A. Well --

17 THE WITNESS: Should I answer?

18 JUDGE WALRATH: You can answer the  
19 question he's asked.

20 A. If it relates to my discussion with  
21 strengths and weaknesses with that I  
22 obviously cited attorney work product  
23 privilege. I certainly have other knowledge  
24 of reading the claims, the counterclaims, the  
25 defenses, statements that I have, that I had

1  
2 in settlement negotiations. So those are  
3 the -- those are the things that I'm relying  
4 on right now. I am not relying on -- on any  
5 privileged conversations with my attorneys to  
6 answer these questions.

7 Q. Let's go to page 128 of your  
8 deposition. You recall, Mr. Kosturos, that  
9 this came up in response to or my question  
10 about preferred securities, correct?

11 A. I'm sorry. Where are you referring  
12 me?

13 Q. First question: You recall that  
14 this came up with respect to a discussion of  
15 preferred securities, correct?

16 MR. MASTANDO: Objection to the  
17 form, your Honor.

18 JUDGE WALRATH: Overruled.

19 A. (Reading).

20 Q. You want me to rephrase my  
21 question?

22 A. Sure.

23 Q. We were just discussing the Trust  
24 Preferred Securities, correct?

25 A. Yes.

1  
2 Q. On page 128 of your deposition you  
3 were asked about Trust Preferred Securities.

4 "Question: You're aware that WMI  
5 asserted counterclaims with respect to  
6 ownership of the Trust Preferred  
7 Securities against JPMorgan; is that  
8 correct?

9 "Answer: Yes.

10 "Did WMI conduct an analysis of  
11 whether or not it was likely to win on  
12 its counterclaims?

13 "I'm going to instruct the witness  
14 not to answer on the grounds of  
15 privilege."

16 That was your position?

17 MR. MASTANDO: John Mastando, your  
18 Honor, from Weil Gotshal on behalf of  
19 the debtors. I note the same objection  
20 and I apologize for interrupting again.

21 JUDGE WALRATH: Would you just  
22 please don't raise it again. You have a  
23 standing objection.

24 MR. MASTANDO: Thank you, your  
25 Honor.

1  
2 A. I'm sorry, Mr. Nelson. What was  
3 the question?

4 Q. The question was: You are  
5 asserting privilege on whether WMI conducted  
6 an analysis of whether or not it was likely  
7 to win the TPS preferred security  
8 counterclaim?

9 A. I agree.

10 Q. The questioning went on:

11 "Question: Did WMI determine that  
12 it would be successful on its claims  
13 with respect to the ownership of the  
14 Trust Preferred Securities?"

15 Now turn to the top of 129. The  
16 question is repeated.

17 "Are you following your counsel's  
18 instructions not to answer that  
19 question?"

20 "Answer: All of those, all of that  
21 work has been conducted and completed by  
22 our attorneys and is attorney work  
23 product privilege."

24 Is that your position still today?

25 A. I stand by my deposition. I don't

1 think my answers, again, have been -- I  
2 haven't stated whether we think we're going  
3 to win or lose things. I have not revealed  
4 privilege. I have merely stated what the  
5 facts are to my knowledge that are  
6 nonprivileged.

7 Q. All of these on this board are  
8 disputed assets, correct?

9 A. I disagree.

10 Q. You have not asserted any  
11 litigation, every single one of these assets  
12 as being owned by the estate?

13 A. At some point we did. But let's  
14 take BOLI/COLI, for instance. The BOLI/COLI  
15 \$5 billion we went through a line-by-line  
16 analysis of that, and it is -- it has been  
17 determined, at least for WMI, that we don't  
18 own the \$5 billion. We potentially had some  
19 claims there but JPM has, to my knowledge,  
20 probably liquidated those already. So, you  
21 know, we -- we have potential claims there.

22 Q. I'm sorry. Those have already been  
23 transferred and have been liquidated by  
24 JPMorgan?  
25

1 There was some certain legal input  
2 on that but there was a lot of review and  
3 analysis completed by the A&M team and the  
4 WMI team.

5 Q. That was an analysis conducted by  
6 counsel?

7 MR. MASTANDO: Objection, your  
8 Honor.

9 Q. In part by counsel you just said?

10 A. Counsel had some input into that,  
11 yes.

12 MR. NELSON: Your Honor, we move to  
13 strike that prior answer as either  
14 revealing attorney-client privileged  
15 information and going beyond the scope  
16 or opening the door for a reliance on  
17 counsel, given the fact that he just  
18 testified that his analysis was in part  
19 due to counsel and that --

20 JUDGE WALRATH: He didn't tell  
21 you --

22 Well, was your statement regarding  
23 the BOLI/COLI based on any advice of  
24 counsel?  
25

1 A. They were never under our control.

2 Q. You disputed these assets and  
3 JPMorgan has liquidated them; is that right?

4 A. I don't know. I'm sorry, I may  
5 have misspoken. I don't know what JPMorgan  
6 has done with those. But those assets are  
7 not owned by WMI. Those assets were on the  
8 balance sheet of WMB.

9 Q. The analysis that was conducted on  
10 BOLI/COLI that you just referenced and said  
11 that you do not have ownership on, that was  
12 an analysis conducted by counsel, was it not?

13 A. I think there was a fair amount of  
14 work that was done by the WMI employees as  
15 well.

16 Q. Yes or no, sir. The analysis that  
17 the estate conducted with respect to  
18 BOLI/COLI that you just testified don't  
19 belong to the estate and belong to JPMorgan,  
20 that analysis was conducted by your counsel?

21 A. Our counsel participated in that  
22 analysis, yes. But it was also largely done  
23 with some of our WMI employees, our WMI  
24 experts and A&M experts, so it was --  
25

1 THE WITNESS: There would have to  
2 be some input from counsel.

3 JUDGE WALRATH: Well, then I am  
4 going to strike the testimony regarding  
5 the BOLI/COLI.

6 MR. MASTANDO: Your Honor, I would  
7 ask that the questions be stricken as  
8 well because counsel is asking him, I  
9 think, things --

10 JUDGE WALRATH: I'm not going to  
11 strike the questions.

12 Q. Let me try again, sir.

13 Every single one of these assets  
14 (indicating) is a disputed asset that the  
15 estate has disputed as between JPMorgan and  
16 the estate, correct?

17 MR. MASTANDO: Objection, your  
18 Honor. I believe this has been asked  
19 and answered.

20 JUDGE WALRATH: Yeah, I think it  
21 has been.

22 MR. NELSON: Okay. Fair enough,  
23 your Honor.

24 Q. I want to go back to the first time  
25

1  
2 that you put an offer on the table to settle  
3 the claims with JPMorgan. That was in, when,  
4 March of 2009; is that correct?

5 A. Yes.

6 Q. Your goal during this negotiation  
7 period was to pay off your creditors; is that  
8 right?

9 A. No. My goal was the debtor was to  
10 maximize the value of the estates.

11 Q. You understood that the creditors  
12 had to accept a settlement, and you were  
13 negotiating on behalf of those creditors to  
14 accept settlement, correct?

15 A. Again, my job as the debtor is to  
16 maximize the value of the estate and I  
17 represent the creditors and interest holders  
18 of the estate.

19 Q. You consulted with creditors'  
20 constituencies before making your March  
21 offer, correct?

22 A. Yes, that's correct.

23 Q. I'd like you to turn to Exhibit 27  
24 in your binder.

25 MR. NELSON: Your Honor, would you

1  
2 Q. Excuse me?

3 A. Not at this point.

4 Q. They did not represent them at this  
5 point?

6 A. Well, again, beyond what I've just  
7 said, that was the two main creditors that  
8 they represented at March 2009, to the best  
9 of my knowledge.

10 Q. Fair enough.

11 You are aware that as we sit here  
12 today, this e-mail from Fried, Frank  
13 represented the position of senior note  
14 holders at least of some major hedge fund  
15 creditor constituencies, correct?

16 A. Yes.

17 Q. They were working on preliminary  
18 bullet points for a settlement; is that  
19 right?

20 A. (Reading) That's what appears on  
21 this e-mail.

22 Q. It starts, "All of the complex  
23 issues in this case which would otherwise  
24 take years to resolve through litigation get  
25 resolved cleanly."

1  
2 like me to wait?

3 JUDGE WALRATH: Yes.

4 You can go ahead.

5 Q. This is an e-mail from Brian  
6 Pfeiffer (ph.) of Fried, Frank to others  
7 including you March 5th, 2009, correct?

8 A. Yes.

9 Q. By the way, Fried, Frank represents  
10 who in the holders of the estate?

11 A. To the best of my knowledge, Fried,  
12 Frank's representation of creditors has  
13 changed. They had some at the beginning and  
14 I think some different ones at the end. So  
15 how would you like me to answer that?

16 Q. In March 2009 who did Fried, Frank  
17 represent?

18 A. I can't be entirely sure because I  
19 don't know the representations, but to the  
20 best of my knowledge, at that point Appaloosa  
21 and Centerbridge were among their clients.

22 Q. They represented the four major  
23 hedge funds who owned significant portions of  
24 the WMI estate; is that right?

25 A. Not at this time.

1  
2 That was a reason why they wanted a  
3 settlement at that point in March 2009,  
4 correct?

5 A. This is their e-mail. I do not  
6 know what that meant. The word "cleanly"  
7 used in this e-mail --

8 Q. Go down to bullet point 3. "They  
9 had an idea that the going forward business  
10 of reorganized WMI will have the benefit of a  
11 large NOL based on the company's ability to  
12 claim a worthless stock deduction related to  
13 its WMB stock." Do you see that?

14 A. Yes.

15 Q. It is true that in the final  
16 settlement there is a reorganized WMI that  
17 may have a large NOL, correct?

18 A. Yes, that's correct.

19 Q. And point 4 is all parties to the  
20 settlement would work together to provide  
21 finality on all points.

22 Do you agree with those points that  
23 the creditor constituency made in March of  
24 2009?

25 A. I wouldn't agree or disagree. I'm

1  
2 just reading the e-mail with you at this  
3 point.  
4 Q. Well, you respond and you state  
5 it's about time the seniors figured this out.  
6 Is that your position in March 2009?  
7 A. I don't know what else to tell you.  
8 It's hard to see what the context of this  
9 e-mail was without knowledge of the greater  
10 discussions that were going on.  
11 Q. Did you want a clean settlement in  
12 March of 2009?  
13 A. I would have loved a settlement in  
14 March 2009, but we -- we subsequently put a  
15 term sheet together and proposed it to JPM  
16 that was unfortunately rejected.  
17 Q. You say it's about time that the  
18 seniors figured this out. How long had you  
19 thought that the best resolution of the  
20 estate was a global settlement with JPMorgan?  
21 A. I don't know.  
22 Q. Was it before March of 2009?  
23 A. To put this time frame in context,  
24 your Honor, when we -- when the bank was  
25 seized by the --

1  
2 When the FDIC became the receiver  
3 and sold the bank, WMI had one employee and  
4 he was an interim employee and he was soon to  
5 leave. The bank and the employees and the  
6 financial records went with the transaction.  
7 So WMI had really -- we had to rebuild WMI,  
8 we had to rebuild the financial statements.  
9 And a lot of the things that came  
10 over the course of these two years were  
11 developed as we went because we didn't have  
12 the historical amount of people to go, like  
13 most companies would, and say, "Where are we?  
14 What is our financial position? What is  
15 our -- what are our rights to our assets?"  
16 That was developed over time, because we had  
17 no employees to talk to about that.  
18 Now, we subsequently went out and  
19 hired -- I think we had maybe 20 or 21  
20 employees at the peak of WMI that we had to  
21 hire from people that used to work there or  
22 some outside people, but from the very  
23 beginning this was a very difficult process  
24 to try to understand what rights, what  
25 financial assets, what liabilities we had.

1  
2 So it's hard to put this all in context.  
3 So at this point in time, you know,  
4 as we're continuing to develop financial  
5 information, did we think a global settlement  
6 was the right thing to do at JPM and the  
7 FDIC? Absolutely. It was the only way that  
8 we were going to cleanly take care of this  
9 estate. There was claims, there was  
10 counterclaims. There was very few things in  
11 this entire estate, as Mr. Nelson has put up  
12 earlier. I think there's \$900 million that  
13 was undisputed. Everything else is a fact.  
14 Q. Respectfully, sir, I'm going to  
15 move to strike as nonresponsive.  
16 MR. MASTANDO: Object, your Honor.  
17 JUDGE WALRATH: Overruled.  
18 Q. My question was did you think  
19 before March of 2009 that it was about time  
20 that the seniors figured out the e-mail that  
21 we just saw on the prior page.  
22 A. I -- I think that it stands on its  
23 own. I can't -- that was the e-mail I wrote.  
24 I can't put it in context for you any more  
25 than what you're showing me.

1  
2 Q. How long, how much prior before  
3 March of 2009 did you think that the correct  
4 resolution of the estate was a settlement?  
5 A. I don't know.  
6 Q. Was it the day you were hired?  
7 A. I think the day I was hired, as I  
8 explained earlier, I would think we were more  
9 worried about just trying to sort out what  
10 WMI had. We had one employee. The FDIC was  
11 there. A lot of people. JPM was starting to  
12 take over the banking assets and there was  
13 one employee and one conference room.  
14 Q. So it was not the day you were  
15 hired.  
16 A. I can -- I can assure you it was  
17 not the day I was hired.  
18 Q. Was it a month after you were  
19 hired?  
20 A. I wouldn't be able to put it in  
21 context for you.  
22 Q. In other words, after maybe the  
23 first couple of weeks when you were getting  
24 your feet on the ground, so to speak, you  
25 can't put in any more precise context when

1  
2 you thought specifically that a global  
3 settlement resolution was in the best  
4 interests of the estate?

5 A. As I sit right now with my  
6 recollection, I -- I -- I don't know the date  
7 that we decided -- we thought that the global  
8 settlement agreement would be a good idea.

9 Now, I will say that in a case like  
10 this that a consensual agreement, could you  
11 get there, is -- is something that one might  
12 want to strive for. You need to balance that  
13 with all our potential claims and determine  
14 where we're at in any negotiation.

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

18 A. I don't know. As I sit here today  
19 and I'm -- perhaps you have more e-mails that  
20 will -- that will jog my memory. At this  
21 point I don't know.

22 Q. Well, let's turn to the settlement  
23 term sheet that you offered JPMorgan in March  
24 of 2009. It's Exhibit 36 in your book.

25 Do you recognize that document?

1  
2 A. Yes.

3 Q. This is a document created by  
4 Sullivan & Cromwell and JPMorgan that  
5 summarized your proposals and then give  
6 JPMorgan's counterproposals as of the  
7 following week; is that correct?

8 A. (Reading) I -- I -- I believe that  
9 this summary is (inaudible), yes.

10 Q. I'm going to focus for the moment  
11 on what's entitled WMI Proposal 3/12/09.  
12 Your offer to JPMorgan in March 2009 was that  
13 JPMorgan would pay the entire amount of the  
14 disputed deposit accounts, correct?

15 A. Yes, including post-petition tax  
16 refunds.

17 Q. Well, the post-petition tax refunds  
18 are actually dealt with I think specifically  
19 on the next page, but we'll get to that.

20 But with respect to the deposit  
21 account itself, you had the position, WMI had  
22 the position, that deposit account should be  
23 turned over to WMI. Correct?

24 A. Yeah. I'm just reading the little  
25 A there to you under deposit accounts.

1  
2 Q. The 292 million is not separate  
3 from the deposit account; it's part of it.  
4 Correct?

5 A. Yes.

6 Q. And the final settlement that we're  
7 talking about today, with the exception of a  
8 portion of the post-petition tax refund, you  
9 did receive all of the money in the deposit  
10 accounts. Correct?

11 A. Less the -- less the tax refunds,  
12 which we have separately split.

13 Q. The tax refunds are a separate  
14 issue. With respect to the deposit accounts,  
15 WMI receives every single penny of the  
16 disputed deposit accounts, correct?

17 A. I'm trying to correct you. And  
18 just so that we're on the same page, there  
19 was a post-petition tax refund receipt that  
20 went into the disputed account, so that --  
21 we're not -- we're not getting all of that  
22 money, because we're split -- there is a  
23 split of all post-petition tax refunds  
24 received. So that's my only clarification.

25 Q. Fair enough.

1  
2 With the exception of the  
3 post-petition tax refund that is split  
4 according to the tax refund sharing part of  
5 the settlement agreement, WMI is receiving  
6 everything else within the deposit accounts.  
7 Correct?

8 A. Yes.

9 Q. The next page discusses the trust  
10 securities; is that right? As the first  
11 bullet point?

12 A. Yes.

13 Q. Your proposal is for the trust  
14 securities, the 4 billion dollars, that those  
15 would go to JPMorgan? That was your proposal  
16 as of March of 2009?

17 A. Yes.

18 Q. That is actually how the settlement  
19 agreement allocates the Trust Preferred  
20 Securities, correct?

21 A. That's correct.

22 Q. Okay. Now, the tax we discussed a  
23 part of this before, your proposal was that  
24 WMI takes the \$250 million already received  
25 in the deposit account plus the first

1  
2 \$500 million more. Is that right, with  
3 respect to your first two bullet points?  
4 A. That's correct.  
5 Q. The third bullet point discusses  
6 both the first refund and the potential of a  
7 second refund; isn't that right?  
8 A. Yes.  
9 Q. At this point in March of 2009 the  
10 potential of a second refund was completely  
11 rumor and speculative, correct?  
12 A. We had -- we had heard through  
13 taxing channels that the administration might  
14 be considering this sometime down the line,  
15 so we -- we included it.  
16 Q. Sorry, sir. Let me just repeat my  
17 question so you can answer it yes or no.  
18 In March of 2009 did you consider  
19 the potential of a new tax law to be nothing  
20 more than a rumor?  
21 A. I -- I -- I don't know how else --  
22 I don't know that -- it -- I don't know if  
23 I'd characterize it as a rumor but it  
24 certainly was not enacted in the law in March  
25 of 2009.

1  
2 Q. You did in fact characterize it as  
3 a rumor in your deposition, didn't you?  
4 JUDGE WALRATH: Aren't we getting  
5 into semantics? Is it really relevant  
6 whether it was a rumor?  
7 MR. NELSON: Fair enough, your  
8 Honor.  
9 Q. Let me ask this question.  
10 It's fair to say that in March of  
11 2009 the second refund was not a known hard  
12 asset of the estate or anybody else, because  
13 nobody knew for sure whether it was going to  
14 happen or not.  
15 A. I would agree with that.  
16 Q. Okay. So let's just focus on the  
17 first tax refund, which is the only known  
18 hard asset. Is that okay?  
19 A. Sure.  
20 Q. You'll agree that with respect to  
21 the -- that was at that point the only hard  
22 asset in terms of what could come into the  
23 estate?  
24 A. From a tax standpoint?  
25 Q. Yes.

1  
2 A. Yes.  
3 Q. Your proposal was to take  
4 \$750 million and then the remainder would be  
5 split 60/40 in favor of WMI; is that right?  
6 A. Yes.  
7 Q. The remainder -- well, let's back  
8 up.  
9 The first tax refund was  
10 approximately \$2.7 billion; is that what  
11 you're getting in today for the tax refund?  
12 A. I think that's approximately right.  
13 Q. So if we take out the \$750 million  
14 that WMI would receive first, that would  
15 leave \$1.95 billion, approximately, to split  
16 60/40 between the parties, correct?  
17 A. The only thing I would put in  
18 context was I don't remember what the  
19 estimate of the tax refunds was at that  
20 point.  
21 First of all, I don't believe that  
22 we had completed a tax refund for 2008 at  
23 this point. We're not sure how the second --  
24 the first set of NOLs are. I'm not sure that  
25 we had all of the information yet as of each

1  
2 specific tax refund. So I don't remember --  
3 I think the number we were thinking about,  
4 but what -- the first set of tax refunds was  
5 actually a little smaller than that.  
6 Q. Fair enough.  
7 What I'm trying to use, is use a  
8 set number to compare. And I want to see --  
9 because we know exactly what the tax refund  
10 ends up being. And on the actual amount of  
11 what the tax refund was, the parties would  
12 have split 60/40 about \$1.95 billion as it  
13 turned out, correct?  
14 A. I'm sorry. Could you repeat that?  
15 Q. Sure.  
16 Based upon the \$2.7 billion first  
17 tax refund that did in fact come to the  
18 estate, under this proposal, the remainder to  
19 be split 60/40 would be about \$1.95 billion,  
20 correct?  
21 A. I think that's right, yes.  
22 Q. Okay. 1.95 billion, 60 percent of  
23 that is about \$1.12 billion; is that right?  
24 Let me see. We can do the math,  
25 but is it approximately --

1 Well, let me phrase it differently.

2 In terms of taking the \$750 million  
3 that you were going to receive first, plus  
4 your 60 percent share of the remainder, based  
5 upon what we know to be the tax refund today,  
6 the amount you proposed to JPMorgan in March  
7 of 2009 that WMI would receive approximately  
8 \$1.92 billion; is that right?  
9

10 A. Yes.

11 Q. What was the amount allocated to  
12 WMI with respect to the tax refunds in the  
13 March 2010 first announced settlement?

14 A. It was 70/30 for the first set of  
15 NOLs and -- sorry, for the first set of tax  
16 refund. I misspoke. And then we would  
17 receive 30.4 percent of the second -- of the  
18 second refunds, second NOLs.

19 Q. And that number was equivalent to  
20 about 1.92 billion?

21 JUDGE WALRATH: For both of them?

22 MR. NELSON: The --

23 JUDGE WALRATH: Or for the first?

24 Q. Let me rephrase.

25 A. I'm happy to do the math in my

1 let's -- let's say that that number was -- I  
2 think it was about \$250 million that we had  
3 already received. But let's say that's  
4 another 75 on top of that.

5 Q. Well, you testified before that in  
6 the current agreement you -- the estate was  
7 receiving about \$2.195 billion in tax  
8 refunds, correct?  
9

10 A. I don't remember what the number  
11 was. I think that's right.

12 Q. You've also testified, both here  
13 and in your deposition, in the first  
14 announced settlement the allocation of tax  
15 refunds was about \$300 million less than the  
16 first agreement, correct?  
17

18 A. Yes.

19 Q. Subtracting 2.195 from 300 --  
20 excuse me, 300 million from 2.195 is about  
21 \$1.95 billion, correct?

22 A. Using that math, yeah, I agree with  
23 you.

24 Q. Using that math, the amount that  
25 WMI proposed to JPMorgan in March 2009 of  
known tax assets was essentially equivalent

1 head.

2 Q. The combined amount of tax refunds  
3 that JPMorgan -- excuse me, let me rephrase.

4 The combined amount of tax refunds  
5 allocated to WMI in the first announced  
6 settlement in March 2010 was approximately  
7 1.92 -- 1.95 billion dollars, correct?  
8

9 THE WITNESS: Your Honor, let's  
10 just try to do that math together.

11 So it's 30 percent of the first set  
12 of tax refunds, which we believe is  
13 \$3 billion, so that's 900 million, plus  
14 40 percent of 2.8 billion, so I think  
15 that's 1.12. I don't have a calculator  
16 in front of me. So I think that total  
17 number is a little over \$2 billion.

18 Q. 1.12 plus 30 percent of at the time  
19 was what -- you said 800 million? Your share  
20 was 800 million?

21 A. 900 million.

22 Q. I'm sorry.

23 A. Plus, plus, there was obviously  
24 some taxes that were already received, of  
25 which we would get 30 percent of that. So

1 to the amount that WMI received a year later  
2 in the March 2010 announced settlement,  
3 correct?  
4

5 A. That's correct. The only context I  
6 would put that in is if you look to the other  
7 box, I believe JPMorgan said we should get  
8 zero.

9 Q. Oh, as I understand, that was a  
10 disputed asset. Correct?

11 A. The tax? Not the tax. I'm just  
12 saying in their counterproposal about that  
13 time, they -- we were pretty far apart.

14 Q. Understood. Thank you.

15 Let's go to the goodwill  
16 litigation. What did the goodwill litigation  
17 refer to? Is that just -- in March 2009 and  
18 this. Was that just the American Savings or  
19 was that also Anchor?

20 A. I believe that we referred to them  
21 together.

22 Q. Okay. My confusion only is that  
23 it's the litigation as opposed to litigations  
24 and the box from JPMorgan -- well, it's  
25 confusing.



1  
2 So to the best of your knowledge  
3 you think it's both litigations at this  
4 point, correct?

5 A. I think that's the way we've  
6 referred to it.

7 Q. In March of 2009, with respect to  
8 the Anchor Savings litigation, there was a  
9 judgment in the court of federal claims for  
10 \$356 million, correct?

11 A. I don't know.

12 Q. Well --

13 A. I don't recall that at that point  
14 in time.

15 Q. Okay. The disclosure statement  
16 would reveal that approximately \$356 million  
17 was the judgment in the court of federal  
18 claims. We don't have to look it up. I  
19 think the disclosure statement will speak for  
20 itself. You understand that the \$356 million  
21 judgment was still on appeal at that point,  
22 correct?

23 MR. MASTANDO: Objection, your  
24 Honor. The witness already testified he  
25 wasn't aware of it.

1  
2 will be receiving that in the global  
3 settlement agreement, yes.

4 Q. Okay, so let's -- taking solely  
5 where we are so far. The differences  
6 between -- and just looking at the bullet  
7 points, between the current settlement and  
8 your first proposal are, number one, with  
9 respect to the taxes, WMI is receiving  
10 approximately 270 to 300 million dollars  
11 less, proposed to receive 270 to 300 million  
12 dollars less in this offer than it's  
13 currently receiving. Correct?

14 A. I would agree.

15 Q. And with respect to the goodwill  
16 litigation, it is not receiving the -- what  
17 was at the time a district court, court of  
18 federal claims, judgment of \$356 million.  
19 Correct?

20 A. As reconciled between this term  
21 sheet and the ultimate settlement, I -- I  
22 agree.

23 Q. Okay. The rabbi trust -- and the  
24 following are the BOLI/COLI rabbi trust  
25 issues. These were eventually how they were

1  
2 JUDGE WALRATH: Were you aware?

3 THE WITNESS: No.

4 Q. You don't know the status of the  
5 procedural history of the --

6 A. That's what I'm testifying to, I --  
7 I -- if it's in the disclosure statement,  
8 then I -- I -- I apologize for not recalling  
9 it as I'm sitting here right now.

10 Q. Okay, fair enough.

11 The American Savings litigation,  
12 excuse me, the American Savings litigation  
13 says 500 million and actually I should put  
14 Anchor Savings litigation. The American  
15 Savings is 55 million; is that right?

16 A. That's right.

17 Q. Okay. So the combined --  
18 essentially if you take the 356 judgment and  
19 the 55 at this point is approximately  
20 \$410 million or so.

21 A. Sure. Yes.

22 Q. At the end of the settlement, WMI  
23 did in fact receive the \$55 million judgment  
24 from American Savings, correct?

25 A. That's right. That's -- we -- WMI

1  
2 distributed to the final settlement plan,  
3 correct?

4 A. No.

5 Q. What's the difference?

6 A. Oh, wait. Sorry. That line item.  
7 I'm sorry.

8 Q. With respect to --

9 A. The rabbi trust, yeah. I was  
10 thinking about the split policies and  
11 everything else, but I see those are below  
12 that.

13 Q. Okay. The rabbi trust, that's how  
14 it ended up in the final settlement  
15 agreement?

16 A. To the best of my knowledge.

17 Q. The split dollar policies, how did  
18 that end up? You're not -- the estate's not  
19 receiving the split dollar policies, is it?

20 A. I believe the \$48 million is where  
21 we sit even though it was disputed, was a  
22 split dollar policy.

23 Q. Okay.

24 A. I can't remember it's a slit dollar  
25 policy or BOLI/COLI.

1  
 2 Q. That's a disputed PAC life policy?  
 3 A. That one.  
 4 Q. So with respect to the split dollar  
 5 policies, those are all going to JPMorgan.  
 6 Correct?  
 7 A. I think this is the way it ended  
 8 up, yes.  
 9 Q. With respect to all four of these,  
 10 this is the way it ended up in the final  
 11 current proposed settlement?  
 12 A. I believe so.  
 13 Q. Okay, let's go to the next page.  
 14 The Visa shares WMI transferred to  
 15 (inaudible) with associated liabilities,  
 16 that's how it ended up, correct?  
 17 A. Plus JPMorgan paid \$25 million for  
 18 that.  
 19 Q. Okay. We'll get to that in a  
 20 second, but in terms of what actually  
 21 happened to the Visa shares, those are going  
 22 to JPMorgan, correct?  
 23 A. Correct.  
 24 Q. Pension plan, your proposal on  
 25 March 2009 was for that to go to JPMorgan.

1  
 2 That's the way it turned out, correct?  
 3 A. That's correct.  
 4 Q. Contracts and licenses, this is  
 5 essentially similar to how it ended up  
 6 subject to, I'm sure, lots of back-and-forth  
 7 negotiation about the this and the that, but  
 8 essentially it is how it was reflected in the  
 9 current agreement?  
 10 A. I think so, subject to the dis-  
 11 (inaudible) amount.  
 12 Q. And the licenses and intellectual  
 13 property, that is transferred to JPMorgan?  
 14 A. Yes.  
 15 Q. The claims for pre-petition  
 16 payments that JPMC to waive, that was your  
 17 proposal in March 2009 and that was also the  
 18 way it ended up, correct?  
 19 A. I just need to look at the rest of  
 20 this, if you don't -- (Reading).  
 21 That's not how it ended up.  
 22 Q. How did that end up?  
 23 A. JPMorgan paid \$50 million on  
 24 account of the pre-petition members' numbers.  
 25 Q. So from the final settlement as

1  
 2 comparison to the current settlement, you're  
 3 getting \$50 million more than what's here  
 4 correct?  
 5 A. Correct.  
 6 Q. Tower insurance, you propose that  
 7 WMI takes priority claim status on D&O type  
 8 policies.  
 9 I believe in the current proposed  
 10 settlement you are getting mostly priority  
 11 but JPMorgan is get some priority. Is that  
 12 right?  
 13 A. I believe the FDIC is.  
 14 Q. Excuse me. WMI is not taking  
 15 priority.  
 16 A. No. WMI, I believe we have  
 17 priority on one claim and then the rest is  
 18 (inaudible) with the FDIC as we defined it.  
 19 Q. Okay. So if the \$50 million you  
 20 got more for the claims pre-petition payments  
 21 it's fair to say that there was some  
 22 reduction in your settlement here for the  
 23 Tower Insurance policies to some degree.  
 24 A. Probably not.  
 25 Q. You're saying it takes priority

1  
 2 claim on all Tower Insurance D&O policies?  
 3 A. We were able to put our biggest  
 4 claim against this. I don't know if we have  
 5 other claims, potential claims, against this  
 6 or not but the D&O policy is this --  
 7 This Tower references both WMI and  
 8 WMB anyway. So, you know, I'm not sure I  
 9 took a reduction in value.  
 10 Q. You're talking about the  
 11 \$20 million ERISA settlement; is that what  
 12 you're referring to?  
 13 A. I can't remember the amount before,  
 14 what exactly we put against it. I think it's  
 15 more in the 50 to 60 million dollar range.  
 16 Q. Okay. So the 50-60 million dollar  
 17 range that you're not receiving a settlement  
 18 certainly because it's been a settlement now.  
 19 Correct?  
 20 I'm sorry. Let me repeat that.  
 21 The 50 to 60 million dollar  
 22 settlement is obviously taken out of Tower  
 23 Insurance, correct?  
 24 A. That's correct.  
 25 Q. So the \$50 million, in the current

1  
2 agreement what WMI is getting is  
3 approximately 50 to 60 million dollars less  
4 in the current agreement than what it was at  
5 the time of March to 2009.

6 A. No. No. We didn't have -- the --  
7 WMI and WMB were splitting this  
8 policy, right? So we both have rights to it.  
9 I don't know that we have any more other  
10 claims that could go against this policy.

11 Q. Okay.

12 A. That's --

13 Q. Fair enough. Let's move on.

14 Intercompany notes, this is how it  
15 turned out. JPMorgan was paying the  
16 intercompany notes totaling 168. It's a  
17 little bit now with interest. Correct?

18 A. Correct.

19 Q. And JPMorgan is forgiving the  
20 \$270 million; is that correct?

21 A. That's correct.

22 Q. Finally the third party loans,  
23 there's a \$24 million payment for principal  
24 and interest. How did that turn out?

25 A. I think we ended up keeping that

1  
2 Q. In the first announced settlement  
3 in March of 2010, JPMorgan was going to pay  
4 \$50 million for the Visa shares, correct?

5 A. That's correct. And that is an  
6 interesting coincidence but I don't remember  
7 that being what the \$50 million was for.

8 Q. With respect simply to your offer,  
9 WMI's offer to JPMorgan in March of 2009, is  
10 it fair to say that, generally speaking,  
11 within some rounding error, what -- the  
12 amount received in the current proposed  
13 settlement for the categories that we've  
14 discussed is essentially equivalent to the  
15 current proposed settlement?

16 MR. MASTANDO: Objection, your  
17 Honor.

18 JUDGE WALRATH: You can answer.

19 A. Again, I haven't had -- other than  
20 having this nice exchange with you. So I  
21 don't know -- I don't know. It seems to be  
22 from the numbers that you've described, you  
23 know, that they seem to be close but I  
24 couldn't give you an exact answer.

25 Q. Okay.

1  
2 and they're going to service it.

3 Q. Okay. And then JPMorgan proposes  
4 \$50 million cash payment to WMI, correct?

5 A. That's not on our column here.

6 Q. I understand. So let me just --  
7 JPMorgan --

8 A. Can I go into some of the other  
9 columns, what they provide?

10 Q. Well, can you bear with me for a  
11 second?

12 A. Sure.

13 Q. With respect to this cash payment  
14 there is -- JPMorgan is proposing a  
15 \$50 million payment to -- for cash payment as  
16 well; is that right?

17 A. That's what it says, yes.

18 Q. Okay. Was that the cash payment  
19 that turned out to be the cash payment for  
20 the Visa shares?

21 A. No -- I don't -- I don't know. I  
22 don't know if it's that, if it's the -- it  
23 could be the payables. It could be --

24 I -- I just don't remember at that  
25 point in time what the 50 was for.

1  
2 You did not value individual pieces  
3 of the settlement agreement, did you?

4 A. I think that what I've testified to  
5 and been deposed on is that for the assets  
6 received, the 6.1 -- the \$6.8 billion, which  
7 we -- we certainly can add those dollars up  
8 and there's a value associated with that.

9 As it relates to the claims, some  
10 of the claims we're releasing, we have not  
11 put an exact dollar value on that in  
12 discussions with counsel. Those are  
13 privileged. So I think that was what I said  
14 in my testimony now.

15 There are some other things,  
16 obviously, that we would consider, as well as  
17 stated claims that JPMorgan has in our  
18 estate, the FDIC has, the bank bondholders  
19 have. So I guess, you know, with a full  
20 adding up of everything we've gotten and  
21 everything that we've had released, I haven't  
22 added all that up. We -- we certainly can go  
23 through that exercise.

24 Q. Well, in your deposition --

25 Just to be clear, I'm reading from

1  
2 page 215, line 2. This is your answer.  
3 "Answer: Again, we did not value  
4 individual pieces of this settlement  
5 agreement. It's always been viewed as a  
6 collective as a whole agreement."

7 You agree with that?

8 A. If you don't mind.

9 MR. MASTANDO: Objection to the  
10 form, your Honor.

11 A. Can I see the question I was  
12 answering?

13 MR. MASTANDO: Yeah, I think that's  
14 appropriate.

15 "Question: Is there any  
16 consideration that was identifiable as  
17 being related to the Texas litigation.

18 "Answer: You mean in the context  
19 of a settlement agreement?"

20 "Question: Yes, sir.

21 "Answer: Again, we did not value  
22 individual pieces of the settlement  
23 agreement. It's always been viewed as a  
24 collective, as a whole agreement."

25 Do you stand by that answer.

1  
2 And the next thing also to consider  
3 was, we also got significantly more tax  
4 dollars, tax refund dollars, as we went from  
5 50 to 25. So, again, one needs to take these  
6 things as a whole, not parse out individual  
7 facts.

8 Q. And that's all I was trying to ask.  
9 The taking it as a whole, the reason why the  
10 Visa share purchase price dropped from  
11 \$50 million to \$25 million was not because  
12 you had a change in what you believed to be  
13 the strength or weakness of your claim,  
14 correct?

15 A. I got more tax dollar -- we got a  
16 bigger share of the taxes and in return we  
17 reduced the price of the visas from 50 to 25.  
18 On a net basis, we got more value.

19 Q. Got it.

20 MR. NELSON: Your Honor, would you  
21 like me to keep on going? It's a  
22 breaking point and so I'm happy to keep  
23 on going at the court's pleasure.

24 JUDGE WALRATH: We can break now  
25 and come back at 1:30 if that works for

1  
2 A. Absolutely. We -- they -- the  
3 question that was answered in that deposition  
4 was what value did I get or did we get for  
5 the ANICO litigation and what the answer was,  
6 you have to look at the global settlement as  
7 a whole. There's no parsing it out this  
8 piece, we got this piece, we got that. It's  
9 a global settlement statement. It stands on  
10 its own. There are assets coming in, there  
11 are liabilities being taken by other parties  
12 and there's releases of claims.

13 Q. To take an example, the difference  
14 between 25 and 50 million dollars for the  
15 Visa shares, that's not because you decided  
16 the Visa shares were suddenly less valuable  
17 in between March and May of 2010, correct?

18 A. I think again let's put that in  
19 context. When -- when JPMorgan was talking  
20 about the value of the shares, they were also  
21 taking the interchange liability, which I  
22 believe has claims of \$5 billion in our  
23 state, they were taking the lot sharing  
24 agreement as well. So that's two things to  
25 consider with your statement.

1  
2 the parties.

3 You're still under oath so you  
4 should not -- you're on cross. You  
5 should not discuss your testimony with  
6 counsel. All right.

7 (Recess taken.)

8 MR. STROCHAK: Can I just get a  
9 sense from counsel as to how long they  
10 anticipate cross-examination with this  
11 witness? Just so we can know who to  
12 have here next.

13 MR. NELSON: Sure. I expected that  
14 the whole thing would take about an hour  
15 but the lack of yes or no answers has  
16 been --

17 JUDGE WALRATH: How much longer do  
18 you have?

19 MR. NELSON: I would expect, your  
20 Honor, to be about -- hopefully about  
21 30 minutes, but it partly depends on the  
22 witness's answers.

23 JUDGE WALRATH: And the other  
24 intent of the cross?

25 MR. STOLL: We'll have at least a

1  
2 half an hour.

3 A VOICE: I will have 30 minutes,  
4 your Honor.

5 JUDGE WALRATH: All right.

6 MR. STROCHAK: We'll plan for an  
7 hour and a half.

8 JUDGE WALRATH: Okay. We'll stay  
9 in recess until 1:30.

10 (Luncheon recess taken at  
11 12:25 p.m.)

12 THE DEPUTY: All rise. You may be  
13 seated.

14 JUDGE WALRATH: All right, you may  
15 proceed with across.

16 MR. NELSON: Thank you, your Honor.  
17 W I L L I A M K O S T U R O S , resumed.

18 as a witness, having been previously  
19 sworn by a Notary Public, was examined  
20 and testified further as follows:

21 EXAMINATION (Cont'd)

22 BY MR. NELSON:

23 Q. Mr. Kosturos, during the break did  
24 you speak to anyone about the substance of  
25 your testimony?

1  
2 hired, had your attorneys provided you any  
3 written work product with respect to the  
4 fraudulent transfer claims for the capital  
5 contributions?

6 A. I don't recall any.

7 Q. Prior to April 2009 had your  
8 attorneys or you undertaken any work product  
9 analysis of the solvency of WMI?

10 Again, just yes or no.

11 A. I can't remember when we started  
12 potentially looking at that. I don't  
13 remember if it was April 2009 or later.

14 MR. NELSON: May I approach the  
15 bench for a moment?

16 JUDGE WALRATH: You may.

17 (Messrs. Mastando and Nelson  
18 approached the bench for an  
19 off-the-record discussion.)

20 Q. Mr. Kosturos, do you recall the  
21 solvency analysis that your company did was  
22 dated August of 2009? Does that refresh your  
23 recollection?

24 A. Yes. I'm just saying when did we  
25 begin, and that was the thing I was --

1  
2 A. No.

3 Q. Do you recall that we were  
4 discussing the March 2009 term sheet that you  
5 provided to JPMorgan? Correct?

6 A. Correct.

7 Q. You testified briefly you hired by  
8 Quinn Emanuel in April of 2009; is that  
9 right?

10 A. Yes.

11 Q. Before that point the debtors'  
12 attorneys were Weil Gotshal and Richards  
13 Layton, right?

14 A. Those were our primary Chapter 11.  
15 We had some other law firms that were -- that  
16 were retained, but certainly not in the world  
17 that those two were.

18 Q. Prior to 2009, did Richards Layton  
19 ever provide you with any written work  
20 product?

21 I'm just looking for a yes or no  
22 answer. I don't want to get into the  
23 substance of the communications.

24 A. I -- I don't remember.

25 Q. Prior to April 2009, when Quinn was

1  
2 I couldn't remember exactly when  
3 that -- I believe we called it a review, but  
4 when this review had started. So that was  
5 the only thing. I was a little unclear when  
6 we commenced it.

7 Q. You completed your solvency  
8 analysis in August of 2009; is that right?

9 A. I think there was a draft. I don't  
10 remember if whatever document our referring  
11 to was the final version of that or was it,  
12 you know, an interim preliminary version. I  
13 can't remember the exact date that we  
14 completed it.

15 Q. Again, without getting into the  
16 analysis or work product, was it Quinn who  
17 instructed you to create the solvency  
18 analysis? Was it your litigation counselors?

19 A. Yes.

20 Q. So, in other words, it would have  
21 to have been after April of 2009.

22 A. I would -- I would agree.

23 Q. Okay. Prior to April 2009, had  
24 your attorneys provided you any written work  
25 product with respect to the intellectual

1  
2 property claims?  
3 A. I don't remember when we -- when  
4 we -- when we completed that analysis or when  
5 we -- when we started it.

6 Q. You understand again without  
7 talking about the substance, you understand  
8 there was an intellectual property report?

9 A. Yes.

10 Q. You understand that was dated  
11 August of 2009, approximately, correct?

12 A. Correct. Again, I just don't  
13 remember when we -- when we -- when we first  
14 hired them and started that, so I -- I -- I  
15 don't remember.

16 Q. Was the decision to make an  
17 intellectual property evaluation, again  
18 without getting into the substance and  
19 without any waiver, was that also through  
20 litigation counsel and Quinn?

21 A. That I can't be certain of, because  
22 I can't remember if we started that before  
23 Quinn was retained or not.

24 Q. You do remember that at least you  
25 hadn't received any report until August of

1  
2 2009.

3 A. Right. But as you can well imagine  
4 those reports take some time to complete.

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

8 A. No.

9 Q. It's also true that to this day you  
10 still have not completed an analysis of the  
11 tax refund claim, correct?

12 A. In my deposition I stated that we  
13 have not completed it, but what -- we have  
14 done a significant amount of work as it  
15 relates to the tax refunds.

16 What I was referring to in the  
17 deposition that wasn't complete was really  
18 kind of tying out the debits and credits to  
19 flow back and forth between WMI and WMB. We  
20 have a very good sense of where we stand with  
21 our potential claims against WMB, i.e.,  
22 JPMorgan, should this settlement agreement  
23 not be completed, but -- but I was -- there  
24 has been an enormous amount of work completed  
25 as it relates to that.

1  
2 Q. You did testify in your deposition  
3 that the analysis has not been completed,  
4 correct?

5 A. I did.

6 Q. The analysis that you undertook  
7 about the value of that claim was done with  
8 the analysis and support of counsel, correct?

9 A. I believe that most of that, if not  
10 all of that, analysis was completed by the  
11 A&M tax department as well as the WMI tax  
12 department. And then -- we would do that  
13 analysis on our own and then as we had  
14 potential issues that arose arise out of  
15 that, that we would be thinking about, then  
16 we would discuss that sometimes with counsel.

17 Q. You consulted with counsel about  
18 the value of that tax refund claim, correct?

19 A. Only as it related to a couple of  
20 very specific items.

21 Q. You didn't get counsel's input at  
22 all with respect to the tax refund claim?

23 A. Primarily that is work product that  
24 was -- that was completed by WMI and A&M.  
25 Because it all flows into the tax return, all

1  
2 of that, the supporting schedules, the  
3 analysis, was all completed by A&M and WMI.

4 Q. Weil -- again without getting into  
5 the substance, Weil and Quinn both undertook  
6 analysis about the worth of the tax refund  
7 claim, correct?

8 A. I would -- I would say all of that  
9 analysis was completed by the financial team  
10 and relied upon from the finance team.

11 Q. It's your testimony under oath that  
12 neither Weil nor Quinn ever created any  
13 document with respect to a  
14 strength/weaknesses analysis and likely  
15 outcomes of tax refund claim?

16 MR. MASTANDO: Objection. I don't  
17 think that's been testified.

18 JUDGE WALRATH: You guys speak into  
19 the microphone.

20 MR. MASTANDO: I'm just objecting  
21 because I don't think that was his  
22 testimony. It's been asked and answered  
23 several times.

24 JUDGE WALRATH: Yes. Sustained.

25 Q. JPMorgan rejected that March offer,

1 correct?  
 2 A. Yes.  
 3 Q. Moving forward, I think you  
 4 testified previously that the negotiations  
 5 were reinvigorated by a possibility of a  
 6 second tax settlement. Correct?  
 7 A. Yes. I mean, we kept in  
 8 communications throughout that. There really  
 9 wasn't much movement from JPMorgan's position  
 10 of -- you know, we might have exchanged a  
 11 term sheet or two that really had no movement  
 12 to it, but then in the summer or early fall  
 13 of 2009, yes, they restarted again.  
 14 Q. The creditors were involved in  
 15 reinvigorating these negotiations, correct?  
 16 A. Yes, certain of -- a couple of the  
 17 creditors, yes.  
 18 Q. In fact, it was I think the  
 19 creditors who sent the term sheet to  
 20 JPMorgan. Isn't that right?  
 21 A. Yes, it was, actually.  
 22 Q. It's fair to say that the creditors  
 23 and the senior note holders certainly don't  
 24 owe any fiduciary obligation to equity  
 25

1 (inaudible), correct?  
 2 MR. MASTANDO: Objection, your  
 3 Honor.  
 4 JUDGE WALRATH: Well, it calls for  
 5 a legal conclusion, doesn't it?  
 6 Q. Well, let me rephrase.  
 7 Are you aware, based on your  
 8 experience as chief restructuring officer in  
 9 this case and your prior history of being  
 10 involved in bankruptcy whether senior  
 11 creditors owe a duty to (inaudible). If you  
 12 can answer based on your own personal  
 13 experience.  
 14 JUDGE WALRATH: Yeah, I'll sustain  
 15 the objection.  
 16 MR. NELSON: Fair enough.  
 17 Q. It is true that both you and  
 18 JPMorgan had certain goals regarding the  
 19 potential outcome of the settlement, correct?  
 20 A. I don't -- I don't understand your  
 21 question.  
 22 Q. Were there any particular metrics  
 23 by which you and/or JPMorgan needed to make a  
 24 settlement work.  
 25

1  
 2 A VOICE: Objection. Calls for  
 3 speculation as to JPMorgan.  
 4 JUDGE WALRATH: Sustained as to  
 5 JPMorgan.  
 6 A. As it relates to WBI, as a debtor  
 7 our goal is to maximize the value of the  
 8 estates. There was no goal to say when was  
 9 enough. We tried to get as much as we could,  
 10 and I think that's what we accomplished in  
 11 this deal.  
 12 Q. You did have negotiations with  
 13 JPMorgan, correct?  
 14 A. There was -- it was really at the  
 15 end the three-way negotiation between FDIC,  
 16 WMB and JPMorgan. And one of the wonderful  
 17 things about a three-way negotiation is that  
 18 any time two of the parties can exert  
 19 leverage on the other.  
 20 Q. My question was actually much more  
 21 simple. You and JPMorgan had communications  
 22 about with the settlement, correct?  
 23 A. Yes.  
 24 Q. At any point in those, did JPMorgan  
 25 ever express to you as part of the settlement

1 negotiations any particular metrics or goals  
 2 that it needed to establish?  
 3 A. I wouldn't know what JPM's metrics  
 4 were in this negotiation.  
 5 Q. Would you turn to Exhibit 47 in the  
 6 notebook, please. And it's the second page,  
 7 on 990. There's an e-mail exchange and you  
 8 ask JPMorgan where is the proposed hundred  
 9 million going. The bondholders. I don't see  
 10 why this is negotiable.  
 11 And you see JPMorgan's response  
 12 which is underlined that says, "I am happy to  
 13 have you negotiate down as long as we stay  
 14 heads up like we discussed." Did you  
 15 understand what you were referring to?  
 16 A. Yes, I do.  
 17 Q. What does that mean?  
 18 A. In the term sheet, in -- there's --  
 19 there's quite a lot of term sheets here, but  
 20 one term sheet in particular is a structure  
 21 that talked about where any settlement to the  
 22 bank bondholders up to \$500 million would be  
 23 split 50/50.  
 24 That was within the context of that  
 25

1  
2 that this was being discussed. It was an  
3 offer we received from the bank bondholders  
4 to settle their claims at a point in time.  
5 We were unwilling to go forward with the  
6 hundred. JPMorgan wanted to go forward with  
7 the hundred. I wanted it negotiated down.  
8 And the response back from Mr. McCree was  
9 "Well, if you negotiate it down," as part of  
10 the 50/50 that's in the term sheet, that's  
11 what he was referring to.

12 Q. In other words, I don't want to  
13 mischaracterizes your testimony -- it's  
14 before that integrative whole in one piece  
15 moves here, it has certain ramifications  
16 later on? Or is this purely relating to the  
17 bondholder issue?

18 A. That is purely related to the  
19 bond --

20 And, most importantly, it's a point  
21 in time where that within this term sheet --  
22 and again, we walked away from this term  
23 sheet. But at the time there was a mechanism  
24 where if we were going to take, accept money  
25 and try to settle with the bank bondholders

1  
2 MR. NELSON: (Handing.)  
3 Q. On the attached page 179 he's asked  
4 a question about what WaMu's position was  
5 with respect to the tax assets and he goes  
6 on, there is a percentage split. And then he  
7 says on line 8, "I should characterize that  
8 very little of the term sheet discussion  
9 related to the merits of the individual  
10 assets but rather it was an effort, certainly  
11 on the part of a lot of funds that were  
12 trying to be part of the settlement, to  
13 achieve certain hurdles of return."

14 Do you agree with that?

15 A. I wouldn't understand the context  
16 of this statement.

17 Q. Well, did you discuss the merits of  
18 litigation positions with your counterparts  
19 at JPMorgan?

20 A. I don't remember discussing our  
21 merits with JPMorgan. Certainly there would  
22 be, in conversation as we were negotiating,  
23 what potential positions could be, what  
24 potential defenses could be, but I don't  
25 remember having a very detailed discussion

1  
2 and the FDIC. It was just an iteration of a  
3 term sheet that ultimately didn't work. So  
4 it was part of a negotiation at that specific  
5 time.

6 Q. Are you aware who Travis Epes is?

7 A. Yes.

8 Q. Who was Travis Epes?

9 A. He worked for JPMorgan. I believe  
10 he works in their general counsel's office.

11 Q. You are aware that he was  
12 designated as JPMorgan's corporate  
13 representative with respect to the settlement  
14 negotiations for purposes of plan  
15 confirmation?

16 A. I was aware of that.

17 Q. Have you reviewed his deposition  
18 testimony?

19 A. I have not.

20 Q. Are you aware about what he said  
21 about some of the negotiations between WMI  
22 and JPMorgan?

23 A. I am not.

24 MR. NELSON: Approach, your Honor?

25 JUDGE WALRATH: You may.

1  
2 about merits.

3 Q. Let me turn your attention to  
4 page 180 starting on line 10. You see where  
5 it says there were many discussions? This is  
6 his answer:

7 "So there were many discussions  
8 about the split of assets that were more  
9 tilted towards how much and who gets  
10 what, rather than the underlying -- you  
11 asked about our position with respect to  
12 taxes. Taxes were really almost a  
13 currency by which various parties could  
14 be allocated value to reach a  
15 settlement.

16 "Okay, and that was the tenor of  
17 the discussion relating to taxes for the  
18 whole period?

19 "Answer: I believe there was  
20 probably some merit-based discussion  
21 with counsel thrown in as well.

22 "Question: But you don't recall  
23 specifically any of those?

24 "Answer: Not specifically.

25 "Question: You weren't present



1  
2 during any of those?  
3 "Answer: No."  
4 Travis Epes was the lead negotiator  
5 for JPMorgan, correct?  
6 A VOICE: Objection.  
7 JUDGE WALRATH: Overruled. I think  
8 we're going to get it.  
9 Q. Travis Epes was not --  
10 A. He was one of the lead negotiators  
11 for JPMorgan. Dominic Fried (ph.) was  
12 undoubtedly the lead negotiator. Travis Epes  
13 would be on the phone and in meetings. And  
14 there were others that were there as well.  
15 Q. Based on your experience then, I  
16 think you've said this, but you don't  
17 disagree with Mr. Epes that in the course of  
18 negotiations, the actual merits of the  
19 underlying assets rarely came up. Correct?  
20 A. Completely disagree.  
21 Q. Okay. During the settlement  
22 negotiations you didn't discuss the business  
23 tort claim with JPMorgan, did you?  
24 A. In the context -- in the context of  
25 discussions the ANICO litigation was out

1  
2 there. And the ANICO litigation is  
3 effectively a business I would -- as a  
4 non-lawyer I would say that contained a lot  
5 of potential business tort claims.  
6 It was well known to JPMorgan if we  
7 were to bring suit and claims where those  
8 claims would come from, what potentially they  
9 would look like. Obviously without discovery  
10 at the time the form of the claim could  
11 change, but I think JPMorgan was well aware  
12 of potential claims that we -- that WMI could  
13 bring.  
14 Q. You did not have any discussions in  
15 detail with JPMorgan about the business tort  
16 claims, did you?  
17 A. I -- I -- I don't -- I -- I -- if  
18 you want to point me to the deposition, that  
19 would be great, but I'm -- as I'm sitting  
20 here, from -- if -- if what oyour talking  
21 about is businessperson to businessperson  
22 would it come up, sure. They would ask --  
23 the context of "Oh, oyour going to sue me?"  
24 Of course we are if we don't have a  
25 settlement agreement. We'll pursue all of

1  
2 our claims.  
3 In the -- in that context,  
4 absolutely it came up. A detailed discussion  
5 of the -- of the business tort claims I don't  
6 believe was had with JPMorgan.  
7 Q. And just to confirm here, you -- in  
8 fact in your deposition that was asked to  
9 you, on page 262, line 22:  
10 "Question: During settlement  
11 discussions did you discuss the business  
12 tort claim with JPMC?  
13 "Answer: Not in any detail, no."  
14 MR. MASTANDO: Objection, your  
15 Honor, consistent with the --  
16 JUDGE WALRATH: Overruled.  
17 Q. At the top of the next page:  
18 "Did you discuss them with the  
19 FDIC?  
20 "Answer: Not in any detail."  
21 That's your testimony, correct?  
22 A. In my deposition, yes.  
23 Q. And still today?  
24 A. I -- I think that what I just said  
25 is fairly consistent with that. It would

1  
2 come up in conversations and we would not  
3 have specific detail about what consisted of  
4 business tort claims.  
5 Q. It's true that if creditors did not  
6 care about a specific particular asset, WMI  
7 did not fight (inaudible). Correct?  
8 A. Disagree.  
9 Q. Let's turn to Exhibit 34 in your  
10 book. This is an e-mail from Brian Rosen to  
11 counsel for the creditors and you are cc'd;  
12 actually to you as well, correct?  
13 A. That's right.  
14 Q. Mr. Rosen answers and says,  
15 responding to the e-mail, "The biggest issues  
16 in your e-mail were the two economic ones,  
17 the price on the Visa shares and the .5  
18 percent. On the first I cannot help you and  
19 Bill must respond. On the second your client  
20 said they did not care about that long ago  
21 and what if JPM gives that all away."  
22 That conversation occurred between  
23 you and the creditors committee, correct?  
24 Excuse me. The senior note holders?  
25 A. Do you mind if I just take a minute

1  
2 and read it?  
3 Q. Of course.  
4 A. Thank you. (Reading).  
5 I'm sorry. I'm finished. Thank  
6 you.  
7 Q. Okay. I'm sorry. I think there is  
8 a question pending. You agree that there  
9 were conversations between the senior note  
10 holders and WMI about what if JPM gives it  
11 all away, correct?  
12 A. (Reading).  
13 That's what this e-mail references.  
14 I don't know what context it's in. And based  
15 on the date of this e-mail, this is very  
16 close to the filing of the first global  
17 settlement and I just don't really completely  
18 know what the context of this e-mail is.  
19 Q. You are aware that Fried, Frank --  
20 I think you testified before that it  
21 represented two of the hedge funds. It was  
22 representing some of the major senior note  
23 holders by this point representing all four  
24 by March of 2010, the hedge fund?  
25 A. Yeah, at this point I believe Owl

1  
2 Creek (inaudible).  
3 Q. If you want, turn to Exhibit 2,  
4 which is the settlement agreement, and it's  
5 Exhibit C1.  
6 Appaloosa, one of the four hedge  
7 funds that Fried, Frank represented, had  
8 290 million of senior notes, 584 million of  
9 senior subordinated notes and 371 million of  
10 allowed PIERS, correct (sic)?  
11 A. Yes, that's what the document says.  
12 Q. Another one of Fried, Frank's  
13 clients, Centerbridge (ph.), had 275 million  
14 of senior subordinated and 69 million of  
15 allowed PIERS. Is that consistent?  
16 A. Yes.  
17 Q. Third, Aurelius had 78 million in  
18 allowed senior notes and 210 million in  
19 allowed senior subordinated and 128 in  
20 allowed PIER claims, correct?  
21 A. That's what the document says,  
22 correct.  
23 Q. Owl Creek, the fourth of their  
24 clients, two senior notes and 279 in senior  
25 subordinated notes and 250 million in allowed

1  
2 PIERS; is that correct?  
3 A. That's what the document says, yes.  
4 Q. This, by the way, those numbers are  
5 before post-petition interest, right?  
6 A. I think that's just the -- yeah,  
7 the par value of their claim.  
8 Q. Okay. So in terms of actual  
9 recovery of what these four hedge funds  
10 represented by Fried, Frank would receive, he  
11 would have to include the post-petition  
12 interest to get a total amount of the  
13 percentage of the estate, correct?  
14 A. For -- for each of the levels, yes.  
15 Q. These hedge funds urged you to  
16 create a reorganized company for -- to take  
17 advantage of the debtors' NOL; isn't that  
18 right?  
19 A. We had several discussions with  
20 them about that, sure, yes.  
21 Q. You wanted to make sure that any  
22 proposed term sheet had the support of major  
23 creditor constituencies, correct?  
24 A. Well, I think at the end of the day  
25 the debtors' responsibility again is to

1  
2 create as much value as we can. There were  
3 many creditor groups involved. The creditors  
4 committee was very actively involved. The  
5 White & Case senior note holders were very  
6 involved. The Fried, Frank group was very  
7 involved.  
8 At the end of the day, it's  
9 important for the debtor to maximize as much  
10 value as we can. Where the dollars stopped  
11 on the waterfall really would -- really  
12 didn't matter. What ultimately was the  
13 debtors' test was to try to create as much  
14 value as we can.  
15 Q. What is an NOL?  
16 A. An NOL is a net operating loss.  
17 Q. What does that mean?  
18 A. A net operating loss is a very  
19 technical tax term. It's generally created  
20 by a loss of an entity during the current  
21 year and then needs to be carried back or  
22 carried forward.  
23 Q. And for carrying forward purposes  
24 you can write off profit based upon your  
25 prior tax loss; is that right?

1  
2 A. That could be something an NOL is  
3 used for.

4 Q. That was -- I'm sorry. That was  
5 the purpose -- one of the purposes of setting  
6 up WMRIC, was to enable the reorganized  
7 Washington Mutual, Inc. to take advantage of  
8 the \$5 billion NOL; is that correct?

9 A. I disagree with that statement.  
10 WMRIC was not created for that reason. WMRIC  
11 was an existing subsidiary that WMI owned  
12 wholly and since the seizure has been in the  
13 basis of runoff. That's what WMRIC is.

14 Q. You understand that one of the  
15 issues with respect to --

16 JUDGE WALRATH: Excuse me.

17 Somebody has a BlackBerry that's too  
18 close to their microphone, and that's  
19 why we're getting some feedback, so if  
20 you would all take them off the tables.

21 Thank you.

22 Go ahead.

23 MR. NELSON: Thank you, your Honor.

24 Q. You understand that one of the  
25 issues in terms of the valuation of WMRIC on

1  
2 that we could use existing NOLs, it would  
3 only create more value.

4 Again, it's our job as the debtor  
5 to try to maximize the value of the estate.  
6 This is one way potentially to maximize the  
7 value of the estate.

8 Q. If new business is put into the new  
9 company they can take more advantage of the  
10 NOL, correct?

11 A. I think that determination is yet  
12 to be determined.

13 Q. You understand that the intention  
14 of these hedge funds is to use and create new  
15 business for the NOL, correct?

16 A. I don't know what the hedge funds  
17 are going to do with it. The most important  
18 thing about this transaction is if we were to  
19 sell it today we will sell it for a discount.  
20 If we are able to spin it out into WMI reorg  
21 and be able use the NOLs, it will create more  
22 value. And Mr. Zelin, who will be testifying  
23 later, I'm sure could walk you through the  
24 differences of what we would receive if we  
25 sold it immediately versus if we held it.

1  
2 a going-forward basis is how much of this  
3 \$5 billion NOL the company can take advantage  
4 of, the new company can take advantage of.  
5 Correct?

6 A. That's correct, but my only point  
7 was WMRIC is an existing subsidiary. You  
8 said we created it for this purpose. We  
9 didn't.

10 Q. Fair enough.

11 You do agree that the senior note  
12 holders and Fried, Frank in their proposals  
13 wanted to have a reorganized WMRIC that would  
14 be able to take advantage of the full NOL,  
15 correct?

16 A. In a value creation, again, by the  
17 debtor, one has to look at two different  
18 distinct opportunities as it relates to an  
19 existing asset.

20 We could ask WMRIC, look to sell it  
21 immediately and what we would do there is get  
22 a discounted cash value or (inaudible) value  
23 for that, or we could turn around and create  
24 possibly more value by effectively spinning  
25 it off in a reorg plan. And to the extent

1  
2 Q. You understand that one of the  
3 issues is the value of a new business and  
4 whether they can use the new business to take  
5 advantage of it, though, right?

6 Let me rephrase. You understand  
7 that the current analysis of the value of  
8 WMRIC assumes there will be no new business,  
9 correct?

10 A. I believe that is in Mr. Zelin's  
11 report, that they -- that he is not ascribing  
12 any value to any NOLs, potential NOLs,  
13 otherwise what he conceived the business  
14 using them for.

15 Q. You understand that at least --

16 Let me tell you that this is a  
17 document 48, Exhibit 48. This is a term  
18 sheet that the note holders sent to you,  
19 correct?

20 A. (Reading). Yes.

21 Q. The top of the term sheet states  
22 Centerbridge, Appaloosa, Owl Creek and  
23 Aurelius, correct?

24 A. Yes. Yes.

25 Q. I'm pointing to the page ending in

1  
2 405, and their plan is to capitalize WMRIC  
3 and expand its business, correct?

4 A. That's what the term sheet says.  
5 It certainly wasn't a term sheet we adopted  
6 but this draft says that, and I believe as  
7 well as that they were going to think about  
8 putting a loan on it.

9 I believe they referred to the term  
10 DIP, so one of their ideas was to put some  
11 capital in the form of debt during the  
12 pendency of the bankruptcy to potentially --  
13 around this entity, yes.

14 Q. You are aware that your lawyers in  
15 this court have taken a position that equity  
16 holders were unlikely to receive any recovery  
17 and therefore have little, if any, economic  
18 interest in the case. Correct?

19 A. Were those statements in connection  
20 with the formation of the equity committee?

21 Q. Yes.

22 A. I'm just trying to -- I think I  
23 remember those, yes.

24 Q. It was a motion to disband the  
25 equity committee?

1  
2 Q. You understand that the equity  
3 committee represents both preferreds and  
4 commons, correct?

5 A. Yes.

6 Q. I think you stated just now that  
7 you've never seen any analysis that would  
8 place recovery through the subordinated  
9 claim; is that right?

10 A. I don't think that we have been  
11 able to do that, no.

12 Q. Okay. Isn't it true that you  
13 absolutely think that the business tort  
14 claim, the claims against JPMorgan have  
15 value?

16 A. I have stated that I believe they  
17 have value.

18 Q. But you never ascribed a particular  
19 value to those claims.

20 A. I did not ascribe a point value,  
21 no. We have talked about, in connection with  
22 our lawyers, a range of values, ranges of  
23 values particularly. Obviously those are  
24 privileged conversations.

25 Q. As we sit here today, then you

1 A. Okay. Yes, I do remember.

2 Q. Do you agree that equity holders at  
3 the time, in January 2010, were unlikely to  
4 receive any recovery and therefore have  
5 little, if any, economic interest in the  
6 case?  
7

8 A. Well, I think that as you look at  
9 the stated liabilities on their balance sheet  
10 they are obviously very significant. And  
11 then below the -- below the stated --

12 I believe it is after class 17,  
13 that the class 18 subordinated claims, most  
14 of those were still unliquidated but  
15 potentially could be very large. So I don't  
16 think that there has been a proposal or  
17 analysis so far that we have seen that would  
18 pay through the subordinated claims, so by  
19 definition I wouldn't -- I don't see that --

20 Oh, also, I might add that beyond  
21 that is obviously the \$7 billion of preferred  
22 stock. So when you take that all into  
23 account I don't know of any potential ability  
24 to go beyond that to get money to common  
25 equity, no.

1  
2 can't tell us or won't tell us whether the  
3 value is 1 dollar or 100 billion dollars?

4 A. I believe that those are privileged  
5 conversations. I certainly can talk to you  
6 about what we believe are the potential  
7 weaknesses and assertions and defenses that  
8 have been raised by other people.

9 Q. I'm not asking you about --

10 MR. MASTANDO: Objection. Your  
11 Honor, the witness wasn't done speaking  
12 I don't believe.

13 JUDGE WALRATH: Just answer the  
14 question.

15 THE WITNESS: Your Honor, it's a  
16 very difficult question, because valuing  
17 litigation is -- is -- is a very, very  
18 difficult thing to do.

19 Q. My question, which I think you  
20 answered, is: You cannot put a value on  
21 whether it's 1 dollar or 1 billion dollars  
22 because any of that is work product  
23 privileged, correct?

24 A. Again, what I'd like to say is that  
25 there are a lot of things that are out there

1  
2 right now. There are claims, there's  
3 counterclaims, there's defenses. There's  
4 plenty of things that are out there in the  
5 public domain that we would love to talk  
6 about and I would love to talk to you about  
7 why we think there are certain issues as to  
8 relates to those claims.  
9 Q. I'm actually only asking what the  
10 value is and oyrur not answering that.  
11 MR. MASTANDO: Objection. I think  
12 the witness has answered and is  
13 answering.  
14 JUDGE WALRATH: Well, we're getting  
15 argumentative now. He's not going to  
16 give you the answer you want.  
17 MR. NELSON: Thank you, your Honor.  
18 Q. You are aware that when we tried to  
19 get documents from JPMorgan in November and  
20 December of 2009 that your own lawyers  
21 complained about the documents that JPMorgan  
22 had given the debtor, and about their lack of  
23 production. Correct?  
24 A. I'll let the court record speak for  
25 itself.

1  
2 Q. Let's just briefly turn to Equity  
3 Committee Exhibit 38. This is a letter from  
4 Quinn Emanuel, your litigation attorneys, to  
5 JPMorgan's attorneys dated December 28, 2009.  
6 Correct?  
7 A. Yes.  
8 Q. And it addresses, just from the  
9 first paragraph, the "deficiencies in JPM's  
10 production and reasons to doubt their  
11 conclusion that the custodians had excluded  
12 lack of relevant documents and (sic) and that  
13 the estate would not agree to seek additional  
14 documents, that based upon the limited  
15 discovery that is still being produced --  
16 excuse me, discovery is still being produced;  
17 is that right?  
18 A. That's what the document says.  
19 Q. Before you announced your  
20 settlement you never got these documents, did  
21 you?  
22 A. I don't know.  
23 Q. Did you take any deposition against  
24 JPMorgan?  
25 A. I don't believe we did.

1  
2 Q. Did you take any depositions  
3 against the FDIC?  
4 A. I don't believe we did.  
5 Q. Besides this third-party Rule 2004  
6 production, did you receive any documents  
7 produced in the adversary proceedings against  
8 JPMorgan?  
9 Let me rephrase. Besides the  
10 Rule 2004 production that we were just  
11 talking about before you announced your  
12 settlement in March 2010, has the estate  
13 received any other documents from JPMorgan?  
14 A. I don't know.  
15 Q. I'm sorry. The estate never  
16 received any documents that were produced in  
17 litigation from the FDIC, correct?  
18 A. I don't know either. I'm sorry.  
19 Q. At the time you entered into your  
20 settlement you had no access to WMI or WMB's  
21 historical pre-seizure record; isn't that  
22 true?  
23 A. No, that's not true.  
24 Q. You did have some access to it?  
25 A. Yes.

1  
2 Q. Did you have access to the loan  
3 portfolio that would be able to determine  
4 whether WMI and WMB were solvent at the time  
5 of the seizure?  
6 A. I don't know if we had access to  
7 it. We -- as part of the analysis that we've  
8 done, we didn't look at the detailed loan.  
9 If we were to proceed with a fraudulent  
10 conveyance, we would certainly hire an expert  
11 who would look at that data. But I believe  
12 that we had access to a very significant  
13 amount of pre-seizure documents.  
14 Q. Not the loan portfolio.  
15 A. I don't know as I -- I don't know  
16 as I sit here today whether we do or not.  
17 Q. You are aware, aren't you, that  
18 FDIC is refusing to sit for a deposition  
19 regarding plan confirmation?  
20 A. I don't. Again, I don't know that  
21 either.  
22 Q. What does PIERS stand for?  
23 A. Give me a minute.  
24 Q. Well, how about this. I'll give  
25 you what the answer is at least. I believe

1  
2 it's on page 42 of the disclosure statement,  
3 which is tab 6 in your binder. It stands for  
4 preferred income equity redeemable  
5 securities, correct?  
6 A. Yes.  
7 Q. WMI issued a debt to Washington  
8 Mutual Capital Trust 2001, correct?  
9 A. That's correct.  
10 Q. WMC 2001 then issued the preferred  
11 and common equity, correct (sic)?  
12 A. That looks to be what this document  
13 says, yes.  
14 Q. In April 2001 these preferred  
15 equity holders bought a security from  
16 Washington Mutual Capital Trust 2001 with a  
17 face value of \$50 and for \$32.33 and a  
18 dividend of 5.38 percent, correct?  
19 A. That's what the document says, yes.  
20 Q. And just to be clear, the security  
21 that they're holding, it is a security but  
22 it's in WMCT 2001, correct?  
23 A. Again, that's what the document  
24 says. I'm not talking through personal  
25 knowledge. I'm just following along with you

1  
2 in the disclosure statement.  
3 Q. You understand that as part of this  
4 April 2001 purchase the -- these preferred  
5 security holders received about -- had a  
6 warrant to purchase 1.2 shares of WMI common  
7 stock? You see that?  
8 A. Uh-huh. Yes.  
9 Q. In your experience in bankruptcy,  
10 have you ever seen a warrant be treated as a  
11 debt?  
12 A. Are you referring specifically to  
13 the PIERs, this document?  
14 Q. My question is: Based on your  
15 experiences as chief restructuring officer  
16 and your qualifications that you told us on  
17 direct examination, have you ever seen a  
18 warrant be treated as a debt?  
19 A. Your specific question is why is  
20 this a debt. I think we have determined --  
21 JUDGE WALRATH: That's not his  
22 question.  
23 THE WITNESS: I'm struggling with  
24 it.  
25 JUDGE WALRATH: Have you ever seen

1  
2 a warrant treated as debt in another  
3 case?  
4 THE WITNESS: I don't think in  
5 other case I had any warrants that  
6 looked like debts.  
7 Q. The holders of PIERs do not hold a  
8 debt against WMI, do they?  
9 A. Are you asking me for a legal  
10 conclusion?  
11 MR. MASTANDO: Objection.  
12 Q. I'm asking you as you sit here  
13 today as a chief restructuring officer  
14 testifying on the settlement, the holders of  
15 PIERs do not hold a debt against WMI, do  
16 they?  
17 MR. MASTANDO: Objection, your  
18 Honor.  
19 JUDGE WALRATH: Well, rephrase. Is  
20 it on the books and records?  
21 MR. NELSON: Excuse me?  
22 JUDGE WALRATH: I guess the  
23 question is whether it's reflected on  
24 the books and records.  
25 MR. NELSON: Well, that is the

1  
2 question.  
3 Q. Is it reflected on the books and  
4 records as a debt against WMI.  
5 A. Yes, it is.  
6 Q. And that debt, however, is not  
7 with -- excuse me. The holder of the  
8 security has a security with WMCT of 2001,  
9 correct?  
10 A. I would -- there's been a lot of  
11 entities over time that have merged into WMI.  
12 I don't know whether -- where WMCT sits on an  
13 organizational chart, where it sat before. I  
14 think it's our determination at this point,  
15 your Honor, that this is a debt of WMI.  
16 Q. Is WMCT 2001 in bankruptcy?  
17 A. Not to the best of my knowledge.  
18 Q. You are aware that the holders --  
19 excuse me, that the overwhelming majority of  
20 the owners of these preferred equity holders  
21 and WMCT 2001 are the very same hedge funds  
22 we've been talking about over the past few  
23 minutes, correct?  
24 A. Yes, they -- they hold a -- a  
25 majority position in dollars of -- of -- I

1  
2 believe of this.  
3 Q. All right. They had, these hedge  
4 funds, the lion's shares of the debt; isn't  
5 that right?  
6 A. I don't know what "lion's share"  
7 means.  
8 JUDGE WALRATH: Of which debt?  
9 MR. NELSON: The debt of the  
10 company.  
11 JUDGE WALRATH: All of the debt of  
12 the company?  
13 MR. NELSON: Yes, that's my  
14 question.  
15 Q. Did these four hedge funds hold the  
16 lion's share of the debt?  
17 A. Again, I don't know what "lion's  
18 share" means. They certainly had a  
19 significant part of our debt. I will -- I  
20 will say that. I mean, but I don't know  
21 quite what your getting at. I think we could  
22 add the four sheets that you had on the paper  
23 and have an exact number, if you want to do  
24 that.  
25 Q. Well, you are aware, though, that

1  
2 at least Fried, Frank's attorneys thought  
3 they had leverage with the negotiations with  
4 you because it had the lion's share of the  
5 debt. If you turn to Exhibit 24, this is an  
6 e-mail from Fried, Frank to you.  
7 Is it true that the hedge fund  
8 lawyers said that, on the second paragraph,  
9 "We have the lion's share of the debt. I  
10 know you want us on board"?  
11 A. It would appear that Mr. Shiller  
12 (ph.) has used the word "lion's share" as  
13 well to describe his own groups, so I would  
14 agree with you the document says that.  
15 Q. Treating this preferred equity  
16 group in WMCT 2001 as a creditor instead of  
17 as an equity holder gives these hedge funds  
18 even more of a benefit in this bankruptcy,  
19 correct?  
20 A. I think, Mr. Nelson, our analysis  
21 including our lawyers, our legal team, has  
22 determined -- has -- has -- has categorized  
23 this as a debt instrument. I don't know what  
24 else to tell you. In our -- in our view, we  
25 believe this is a debt instrument and is

1  
2 classified in class 16.  
3 I -- I -- I see what your referring  
4 to. I don't know the history of whether this  
5 -- this subsidiary has merged up into WMI  
6 over the time. I -- I -- we would -- I don't  
7 know what else to tell you.  
8 Q. Well, you do understand, since you  
9 have been propounding this plan, that if  
10 PIERs, these preferred equity holders in WMCT  
11 were treated as preferreds, then the other  
12 preferred equity shareholders would be pari  
13 passu and there would be recovery for the  
14 third class. Isn't that true?  
15 A. It would be recovery for what? I'm  
16 sorry, that last --  
17 Q. It would be recovery for the  
18 preferred shareholders and pari passu with  
19 the PIERs.  
20 A. Well, first of all, I -- we'll have  
21 to obviously go through and go through the  
22 evidence that your presenting here to  
23 determine whether this is a debt or an  
24 equity. We believe it's a debt. I think  
25 that's part of the confirmation process.

1  
2 But there's a class, there's one  
3 more class between -- that's after the PIERs,  
4 and that will be the class 18. That is the  
5 subject -- the subordinated claims, of which  
6 most of those are unliquidated. And when we  
7 go through the claims analysis and estimation  
8 process, we'll have a sense of the size of  
9 that. It will take us some time to work  
10 through that class. But if indeed, if in  
11 your situation, if class 16 was zero and  
12 class 17 went -- class 18 wasn't big enough  
13 potentially it could go through, potentially,  
14 sure.  
15 Q. Your plan that you proposed treats  
16 holders of preferred equity within WMCT, the  
17 PIERs holders, differently based upon how  
18 much they own; isn't that true?  
19 MR. JOHNSON: Objection, your  
20 Honor. He's mischaracterizing Exhibit 6  
21 by describing this as a preferred  
22 equity.  
23 JUDGE WALRATH: Well --  
24 Q. Let me rephrase.  
25 JUDGE WALRATH: Okay.

1  
2 Q. The PIERs class is treated  
3 differently among members of the class based  
4 upon how much a person owns of PIERs,  
5 correct?

6 JUDGE WALRATH: Within the class.

7 MR. NELSON: Within the class, yes,  
8 your Honor.

9 A. I --

10 JUDGE WALRATH: Is that correct?

11 THE WITNESS: I'm not following  
12 that. I'm sorry, I'm not following his  
13 question.

14 Q. You understand that PIERs --  
15 certain PIERs holders are given the right to  
16 buy into WMRIC, the new reorganized company,  
17 correct?

18 A. Certain PIERs quotas are receiving  
19 subscription rights, yes. They have zero  
20 value and have the ability to subscribe to  
21 them. In our estimates, they have zero  
22 value. Should they have value, they can --  
23 (inaudible) ahead of them should they not be  
24 paid, they will have to pay up that value.

25 Q. The value that you have put on,

1  
2 You are aware, sir, that according  
3 to the declaration of David Sharp submitted  
4 in this case on direct, that the only people  
5 who can purchase it in the rights offering  
6 process -- this is paragraph 6 of that  
7 declaration -- certain subscription rights  
8 for an aggregate subscription price of at  
9 least \$2 million. Excuse me. \$2 million.  
10 You see that?

11 Let me rephrase. According to  
12 paragraph 6 submitted by WMI, the  
13 subscription right exists if such holder  
14 based on its pro rata share was entitled to  
15 subscribe for shares for an aggregate  
16 purchase price of at least \$2 million,  
17 correct?

18 A. That's what this says, yes.

19 Q. Are you aware of who the members of  
20 WMRIC will be?

21 A. Sorry. Members?

22 Q. The shareholders of WMRIC, excuse  
23 me, the board of directors for WMRIC on a  
24 going-forward basis. Do you know who they  
25 will be?

1  
2 even without any ongoing business of WMRIC,  
3 is \$157.5 million, correct?

4 A. Oyour mischaracterizing the  
5 testimony.

6 Q. All right. Well, let me rephrase.  
7 I want to understand and get your testimony  
8 on how different members of the same PIERs  
9 class are treated.

10 It is true that only certain  
11 members of the PIERs class are able to buy  
12 into these subscription rights, correct?

13 A. I don't believe that's true, no.

14 Q. You don't have to have \$20 million  
15 in order to subscribe?

16 A. I'm sorry.

17 Q. If I only own a few shares of PIERs  
18 can I subscribe to WMRIC?

19 A. In the subscription rights?

20 Q. Whatever rights the PIERs class has  
21 with respect to WMRIC, small shareholders or  
22 small holders of PIERs have that same, right?

23 A. Can I refer to the document?

24 Q. Sure. I don't think it's on this  
25 page.

1  
2 A. I believe they're listed in the  
3 disclosure statement.

4 Q. Do you know who they work for?

5 A. If we go to that page, we certainly  
6 can go name by name if you'd like.

7 Q. This is docket number 6188, notice  
8 of prospective appointment of directors for  
9 the reorganized company.

10 A. Um-hm.

11 Q. We have Appaloosa's general  
12 counsel, correct?

13 A. I don't know him.

14 Q. Jim Bolen (ph.), you don't know  
15 him?

16 A. I do know him.

17 Q. He's with Appaloosa?

18 A. Owl Creek.

19 Q. Cornfield (ph.) with Owl Creek?

20 A. Yes.

21 Q. And then Dan Brocker (ph.) with  
22 Aurelius, correct?

23 A. And Jeff Hart (ph.) at  
24 Centerbridge.

25 Q. Do you know Arnie Kastenbaum (ph.)?



1  
2 A. No.

3 Q. So of the six we were able to  
4 identify, six -- all six worked for one of  
5 these four hedge funds, correct?

6 A. That's something I don't know, that  
7 Ken (inaudible) works for Appaloosa directly.  
8 The others specifically I can identify.

9 Q. With respect to the PIERs, there is  
10 actually a common PIERs class as well as a  
11 pressed PIERs class, correct?

12 A. I think you -- yes, I think that's  
13 right, but I'm going towards the edge of my  
14 knowledge as it related to this specific  
15 security.

16 Q. Who is the owner of the PIERs  
17 common security?

18 A. I don't know how the ownership  
19 works within these securities.

20 Q. All right. Let's go to the next  
21 page of the disclosure statement.

22 It's true that WMI itself is the  
23 owner of these common securities and WMI  
24 stands to get a distribution for itself as  
25 part of this plan? Common securities of --

1  
2 priority within this -- this venture that we  
3 are talking about the preferred and the  
4 commons, whether the preferreds need to be  
5 paid first, the commons, is there -- is there  
6 some formula for paying them. But as far as  
7 I know, we are not paying ourselves for these  
8 securities.

9 Q. You are aware that the liquidity  
10 analysis and the recovery analysis list, that  
11 there is \$789 million in pre-petition claims,  
12 correct?

13 A. (Reading) Yes.

14 Q. One way to get to \$789 million is  
15 you include the 23 million going back to WMI  
16 correct?

17 A. That's correct.

18 Q. Where is the \$23 million going?

19 A. I presume that we're just going to  
20 pay off 765. I don't know -- I don't know  
21 that we're accounting for the 23 million,  
22 that there's going to be a payout within the  
23 plan. You would just --

24 If that was the case it would be a  
25 fairly circular argument, because you turn

1  
2 This is the next page. You see  
3 this?

4 A. Um-hm.

5 Q. Common securities, there is  
6 approximately 23 million allocated to common  
7 securities and there's a footnote. The  
8 footnote says these securities are owned by  
9 WMI.

10 A. Um-hm.

11 Q. WMI owns these common securities,  
12 correct?

13 A. Yes.

14 Q. What will happen to this  
15 \$23 million that WMI is getting from itself  
16 as part of this proposed settlement and  
17 confirmation?

18 A. I don't believe we're paying  
19 ourselves for these.

20 Q. What's happening to the 23 million?

21 A. I don't think we're paying  
22 ourselves.

23 Q. Is everyone else moving up in  
24 priority?

25 A. I don't know what it relates to the

1  
2 around and then pay whoever wasn't paid on  
3 the bond in the waterfall.

4 Q. Is it going to WMRIC?

5 A. I don't believe so.

6 Q. According to your analysis PIERs  
7 pre-petition, 789.

8 A. Um-hm.

9 Q. So at least according to your  
10 recovery analysis, they are -- WMI is  
11 standing to recover, correct?

12 A. Well, in that total, yes, they  
13 would be adding both of them. Again, that's  
14 a liquidity analysis. I do not believe that  
15 we are transferring those securities to WMI  
16 reorg.

17 Q. Can we focus, hopefully almost  
18 finally, on the allowed accrued interest?

19 A. Certainly.

20 Q. And actually let's turn, please, to  
21 I believe it's Exhibit C of the plan.

22 For a pre-petition for allowed  
23 principal of \$756 million and pre-petition  
24 interest of \$9 million, for approximately a  
25 two-year period, PIERs are getting

1  
2 preferred -- PIERs are getting \$154 million  
3 in post-petition interest. Is that true?  
4 A. I don't think they're getting paid  
5 that. I think that that's the calculation  
6 if -- if they were to -- if they --  
7 This would be the -- that would be  
8 the mathematical calculation for two years of  
9 interest, yes.  
10 Q. That's -- I'm just going to map it.  
11 756 million for two years, that's what,  
12 approximately 10 percent a year?  
13 A. I don't have the debenture in front  
14 of me of how the interest is calculated.  
15 Q. Well --  
16 A. Right, doing the straight math to  
17 that, I presume that your estimate's right.  
18 Q. Now, with respect to the federal  
19 court's rate of interest for all  
20 post-petition interest, you are aware that  
21 that rate is at the lowest rate essentially  
22 in recent memory, correct?  
23 A. The federal rates.  
24 Q. Yes. You are aware that the  
25 decision to treat post-petition interest

1  
2 according to whether it's the debenture or  
3 some other thing that equates to 10 percent a  
4 year is substantially higher than the federal  
5 court's interest rate for post-judgment  
6 claims, correct (sic)?  
7 A. I believe that this interest is  
8 calculated at the stated rate of the  
9 debentures as well as all the interest on  
10 senior notes, the sub notes. It's the stated  
11 interest rate on the debenture.  
12 Q. Okay. Finally, I just have a  
13 couple more questions. Thank you for your  
14 patience.  
15 As chief restructuring officer, you  
16 are aware that four current board members of  
17 WMI served on the board during the events  
18 that led to the seizure, correct?  
19 A. Four?  
20 Q. More or less.  
21 A. I don't remember off the top of my  
22 head how many current board members we have  
23 but we haven't nominated any post-petition.  
24 Q. There have been no change in board  
25 members except through resignation

1  
2 post-petition; is that right?  
3 A. That's right.  
4 Q. No board member has been replaced?  
5 A. No.  
6 Q. How many board members are there  
7 currently?  
8 A. I don't know the exact number.  
9 Q. Is it 20?  
10 A. Again, I don't know the exact  
11 number. It's certainly less than 20.  
12 Q. Okay. Despite the board members'  
13 oversight of a company that's suffered the  
14 largest bank failure in history, you were  
15 aware that the settlement and plan gives  
16 these directors at a minimum a partial  
17 release, correct?  
18 A. That's correct.  
19 MR. NELSON: Okay. Thank you.  
20 JUDGE WALRATH: Should we take a  
21 short break before we continue?  
22 (Recess taken.)  
23 THE DEPUTY: All rise. You may be  
24 seated.  
25 JUDGE WALRATH: You may proceed.

1  
2 MR. STOLL: Thank you, your Honor.  
3 EXAMINATION BY  
4 MR. STOLL  
5 Q. Good morning, Mr. Kosturos. My  
6 name is James Stoll from the law firm of  
7 Brown & Rudnick and we represent the Trust  
8 Preferred Security Holders.  
9 Mr. Kosturos, I want to take you  
10 back to the direct testimony in the form of  
11 your affidavit with respect to your analysis  
12 of the fairness -- your opinion of the  
13 fairness of the proposed settlement. All  
14 right?  
15 Now, your testimony regarding the  
16 fairness of the settlement comes from your  
17 affidavit and it comes from paragraphs 20  
18 through 90. Is that fair?  
19 A. 26 through --  
20 Q. Paragraph 26 through paragraph 90.  
21 A. I don't have my declaration in  
22 front of me.  
23 Q. You don't have a copy?  
24 MR. STOLL: Do you have a copy?  
25 JUDGE WALRATH: Could the parties

1  
2 on the phone mute their phone? We're  
3 getting feedback. Thank you.

4 Q. I believe that this is Exhibit 13  
5 on Plaintiff's exhibit list. I don't know if  
6 I heard it actually entered into as an  
7 exhibit this morning. But in any event, if  
8 you begin with paragraph 25 --

9 Actually, on -- excuse me. Let me  
10 just start this way.

11 Beginning on page 5, paragraph 8 of  
12 your declaration, sir, you begin with an a  
13 background recitation of facts; is that fair?

14 A. Yes.

15 Q. And then what you do over the next  
16 several pages until you get to paragraph 13  
17 is you discuss a variety of events that  
18 occurred, principally various litigation  
19 actions, correct?

20 MR. MASTRANDO: Objection to the  
21 form.

22 JUDGE WALRATH: Overruled.

23 A. I think it's just all in this  
24 pertinent factual background section.

25 Q. Right. And then on page 13,

1 paragraph 30, is the beginning of your  
2 discussion of the global settlement and why  
3 it should be approved; is that fair?

4 A. Page --

5 Q. Page 15.

6 A. 15. Yes.

7 Q. Okay. And then from page 15,  
8 paragraph 30 through to paragraph 90, which  
9 ends on page 43, running over to page 44, if  
10 I at least understand the structure of your  
11 affidavit, that is your testimony about the  
12 global settlement and why it should be  
13 approved; is that fair?

14 A. (Reading). Right, 43 and 44, yes.

15 Q. Okay. And we're going to look at  
16 some of those discrete paragraphs in a  
17 moment, sir, but if I can summarize it  
18 essentially what you've stated in your  
19 affidavit is that you've engaged in analyses,  
20 in valuations and assessments of the claims  
21 and looked at the settlement and come to the  
22 conclusion that it's fair and reasonable and  
23 in the best interests of the estate. Is that  
24 fair?  
25

1  
2 A. I don't know that I would maybe  
3 limit it to that, but I might add the claims  
4 extinguishing very large claims as well to  
5 that. But broadly let's agree on that for  
6 now.

7 Q. Okay. Nowhere in your testimony or  
8 in your affidavit do you in any way discuss  
9 any analysis of the likelihood of success of  
10 any particular claim; is that fair?

11 A. I think I go through each claim as  
12 in my declaration. I point out that there  
13 are potential assertions, defenses, things  
14 like that. But do I -- specific value on  
15 that one?

16 Q. That's right. You don't put any  
17 value on one particular claim. Is that fair?

18 A. I think I testified to that  
19 already. Yes.

20 Q. And you don't put any sort of range  
21 of assessment of risk on any particular  
22 claim; is that right?

23 MR. MASTANDO: Objection, your  
24 Honor.

25 JUDGE WALRATH: Overruled.

1  
2 A. It's difficult to put an attorney  
3 work product privilege into a public document  
4 so I'm following you, but we didn't put our  
5 work product in here.

6 Q. Right. And all I'm trying to  
7 understand, sir, is what you are testifying  
8 to.

9 A. Um-hm.

10 Q. And so what you are not testifying  
11 to is that any particular claim has any  
12 particular assessment of likelihood of  
13 success, in your opinion.

14 A. Well, what I've done is I've gone  
15 to great lengths to talk about what we  
16 believe are some of the assertions and  
17 defenses against each claim.

18 I think that we have listed and  
19 detailed out the business -- the pre-petition  
20 business torts, we have talked about those  
21 specifically. I think we've talked about the  
22 fraudulent conveyance potential action  
23 against the FDIC and JPMorgan. I think we've  
24 broadly described what they are. We've  
25 talked about what potentially some of the

1 defenses are against those. And I think  
2 that's what's in my declaration.  
3

4 Q. Okay. And again, I'm trying to be  
5 specific here, sir, so just let me try to  
6 wrap this up. But with respect to any  
7 particular claim, you did not reach any sort  
8 of conclusion and certainly did not put in  
9 your affidavit any sort of testimony that any  
10 particular claim had, in your mind, any  
11 particular likelihood of success on the  
12 merits. Is that fair?

13 MR. MASTANDO: Sorry to interrupt,  
14 your Honor. I want to object. Counsel  
15 is talking about the declaration. It  
16 wasn't clear to me he was talking about  
17 beyond the declaration in the --

18 JUDGE WALRATH: Well, in the  
19 declaration.

20 A. I just want to make sure I have  
21 that. When you refer to claim, in my mind, I  
22 think oyour referring to the potential  
23 fraudulent conveyance and the business tort  
24 claims. Is that right?

25 Q. No, that's not right, sir. I'm

1 talking about the components of the  
2 settlement agreement, all the components of  
3 the settlement agreement, not one component  
4 of any claim that was settled, any claim  
5 demand right that was settled in the  
6 settlement agreement. Was there any sort  
7 of -- any particular likelihood of success  
8 that you are prepared -- that you have  
9 testified to in your declaration?

10 A. I think the only claims again that  
11 I'm referencing in this declaration are we  
12 are talking about the FDIC and JPM potential  
13 capital contribution (inaudible) demands and  
14 business torts, and then we've gone on to  
15 talk about -- a little bit about the DC  
16 claims and things like that.

17 I'm just struggling with this  
18 definition of claims, because I mean there's  
19 significant claims in my estate, at least --  
20 I'm struggling with this definition of  
21 claims.

22 Q. The claims that are referred to in  
23 your declaration -- right? -- not one of  
24 those claims do you provide any testimony  
25

1 regarding your assessment of the likelihood  
2 of success of any claim? Correct?

3 A. In my declaration?

4 Q. In your declaration.

5 A. I agree.

6 Q. Okay. Now I understand what you  
7 did do, I believe you say this in your  
8 report, is you sat down -- I'll say that  
9 figuratively I guess, but you personally read  
10 pleadings in the case; is that right?

11 A. I have read pleadings in the case.

12 Q. And you read pleadings that your  
13 lawyers submitted and opposing lawyers  
14 submitted; is that right?

15 A. Yes.

16 Q. And based on that exercise of  
17 reading various pleadings, that's how you  
18 made your decision as to whether claims  
19 should have a certain risk associated with  
20 them, is that fair?

21 A. I would also add that there were  
22 settlement discussions and negotiations.

23 Q. Sure. You sat in a room perhaps  
24 with the lawyers and Sullivan & Cromwell and  
25

1 they told you what they thought about their  
2 claims, right?

3 A. As well as their business people,  
4 sure. As well as the, you know, members from  
5 the FDIC and the others.

6 Q. Sure. All the theoretical  
7 adversaries told you about all the strengths  
8 of their claims, right?

9 A. Well, again, I -- obviously I can  
10 balance that with I have my own sets of  
11 lawyers who are pursuing our claims through  
12 our positive --

13 Q. But you are --

14 A. (Speaking simultaneously).

15 Q. But you don't factor?

16 MR. MASTANDO: Your Honor, I  
17 object.

18 JUDGE WALRATH: Please don't  
19 interrupt the witness.

20 MR. STOLL: I apologize.

21 JUDGE WALRATH: Or overtalk each  
22 other. Let him finish his answer.

23 MR. STOLL: I'm sorry.

24 A. There is a great many pleadings,  
25

1 assertions, counterclaims in this case, in  
 2 the ANICO case, in all sorts of jurisdictions  
 3 in this case. There's plenty of things to  
 4 read. There's plenty of things to look at.  
 5 There's plenty of things, particularly as it  
 6 relates to ANICO and how the complexity of  
 7 (inaudible) applies to all of these claims.  
 8 It really isn't all that difficult to assess  
 9 the risk of these claims.  
 10 Q. Are you a lawyer, sir?  
 11 A. No.  
 12 Q. Okay. So, but you feel competent  
 13 to read pleadings and assess the risks, the  
 14 legal risks and assess what that -- how that  
 15 should be evaluated with the settlement; is  
 16 that fair?  
 17 A. Well, again, it's -- there's no "I"  
 18 in this. We are the debtor. We have  
 19 obviously resources within the company. It's  
 20 not just me making any decisions for the  
 21 debtor. There is lots of things to assess  
 22 and review and to consider.  
 23 Q. Well, and those resources that you  
 24 have drawn on exclude -- exclude your own

1 counsel Weil Gotshal's assessment; is that  
 2 fair?  
 3 A. I think we are -- we came to this  
 4 conclusion in our own business judgment.  
 5 Q. Okay. Which means that you did not  
 6 receive any legal advice whatsoever regarding  
 7 the likelihood of success on the claims from  
 8 your counsel; is that fair?  
 9 MR. MASTANDO: Objection. I think  
 10 he mischaracterizes the testimony.  
 11 JUDGE WALRATH: Overruled. Let him  
 12 answer.  
 13 A. I think I testified in my  
 14 depositions, as well as in my declarations,  
 15 that we were advised by counsel on strengths  
 16 and weaknesses of our claims, we were able to  
 17 review counterclaims, we were able to review  
 18 assertions, defenses, we were able to gather  
 19 information from the settlement negotiations,  
 20 when we used our own business judgment to  
 21 settle these claims and answering to the  
 22 global settlement agreement.  
 23 Q. Let me make sure I understand that  
 24 answer. When you say you, your company, used

1 your own business judgment in order to reach  
 2 your conclusion as to relative strengths and  
 3 weaknesses of the claims, are you saying that  
 4 you are basing that on the advice of counsel?  
 5 A. No.  
 6 Q. Okay. So whatever Weil Gotshal had  
 7 to say when it came time for you to assess  
 8 the weaknesses and the strengths of the  
 9 claims for the purpose of evaluating the  
 10 settlements, you erased anything they told  
 11 you from your mind; Is that fair?  
 12 MR. MASTANDO: Objection.  
 13 Mischaracterizes his testimony.  
 14 JUDGE WALRATH: Overruled. I'll  
 15 allow him to answer.  
 16 Can you answer that? Did you erase  
 17 it from your mind?  
 18 A. I don't think you can erase that  
 19 from your mind.  
 20 Q. So I take it from your answer that  
 21 you did receive advice from Weil Gotshal,  
 22 your counsel, regarding the strengths and  
 23 weaknesses of claims before you reached your  
 24 business judgment that the claims had a

1 certain risk and therefore the settlement was  
 2 reasonable. Is that fair?  
 3 A. I think we both know I talked to my  
 4 counsel and again, as I said earlier, that we  
 5 talked about our strengths and weaknesses  
 6 with counsel. Of course we did.  
 7 Q. Okay. So that's factored into your  
 8 ultimate conclusion that the settlements are  
 9 reasonable, right?  
 10 A. I stand by my previous statement  
 11 that we -- there was a consideration.  
 12 We also were able to glean a lot of  
 13 information as it related to assertions and  
 14 defenses from -- from other filings within  
 15 our case and within the ANICO case.  
 16 Q. So is it your testimony, sir, that  
 17 simply by looking at a pleading filed by your  
 18 opponent, that you evaluate that the claim is  
 19 risky and therefore it should be settled?  
 20 MR. MASTANDO: Objection.  
 21 A. I -- I -- I think certainly we can  
 22 use our business judgment and consider that,  
 23 yes.  
 24 Q. I'd like you to turn to page 24,

1 paragraph 44.  
 2  
 3 A. I'm sorry, what?  
 4 Q. Page 24, paragraph 44 of your  
 5 declaration.  
 6 A. Um-hm.  
 7 Q. If you go down six lines to the  
 8 sentence that begins in the middle of that  
 9 line, "Based upon careful review," do you see  
 10 that?  
 11 A. Um-hm.  
 12 Q. Let me read that into the record,  
 13 if I could just to preface the question.  
 14 I'll read as follows.  
 15 "Based upon careful review and  
 16 consideration of all the asserted claims,  
 17 counterclaims and potential claims in all of  
 18 the asserted defenses and responses thereto  
 19 as well as consideration of the strengths and  
 20 weaknesses both of their own claims and those  
 21 asserted against them and the delay, expense,  
 22 uncertainty and risks of continued litigation  
 23 of these claims, the debtors determine the  
 24 global settlement agreement is fair and  
 25 reasonable."

1  
 2 in evaluating the asserted claims,  
 3 counterclaims and potential claims and came  
 4 to our conclusion as our business judgment  
 5 that this was a fair and reasonable global  
 6 settlement agreement.  
 7 Q. And you based that on  
 8 communications with your counsel as to the  
 9 assessment of the likelihood of success of  
 10 the merits; isn't that right?  
 11 A. I think you asked me that earlier  
 12 and the judge asked me to make sure, I could  
 13 not erase that from my memory and we used our  
 14 business judgment in looking at all these  
 15 strengths and weaknesses.  
 16 Q. Now, beginning at paragraph 53 of  
 17 your declaration, sir, I think that's on  
 18 page 29, you begin discussing certain of the  
 19 claims specifically. I believe you begin  
 20 with the deposit claim and that I believe  
 21 goes through paragraph 63. If you could take  
 22 a quick second to look through that and make  
 23 sure I've got that correct, sir.  
 24 A. (Reading). Yes.  
 25 Q. All right. So you spend 10

1  
 2 Did I read that accurately, sir?  
 3 A. Yes.  
 4 Q. And that's a fair statement of your  
 5 testimony; is that right? That is your  
 6 testimony?  
 7 A. That is my testimony.  
 8 (Laughter.)  
 9 Q. And that careful assessment,  
 10 including the strengths and weaknesses is  
 11 based on the information we just discussed;  
 12 is that right?  
 13 A. Yes.  
 14 Q. So attorney communications with  
 15 Weil Gotshal attorney work product, their  
 16 assessment of the strengths and weaknesses is  
 17 embedded in your business judgment as set  
 18 forth in that sentence; is that right?  
 19 A. Did you use the word "embedded"?  
 20 Q. Embedded, imbedded.  
 21 (Laughter.)  
 22 A. I don't know how -- how I can  
 23 continue to answer the different questions  
 24 the same way.  
 25 We exercised our business judgment

1  
 2 paragraphs talking about the deposit claim,  
 3 and you culminate, I believe, in paragraph 62  
 4 on page 32 with the statement that the debtor  
 5 disputes the FDIC's right of setoff.  
 6 Do you see that?  
 7 A. 9.5 rights; is that what you're  
 8 referring to?  
 9 Q. That's right.  
 10 A. Yeah.  
 11 Q. Okay. Now, again, just to be  
 12 clear, in evaluating the \$4 billion deposit  
 13 claim, that's what those 10 paragraphs allude  
 14 to, right?  
 15 A. Yes.  
 16 Q. Okay. And you did not include or  
 17 do not have any testimony as to whether the  
 18 debtor had a 99.9 percent chance of winning  
 19 on that claim or a 1 percent chance of  
 20 winning on that claim or anything in between;  
 21 is that fair?  
 22 A. That's fair.  
 23 This is -- this claim -- this  
 24 section, the cash deposit account is under  
 25 current litigation. We have stated that

1 JPMorgan has -- has filed a motion as it  
 2 relates to this claim against theirs, as well  
 3 as a couple of other things including noting  
 4 some of these factual inaccuracies that they  
 5 believe would support their claim.  
 6 We believe that we have put in a  
 7 lot of evidence here. We've asked for a  
 8 summary judgment. If we were to win that,  
 9 obviously JPMorgan would have appeal rights.  
 10 If it was deemed to be a cash deposit account  
 11 the FDIC would then assert their 9.5 rights.  
 12 They've asserted potential offset rights,  
 13 JPMorgan's alleged potential offset rights.  
 14 I think this is a factual summation of where  
 15 we're at right now.  
 16 Q. Okay. So you looked at all the  
 17 risks that were potentially associated with  
 18 the claim but you didn't assess the  
 19 likelihood of any of those risks; is that  
 20 fair?  
 21 A. We certainly took them all into  
 22 consideration when we decided to enter into  
 23 the global settlement agreement.  
 24 Q. And when you say "we" you mean you

1 MR. MASTANDO: Object to the form,  
 2 mischaracterizes the testimony.  
 3 JUDGE WALRATH: Sustained. It's  
 4 argumentative.  
 5 Q. Beginning on page 33 of your  
 6 declaration, sir, paragraph 64, extending  
 7 over to page 36, paragraph 71, this is the  
 8 section of your declaration where you discuss  
 9 the business tort claims, right?  
 10 A. Yes.  
 11 Q. And we referred to testimony about  
 12 that today. I just want to confirm, nowhere  
 13 in this section of your declaration do you  
 14 provide any testimony as to the likelihood of  
 15 success of those claims; is that fair?  
 16 A. That's fair, yes.  
 17 Q. And nowhere in that section of your  
 18 declaration do you in any way attempt to  
 19 value that claim; is that right?  
 20 A. We did not attempt to value that  
 21 claim, no.  
 22 Q. Fair enough.  
 23 Beginning on page 37, paragraph 72  
 24 and extending through paragraph 80 on page 40

1 and your counsel?  
 2 A. The debtor, WMI.  
 3 Q. But not your counsel.  
 4 A. Well, again, if we're going to --  
 5 I get where we're going here in  
 6 this conversation. I continue to say we  
 7 exercised our business judgment and you  
 8 continue to connect Weil Gotshal and Quinn  
 9 Emanuel. We have said over and over we used  
 10 our business judgment as it relates to what  
 11 we believe is a very fair and reasonable  
 12 settlement.  
 13 Q. Do you in your experience, sir,  
 14 which I believe you've been working with  
 15 Alvarez for eight years; is that right?  
 16 A. Eight and a half years.  
 17 Q. And how many years have you been in  
 18 the restructuring business?  
 19 A. Well over 20.  
 20 Q. Well over 20.  
 21 Is it your opinion, sir, that it's  
 22 responsible to ignore your counsel's advice  
 23 and assessment of claims in reaching  
 24 settlements in a bankruptcy case?  
 25

1 running over to page 41, that's the area of  
 2 your declaration where you discuss the --  
 3 what you term the capital contribution  
 4 claims. You see that?  
 5 A. Yes.  
 6 Q. That's the so-called fraudulent  
 7 conveyance claims; is that right?  
 8 A. That's right.  
 9 Q. And again nowhere in that section  
 10 do you provide any testimony as to the  
 11 likelihood of success of those claims; is  
 12 that fair?  
 13 A. Can you repeat that question,  
 14 please?  
 15 Q. Nowhere in those paragraphs you  
 16 provide any testimony as to the likelihood of  
 17 success of those claims.  
 18 A. Well, I think we try in this  
 19 section to list the risks and the risks in  
 20 the fraudulent conveyance litigation are very  
 21 significant.  
 22 One of the things about the  
 23 fraudulent conveyance is that it has real  
 24 tension with the business courts. In the  
 25

1 fraudulent conveyance, you are trying to  
2 prove insolvency as you look back to try to  
3 recover potential capital contributions. In  
4 the business torts, we would be trying to do  
5 the opposite. So there is a natural tension  
6 between these, and it makes it very difficult  
7 to really proceed with both of them. The  
8 likelihood, if we were to proceed with  
9 litigation, we would have to choose one or  
10 the other.

11 Q. And that tension you described  
12 between the two claims, was that tension  
13 something that you learned about through  
14 counsel?

15 A. No. I think as -- as a  
16 businessperson, one can figure out the  
17 differences is that when you're looking at a  
18 business tort, there's obviously two  
19 components. One is to prove what kind of  
20 claims you have and the second is obviously  
21 the value of the potential damages.

22 If I'm trying to prove an  
23 insolvency, it would I think take away quite  
24 a number of the damage potential calculations  
25

1 next page, that's where you discuss the  
2 so-called preference claims; is that fair?

3 A. That's fair.

4 Q. And again, like with the other  
5 claims, there is no attempt to -- there is no  
6 testimony provided as to the likelihood of  
7 success of those particular claims, right?

8 A. Well, I think this claim is much  
9 different than the other claims. In -- in a  
10 (inaudible) action, should we be able to win  
11 these arguments, we would have to give them  
12 back a corresponding claim, and in a case  
13 like ours where we believe we're paying the  
14 guts a hundred percent, it effectively  
15 creates no value below the gut claim. So,  
16 you know, it's effectively a wash.

17 Q. And you made that legal assessment  
18 yourself --

19 MR. MASTANDO: Objection, your  
20 Honor.

21 Q. -- that you have to claim that?

22 A. I think I'm capable of that with my  
23 Chapter 11 experience.

24 Q. So the answer is you did not rely  
25

1 that I could potentially get, we could  
2 potentially get, under the business torts.

3 A VOICE: Objection, your Honor.

4 It relies on --

5 JUDGE WALRATH: You have to talk  
6 into a microphone or you just not going  
7 to be made part of the record.

8 A VOICE: He's already stated that  
9 all his analysis of claims is due to  
10 attorney-client advice. He's talking  
11 about what will happen, what might  
12 happen, which is clearly analysis.

13 MR. MASTANDO: Your Honor, I'm  
14 sorry.

15 JUDGE WALRATH: I think he did.  
16 I'm going to overrule that objection.

17 Q. Okay, that tension that you've  
18 described between the business tort claims  
19 and the fraudulent conveyance claims, all of  
20 those claims are being released under the  
21 settlement, correct?

22 A. That would be correct.

23 Q. Beginning at paragraph 81 on  
24 page 41 and running through paragraph 84, the  
25

1 on counsel for that?

2 A. I did not rely on counsel.

3 Q. On page 42, beginning at paragraph  
4 85 and extending through paragraph 90, these  
5 are the so-called DC claims. Is that fair?

6 A. Yes.

7 Q. And again, like the other claims,  
8 this claim has no likelihood of success on  
9 the merits associated with it; is that right?  
10 No testimony, excuse me, regarding likelihood  
11 of success on the merits.

12 A. That's correct.

13 Q. Now, and that is the end of the  
14 section of your declaration analyzing the  
15 claims and why you believe it's fair and  
16 reasonable -- the settlement is a fair and  
17 reasonable settlement; is that right?

18 A. That's right.

19 Q. And nowhere in any of that  
20 testimony, paragraphs 1 through 90, do you in  
21 any way discuss the claims regarding the  
22 Trust Preferred Securities; is that right?

23 A. That would be right.

24 Q. You have no testimony on the Trust  
25



1  
 2 Preferred Securities whatsoever, right?  
 3 A. I have no testimony as it relates,  
 4 yes, into the first 90.  
 5 Q. As it relates to the settlement and  
 6 the fairness of the settlement, you have  
 7 given no testimony with respect to the Trust  
 8 Preferred Securities in your direct  
 9 affidavit; is that right?  
 10 A. Yes.  
 11 Q. Even though the company is  
 12 surrendering a \$4 billion claim in the  
 13 settlement, you've provided no testimony with  
 14 respect to that claim; is that fair?  
 15 A. I personally am not preparing any  
 16 direct testimony, correct.  
 17 Q. Now, I believe you said you were  
 18 hired in October of 2008, almost immediately  
 19 after the bankruptcy filing. Is that fair?  
 20 A. Yes.  
 21 Q. And I believe in your declaration  
 22 you say that that settlement negotiations  
 23 began almost immediately. Is that right?  
 24 A. The settlement -- we had numerous  
 25 conversations with JPMorgan, as I testified

1  
 2 to earlier. We only had one employee. We  
 3 had no access to financial records. We had  
 4 no access to many records. So one of the  
 5 first things we did when we were meeting with  
 6 JPMorgan was try to negotiate an information  
 7 access agreement so we can try to get  
 8 information to that. There was various other  
 9 administrative type of issues as it related  
 10 to employee benefit plans that we tried to  
 11 identify. So almost immediately there was a  
 12 discussion of trying to identify the issues.  
 13 Q. Okay.  
 14 A. As well, I might add, that  
 15 obviously very early on, that JPMorgan had  
 16 put a freeze on the majority of the large  
 17 deposit accounts, so obviously we were very  
 18 interested in talking about them.  
 19 Q. Right. And you stated in your  
 20 declaration that it was obvious to WMI at the  
 21 outset of the case that there were already  
 22 claims and disputes with JPMorgan. Is that  
 23 fair?  
 24 A. Yes, from very early on.  
 25 Q. Now, oyur aware that counsel, Weil

1  
 2 Gotshal, that counsel for the debtor was  
 3 retained and its retention was approved with  
 4 the recognition that Weil Gotshal also  
 5 represented JPMorgan. Is that fair?  
 6 A. Yes.  
 7 Q. You knew that, right?  
 8 A. I did know that.  
 9 Q. And when you started negotiating  
 10 with JPMorgan to settle the claims or  
 11 10 percent of the claims, that negotiation  
 12 occurred with you as the lead negotiator as  
 13 you said in your declaration, and it was Weil  
 14 Gotshal representing the debtors; is that  
 15 right?  
 16 A. Weil Gotshal yes.  
 17 Q. Okay. And did you ever consider  
 18 the conflicts of interest in having Weil  
 19 Gotshal represent the debtor in negotiations  
 20 of claims with JPMorgan when JPMorgan was one  
 21 of those clients?  
 22 A. Yes, we considered it. We thought  
 23 Weil Gotshal did a great job at identifying  
 24 issues, analyzing legal issues and moving the  
 25 case along.

1  
 2 Q. And it's fair to say, is it not,  
 3 sir, that one of Alvarez's principal clients  
 4 is also JPMorgan?  
 5 A. We have relationships as we  
 6 identified in our -- as we have identified.  
 7 I wouldn't know if I would call them a  
 8 principal client.  
 9 Q. Well, when you submitted your  
 10 retention application, I think you submitted  
 11 three of them in the context of this case,  
 12 you identified a variety of JPMorgan entities  
 13 as clients of Alvarez. Did you not, sir?  
 14 A. The documents speak for itself.  
 15 Q. But did you do that, sir? Do you  
 16 know that?  
 17 A. Yeah. If it's in the documents  
 18 it's in the document. I think oyur saying in  
 19 the document. If it's in the document it's  
 20 in the document.  
 21 Q. Okay. And isn't it the case, sir,  
 22 that in the course of providing types of  
 23 services that Alvarez provides, that  
 24 oftentimes in restructurings, especially  
 25 where secured lenders are involved, that

1  
2 secured lenders require the retention of  
3 workout professionals like yourself?  
4 A. Yes.  
5 Q. And isn't it the case that while --  
6 JPMorgan has from time to time specifically  
7 approved or required Alvarez's retention?  
8 A. Working for them?  
9 Q. Yes.  
10 A. Yes. It comes up, sure, sure.  
11 Q. And so during the whole course of  
12 the negotiation of the settlement, the two  
13 principal negotiators negotiating on behalf  
14 of the debtor, Weil Gotshal and you on behalf  
15 of Alvarez and WMI, were both negotiating  
16 while at the same time your companies were  
17 representing the principal party on the other  
18 side of the negotiations, JPMorgan; is that  
19 fair?  
20 A. I think that we have disclosed our  
21 relationship with JPMorgan in our  
22 application. We had to bring suit against  
23 JPMorgan in a couple of various debtor  
24 assignments and we have brought suits against  
25 them.

1  
2 Q. Okay. Now, you talked earlier on  
3 the cross-examination by Mr. Nelson regarding  
4 the term sheet that he put up on the board  
5 and he showed you in March. Do you remember  
6 that?  
7 A. Yes.  
8 Q. And that term sheet was I think  
9 dated in the middle of March. Do you  
10 remember that? March 2009, do you remember  
11 that?  
12 A. Yup. Yes.  
13 Q. And I believe after going through  
14 that entire term sheet, you agreed with  
15 Mr. Nelson that the economic result or  
16 culmination of the negotiations between March  
17 of 2009 and what was ultimately submitted by  
18 the parties as the proposed settlement that  
19 the economic impact remained the same,  
20 essentially. Do you remember that?  
21 A. Yeah.  
22 I think the more fascinating point  
23 was the other comment that Mr. Nelson didn't  
24 talk about, was where JPMorgan started in  
25 their negotiation, which was a significantly

1  
2 smaller number, and created a wide gulf  
3 between the two term sheets. I think, in  
4 fact, I think the gulf was over \$2 million.  
5 MR. STOLL: Your Honor, may I hand  
6 up a document I'd like to mark as an  
7 exhibit and approach the witness.  
8 JUDGE WALRATH: Okay. Show it to  
9 counsel first.  
10 MR. STOLL: (Handing.)  
11 JUDGE WALRATH: We'll mark this  
12 TPS 1?  
13 MR. STOLL: TPS 1, yes.  
14 (TPS Exhibit 1, term sheet, marked  
15 for identification, as of this date.)  
16 Q. Mr. Kosturos, I've handed you what  
17 we've marked as TPS Exhibit 1, which is a  
18 term sheet that is entitled "WGM Draft" which  
19 I assume means Weil Gotshal & Manges draft  
20 "3/5/09." Have you seen this document  
21 before, sir?  
22 A. I believe so.  
23 Q. I believe this is the first term  
24 sheet representing written settlement terms  
25 in this matter. Would you agree with that?

1  
2 A. I wouldn't know.  
3 Q. Okay. There might have been  
4 earlier ones is what you're saying?  
5 A. There may have been earlier ones.  
6 Q. Okay. I'd like you to turn at the  
7 very bottom of the first page where it says  
8 "363 sale assets." Do you see that?  
9 A. Yes.  
10 Q. And that says, if I can just read  
11 into the record, "In consideration of the  
12 sale proceeds described below, JPM PC shall  
13 purchase all of WMI's rights, title and  
14 interest in and to" and then it lists the  
15 Trust Preferred Securities, the Visa shares  
16 and the WMI intellectual property.  
17 Do you see that?  
18 A. Yes.  
19 Q. And then the next paragraph says,  
20 "Again, as a 363 sales of proceeds JPMC shall  
21 pay or transfer all of its rights, title and  
22 interest in and to the funds in the deposit  
23 accounts and the goodwill litigation  
24 proceeds." Do you see that?  
25 A. Yes.

1  
2 Q. And the funds in the deposit  
3 account, that's the \$4 billion deposit  
4 account, right?  
5 A. Yes.  
6 Q. And the Trust Preferred Securities  
7 claims is also a \$4 billion claim; is that  
8 right?  
9 A. It has \$4 billion of stated value,  
10 yes.  
11 Q. That's right.  
12 And that proposal, the exchange of  
13 the \$4 billion deposits to WMI and the Trust  
14 Preferred Securities to JPMorgan, that  
15 exchange has never changed in the course of  
16 any of the settlement discussions; is that  
17 right?  
18 MR. MASTANDO: Objection, your  
19 Honor.  
20 A. I think that there are -- the Trust  
21 Preferred Securities has always been a part  
22 of every term sheet that I can remember.  
23 Q. As well as the deposit accounts.  
24 A. Yes.  
25 Q. Okay. And this term sheet, 3/5/09,

1  
2 was entered or was exchanged before any  
3 litigation was filed against JPMorgan; is  
4 that right?  
5 A. Yes, that would be correct.  
6 Q. And it was filed before Quinn  
7 Emanuel was hired as conference counsel; is  
8 that correct?  
9 A. That's also correct.  
10 Q. And throughout the time period of  
11 these negotiations following this term sheet,  
12 at all times Weil Gotshal and not Quinn  
13 Emanuel did the negotiation -- negotiating  
14 with JPMorgan on behalf of the debtor; is  
15 that right?  
16 A. Can you say that again?  
17 Q. Yeah, I'm sorry.  
18 At all times after this term  
19 sheet --  
20 A. Um-hm.  
21 Q. -- and up to the time of the  
22 settlement, the settlement negotiations on  
23 behalf of the debtor were conducted by you  
24 and Weil Gotshal; is that fair?  
25 A. Up to this point?

1  
2 Q. No. From this point to the point  
3 where the settlement was actually entered  
4 into.  
5 A. Quinn Emanuel was definitely  
6 involved. They would review some of the  
7 terms. We kept them involved and up-to-date  
8 as one would with a good legal team like we  
9 had.  
10 Q. You kept them informed. Were they  
11 the lead negotiators?  
12 A. I would say I was the lead  
13 negotiator. I would say that Weil Gotshal  
14 drafted a lot of the documents, as well as  
15 Quinn Emanuel after they were hired also had  
16 input in the documents as well.  
17 I might point out your term sheets  
18 has brackets with all of the numbers with  
19 nothing in them, so I think this was a form  
20 of a term sheet that we considered but  
21 clearly there's no numbers in this.  
22 MR. STOLL: Your Honor, that's all  
23 I have.  
24 JUDGE WALRATH: Anyone else?  
25 A VOICE: Let him go first, your

1  
2 Honor.  
3 EXAMINATION BY  
4 MR. STEINBERG:  
5 Q. Good afternoon, Mr. Kosturos. I'm  
6 Arthur Steinberg from King & Spalding. I  
7 represent the (inaudible) warrant holders.  
8 I wanted to talk to you about the  
9 requirements of confirmation of a plan and  
10 specifically the best interest test. Do you  
11 know what the best interest test is?  
12 A. Yes, I do.  
13 Q. Okay. It's set forth in Section  
14 1129(a)(7) of the Bankruptcy Code and  
15 essentially provides that an impaired party  
16 is supposed to get in a reorganization plan  
17 at least as much as they would get in a  
18 liquidation; is that correct?  
19 A. That's correct.  
20 Q. And 1129(a)(7) and the best  
21 interest test brings into play the  
22 distribution scheme in Chapter 7 of the  
23 Bankruptcy Code; is that correct?  
24 A. That's correct.  
25 Q. So this case is -- and these are my

1  
2 words, not your words -- a bit unusual in  
3 that unsecured claims are getting paid on  
4 post-petition interest. Does that only come  
5 about, from your experience, if the entity is  
6 solvent?

7 A. It's my understanding that we are  
8 going to pay post-petition interest. We've  
9 talked about that with our lawyers. We  
10 believe it's appropriate in this case and  
11 we'll be putting on additional arguments  
12 about that later in the case.

13 Q. So is Washington Mutual insolvent  
14 at this point in time?

15 MR. MASTANDO: Objection, your  
16 Honor.

17 JUDGE WALRATH: Overruled.  
18 Can you answer?

19 THE WITNESS: I -- I -- at this  
20 point I can't -- I can't make a  
21 determination. It's going to largely  
22 depend on what the claim reserves are  
23 set out and where the ultimate amounts  
24 of the debt --

25 Q. Did you do -- I'm sorry.

1  
2 A VOICE: That's Exhibit 37, I  
3 believe.

4 THE WITNESS: Thank you.

5 A VOICE: Exhibit 6.

6 A. Equity 6. It's also 37.

7 Q. So you can turn to page C-3 of the  
8 liquidation analysis.

9 A. Um-hm.

10 Q. And do you see the amount set forth  
11 for paying post-petition interest in the  
12 Chapter 11 scenario for senior notes and  
13 senior subordinated notes, nothing for  
14 general unsecured creditors and a small  
15 amount for CCD guarantees? Do you see those  
16 numbers?

17 A. Just correct you there. I believe  
18 that we're paying 100 percent of the general  
19 unsecured claims.

20 Q. Right, but nothing -- there's  
21 nothing set forth for post-petition interest?

22 A. For them, yes.

23 Q. 439 million for post-petition  
24 interest on the senior notes and 258 million  
25 for the senior subordinated notes and

1  
2 A. Where the debt claims come out.

3 Q. Did you did a liquidation analysis  
4 for purposes of the disclosure statement and  
5 plan?

6 A. We did.

7 Q. And did you make assumptions as to  
8 what the unsecured claims and the other  
9 creditor claims would come out?

10 A. I believe we did.

11 Q. And based on the assumptions that  
12 you made in your liquidation analysis, would  
13 you say that Washington Mutual is solvent?

14 A. If you might, could we refer to the  
15 specific liquidation analysis? I know  
16 Mr. Nelson was referring to me to that  
17 earlier. I would just --

18 JUDGE WALRATH: Bring it up again.

19 Q. I was referring to the one attached  
20 to your disclosure statement prepared in  
21 connection with the solicitation for the  
22 plan.

23 A. I believe that's --

24 JUDGE WALRATH: Well, he has the  
25 demonstrative for that.

1  
2 8 million for the CCD guarantees; is that  
3 correct?

4 A. That's correct.

5 Q. All right. So I haven't gotten the  
6 exact math but it's close to \$700 million,  
7 maybe a little bit more than \$700 million?

8 A. On the interest?

9 Q. Yes. Plea 49.

10 A. I think it's 600.

11 Q. I'm sorry, \$600 million.

12 A. Um-hm.

13 Q. And if you look at the principal  
14 amounts that are being paid on account of the  
15 senior notes, they're getting back their  
16 principal in full, right?

17 A. Yes.

18 Q. And the senior subordinated notes  
19 are getting their principal back in full,  
20 right?

21 A. Yes.

22 Q. The CCD guarantees are getting  
23 their principal back in full, correct?

24 A. That's correct.

25 Q. And the only entity listed as a

1  
2 debtor is the PIERs and our shy by  
3 approximately \$200 million, right?  
4 A. That's correct.  
5 Q. So you have \$600 million of  
6 post-petition interest being paid and the --  
7 on your debt structure that you assume as  
8 part of your liquidation analysis. The only  
9 principal not being paid on the debt is  
10 \$200 million. So that does mean that the  
11 entity which is the subject of -- which has  
12 been baked into your liquidation analysis is  
13 solvent?  
14 A. It's kind of circular, because if  
15 you were to take out the post-petition  
16 interest, this would pay 100 percent to the  
17 PIERs and then you'd have to revise the  
18 analysis. I believe the analysis also works  
19 to the extent that --  
20 So I mean it's a circular question,  
21 if you will.  
22 Q. Well, let me see if I can clarify  
23 it so it won't be circular.  
24 The amount that the PIERs are not  
25 getting paid that would otherwise have to be

1  
2 paid for them to be paid 100 percent of the  
3 principal amount of their claim is  
4 \$201 million, according to your analysis; is  
5 that right?  
6 A. That's correct.  
7 Q. But the aggregate amount of  
8 post-petition interest paid under this plan  
9 is -- with the assumptions baked into your  
10 liquidation analysis is over \$600 million,  
11 correct?  
12 A. That's correct.  
13 Q. So if you didn't pay post-petition  
14 interest of \$600 million and you only paid  
15 \$400 million and you topped off the year so  
16 they get 100 percent on the pre-petition  
17 claim, you still have \$400 million over. And  
18 instead of distributing to other parties, you  
19 pay a post-petition interest on unsecured  
20 claims; is that correct?  
21 A. That's correct.  
22 The point of this analysis really  
23 is just to compare it to the Chapter 7, which  
24 is the section our referring to, is asking  
25 us to do and what we tried to prove is that

1  
2 under a Chapter 7 liquidation, you would not  
3 get as much as under a Chapter 11 claim.  
4 Q. But our comparing it to what your  
5 claim is actually providing, which is the  
6 left side of page C-3, right?  
7 A. Agreed.  
8 Q. So what our saying is our  
9 positing that under my plan, that this is my  
10 distribution scheme in Chapter 11 and this is  
11 what I think might happen in the Chapter 7.  
12 But you are starting with the fundamental  
13 assumption that your plan provides for the  
14 distributions within your liquidation  
15 analysis.  
16 A. That's true.  
17 Q. Okay. So if you have a little  
18 familiarity with the distribution scheme of  
19 Chapter 7, best interest, do you know whether  
20 post-petition interest gets paid ahead of  
21 late filed claims?  
22 A. I don't know.  
23 Q. Okay. If you wanted to have a  
24 reference, you could look at Section 7.6 in  
25 the plan?

1  
2 JUDGE WALRATH: You can save that  
3 for argument.  
4 MR. STEINBERG: Okay.  
5 Q. So do you know whether  
6 post-petition interest on unsecured claims  
7 get paid ahead of subordinated debt?  
8 A. Under the terms of -- of our plan,  
9 the way that it works is that the PIERs under  
10 their debenture will pay up to the  
11 post-petition -- to the interest of the  
12 senior notes, the senior sub notes and the  
13 CCD (inaudible).  
14 Q. I wasn't asking that question. I  
15 was just saying under the best interest test,  
16 do you know whether subordinated debt claims  
17 get paid ahead of post-petition interest on  
18 unsecured claims? Do you have that basis of  
19 knowledge, based on your experience in the  
20 case?  
21 A. Again, I think I answered that. It  
22 is our belief and our counsel's belief that  
23 it applies in this case and we'll be making  
24 our arguments later on in a confirmation.  
25 Q. One more time: If you have a

1  
2 Section 510(b) claim a debt claim being  
3 subordinated, not an equity claim that's  
4 being subordinated, do you know whether that  
5 claim under the best interest test would get  
6 paid ahead of post-petition interest on an  
7 unsecured claim?

8 A. I believe the position that we've  
9 taken in our plan is that we will be paying  
10 post-petition interest to the unsecured  
11 classes. We will be putting on our testimony  
12 to that later in the confirmation.

13 Q. Okay. Now, Section 726 of the  
14 Bankruptcy Code which talks about  
15 post-petition interest uses the term "legal  
16 rate." Do you recall ever having a  
17 discussion as to whether you should be paying  
18 the contractual rate or the federal judgment  
19 rate for purposes of calculating  
20 post-petition interest?

21 A. We have take a position we should  
22 be paying contractual interest.

23 Q. Do you know what the difference is  
24 as far as value goes, that if you are paying  
25 federal judgment interest what the difference

1  
2 would be?

3 A. I do not know.

4 Q. Okay. I'd like to turn to the  
5 Anchor litigation. That's one of the assets  
6 that are being sold as part of the plan of  
7 reorganization, right?

8 JUDGE WALRATH: Could you rephrase  
9 that? Say that again?

10 Q. I want to refer to the Anchor  
11 litigation. Is that one of the assets being  
12 sold under Section 363 of the Bankruptcy Code  
13 to JPMorgan as part of the global settlement  
14 and the plan of reorganization?

15 MR. MASTANDO: Objection to the  
16 form.

17 JUDGE WALRATH: Overruled. Can you  
18 answer?

19 A. I believe it is being listed.  
20 Again, the form of the sale really is to  
21 implement settlement agreement, if you will.  
22 We believe we have claims to that. JPMorgan  
23 believes they have claims to that. The 363  
24 is merely a form of a document to implement  
25 settlement agreement.

1  
2 Q. Okay. So in the global settlement  
3 agreement there's a defined term called "363  
4 sale and settlement"; is that correct?

5 A. Yes.

6 Q. And the Anchor litigation is listed  
7 as one of those assets that is part of the  
8 defined term 363 sale and settlement,  
9 correct?

10 A. I agree.

11 Q. And the defined term says that --  
12 means the compromise and settlement set forth  
13 in Bankruptcy Rule 9019 and the plan  
14 regarding, among other things, agreements  
15 with respect to ownership of plan  
16 contribution assets and the sale, transfer  
17 and assignment pursuant to the plan in  
18 sections 363 and 365 of the Bankruptcy Code  
19 and then it lists a whole bunch of assets in  
20 Romanette vii is the Anchor litigation,  
21 right?

22 JUDGE WALRATH: Do you know off the  
23 top of your head or do you want to --

24 A. I believe it's in there, yes. I  
25 mean I --

1  
2 Q. So the debtor is taking -- the  
3 debtor took the position by way of they don't  
4 need the Anchor litigation?

5 A. We believe we have claims to the  
6 Anchor and we've never settled whether --  
7 settled the litigation whether we own it or  
8 WMB owned it.

9 Q. You took the position that you  
10 owned the litigation, that it was yours and  
11 not JPMorgan's; isn't that right?

12 A. I -- I -- I stand by what I said.

13 Q. Within the adversary proceeding you  
14 had with JPMorgan you filed an answer.  
15 Didn't you state in that answer that that  
16 litigation, that asset, you -- you said that  
17 the court should adjudicate that (inaudible)  
18 to the asset?

19 A. I think that's what I said.

20 Q. Okay, good. And the confirmation,  
21 throughout some of this stuff there's a  
22 reference to a certificate that was filed by  
23 the counsel in the Anchor litigation that  
24 said that the real party in interest is  
25 Washington Mutual, Inc. as contrasted with

1  
2 Washington Mutual Bank; isn't that correct?  
3 A. I don't recall. If you could point  
4 me to a document, that would be very helpful.  
5 Thank you.

6 Q. All right. Well, I will try to do  
7 that in the confirmation brief and I'll just  
8 leave it for that.

9 JUDGE WALRATH: Move on.

10 Q. Are you familiar with the amended  
11 warrant agreement relating to the litigation  
12 tracking warrants?

13 A. Not very familiar with it.

14 Q. Are you familiar with any of the  
15 provisions?

16 A. I listened in a little bit on your  
17 trial yesterday, but I -- I don't know very  
18 much about -- (Speaking simultaneously).

19 Q. So if I asked you a question about  
20 Article 6.3 that says the bank owns the  
21 litigation and the bank is entitled to  
22 100 percent recovery of debts of Washington  
23 Mutual, Inc. and ask you how can you make the  
24 conclusion that Washington Mutual owns it in  
25 the context of the litigation, and how would

1  
2 you were asked this question before. There's  
3 two goodwill litigations, the American  
4 Savings litigation and the Anchor litigation,  
5 correct?

6 A. Yeah, right, under the term  
7 "goodwill," yes.

8 Q. And under the plan, the debtor is  
9 keeping the American Savings litigation and  
10 JPMorgan is keeping the Anchor litigation,  
11 correct?

12 A. Yes.

13 Q. And the Anchor litigation has  
14 something called litigation tracking warrants  
15 associated with it, the American Savings bank  
16 litigation didn't have litigation tracking  
17 warrants; is that correct?

18 A. That's correct.

19 Q. Okay. And when you did the global  
20 settlement, there's language that says that  
21 JPMorgan is going to take the Anchor  
22 litigation and then it adds specifically,  
23 free and clear of the rights of the  
24 litigation tracking warrant holders. There's  
25 something that's specifically referenced that

1  
2 you contrast and put it differently from the  
3 language of the agreement, you wouldn't have  
4 the capability of answering it?

5 A. I'm afraid I wouldn't.

6 Q. Sounds ambiguous to me.

7 Let me ask you a question. Why is  
8 the 363 sale -- why do you have to go at  
9 retroactive for three years? I mean, I never  
10 heard of a situation where you sign an  
11 affidavit pursuant to a plan that we want to  
12 have the transfer date retroactively applied  
13 to 2008. Why is that the case here?

14 A. You know, I -- I -- I don't know  
15 about that petition. I don't know why that  
16 has to happen that way.

17 Q. Seems unusual to you to backdate a  
18 transfer for two years?

19 MR. MASTANDO: Objection to the  
20 form, your Honor.

21 JUDGE WALRATH: Sustained.

22 A. I wouldn't have a comment on it.

23 JUDGE WALRATH: You don't have to  
24 answer.

25 Q. All right. Now, there's -- I think

1  
2 that asset is going to be sold free and clear  
3 of the litigation tracking warrant holders.  
4 Do you remember why that language was  
5 inserted?

6 A. No, I did not.

7 Q. Do you remember who asked to insert  
8 it?

9 A. I don't.

10 Q. Okay. Do you know the law firm  
11 that represents JPMorgan in this case?  
12 Sullivan & Cromwell, right?

13 A. Yes, I know (Speaking  
14 simultaneously).

15 Q. Do you know who drafted the Dime  
16 warrants and the litigation tracking  
17 warrants; do you know which firm did, drafted  
18 that?

19 A. I don't.

20 Q. Okay. Would it surprise you if I  
21 told you had Sullivan & Cromwell?

22 A. I would expect.

23 MR. MASTANDO: Objection to the  
24 form your Honor.

25 (Laughter.)

1  
2 Q. How much is the Anchor litigation  
3 worth? Because we're giving that one to  
4 JPMorgan. So what's the value of that?

5 A. I think on some of the previous  
6 slides I think we have -- off the top of my  
7 head I think it was in that 360 million,  
8 365 million dollar range.

9 Q. Right. So if I were to tell  
10 something like \$356 million and then there  
11 was a request for another \$63 million that  
12 hadn't been decided, is that familiar to you  
13 as a person involved in the claim?

14 A. Yes.

15 Q. Okay. So what about the tax  
16 gross-up? Are you familiar with that issue  
17 at all as to whether that is an additional  
18 amount to the Anchor litigation?

19 A. You know, I have not focused on it  
20 for the gross-up. I've been aware of the  
21 discussions about trying to get an estimate  
22 in but I have not been involved in that  
23 calculation.

24 Q. Are you familiar with the pleading  
25 that JPMorgan filed in the Federal Court of

1 JUDGE WALRATH: Agreed.

2 He doesn't know.

3 MR. STEINBERG: Okay.

4 Q. Now, in the definition of what is  
5 being sold, is there a value that you think  
6 that is being sold to JPMorgan? Is it north  
7 of \$2 billion, north of \$4 billion?

8 A. I think I've testified earlier  
9 that, you know, I then -- we haven't looked  
10 at it that way. It's a very complex  
11 situation. We're having claims released.  
12 We're releasing claims against them. It's --

13 You know, the one thing I can tell  
14 you is I know we're getting in our estimation  
15 in our disclosure statement, where we said  
16 6.1 to 6.8 billion dollars. What we've given  
17 across to JPMorgan is very difficult to put a  
18 dollar value on because of how much there  
19 where they cannot disclose as well as the  
20 FDIC. It's very, very complex.

21 Q. If I wanted to state it in the most  
22 general terms, would it be fair to say that  
23 your giving up claims through a 363 process  
24 that would be in the billions? It would be  
25

1 Claims that said that the tax gross-up should  
2 be at a minimum of \$104 million and max of  
3 \$144 million, which would take the amount of  
4 the Anchor litigation into the \$550 million  
5 category? Are you familiar with that at all?

6 A. I'm not familiar.

7 Q. Okay. Do you know what tax rate  
8 that JPMorgan used for purposes of their  
9 gross-up?

10 A. No, I don't.

11 Q. Okay. So would it surprise you if  
12 I told you JPMorgan's gross-up tax rate was  
13 less than what the debtor put in its  
14 disclosure statement as to what the tax rate  
15 should be, that they didn't have the same  
16 rate?

17 A. I wouldn't know what to make of  
18 that.

19 Q. So if I told you the JPMorgan rate  
20 was 38.7 percent and the debtor 45.5 percent  
21 that would not be familiar to you one way or  
22 the other?

23 MR. MASTANDO: Objection, your  
24 Honor. Counsel's testifying.  
25

1 more than a billion dollars?

2 A. You know, I -- I have -- we have  
3 not put dollar values on those. I -- I -- I  
4 really struggle with (Speaking  
5 simultaneously).

6 Q. So right now the estate has  
7 \$900 million and then after the JPMorgan  
8 settlement is done you'll have \$7.5 million  
9 and so there's 6 some odd billion dollars of  
10 value assets that were otherwise (inaudible)  
11 under the global settlement gets transferred  
12 to JPMorgan; is that correct?

13 A. I'll agree with that.

14 Q. I think your plan also provides  
15 that the assets remained, they're left  
16 behind, the reorganized entity will have  
17 something valued somewhere between 150 and  
18 200 million dollars?

19 A. I think that Mr. Zelin will testify  
20 to that later. I believe the number that  
21 we're using is 157.5 million.

22 Q. So would you think that it would  
23 be -- is it fair to say that under the global  
24 settlement, that Washington Mutual, Inc.  
25



1 through the global settlement is selling  
 2 substantially all of its assets to JPMorgan?  
 3 MR. MASTANDO: Objection to the  
 4 form.  
 5 JUDGE WALRATH: Sustained.  
 6 Definitely or litigation.  
 7 Q. Now, under the JPMorgan settlement,  
 8 I think it's somewhere in the myriad of  
 9 declarations that are filed, that there's  
 10 approximately \$580 million liability that  
 11 JPMorgan is assuming and that's additional  
 12 consideration for the global settlement; is  
 13 that correct?  
 14 A. It's specific liabilities that  
 15 they're taking.  
 16 Q. That they're taking on that  
 17 Washington Mutual otherwise had as part of --  
 18 the global settlement's assuming liabilities  
 19 and Washington Mutual, Inc. is being relieved  
 20 of those liabilities and that number is north  
 21 of \$500 million.  
 22 A. I think it's substantially north of  
 23 that number. They're taking employee claims.  
 24 They're releasing -- they're releasing some

1 intercompany claims. They're taking on the  
 2 Visa interchange. They're taking on the Visa  
 3 law sharing agreement. They're releasing  
 4 other claims that they have against us. It's  
 5 significant dollar value.  
 6 Q. So who decided which liabilities  
 7 they should take and which liabilities should  
 8 be left behind?  
 9 A. It was all part of the negotiation.  
 10 Q. Well, who decided they shouldn't  
 11 take on the litigation tracking warrants?  
 12 They took on more than a half a billion  
 13 dollars worth of claims. Why didn't they  
 14 pick the obligations relating to the  
 15 obligation of tracking warrants?  
 16 MR. MASTANDO: Objection, your  
 17 Honor. And I believe this is getting  
 18 into the adversary proceeding we heard  
 19 about this morning, and that this is not  
 20 appropriate for now.  
 21 JUDGE WALRATH: No, I think it's  
 22 going to the settlement.  
 23 A. You know, at the end of the day we  
 24 are very satisfied. We think the global

1 settlement agreement is a very fair and  
 2 reasonable outcome for WMI. Why were certain  
 3 things left off, why were things included, I  
 4 don't have a specific answer for that.  
 5 Q. I know that if I were at the table  
 6 I would have been negotiating on the behalf  
 7 of the litigation tracking warrant. So you  
 8 were at the table negotiating on behalf of  
 9 the entire estate. How can you decide which  
 10 liabilities should be taken by JPMorgan and  
 11 which ones shouldn't?  
 12 MR. MASTANDO: Objection, your  
 13 Honor, to the form and to the premise of  
 14 the question.  
 15 JUDGE WALRATH: Overruled.  
 16 How did you make the decision?  
 17 THE WITNESS: Oh, I think that  
 18 there were some liabilities that were,  
 19 by their nature, easier to transfer as  
 20 they related to the employee claims. A  
 21 lot of the Foley, Tully (ph) and the  
 22 assets that went with those liabilities,  
 23 they were now JPMorgan employees, they  
 24 naturally fitted in the context of the

1 negotiations to try to get JPM to take  
 2 those. There are other liabilities, I'm  
 3 sure. I'm sure there's numerous people  
 4 in this courtroom who would have liked  
 5 us to change the structure of the  
 6 settlement. I can't go back and redo  
 7 different portions. The settlement  
 8 agreement speaks for itself.  
 9 Q. Okay. So at the settlement table  
 10 there was you on behalf of the estate, there  
 11 was obviously JPMorgan, there may have been  
 12 the FDIC. Which other creditor  
 13 constituencies were at the table trying to  
 14 negotiate the chips of the settlement?  
 15 A. The unsecured creditors committee  
 16 clearly was involved to a great extent.  
 17 Q. Right?  
 18 A. They were involved in every step of  
 19 the way.  
 20 Q. So did they participate in deciding  
 21 which creditor unsecured credit funds would  
 22 get assumed by JPMorgan and otherwise pay  
 23 them and which one is left behind? Is that  
 24 something they participated in?

1  
2 A. The unsecured creditors committee  
3 obviously was a great source in our  
4 Chapter 11. They were definitely involved.  
5 And at the end of the day it's the debtors'  
6 job to maximize the value for the estate and  
7 it's ultimately the debtors' job to do that.  
8 Q. So the debtors' job is also to  
9 build a consensual resolution and as well,  
10 too, in the context of managing a Chapter 11?  
11 A. To the extent that a consensual  
12 resolution is possible, that is usually the  
13 preferred case. In this case, consensual  
14 resolution was never going to be an outcome  
15 and that's probably why we're two years,  
16 three months, still here talking about it.  
17 Q. But you tried, right?  
18 A. We tried.  
19 Q. And you tried on behalf of the  
20 litigation tracking warrant holders to try to  
21 do something for JPMorgan, too?  
22 A. My job as the debtor is to maximize  
23 the value of the estate. That is first and  
24 foremost my decision or responsibility. As  
25 it relates to how we pay I pay down the

1  
2 rights out of the balance sheet, the  
3 liabilities are what they are. They are --  
4 they have contractual rights to them. We pay  
5 down as far as we can.  
6 Q. Right?  
7 A. That's all the debtor can do.  
8 Q. But someone negotiated for JPMorgan  
9 to take on assuming certain liabilities that  
10 were Washington Mutual liabilities that they  
11 didn't otherwise have. So that was decided  
12 at the negotiating table that you were at;  
13 isn't that correct?  
14 A. That's correct, but it's also part  
15 of value, and so whether they pay me a dollar  
16 or whether they take a dollar of liabilities  
17 that's going to get paid, it's still a dollar  
18 value of the estate.  
19 Q. Did someone get the benefit of that  
20 value specifically as compared to going into  
21 the general part of the estate? And that's  
22 what I quarrel with in your answer.  
23 MR. MASTANDO: Objection, your  
24 Honor. I don't know if that's a  
25 question.

1  
2 JUDGE WALRATH: Let's save argument  
3 for the end.  
4 MR. STEINBERG: I'm sorry.  
5 Q. Let's talk about the goodwill  
6 litigations. How did you decide to take the  
7 American Savings and give up the Anchor?  
8 Anchor is so much bigger.  
9 A. I would agree with you that the  
10 Anchor savings is a bigger dollar value than  
11 the American. Again, it's part of the global  
12 settlement agreement. It was part of how we  
13 arrived at the end solution. It is all  
14 comprised into one. You know, I can't go  
15 back and re-parse the decisions of how we got  
16 to where we got. I think the global  
17 agreements speak for itself.  
18 Q. So there were --  
19 A. (Speaking simultaneously).  
20 Q. You looked at it on a macro global  
21 level: This is what we are getting, this is  
22 what we're giving up, and these are chips to  
23 pass around back and forth; is that fair?  
24 A. I think at the end of the day we  
25 negotiated the best deal of value that we

1  
2 could. That was what we intended to do,  
3 that's what we did. So that's -- whoever  
4 who's getting one under the global settlement  
5 agreement, that was the best deal we could  
6 get for the estate.  
7 Q. Okay. Let's talk about the  
8 releases that are part of the plan and  
9 specifically the third-party releases.  
10 A. Yes.  
11 Q. The debtor originally filed a plan  
12 which had some version of third-party  
13 releases, and then filed recently an  
14 amendment to change what the third-party  
15 releases are. And I have to confess, even  
16 though I think I'm sort of average smart, I  
17 don't understand what you did.  
18 So instead of trying to have  
19 someone write it, it sounds like a  
20 combination of tax and corporate lawyer who  
21 wrote it, I'm going to ask you to articulate  
22 what does someone who under a plan is not  
23 getting distribution, never got a ballot and  
24 therefore didn't check any kind of boxes,  
25 what are they -- what are they preserving and

1  
 2 what are they giving up under your plan with  
 3 regard to third party?  
 4 A VOICE: Objection, your Honor.  
 5 Isn't it this a legal issue?  
 6 JUDGE WALRATH: I'll allow him to  
 7 try to tell us.  
 8 MR. MASTANDO: It's beyond the  
 9 direct.  
 10 MR. STEINBERG: He's the witness on  
 11 your plan.  
 12 JUDGE WALRATH: Go ahead.  
 13 THE WITNESS: I will try, your  
 14 Honor.  
 15 A. I believe that the way that the  
 16 releases are set is that the debtors  
 17 committee, everyone involved with the estate  
 18 will be granted a release, and then those who  
 19 didn't get dollars don't grant releases  
 20 beyond that.  
 21 Q. So does someone who's not getting  
 22 any money in the plan, are they releasing  
 23 JPMorgan?  
 24 A. I don't believe they are.  
 25 Q. Someone's who's not getting any

1  
 2 of the earlier motions, that should the  
 3 disputed reserve be set up, we will put  
 4 100 percent of cash to the side and put that  
 5 in a liquidating trust and then try to  
 6 resolve the claim. I believe that's how the  
 7 claim's written. I actually --  
 8 You said that earlier.  
 9 Q. I did. But I was asking a  
 10 different question, which is that people who  
 11 have disputed claims didn't have the  
 12 opportunity to take something other than  
 13 cash, take the same kind of operation as  
 14 reorganized stock; is that correct?  
 15 A. I believe that is correct.  
 16 Q. Why did you participate in the  
 17 construction of a plan which deprived  
 18 disputed creditors with the same rights that  
 19 allowed creditors have with the assumption  
 20 that ultimately the disputed claims would  
 21 become allowed at some point in the future?  
 22 MR. MASTANDO: Objection to the  
 23 form, your Honor.  
 24 JUDGE WALRATH: Yes. You want to  
 25 save that for argument?

1  
 2 amount of money on the plan, are they  
 3 releasing the board of directors for the  
 4 post-petition interest?  
 5 A. I believe they are.  
 6 Q. They are releasing the board.  
 7 A. I believe so.  
 8 Q. Even though they're getting no  
 9 money under the plan?  
 10 A. I believe that is -- I believe that  
 11 is how the releases read.  
 12 Q. Are they getting -- are they  
 13 releasing for their post-petition acts?  
 14 A. Yes.  
 15 Q. Okay. I want to talk a little  
 16 about the stock elections. General unsecured  
 17 creditors' claims are entitled to take an  
 18 election to take reorganized stock instead of  
 19 the cash distribution; isn't that correct?  
 20 A. That's correct.  
 21 Q. But the disputed creditors are not  
 22 entitled to take a stock -- to get that kind  
 23 of election; is that correct?  
 24 A. I believe, and I believe actually  
 25 you said it earlier today in addressing one

1  
 2 MR. STEINBERG: Well, your Honor,  
 3 I'll ask a different question on the  
 4 same topic.  
 5 Q. Have you put a value on what that  
 6 election to take reorganized stock is, what  
 7 it's worth?  
 8 A. I believe it is stated over and  
 9 over again. Again, Mr. Zelin will be talking  
 10 about that, but I believe that we believe  
 11 it's \$157.5 million for the reorganized  
 12 entity.  
 13 Q. But did you separately value --  
 14 And it's not subject of your  
 15 testimony but someone else, we'll ask that  
 16 other person. the value of the ability to  
 17 make the election to take stock instead of  
 18 cash, what's that worth to a creditor to have  
 19 that right?  
 20 A. We didn't -- we didn't put a value  
 21 on that.  
 22 Q. Okay. Are you familiar with who  
 23 actually made the election, who opted under  
 24 the plan to take the reorganized stock  
 25 instead of the cash? Are you familiar with

1 the results of the election?

2 A. I believe that's going to be a part  
3 of the KCC declarations. I could talk about  
4 it -- I don't have enough detail to talk  
5 about it.

6 Q. Okay, just a couple more questions.

7 Under the global settlement if  
8 there's a sale of an asset, is it correct to  
9 say that your looking to sell that asset to  
10 JPMorgan free and clear of all liens and  
11 claims?

12 A. I would believe that would be  
13 the -- the -- the structure of the 363 assets  
14 sale, yes.

15 Q. And if someone actually did have a  
16 claim against an asset or a lien against an  
17 asset that was being sold, do those liens and  
18 claims get preserved at least of the proceeds  
19 of the sale?

20 MR. MASTANDO: Objection to the  
21 form, calls for a legal conclusion.

22 JUDGE WALRATH: Under your plan.  
23 Overruled.

24 A. I'm not aware of that. Obviously

1 A. Well, currently your in class 21.  
2 I guess if you prove your claim we believe  
3 that you'll be into class 12 and you'll have  
4 your claim estimated at the next hearing and  
5 that's --

6 Q. So --

7 A. That's the mechanics.

8 Q. So the mechanics would be that  
9 while I can raise this kind of theoretical  
10 concern, your plan is structured so that if I  
11 can establish that I am a creditor, I will  
12 have a fully funded class claim and I'll get  
13 paid out of that anyway. Is that essentially  
14 your testimony?

15 A. That is my testimony.

16 Q. Okay. And the debtors' original  
17 plan had a footnote as to how you factored in  
18 the reserve for the litigation tracking  
19 warrants. It was a number like 183 and a  
20 half million dollars. There was a little  
21 formula. And then on November 17th, you  
22 filed a motion that said, you know, "I made a  
23 mistake, the number is really at least  
24 \$250 million. Do you know how that came

1 you have the LT -- your warrants, which are  
2 what they are, but I'm not aware of anything  
3 else that has a lien attached to it with any  
4 assets we're selling.

5 Q. So if you did have a lien or a  
6 claim against an asset that was being sold  
7 and it's now being stripped away from that  
8 asset so it's being sold free and clear of  
9 that asset, does that claim attach to  
10 anything or did you just lose that right?

11 A. I'm not aware of anything. I'm not  
12 aware of anything that -- what your talking  
13 about specifically, other than your clients,  
14 the litigation tracking warrant holders.

15 Q. Does the plan provide that in the  
16 event that I actually am right that there was  
17 a claim that attached to the Anchor  
18 litigation such that JPMorgan was supposed to  
19 take it and you didn't bargain for it, you  
20 didn't cause it to happen, you created a  
21 breach, all the things I talked about  
22 yesterday, whatever that claim is, it doesn't  
23 attach to anything that JPMorgan's paying for  
24 getting a \$600 million litigation?

1 about, what the mistake was and whether the  
2 new number is correct?

3 MR. MASTANDO: Objection to the  
4 form, your Honor.

5 JUDGE WALRATH: Well, if you want  
6 to rephrase.

7 MR. STEINBERG: Yeah.

8 Q. Do you know why you changed your  
9 number from \$183 million to \$250 million?

10 A. I don't know why, but there's an  
11 estimation process and at the end of the day  
12 if your number is -- I can't remember what  
13 you said your number would potentially be --  
14 500 million on the tax credit, then you know  
15 we have a claims estimation procedure to deal  
16 with that.

17 Q. I was asking why you changed your  
18 number. You originally said it was 183, then  
19 you said 250. When I say "you" I mean the  
20 debtor. Your the CRO for the debtor.

21 A. I don't know. I don't know.

22 MR. MASTANDO: Objection, asked and  
23 answered.

24 MR. STEINBERG: I didn't get that

1  
 2 answer. That's why I asked it again.  
 3 A. I don't know.  
 4 MR. STEINBERG: I have no other  
 5 questions.  
 6 JUDGE WALRATH: Thank you. Anybody  
 7 else?  
 8 MR. ROQUEMORE: Your Honor, James  
 9 Roquemore representing the American  
 10 National in the Texas litigation.  
 11 Your Honor, previously debtors'  
 12 counsel had agreed to stipulate to  
 13 authentication of certain exhibits and  
 14 I'd like to introduce these at this  
 15 time.  
 16 (Discussion off the record.)  
 17 MR. ROQUEMORE: Your Honor, may I  
 18 approach?  
 19 JUDGE WALRATH: You may.  
 20 MR. ROQUEMORE: (Handing).  
 21 JUDGE WALRATH: You want to tell me  
 22 which is A1 and which --  
 23 MR. ROQUEMORE: I was waiting for  
 24 the court to --  
 25 JUDGE WALRATH: All right. The

1  
 2 A. Yes.  
 3 Q. Okay. It's also called the  
 4 American National litigation and the ANICO  
 5 litigation; is that correct?  
 6 A. Yes.  
 7 Q. Okay. And oyour familiar that the  
 8 Texas litigation was originally filed in  
 9 Galveston County by American National  
 10 Insurance Company?  
 11 A. Yes.  
 12 Q. And later moved to federal court  
 13 and ultimately transferred to the District of  
 14 Columbia where it's on appeal pending before  
 15 the District of Columbia Court of Appeals?  
 16 MR. SACKS: Your Honor, I object to  
 17 this. This isn't even a case to the  
 18 debtor.  
 19 JUDGE WALRATH: If oyour not talking  
 20 into the microphone --  
 21 MR. SACKS: This is not even a case  
 22 against the debtor. This witness hasn't  
 23 established he has any personal  
 24 knowledge having to do with this case.  
 25 It's --

1  
 2 order is A1. The notice of dismissal is  
 3 A2.  
 4 (ANICO Exhibit A1, Order, marked  
 5 for identification, as of this date.)  
 6 (ANICO Exhibit A2, Notice of  
 7 Dismissal, marked for identification, as  
 8 of this date.)  
 9 MR. ROQUEMORE: Thank you, your  
 10 Honor.  
 11 JUDGE WALRATH: Are there two  
 12 orders or motions or, excuse me, two  
 13 notices of dismissal?  
 14 MR. ROQUEMORE: There should be  
 15 only one notice of dismissal.  
 16 JUDGE WALRATH: I have an extra  
 17 copy. All right.  
 18 MR. ROQUEMORE: Your Honor, may I  
 19 proceed?  
 20 JUDGE WALRATH: You may.  
 21 MR. ROQUEMORE: Thank you.  
 22 EXAMINATION BY  
 23 MR. ROQUEMORE:  
 24 Q. Mr. Kosturos, oyour familiar with  
 25 the Texas litigation; is that right?

1  
 2 JUDGE WALRATH: It is not covered  
 3 by the global settlement?  
 4 MR. SACKS: There is no release  
 5 involving this case under the global  
 6 settlement, that's correct, your Honor.  
 7 They can maintain and continue to with  
 8 case, that's correct, under the global  
 9 settlement agreement. It doesn't affect  
 10 their right to continue with that  
 11 action. They filed no Proof of Claim  
 12 against the debtor. This claim is  
 13 against my client. The global  
 14 settlement agreement doesn't release  
 15 this case. I don't understand why  
 16 they're here but my objection at this  
 17 point is to questioning this witness  
 18 about a litigation that the debtor is  
 19 not even a party to.  
 20 JUDGE WALRATH: You want to respond  
 21 to that?  
 22 MR. ROQUEMORE: Your Honor, the  
 23 Texas litigation is in the global  
 24 settlement agreement. There were  
 25 releases that purport to release the

1  
2 litigation, the Texas litigation. We've  
3 objected to those. We objected to  
4 those, we objected to the plan  
5 confirmation with regard to those  
6 releases. We believe that they're not  
7 consensual releases that provide no  
8 consideration to the Texas litigants.  
9 They violate circuit law. And --  
10 JUDGE WALRATH: Well, I'll allow  
11 you to ask some questions of this  
12 witness to see if oyour correct and rely  
13 on the testimony of counsel.  
14 MR. STROCHAK: Your Honor, may I be  
15 heard briefly.  
16 JUDGE WALRATH: Yes.  
17 MR. STROCHAK: On the release  
18 issue, I just -- Mr. Roquemore is not  
19 correct. The releases have been  
20 modified to provide that anyone who is  
21 not getting a distributions is not  
22 covered by the releases. That's the  
23 modification that we filed. And my  
24 understanding is Mr. Roquemore's clients  
25 are not getting distributions and

1  
2 therefore they would not be covered by  
3 the third party release in 30.6.  
4 The only thing the settlement  
5 agreement does is it has a cooperation  
6 clause that says the debtors will  
7 cooperate in connection with asserting  
8 that any of the claims, to the extent  
9 that they're derivative actions. To the  
10 extent they belong to the estate and  
11 likewise to the extent they believe to  
12 the FDIC as the receiver, there are  
13 provisions for cooperation with respect  
14 to those issues. But the releases  
15 simply do not apply to their claims  
16 anymore to the extent they are not  
17 receiving distribution.  
18 MR. ROQUEMORE: Your Honor, if I  
19 could.  
20 We briefed our -- we provided our  
21 briefings. We can explain where we see  
22 releases in the plan and the settlement  
23 agreement. However, I will start off my  
24 questioning with regard to what counsel  
25 has stated to you on the record to see

1  
2 the accuracy of that.  
3 JUDGE WALRATH: All right.  
4 Q. Mr. Kosturos, does the plan provide  
5 any releases to -- regarding the Texas  
6 litigation?  
7 A. I believe that the statements that  
8 my counsel made is very consistent with my  
9 knowledge, that the they -- the release has  
10 been modified such that if you are not  
11 receiving anything under the plan, you are  
12 not releasing JPMorgan.  
13 Q. So is your testimony that it's your  
14 understanding that the plan does not release  
15 the Texas litigation; is that correct?  
16 A. That's correct.  
17 Q. Okay. And the provisions of the  
18 debts -- the definition of related actions,  
19 does that include the Texas litigation?  
20 A. Again, consistent with my lawyer's  
21 comments, I believe under the global  
22 settlement agreement we have stated that we  
23 will use our reasonable best efforts; if the  
24 ANICO litigation is a derivative action that  
25 really belongs to WMI or the FDIC, that we

1  
2 will use our reasonable best efforts to  
3 exercise our rights. Should -- should your  
4 clients' rights -- should we not have those  
5 rights, you are free to continue on in the  
6 pursuit of your litigation. If we believe  
7 there are derivative rights we're releasing,  
8 we're releasing those from -- we will use our  
9 reasonable best efforts to release those  
10 claims.  
11 Q. It's true, is it not, that the  
12 Texas litigation as it stands now involves  
13 only holders of WMB bonds.  
14 A. I don't remember. You've modified  
15 your claims previously. It was some WMI note  
16 holders. I just don't remember where you've  
17 ended up, whether it's just WMB or what have  
18 you, but again our WMB senior note holders  
19 are -- we're settling them and they're  
20 granting a release towards us.  
21 Q. I direct your attention to  
22 Exhibit 82. That's the plaintiff's notice of  
23 Washington Mutual, Inc. bondholder and  
24 stockholder claims.  
25 A. I'm sorry, what is the exhibit?

1  
2 Q. It's A2, which is the plaintiff's  
3 notice of dismissal of Washington Mutual,  
4 Inc. bondholder and stockholder claims. I  
5 provided (inaudible)?  
6 A. I'm not following you. I'm sorry.  
7 I only have --  
8 JUDGE WALRATH: Do you have A2?  
9 THE WITNESS: No. I have the  
10 second one.  
11 MR. ROQUEMORE: Ah. (Handing)  
12 THE WITNESS: Thank you.  
13 Q. Now do you see the plaintiffs'  
14 notice of dismissal?  
15 A. Yes.  
16 Q. Have you seen that document before?  
17 A. No.  
18 Q. So your understanding of what the  
19 global settlement agreement applies to --  
20 whether the global settlement agreement  
21 applies to the Texas litigants was not based  
22 upon this filing, A2.  
23 A. No.  
24 Q. Now, you testified that at your  
25 deposition that the debtors do not own claims

1  
2 by WMB bondholders against JPMorgan; is that  
3 correct?  
4 A. That's correct.  
5 Q. And you understand that the Texas  
6 litigants are WMB bondholders.  
7 A. Based on your representations to  
8 me, yes.  
9 Q. And further, the WM -- the Texas  
10 litigants aren't subordinated -- WMB  
11 subordinated (inaudible)?  
12 MR. MASTANDO: Objection, your  
13 Honor.  
14 JUDGE WALRATH: Well, answer it if  
15 you can.  
16 A. I wouldn't know. I don't know  
17 who -- who -- where their claims fall. Are  
18 you suggesting they're in 17B? 17D? Clause.  
19 Q. WMB subordinated note. Are you  
20 familiar with whether or not the Texas  
21 litigants have WMB's subordinated note?  
22 A. I'm just going on your  
23 representation.  
24 Q. Well, don't take it --  
25 JUDGE WALRATH: If you don't know,

1  
2 say you don't know.  
3 THE WITNESS: I don't know.  
4 Q. Okay. Are you familiar with the  
5 claim that the debtors filed with regard to  
6 their -- this plan confirmation hearing, the  
7 debtors' omnibus response to objections to  
8 confirmation to the debtors' sixth amended  
9 joint plan and the failure to debtors  
10 pursuant to Chapter 11 of the United States  
11 Bankruptcy Code?  
12 A. I have read that document.  
13 Q. You've read that document. And are  
14 you familiar with page 42, where they discuss  
15 the Texas litigation?  
16 A. I would greatly appreciate a copy  
17 of that.  
18 MR. ROQUEMORE: (Handing.)  
19 Q. Now you've read the copy of the  
20 pleading that your attorneys have filed; is  
21 that correct?  
22 A. Yes.  
23 Q. Okay. Is it true the first line  
24 says the Texas claimants or litigants have  
25 the WMB subordinated note?

1  
2 A. Yes.  
3 MR. MASTANDO: Your Honor, I don't  
4 have a copy of the exhibit.  
5 MR. ROQUEMORE: Sorry. I only made  
6 one copy for myself but this is the  
7 debtors' omnibus response. It's part of  
8 the record.  
9 JUDGE WALRATH: Yeah, it's part of  
10 the record.  
11 Go ahead.  
12 MR. ROQUEMORE: Thank you, your  
13 Honor.  
14 Q. And you would also agree that it's  
15 your position that it would not be fair for  
16 the plaintiff to call for a release of WMB  
17 bondholder claims against the -- it would not  
18 fair for the plan to call for release of WMB  
19 bondholder claims against a non-debtor third  
20 party?  
21 JUDGE WALRATH: Are you talking  
22 about the subordinated notes?  
23 MR. ROQUEMORE: Yes.  
24 JUDGE WALRATH: All right, then  
25 rephrase.

1  
2 Q. You would agree it would be unfair  
3 for the plan to call for a release of the WMB  
4 subordinated note holders' claims against a  
5 non-debtor third party such as JPMC?

6 A. I believe we testified that we  
7 amended the releases and that's the release.  
8 If you don't receive value under the plan,  
9 oyrur not releasing -- we changed that. We  
10 changed the provision and oyrur not releasing  
11 JPMorgan.

12 Q. And you would agree that would not  
13 be fair to release JPMorgan from such claims.

14 MR. MASTANDO: Objection to the  
15 form, your Honor.

16 JUDGE WALRATH: Sustained. That  
17 calls for a legal conclusion. It's  
18 argumentative. Save it for third party.

19 Q. Now, you understand the Texas  
20 litigation does not include claims against  
21 WMB. Oyrur familiar with the Texas litigation  
22 and you would agree that it does not involve  
23 claims against WMB or the receivership?

24 MR. MASTANDO: Objection, your  
25 Honor. Calls for a legal conclusion as

1  
2 A. No, I don't.

3 MR. MASTANDO: For the record, I  
4 believe the deposition was on the 16th.

5 MR. ROQUEMORE: November 16th.

6 Q. Page 216, line 16. (Handing.) The  
7 question was:

8 "You agree that you never got any  
9 consent from us for this provision,  
10 right?"

11 Your answer: "I did not receive  
12 consent from the ANICO plan for this  
13 provision."

14 And that provision was -- had to do  
15 with the release; is that correct?

16 A. This is clearly what I was deposed  
17 on. Since then the releases have changed,  
18 so --

19 Q. Oyrur saying that they did consent?

20 A. No.

21 Q. It's also true that the Texas --  
22 none of the Texas plaintiffs received any  
23 consideration from the debtors for any  
24 release of their claims against JPMorgan. Is  
25 that true?

1  
2 well.

3 JUDGE WALRATH: Yeah. Sustained.

4 Q. Are you familiar with the damages  
5 claim by the Texas litigation claimants?

6 A. No.

7 Q. Are you familiar with the face  
8 value of the bonds that the -- that the Texas  
9 group holds of WMB?

10 A. No.

11 Q. It's true that with regard to the  
12 provisions of the plan and the global  
13 settlement agreement, that none of the Texas  
14 litigants consented to that provision of the  
15 plan or the releases therein.

16 A. I don't know if they voted, so if  
17 they didn't -- if I'm unclear whether they  
18 voted, I'm therefore unclear whether they  
19 consented.

20 Q. You remember your deposition on the  
21 22nd?

22 A. Sure.

23 Q. I refer you to page 216. Do you  
24 still have a copy of your deposition in front  
25 of you?

1  
2 MR. SACKS: Objection, your Honor.  
3 There is no release of the claim.

4 JUDGE WALRATH: Sustained.

5 MR. MASTANDO: I join the  
6 objection, your Honor.

7 JUDGE WALRATH: Sustained.

8 Q. I just wanted to clarify something  
9 you testified to earlier.

10 Did you testify that under the  
11 terms of the plan, someone who gets no  
12 distribution under the plan and holds no  
13 claims against the debtor are releasing  
14 claims against a non-debtor third party --  
15 can be releasing claims against a non-debtor  
16 third party like JPMorgan?

17 MR. MASTANDO: Objection to the  
18 form and calls for a legal conclusion.

19 JUDGE WALRATH: Overruled.

20 Can you answer that?

21 THE WITNESS: I think I have.

22 JUDGE WALRATH: Answer it again.

23 (Laughter.)

24 Q. I didn't hear your answer. That's  
25 why I asked the question?



1  
2 A. My understanding, if a claimant  
3 does not receive value under our plan they  
4 are not fair -- they are not releasing the  
5 non-debtors.  
6 MR. ROQUEMORE: Those are all the  
7 questions I have. Thank you, your  
8 Honor.  
9 JUDGE WALRATH: Thank you. Anybody  
10 else?  
11 MS. SLOTKO: Your Honor, I am not  
12 an attorney so I'm not here to cross  
13 this witness but I would like --  
14 JUDGE WALRATH: Well, you have to  
15 tell us who you are for the record.  
16 MS. SLOTKO: I'm Eileen Slotko. I  
17 would like about five minutes of the  
18 court's time if I may, please.  
19 JUDGE WALRATH: To not  
20 cross-examine the witness?  
21 MS. SLOTKO: Not to cross-examine  
22 the witness.  
23 JUDGE WALRATH: I'm not sure we're  
24 at that stage.  
25 MS. SLOTKO: I'm sorry, I thought

1  
2 Mr. McCree was a senior businessperson at  
3 JPMorgan Chase?  
4 A. Yes, I did.  
5 Q. And prior to your negotiation with  
6 Mr. McCree in the context of this matter, did  
7 you have any prior relationship or knowledge  
8 of Mr. McCree?  
9 A. I had never met Mr. McCree prior to  
10 Washington Mutual.  
11 Q. Would you characterize your  
12 negotiations with Mr. McCree as arm's-length  
13 business negotiation?  
14 A. Yes.  
15 Q. Now, you indicated that there were  
16 other parties that also participated in the  
17 negotiations in this case; is that correct?  
18 A. That's correct.  
19 Q. The FDIC was one of those parties?  
20 A. That's correct.  
21 Q. And did you negotiate with  
22 individuals on behalf of the FDIC?  
23 A. Yes, I did.  
24 Q. And who were those individuals?  
25 A. Primarily two individuals. At the

1  
2 we were done for today. I'm sorry.  
3 JUDGE WALRATH: Not yet. All  
4 right.  
5 MS. SLOTKO: Thank you.  
6 MR. SACKS: Again, Robert Sacks  
7 from Sullivan & Cromwell for JPMorgan  
8 Chase.  
9 EXAMINATION BY  
10 MR. SACKS:  
11 Q. Good afternoon, Mr. Kosturos. It's  
12 late, I know. I'll be very, very brief with  
13 you.  
14 I'd like to bring you back to the  
15 subject of negotiations. You've testified  
16 both in your written direct and also today  
17 about the subject of the negotiations. I'm  
18 correct that you were the lead business  
19 negotiator for the debtors in the settlement  
20 negotiation, correct, sir?  
21 A. That's correct.  
22 Q. And who is the lead negotiator for  
23 JPMorgan Chase?  
24 A. It was Dom McCree.  
25 Q. And do you understand that

1  
2 time the general counsel of the FDIC, Mike  
3 Broadfield, who has since retired. And then  
4 Rick Osterman took his place as interim  
5 general counsel who concluded the  
6 negotiation.  
7 Q. And prior to the negotiations with  
8 those individuals in this case, did you have  
9 any prior business or personal relationship  
10 with those individuals?  
11 A. No, I had never met either  
12 individual before.  
13 Q. Would you describe those  
14 negotiations as arm's-length?  
15 A. Yes, I would.  
16 Q. You negotiated with representatives  
17 of the bank bondholders as well, did you not?  
18 A. Yes, I did.  
19 Q. And who did you negotiate with on  
20 that part of the negotiation?  
21 A. Bill Anchor and Dan Pine and a  
22 couple other gentlemen within the bank  
23 bondholder group, and then Mr. Anchor was  
24 replaced by Dean Zeal (ph.) from (inaudible)  
25 & Young.

1  
 2 Q. And did you have any prior personal  
 3 relationship with any of those individuals?  
 4 A. I had known Dean Zeal for some time  
 5 but all the other individuals I had never met  
 6 before.  
 7 Q. But your relationship with Mr. Zeal  
 8 was in a professional capacity?  
 9 A. Yes.  
 10 A VOICE: Objection, your Honor.  
 11 We object to the leading questions  
 12 because JPMorgan is a settling party and  
 13 is not adverse to Washington/WMI for the  
 14 purposes of this claim confirmation.  
 15 JUDGE WALRATH: All right.  
 16 Sustained.  
 17 Q. How would you characterize your  
 18 negotiations, sir, with representatives of  
 19 the bank bondholders?  
 20 A. I would say that it was  
 21 arm's-length.  
 22 Q. Were there any -- you've been  
 23 involved in many commercial negotiations  
 24 before, have you not?  
 25 A. Yes, I have.

1  
 2 Q. Were there any circumstances that  
 3 made these negotiations complicated, that  
 4 complicated these negotiations?  
 5 A. These negotiations were incredibly  
 6 complicated. You very rarely have the  
 7 situation that we have in this case, where  
 8 you have a holding company, you have an FDIC  
 9 receivership, and then you have a purchaser  
 10 of those assets on the other side. When --  
 11 you usually don't run into these types of  
 12 complex negotiations, as well as creditors  
 13 who are at the bank level who have claims.  
 14 This was an incredibly complex case.  
 15 Q. I'd like to stay on the subject of  
 16 the negotiations but just switch topic and I  
 17 promise I won't be much longer.  
 18 You were asked a number of  
 19 questions by Mr. Nelson and by others that  
 20 related to the value that was being  
 21 transferred. Do you recall that?  
 22 A. Yes.  
 23 Q. And you recall indicating that  
 24 there was a schedule in JPMorgan Chase's  
 25 brief that you thought summarized principal

1  
 2 components of the settlement agreement; do  
 3 you recall that?  
 4 A. Yes.  
 5 MR. SACKS: Your Honor, may I  
 6 approach?  
 7 JUDGE WALRATH: You may.  
 8 MR. SACKS: Thank you. (Handing.)  
 9 JUDGE WALRATH: Marked as JPMC 1.  
 10 (JPMC Exhibit 1, copy of chart,  
 11 marked for identification, as of this  
 12 date.)  
 13 Q. If you look at the exhibit marked  
 14 as JPMC Exhibit 1, Mr. Kosturos, is that a  
 15 copy of the chart you were referring to?  
 16 A. Yes, it was.  
 17 Q. Now, Mr. Kosturos, let me just go  
 18 through a few of the items on here.  
 19 You were asked about a -- questions  
 20 about value being transferred but very few  
 21 questions about claims being released or  
 22 liabilities being assumed, and I'd like to go  
 23 through a few of those if I could.  
 24 First, looking at the first entry  
 25 under disputed accounts; do you see that?

1  
 2 A. Yes.  
 3 Q. Okay. And it indicates that  
 4 JPMorgan was releasing its claims as to all  
 5 of those -- the approximately \$4 billion in  
 6 those accounts, correct?  
 7 A. That's correct.  
 8 Q. All right. Did you understand what  
 9 some of those claims were at the time of the  
 10 negotiation?  
 11 A. Yes. They were mainly documented  
 12 in JPMorgan's motion, I believe it was dated  
 13 March 24th.  
 14 Q. Did you understand in addition to  
 15 its claims to those accounts that JPMorgan  
 16 Chase had challenged the jurisdictional  
 17 aspects of the litigation?  
 18 A VOICE: Objection, your Honor  
 19 leading.  
 20 JUDGE WALRATH: Sustained.  
 21 Q. In the negotiation did JPMorgan  
 22 Chase tell you any -- do you recall JPMorgan  
 23 Chase telling you anything about what might  
 24 happen for it to lose an appeal with respect  
 25 to those issues?

1  
2 A. If they would lose --

3 Q. Yes. The JPMorgan Chase.

4 MR. STOLL: Objection, your Honor.

5 That's hearsay. It's an out-of-court  
6 statement. It's not an admission.

7 There is a no exception to that.

8 MR. SACKS: I'm offering it just  
9 for what went back and forth in the  
10 negotiations, not for the truth.

11 JUDGE WALRATH: Overruled. Just  
12 what was discussed in the negotiation.

13 Q. Do you recall, Mr. McCree or others  
14 on behalf of JPMorgan Chase telling you  
15 JPMorgan Chase's -- what do you recall them  
16 telling you?

17 A. Well, as it related to the disputed  
18 accounts --

19 Q. Yes.

20 A. -- I believe that JPMorgan  
21 continually brought up the subject that were  
22 they to lose within the Bankruptcy Court or  
23 face summary judgment, that they would  
24 continue to appeal it, and were also looking  
25 to potentially move this to the district

1  
2 JUDGE WALRATH: (Inaudible.)

3 Q. Do you recall whether there were  
4 any claims in the litigation relating to  
5 amounts -- specifically from the FDIC that  
6 related to amounts that had been transferred  
7 into or out of those accounts in the month  
8 prior to bankruptcy?

9 A. The FDIC had brought forth a claim  
10 of they believed there was a preference of  
11 \$922 million which was a tax transfer from  
12 WMB to WMI, and they were -- they were  
13 looking -- they had developed their 9.5  
14 rights. They believed they had a valid  
15 offset claim for at least 922 and were going  
16 to release it as part of the settlement.

17 Q. Let's look at taxes for a moment,  
18 if we could please, sir, the next item.

19 Now, Mr. Nelson asked you about the  
20 amount that was going to JPMorgan Chase. My  
21 question to you is: In your negotiations  
22 with Mr. McCree, did he describe -- what did  
23 he say to you, if anything, about what  
24 JPMorgan Chase might be giving up with  
25 respect to taxes?

1  
2 court, and also that I believe because they  
3 are a bank, that they don't need to bond any  
4 appeal.

5 Q. And as part of the settlement, am I  
6 correct that JPMorgan Chase gave up all of  
7 its rights to any portion of those accounts,  
8 it released those claims?

9 A. Yes.

10 Q. Okay. And the FDIC similarly, as  
11 part of the settlement, it was releasing its  
12 claims to all or any portion of those  
13 accounts correct?

14 A VOICE: Objection, your Honor.  
15 Leading.

16 JUDGE WALRATH: Sustained.

17 Q. What releases did the FDIC give in  
18 the settlement agreement that related to the  
19 deposit accounts, if any?

20 A. The FDIC was releasing their 9.5  
21 rights to the deposit as well.

22 Q. Do you recall whether there were  
23 any claims involving a \$922 million payment?

24 A VOICE: Objection, your Honor.  
25 Leading.

1  
2 A. It was Mr. McCree's position that  
3 JPMorgan owned the entire tax refunds, both  
4 the first NOLs and the second NOLs.

5 Q. And did you and Mr. McCree discuss  
6 the second NOLs I take it as well?

7 A. Yes.

8 Q. And do you recall -- did you and he  
9 or did he discuss with you whether -- his  
10 view as to whether the estate would ever get  
11 any value out of the second NOL?

12 A. It was Mr. McCree's position that  
13 they owned the second NOL. It was also -- I  
14 don't believe that he -- I think that as it  
15 relates to the FDIC, I think that they had  
16 agreed with JPMorgan that they owned the  
17 first set of NOLs, the 3 billion.

18 JUDGE WALRATH: Who owned?

19 THE WITNESS: That JPMorgan owned  
20 the \$3 billion of -- that we referred to  
21 the first set of NOLs. I believe that  
22 the FDIC never on record declared that  
23 either JPMorgan or the FDIC owned the  
24 second NOL, but certainly Mr. McCree  
25 asserted rights that JPMorgan had

1  
 2 purchased that when they purchased the  
 3 WMB assets.  
 4 Q. You were asked some questions  
 5 earlier about JPMorgan Chase's status as a  
 6 part bank. Do you recall that?  
 7 A. I do.  
 8 Q. Do you recall discussing that  
 9 subject with Mr. McCree?  
 10 A. I do.  
 11 Q. Do you recall any discussion of  
 12 what would happen if JPMorgan Chase were not  
 13 to get the NOL because of that, where they  
 14 might go?  
 15 A. I believe it was their position  
 16 that if JPMorgan wasn't able to receive it,  
 17 it would likely go to the FDIC. It -- I  
 18 think they made the point very clear to us  
 19 that according to the tax-sharing agreement  
 20 that WMI was not -- was not entitled to keep  
 21 any of the attached refunds, that it would  
 22 need to be sent out to WMB or its successors.  
 23 Q. Let's look at the next items on the  
 24 list, TRuPS. Did Mr. McCree make clear to  
 25 you that JPMorgan Chase would not settle

1  
 2 without getting the TRuPS free and clear?  
 3 A. Yes, it was Mr. McCree's position  
 4 that JPMorgan had purchased the trust via the  
 5 T&A agreement with the FDIC.  
 6 Q. Now let's look at the number of the  
 7 liabilities here which have not been  
 8 identified.  
 9 Look, if you would, down under  
 10 pension and medical plans. Is JPMorgan Chase  
 11 assuming liabilities with respect to that?  
 12 You were asked some questions about the value  
 13 of what might be going over to them but is  
 14 JPMorgan Chase assuming liability?  
 15 A. Yeah, we never did get to the value  
 16 of the pension plan. The pension plan at  
 17 various states, depending on the market,  
 18 could be overfunded, could be -- it generally  
 19 is in an overfunded state. I think that we  
 20 as we've used the \$350 million as a proxy for  
 21 what we believe the overfunding state is, but  
 22 that would really be a -- let's say, for  
 23 instance, assets of 1.6 billion and  
 24 liabilities of 1.25 billion, so they are  
 25 assuming some of the liability. Again, it's

1  
 2 all together, if you will, but it's  
 3 encompassing in the pension plan.  
 4 Q. And you understood JPMorgan Chase  
 5 was going to continue to handle liabilities  
 6 for these people who are now their employees.  
 7 A. Yes.  
 8 Q. Okay. And the assets that you  
 9 describe, whether overfunded or underfunded,  
 10 those assets change in value day to day,  
 11 don't they, sir?  
 12 A. Well, they change in value day to  
 13 day, as well as what it was worth to the  
 14 debtor is uncertain. It's very difficult to  
 15 terminate a pension plan. There's varying --  
 16 there is a lot of steps that one needs to go  
 17 through, a cash funding process, through --  
 18 there's some very significant taxes should  
 19 you have to actually try to liquidate a  
 20 pension plan.  
 21 So the pension plan in the value of  
 22 WMI was nowhere near worth \$350 million but  
 23 that was the state of the overfunding. And  
 24 to be fair to what we were trying to do in  
 25 value, what we received in the 6.1 to 6.8

1  
 2 billion dollars, there was a deduct on both  
 3 sides of \$350 million so that we could range  
 4 what we viewed the value as.  
 5 Q. Just a few more, sir.  
 6 Goodwill, you were asked questions  
 7 the Anchor litigation and the American  
 8 Savings litigation. Am I correct that the  
 9 party to the Anchor litigation which is going  
 10 to JPMorgan Chase was Washington Mutual Bank,  
 11 not Washington Mutual, Inc.?  
 12 A. I believe that the party was  
 13 Washington Mutual Bank.  
 14 Q. Thank you.  
 15 These Visa shares you indicated  
 16 that -- in your testimony that JPMorgan Chase  
 17 was assuming some significant liability,  
 18 would you describe what those liabilities  
 19 were?  
 20 A. The two significant ones that come  
 21 to mind are the interchange liability, which  
 22 is a claim that's been filed in our state  
 23 that they claimed we owed them \$5 billion.  
 24 Now, the way that Visa shares work is they  
 25 are restricted shares issued to a trust and

1  
2 then once the litigation come into the trust  
3 and they pay off the trust, at some point  
4 those restricted shares may be released.  
5 The main liability or the main  
6 claim that's in those, that's in against the  
7 Visa as right now, is this interchange  
8 liability. So we were in a very difficult  
9 position. If we had kept those and didn't --  
10 but didn't let -- didn't have JPMorgan assume  
11 those liabilities, it would have been a very  
12 difficult point trying to quantify though  
13 claims.

14 Also, within the Visa shares, it's  
15 my understanding there is lot-sharing  
16 agreement that goes along with it such that  
17 if the restricted shares that are in the  
18 trust aren't enough to cover the litigation  
19 that goes against it, then the -- then there  
20 is a lot-sharing that goes back to the  
21 participants to fund those positional losses.

22 Q. And the potential magnitude of  
23 those liabilities that oyeur talking about are  
24 what, sir?

25 A. Unquantifiable.

1  
2 Q. Okay. Potentially substantial?

3 A. I prefer unquantifiable.  
4 (Laughter.)

5 Q. Let's go down. There's some other  
6 things as well there. There's DKK, which is  
7 down there. Just explain very briefly when  
8 DKK is.

9 A. DKK is a landfill liability, I  
10 believe. I'm probably not going to give this  
11 enough justice to what it is, but it is a --

12 Q. That's sufficient. It's a  
13 hazardous landfill?

14 A. Of which there is a liability that  
15 was a legacy liability within some of the  
16 subsidiaries of WMB and one of the  
17 non-debtors. So the DKKs I believe has made  
18 a claim upon the case and for that JPMorgan  
19 will be effectively taking the liability or  
20 indemnifying the estate for that. Again, I  
21 don't know what the total liabilities are.  
22 They're very significant. I think they've  
23 been asserted somewhere in the 300 to 500  
24 million dollar range and is joint and  
25 severally.

1  
2 Q. Finally, sir, let's talk for a  
3 moment about the releases here. One of the  
4 provisions of the settlement are (inaudible),  
5 correct?

6 A. Correct.

7 Q. And I'm correct that JPMorgan  
8 insisted they had would get broad releases as  
9 part of the settlement in the negotiation; is  
10 that correct?

11 A. That's correct.

12 Q. Now, they're -- JPMorgan Chase and  
13 the FDIC are releasing claims against the  
14 estate, aren't they?

15 A. Yes, they are.

16 Q. Okay. And with respect to JPMorgan  
17 Chase, what's the, you know, size of the  
18 claim, just the liquidated estimated portion  
19 of JPMorgan Chase's claim that's been filed  
20 against the estate?

21 A. I think it's somewhere in the 12 to  
22 15 billion dollar range.

23 Q. And with respect to the FDIC  
24 additional claims you described here, they  
25 did file a claim in the DC action against the

1  
2 estate, did they not?

3 A. Yes. I believe they also filed on  
4 this one.

5 Q. And what's the magnitude of those  
6 claims that are being released?

7 A. \$20 billion.

8 MR. SACKS: Okay. Thank you, sir.  
9 Nothing further.

10 MS. NAGLE: Good morning or  
11 evening, your Honor. Sharon Nagle from  
12 Fried, Frank on behalf of the settlement  
13 note holders. I will be brief. I have  
14 five minutes?

15 JUDGE WALRATH: Okay.

16 EXAMINATION BY

17 MS. NAGLE:

18 Q. Mr. Kosturos, if you can turn to  
19 what I believe was Equity Committee 3, which  
20 was the plan. It's I believe in those  
21 binders behind you, specifically Section 42.4  
22 entitled "Directors of the Reorganized  
23 Debtor."

24 Pursuant to the plan, who selects  
25 the directors of the reorganized debtor?

1  
2 A. (Reading) the creditors committee.  
3 Q. And on the effective date, assuming  
4 there's no sale transaction as that term was  
5 described in the plan, is it likely that  
6 reorganized WMI will be a public company  
7 having more than 300 shareholders?  
8 A VOICE: Objection; leading.  
9 JUDGE WALRATH: Overruled.  
10 Go ahead. Can you answer?  
11 A. You know, I haven't gone back and  
12 looked at where everything's coming right  
13 now. I'm unclear of how many owners it would  
14 be but that is a very real possibility that  
15 that will be a public company.  
16 Q. Okay. And back to that section of  
17 the plan, when does it say that the new  
18 shareholders of reorganized WMRIC will have  
19 their first annual meeting to select the  
20 permit board?  
21 A. It should take place within the  
22 first six months after the effective date, I  
23 presume.  
24 Q. Okay. But on the effective date  
25 shares are going to be distributed to the

1  
2 shareholder, right? I believe the majority  
3 of them are going to the PIERS. Is that  
4 correct?  
5 A. Yes. But again, it depends upon  
6 whether -- if there's been other elections by  
7 some of the other senior creditors who have  
8 elected to get some stock. So, yes, some  
9 could go off as well.  
10 Q. Okay. And so on the effective date  
11 there will be maybe a public company that  
12 somebody's going to have to run so it has to  
13 have a board, correct?  
14 A VOICE: Objection. Leading.  
15 JUDGE WALRATH: Sustained.  
16 Q. Do you know how much of the PIERS  
17 are owned by the settlement note holders, an  
18 approximately guess?  
19 A. I think it's an approximately  
20 66 percent.  
21 Q. Okay. And the class above that of  
22 the senior subclass, do you know  
23 approximately how much of that class  
24 settlement note holders own?  
25 A. I don't remember off the top of my

1  
2 head. It's significant. I want to think  
3 around 40 to 50 percent, somewhere in that  
4 range. But again, I don't -- I didn't add  
5 them up, unfortunately, Mr. Nelson's screen.  
6 I should have.  
7 Q. Is it your understanding that the  
8 settlement note holders, as of the effective  
9 date when these shares are initially  
10 distributed for the reorganized WMRIC, is it  
11 your understanding that they will be the  
12 majority shareholders of reorganized WMRIC?  
13 A. Yes, I believe they'll be the  
14 majority shareholders of WMRIC.  
15 Q. Before you were asked about who was  
16 going to be on the board of directors and you  
17 now know that was selected by the committee.  
18 Do you think the committee's choice for the  
19 board makes sense?  
20 A. I think given that the settlement  
21 note holders were -- own a majority of the  
22 stock, I think it makes a lot of sense to  
23 have them be the initial board. And should  
24 it go public thereafter or if that not be the  
25 case for whatever reason, you certainly have

1  
2 another election period very soon thereafter.  
3 Q. Thank you.  
4 We've had a lot of testimony today  
5 about the negotiations leading up to the  
6 settlement, global settlement agreement, and  
7 who was involved in those negotiations. Did  
8 you attempt to include all the major creditor  
9 groups in your negotiations?  
10 A. Yes. We included the unsecured  
11 creditors committee, 59 various levels. The  
12 White & Case group, which generally  
13 represents senior note holders, was involved.  
14 And then the Fried, Frank group was very much  
15 involved.  
16 Q. Were the bank bondholders involved  
17 in the negotiation, the WMB bank bondholders?  
18 A. They were to some extent. Largely  
19 the FDIC receiver negotiated on their behalf.  
20 Q. Okay. And how would you describe  
21 the negotiation?  
22 A. Well, I would describe -- I use a  
23 lot of words. I've used the word "complex."  
24 I think we've used "arm's-length." I would  
25 use the word "intense." There is a lot of

1  
2 words that would have to describe the  
3 acrimony that went throughout this  
4 negotiation, so I would say the settlement  
5 negotiations were very, very difficult  
6 throughout.

7 Q. Several term sheets were  
8 highlighted today, some in the e-mail, some  
9 up on the screen. Did they in any way  
10 reflect a portion of what you considered?

11 MR. NELSON: Objection. Leading  
12 and vague.

13 JUDGE WALRATH: What are you  
14 talking about?

15 Q. Sorry. The several term sheets  
16 that were highlighted today and used in  
17 exhibits, I can't remember how many, I think  
18 it was three or four, were those the only  
19 term sheets the debtor was given to consider?

20 A. No.

21 Q. About how many term sheets or  
22 settlement proposals did you receive?

23 A. Well, I'm not sure I could estimate  
24 but it has to be in the 10 to 20 range.

25 Q. And did you receive them from

1  
2 global settlement agreement, major claims  
3 removed. All in all, it was the best deal  
4 that we could negotiate for the debtor.

5 Q. There's a reference to the  
6 settlement note holders' negotiations or  
7 involvement with the global settlement  
8 agreement. Are the settlement note holders  
9 getting anything under the plan or the  
10 settlement agreement that their class as a  
11 whole at the various levels -- senior, senior  
12 subs, PIERs -- are not getting?

13 A. Not to my knowledge.

14 MS. NAGLE: Thank you. Nothing  
15 further.

16 JUDGE WALRATH: Thank you. Anybody  
17 else for cross? Any redirect?

18 MR. MASTANDO: Your Honor, John  
19 Mastando from Weil Gotshal on behalf of  
20 the debtors. We will have some redirect  
21 but we're sure the witness has been  
22 going for a while. I assume that it  
23 might be a good time potentially to  
24 break for the day and finish with him in  
25 the morning.

1  
2 groups other than the settlement note holders  
3 and JPMorgan?

4 A. I think that there was a number of  
5 groups that weighed in with structures. I  
6 believe the FDIC had some ideas, the bank  
7 bondholders had some ideas, the senior note  
8 holders had some ideas, that would be the  
9 White & Case group, all floating completely  
10 different structures and ideas. But, you  
11 know, there was a wide range of thought  
12 process that people -- that people gave us  
13 their ideas of how they'd like to see the  
14 negotiations go.

15 Q. And what ultimately led to the form  
16 of the global settlement agreement, the term  
17 sheet or the document itself?

18 A. I'm not sure I understand what --

19 Q. Why did you pick that one?

20 A. I think we picked that one because  
21 that was the best deal we thought we could  
22 get for the estate. We thought it created  
23 the most value for the estate and it took  
24 away a lot of claims, counterclaims. A lot  
25 of different things were taken care of in the

1  
2 JUDGE WALRATH: Any objection to  
3 that?

4 MR. NELSON: Yes, your Honor. If  
5 we have any chance of finishing by  
6 tomorrow we should go on, and it's --  
7 we're still in court and if the debtor  
8 has redirect, now's the time for it.

9 JUDGE WALRATH: How long will the  
10 debtor be?

11 MR. MASTANDO: Maybe we can take a  
12 short break and discuss it.

13 JUDGE WALRATH: Let's take five  
14 minutes.

15 THE DEPUTY: All rise. You may be  
16 seated.

17 MR. MASTANDO: Your Honor, John  
18 Mastando from Weil Gotshal on behalf of  
19 the debtors again.

20 In the interest of efficiencies and  
21 moving the proceedings along, we have no  
22 redirect for Mr. Kosturos. And, your  
23 Honor, at this time we would suggest  
24 either breaking for the day or we do  
25 have a witness here who is probably

1  
2 going to be shorter in his timing than  
3 Mr. Goulding and is trying to make his  
4 father's 80th birthday.  
5 JUDGE WALRATH: How long is he  
6 going to take?  
7 MR. MASTANDO: Well, again we  
8 submit him by declaration. I'm just  
9 guessing --  
10 JUDGE WALRATH: Who is it?  
11 MR. MASTANDO: That would be  
12 Mr. Zelin and there was no deposition of  
13 him even though he was listed on our  
14 list of confirmation witnesses over two  
15 weeks ago.  
16 JUDGE WALRATH: Any idea how long  
17 cross will be?  
18 MR. NELSON: I think at most an  
19 hour, probably substantially shorter.  
20 Your Honor, while I have the podium  
21 for one second, after we finish the  
22 logistics can I be entitled to literally  
23 about two minutes of recross with  
24 respect to the settling parties'  
25 questions of Mr. Kosturos?

1  
2 JUDGE WALRATH: Let's do that  
3 first. I don't know well go ahead with  
4 Mr. Zelin tonight. I think we'll finish  
5 this witness and come back tomorrow.  
6 MR. NELSON: Okay.  
7 MR. MASTANDO: Your Honor, we would  
8 object to the questioning and reserve  
9 our right for redirect based on the  
10 questioning.  
11 JUDGE WALRATH: Well, I'm going to  
12 allow the settling parties (inaudible).  
13 MR. NELSON: Thank you, your Honor.  
14 EXAMINATION BY  
15 MR. NELSON:  
16 Q. With respect to JPMorgan's  
17 questioning of you regarding the negotiations  
18 you stated that JPMorgan talked about how bad  
19 your claims were, correct?  
20 A. The claims being --  
21 Q. The claims --  
22 A. The potential litigations against  
23 them?  
24 Q. Correct.  
25 A. Yes, they weren't generally

1  
2 impressed with what our potential claims.  
3 Q. You've been involved in a lot of  
4 negotiations correct?  
5 A. Yes, I have.  
6 Q. Have you ever involved in a  
7 negotiation where the other side has conceded  
8 the strength of your claims?  
9 A. Very rarely.  
10 Q. Did you rely on JPMorgan's word  
11 about how valid your claims were in deciding  
12 whether to settle these claims?  
13 A. As it related to the settlement  
14 negotiations in those discussions?  
15 Absolutely not.  
16 Q. I believe the PIERS or the  
17 settlement note holders questioned you and  
18 your response was that you included all  
19 creditor groups in the negotiations. Is that  
20 right?  
21 A. As it relates to -- let me just be  
22 specific. The creditors committee, the  
23 Fried, Frank group and the White & Case  
24 groups were the creditor groups I was  
25 referring to.

1  
2 Q. You did not attempt to include any  
3 member of equity nor the equity committee  
4 after it was formed from January of 2010  
5 until the time the first settlement was  
6 announced in 2010, is that correct?  
7 A. That's not true. We made some  
8 settlement to the equity committee.  
9 Q. Let me rephrase.  
10 I'm not speaking between the equity  
11 committee and WMI. I'm speaking as between  
12 in the negotiations that led to the global  
13 settlement, you did not invite or include the  
14 equity committee in those negotiations, did  
15 you?  
16 A. That's correct.  
17 Q. Finally, the settlement note holder  
18 lawyer questioned you with respect to whether  
19 there was any difference in the treatment of  
20 classes among any of the different classes.  
21 Do you recall that testimony?  
22 A. Yes.  
23 Q. You stated that to the best of your  
24 knowledge there was no differentiation among  
25 members of the same class, is that correct?



1  
2 A. That's correct.  
3 Q. How then can you explain that in  
4 the PIERS class you only get subscription  
5 rights if you have 2 million? That is a  
6 difference in treatment based upon the amount  
7 of PIERS holdings you have, correct?  
8 A. As it relates to subscription  
9 rights, currently we value the subscription  
10 rights at zero, so to the extent that --  
11 What you say is correct, but to the  
12 extent that those are worthless, which we  
13 believe they have no value associated with  
14 them, I would agree with your comment that we  
15 are -- there is that class in there that  
16 largely because (inaudible) issuing  
17 fractional shares so -- (sic).  
18 Q. In your opinion it's worthless, yet  
19 people paid to subscribe to join the new  
20 reorganized company, correct?  
21 A. People have exercised some of those  
22 rights, yes. I believe the amount is  
23 \$31 million.  
24 Q. So it's not worthless. They paid  
25 at least \$31 million for that?

1  
2 A. There is no value associated with  
3 it. Certainly Mr. Zelin can get into that  
4 with you what he believes the value of the  
5 subscription rights is and that will be part  
6 of his testimony.  
7 Q. Did I hear you say on examination  
8 by the settlement note holders' attorney that  
9 there's a possibility that WMRIC will become  
10 a public company after the emergence from  
11 bankruptcy?  
12 A. I haven't added everything up. At  
13 some point if you have more than 300 holders  
14 there may be a requirement for that company  
15 to go public. It depends on how everything's  
16 tallied, you know, who's selected. We  
17 haven't added all of that up, how many people  
18 are selected, how many holders there are.  
19 All I said is it's a possibility.  
20 Q. Is a public company valueless?  
21 MR. MASTANDO: Objection, your  
22 Honor.  
23 JUDGE WALRATH: Sustained.  
24 MR. NELSON: Thank you, your Honor.  
25 Nothing further.

1  
2 MR. STOLL: I have a couple of  
3 follow-up questions to Mr. Sacks.  
4 JUDGE WALRATH: All right.  
5 EXAMINATION BY  
6 MR. STOLL:  
7 Q. Sir, during the examination from  
8 Sullivan & Cromwell's counsel you were asked  
9 a couple of questions about (inaudible) on a  
10 chart that we provided you. Do you have that  
11 chart in front of you still?  
12 A. Yes, I do.  
13 Q. I think it's been marked as JPMC  
14 Exhibit 1. And this is a document prepared  
15 by JPMorgan; is that right?  
16 A. It was attached to -- it was within  
17 their filings, yes.  
18 Q. All right. And you talked about a  
19 couple of liabilities at the very bottom,  
20 specifically the DKK liability and the FDIC  
21 releases. Do you see that?  
22 A. Yes.  
23 Q. Do you remember that testimony? I  
24 think you testified that the DKK litigation  
25 involved a landfill litigation, is that  
  
1 right, or landfill liability?  
2 A. To the best of my knowledge.  
3 Q. Okay. And that's a landfill --  
4 what do you mean by a landfill liability?  
5 A. It is a hazardous waste site that  
6 is -- that has some rehabilitation cost to  
7 it.  
8 Q. One of the WMI/WMB subsidiaries is  
9 a party that is potentially subject to  
10 liability at that landfill site?  
11 A. Specifically my (inaudible) tell me  
12 was WMB or one of its successors and I  
13 believe WNI Rainier, which is a non-debtor.  
14 Q. Is that a Super Fund site, sir?  
15 A. I don't know.  
16 Q. And is WMB the only party liable at  
17 that site, sir?  
18 A. No.  
19 MR. MASTANDO: Objection.  
20 A. There are several.  
21 Q. Do you know how many?  
22 A. No, I don't.  
23 Q. And in the chart that Sullivan  
24 & Cromwell provided on behalf of JPMorgan,  
25

1  
2 you actually have two columns, unquantified  
3 value and unquantified cost. Did I hear you  
4 testify that the estimated range of liability  
5 for WMB was 300 to 500 million?

6 A. No, that was the estimate of the  
7 entire site. They're joint and several.

8 Q. Ah.

9 A. I'm sorry.

10 Q. Ah.

11 A. (Speaking simultaneously).

12 Q. None of that testimony was in your  
13 affidavit submitted as your direct testimony,  
14 was it, sir?

15 A. I don't think so, but I was deposed  
16 on it.

17 Q. None of that, no documents have  
18 been produced in this case by the debtor  
19 supporting the liability assertion of 300 to  
20 500 million dollars for that landfill site,  
21 is there, sir?

22 MR. MASTANDO: Objection, your  
23 Honor.

24 A. I -- I --

25 JUDGE WALRATH: Let him answer.

1  
2 your saying?

3 A. That what I'm saying.

4 Q. In your response to Mr. Nelson's  
5 questions just a moment ago, just because  
6 they made a claim doesn't mean you accept it  
7 or believe it or think it has anything to do  
8 with reality; is that fair?

9 A. I'm merely stating what the claim  
10 says.

11 Q. Now, you also testified with  
12 respect to Mr. Sacks' question that the  
13 negotiations that you had with JPMorgan on  
14 behalf of the debtor were arm's-length; is  
15 that right?

16 A. Yes.

17 Q. And you identified the fact that  
18 Mr. -- I'm going to get his name wrong, but  
19 McCree?

20 A. Don McCree.

21 Q. McCree?

22 A. McCree.

23 Q. That was an individual at JPMorgan  
24 that you didn't know prior to the  
25 negotiations, right?

1  
2 A. I don't know.

3 Q. And of the several parties, has  
4 there been any sort of allocation of  
5 liability amongst the various parties?

6 A. I am not aware of any.

7 Q. And again, do you even know whether  
8 it's a Super Fund site being administered by  
9 the EPA?

10 MR. MASTANDO: Objection. Asked  
11 and answered, your Honor.

12 JUDGE WALRATH: Sustained.

13 Q. Let's go to the bottom column, the  
14 FDIC releases. Did I hear you say that the  
15 FDIC releases which our debtor listed as an  
16 unquantified value and unquantified cost,  
17 that has a \$20 billion liability associated  
18 with it?

19 A. I believe you heard that wrong.

20 Q. Okay. What did I hear wrong?

21 A. I testified that they have -- I  
22 believe they have filed a claim within our  
23 estate that's approximately \$20 billion.

24 Q. I see. That's the FDIC assertion  
25 of a potential damage claim; is that what

1  
2 A. That's correct.

3 Q. Okay. But you do acknowledge that  
4 Alvarez does a substantial amount of business  
5 with JPMorgan?

6 A. I believe I testified on that  
7 already.

8 MR. MASTANDO: Objection, asked and  
9 answered.

10 JUDGE WALRATH: Let's not repeat.

11 Q. Do you know who Jeff Sell is, sir?

12 A. I do.

13 Q. And he's a partner of yours?

14 A. I do not believe he's a partner of  
15 ours but I believe he worked for Alvarez &  
16 Marsal.

17 Q. He's a senior advisor at Alvarez &  
18 Marsal; is that right?

19 A. I think so.

20 Q. And prior to being hired by Alvarez  
21 he worked for JPMorgan Chase, did he not?

22 A. Yes, he did.

23 Q. He's a substantial source of  
24 business for Alvarez & Marsal?

25 A. I don't think so. I wouldn't say

1  
2 that.  
3 Q. Do you know who Tom Jones is?  
4 A. I have met Tom Jones before.  
5 Q. He's managing director at Alvarez;  
6 is that right, sir?  
7 A. I believe that's right.  
8 Q. And prior to working -- coming to  
9 work for Alvarez he worked for JPMorgan for  
10 over 20 years ago; is that right sir?  
11 A. I don't know.  
12 MR. STOLL: I have nothing further,  
13 your Honor.  
14 Oh, one moment, your Honor.  
15 (Perusing documents.) May I approach  
16 the witness, your Honor?  
17 JUDGE WALRATH: You may. Give  
18 counsel a copy.  
19 MR. MASTANDO: Can I have a copy,  
20 Counsel?  
21 MR. STOLL: Yes. One second.  
22 (Handing.)  
23 MR. MASTANDO: Thank you.  
24 JUDGE WALRATH: TPS 2 and 3?  
25 MR. STOLL: Yes, please.

1  
2 Q. Mr. --  
3 MR. MASTANDO: Sorry to interrupt.  
4 I object to these, your Honor, as  
5 beyond the relevance and beyond the  
6 scope of the cross.  
7 MR. STOLL: It goes to the issue of  
8 the arm's-length negotiations and the  
9 conflict of interest.  
10 JUDGE WALRATH: I'll allow it very  
11 briefly.  
12 Q. Alvarez, I take it, with respect to  
13 its professionals maintains a website that  
14 publishes their biographies?  
15 A. Certain of them.  
16 Q. And Mr. Sell and Mr. Jones as you  
17 testified are both employed by Alvarez  
18 currently, is that right?  
19 A. Yes.  
20 Q. And these biographies in a form you  
21 normally see biographies at Alvarez?  
22 A. I think biographies and resumes can  
23 come in many different forms. If you got it  
24 from my website, got it from Alvarez's  
25 website, you got them from Alvarez's website.

1  
2 Q. And Alvarez keeps the updated  
3 biographies of its employees on its website?  
4 A. We try.  
5 Q. They try to make them accurate and  
6 truthful?  
7 A. Yes.  
8 MR. STOLL: Thank you.  
9 JUDGE WALRATH: Anybody else?  
10 MR. SACKS: Just as a housekeeping  
11 matter, your Honor, I don't know what  
12 oyr going to do with respect to  
13 admission into evidence. I would offer  
14 JPMorgan Exhibit 1 into evidence.  
15 JUDGE WALRATH: Well, let me let  
16 the witness step down.  
17 Does anybody object to any of the  
18 exhibits that were marked JPM 1 -- C,  
19 JPMC 1, TPS 1 through 3, ANICO 1 and 2  
20 and the various documents in the exhibit  
21 binders identified by the debtors? Any  
22 objections?  
23 MR. MASTANDO: Your Honor, are you  
24 referring to all the documents or just  
25 the documents from today?

1  
2 JUDGE WALRATH: Just the ones from  
3 today.  
4 MR. MASTANDO: I note the  
5 objections to TPS 2 and 3.  
6 JUDGE WALRATH: I overrule the  
7 objections.  
8 MR. SACKS: I don't know whether  
9 they are being offered. I don't think  
10 they were marked, the charts that were  
11 used as demonstratives by Mr. Nelson.  
12 Assuming those are excluded, I don't  
13 have any issues.  
14 MR. MASTANDO: I object to those as  
15 well, your Honor --  
16 May I finish, Counsel?  
17 I don't think there was a basis for  
18 foundation for what's in them and they  
19 were just given to us right before the  
20 hearing began.  
21 MR. NELSON: They are in the  
22 demonstrative exhibits. I will say  
23 there's not a lot of difference between  
24 that and JPMorgan's, but it speaks for  
25 itself so --

1  
2 JUDGE WALRATH: All right. They're  
3 not being offered so they won't be  
4 admitted. All right.  
5 MR. JOHNSON: With respect to the  
6 equity committee exhibits, I want to  
7 clarify we are talking about the  
8 exhibits used today.  
9 JUDGE WALRATH: Yes.  
10 MR. JONES: The creditors committee  
11 has no objection.  
12 JUDGE WALRATH: I think I was going  
13 to ask Mrs. Slotko to make a comment but  
14 before we recess tonight.  
15 MR. ROSEN: Your Honor, before we  
16 do recess I just wanted to talk overall  
17 schedule.  
18 MR. STARK: Maybe I can be helpful.  
19 Ms. Slotko is a shareholder and she'd  
20 like to make a personal statement with  
21 respect to these proceedings. I made  
22 the recommendation it might be better to  
23 wait until after the evidence, after  
24 closing argument. And I think that's  
25 acceptable to you, but I'm just trying

1  
2 for me I have Monday free although we  
3 cannot use this courtroom. Are the  
4 parties available Monday?  
5 We're here.  
6 JUDGE WALRATH: All right. I have  
7 all day tomorrow and all day Monday, so  
8 I hope we can finish Monday.  
9 MR. ROSEN: Okay. Thank you, your  
10 Honor.  
11 JUDGE WALRATH: All right. Well,  
12 I'll see the parties back here tomorrow  
13 at 9:30.  
14 MR. NELSON: For planning purposes,  
15 we're not planning to get to closing  
16 statements tomorrow, correct?  
17 JUDGE WALRATH: We certainly are  
18 not.  
19 MR. NELSON: Okay, thank you.  
20 MR. STEINBERG: I just wanted to  
21 note the order of the witnesses so we  
22 can prepare our crosses effectively.  
23 MR. ROSEN: Your Honor, we are  
24 going to keep them as we outlined them  
25 this morning.

1  
2 to help.  
3 JUDGE WALRATH: I'm going to hear  
4 statement from all of the parties at the  
5 end of the testimony. If that's what  
6 you're interested in making, I'll hear you  
7 then now.  
8 MS. SLATKO: It is and I appreciate  
9 you letting me come up again.  
10 JUDGE WALRATH: Okay. Thank you.  
11 I don't think we're going to finish the  
12 next seven witnesses tomorrow, are we?  
13 MR. ROSEN: Your Honor, if today  
14 was any indication what some people have  
15 in store, I think not. Although I think  
16 that many of those that are going  
17 tomorrow will be much briefer than  
18 today. But I can't vouch for that.  
19 So, your Honor, that will of course  
20 lead to how much time the court has  
21 tomorrow and if in fact we cannot finish  
22 tomorrow, we wouldn't get to closing  
23 statement, when we would be able to  
24 return to finish confirmation?  
25 JUDGE WALRATH: Well, unfortunately

1  
2 MR. STEIN: So Mr. Zelin was not  
3 going to start tomorrow.  
4 MR. ROSEN: No. Thank you, your  
5 Honor.  
6 JUDGE WALRATH: We'll stand  
7 adjourned.  
8 (Time noted: 5:38 p.m.)  
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<b>A</b>				
<b>abide</b> 326:9	<b>accurate</b> 350:11 352:18 608:5	<b>addressing</b> 291:7 543:25	<b>advice</b> 384:24 487:7 488:5,22	<b>agreed</b> 286:19 287:22 367:15
<b>ability</b> 295:18 310:3 315:16,18	<b>accurately</b> 351:18 491:2	<b>adds</b> 528:22	495:23 499:11	507:14 520:7
389:11 451:23	<b>achieve</b> 436:13	<b>adjourned</b> 613:7	<b>advised</b> 487:16	532:2 550:12
466:20 545:16	<b>acknowledge</b> 311:5 313:14 605:3	<b>adjudicate</b> 525:17	<b>advisor</b> 339:2 605:17	577:16
<b>able</b> 280:5,21	<b>acknowledging</b> 309:7	<b>administered</b> 269:6 603:8	<b>affect</b> 308:20 553:9	<b>agreement</b> 275:25 279:4 310:25
294:24 305:2	<b>acquire</b> 313:18	<b>administration</b> 398:13	<b>affidavit</b> 308:11,13 327:21 330:6	311:6,7 313:15,20
324:7,11 326:8,17	<b>acrimony</b> 590:3	<b>administrative</b> 503:9	477:11,17 479:12	328:7 331:15
331:6 370:10	<b>Act</b> 341:20	<b>admissible</b> 294:3 305:13	479:20 480:8	339:15 342:17
393:20 413:3	<b>action</b> 291:14 307:17 481:22	<b>admission</b> 574:6 608:13	482:9 502:9	345:2 352:21
447:14 448:20,21	500:11 553:11	<b>admissions</b> 286:12	527:11 602:13	361:6 362:6,24
452:11 457:3	556:24 584:25	<b>admit</b> 279:14 294:21 301:15	<b>affidavits</b> 287:6,25 334:25	363:12 366:23
467:11 470:3	<b>actions</b> 478:19 555:9 556:18	340:25	<b>affirmative</b> 325:20	367:21,23 369:14
487:17,18,19	<b>actively</b> 445:4	<b>admitted</b> 279:9 289:12 293:13	<b>afraid</b> 527:5	370:2 372:16,25
489:13 500:11	<b>acts</b> 543:13	301:7,9,11 302:15	<b>afternoon</b> 308:7 513:5 567:11	394:8,10 397:5,19
578:16 611:23	<b>actual</b> 357:3,7 401:10 438:18	305:19 326:14	<b>agenda</b> 275:11 321:15 330:20	404:7,16 408:3
<b>absolutely</b> 314:12	444:8	610:4	<b>aggregate</b> 468:8,15 519:7	409:15 411:9
318:11,17 392:7	<b>Adam</b> 270:8 271:24 321:13	<b>admonished</b> 286:22	<b>agnostic</b> 321:22	414:2,4 417:3
419:2 440:4	<b>ADAMS</b> 274:2	<b>adopted</b> 450:5	<b>ago</b> 276:23 303:13 306:22 333:7	418:5,6,19,23,24
452:13 596:15	<b>add</b> 284:20 362:7 372:22 417:7	<b>Adv</b> 269:10	441:20 594:15	419:24 427:22
<b>absurdities</b> 313:12	451:20 462:22	<b>advance</b> 347:19 348:16 350:17	604:5 606:10	439:25 443:4
<b>accept</b> 386:12,14	480:3 484:22	361:20	<b>agree</b> 280:5 297:3 330:15 345:13	483:3,4,7 487:23
434:24 604:6	503:14 588:4	<b>advantage</b> 305:20 444:17 446:7	348:13 350:11,25	490:24 492:6
<b>acceptable</b> 610:25	<b>added</b> 362:11 417:22 599:12,17	447:3,4,14 448:9	352:7,11,18 354:7	494:24 503:7
<b>accepted</b> 304:10	<b>adding</b> 372:4 417:20 473:13	449:5	354:13 361:24	523:21,25 524:3
<b>access</b> 456:20,24	<b>addition</b> 303:16 314:3 573:14	<b>adversaries</b> 281:10 485:8	362:4 371:21,22	526:11 527:3
457:2,6,12 503:3	<b>additional</b> 342:5,14 355:22 368:2	<b>adversary</b> 307:22 308:11 310:8,12	372:2,12,14 381:9	535:4 536:2 537:9
503:4,7	455:13 514:11	310:22 311:20	389:22,25 399:15	540:12 541:5
<b>accomplished</b> 368:6 432:10	530:17 534:12	312:23 313:5	399:20 404:21	553:9,14,24 555:5
<b>account</b> 395:21,22	584:24	314:19 315:14	408:14,22 418:7	555:23 556:22
396:3,20 397:25	<b>address</b> 282:19,21 286:5 297:4	317:20 318:4,7,12	425:22 436:14	558:19,20 563:13
411:24 451:23	311:16 327:2	318:19,20,23	442:8 447:11	572:2 575:18
493:24 494:11	328:5	319:3,24 456:7	451:3 455:13	578:19 579:5
510:3,4 517:14	<b>addresses</b> 455:8	525:13 535:19	463:14 480:5	582:16 589:6
<b>accounting</b> 337:14 472:21		<b>adverse</b> 570:13	484:6 508:25	591:16 592:2,8,10
<b>accounts</b> 395:14,25			524:10 533:14	<b>agreements</b> 524:14 540:17
396:10,14,16			540:9 561:14	540:17
397:6 503:17			562:2,12,22 564:8	<b>Ah</b> 558:11 602:8,10
509:23 510:23			598:14	<b>ahead</b> 332:24 387:4 446:22 466:23
572:25 573:6,15				520:20 521:7,17
574:18 575:7,13				522:6 542:12
575:19 576:7				561:11 586:10
<b>accrued</b> 473:18				595:3
<b>accuracy</b> 556:2				<b>aid</b> 304:7
				<b>aircraft</b> 338:23

<b>AKIN</b> 272:4	540:11 550:9	518:8,12,18,18	381:20 384:14	<b>appeal</b> 321:4,5
<b>al</b> 269:4,8,12 272:3	552:4,9 581:7	519:4,10,22	387:15 398:17	406:21 494:10
<b>ALEXANDER</b>	<b>Americas</b> 272:14	520:15	416:18,24 418:2,3	552:14 573:24
270:10	<b>amount</b> 279:4	<b>analyze</b> 288:13,21	418:18,21,25	574:24 575:4
<b>alleged</b> 494:14	308:24 374:10	<b>analyzing</b> 501:15	419:5 423:22	<b>Appeals</b> 552:15
<b>allocate</b> 362:25	383:14 391:12	504:24	431:13 437:6,19	<b>appear</b> 295:20,22
<b>allocated</b> 402:11	395:13 401:10	<b>Anchor</b> 309:22	437:24 438:3	348:24 349:5
403:6 437:14	402:7,11 403:3,5	405:19 406:8	440:13,20 453:13	463:11
471:6	404:23 405:2	407:14 523:5,10	454:16 457:25	<b>Appearances</b> 271:2
<b>allocates</b> 397:19	411:11 413:13	524:6,20 525:4,6	485:23 487:13,25	<b>appeared</b> 294:8
<b>allocation</b> 362:3	416:12 427:14,24	525:23 528:4,10	488:16,17,21	<b>appears</b> 294:19
364:11,22 367:8	444:12 457:13	528:13,21 530:2	491:23 500:25	308:13 329:25
367:13 368:16	516:10,15 518:24	530:18 531:5	514:18 523:18	388:20
371:24 404:14	519:3,7 530:18	540:7,8,10 547:18	525:14,15 527:24	<b>application</b> 505:10
603:4	531:4 543:2	569:21,23 581:7,9	536:5 539:22	506:22
<b>allocations</b> 368:12	576:20 598:6,22	<b>Andersen</b> 337:24	550:2 559:14	<b>applied</b> 527:12
<b>allow</b> 305:22	605:4	338:25	564:11 565:20,22	<b>applies</b> 486:8
314:12 329:12	<b>amounts</b> 358:7	<b>Andrews</b> 272:19	565:24 586:10	521:23 558:19,21
488:16 542:6	359:11 514:23	307:9	602:25	<b>apply</b> 555:15
554:10 595:12	517:14 576:5,6	<b>and/or</b> 330:17	<b>answered</b> 385:20	<b>appoint</b> 301:24
607:10	<b>analyses</b> 290:12	431:24	419:3 429:22	305:17
<b>allowance</b> 276:3	291:13 479:20	<b>ANICO</b> 419:5	453:20 454:12	<b>appointed</b> 291:22
<b>allowed</b> 443:10,15	<b>analysis</b> 287:16	438:25 439:2	521:21 549:24	298:7,7,11 301:14
443:18,19,20,25	342:7 343:25	486:3,7 489:16	603:11 605:9	301:17,19
473:18,22 544:19	344:4,23 348:10	551:4,6 552:4	<b>answering</b> 418:12	<b>appointment</b> 469:8
544:21	348:24 349:3,5,21	556:24 564:12	454:10,13 487:22	<b>appreciate</b> 560:16
<b>allude</b> 493:13	350:7,12,24	608:19	527:4	611:8
<b>Alvarez</b> 337:17,19	351:16,17 373:21	<b>annex</b> 311:23	<b>answers</b> 382:2	<b>approach</b> 283:9
338:4 495:16	373:22 374:5,14	<b>announced</b> 364:12	421:15,22 441:14	313:12 336:5
505:13,23 506:15	375:6,17,22	367:14 402:13	<b>anticipate</b> 421:10	340:7 346:15
605:4,15,17,20,24	376:25 377:6,22	403:6 404:14	<b>anticipated</b> 283:18	347:10 365:10,22
606:5,9 607:12,17	380:10 381:6	405:3 416:2	<b>anybody</b> 399:12	424:14 435:24
607:21 608:2	382:17 383:10,13	455:19 456:11	550:6 566:9	508:7 550:18
<b>Alvarez's</b> 505:3	383:17,21,23	597:6	592:16 608:9,17	572:6 606:15
506:7 607:24,25	384:4,6,19 424:9	<b>annual</b> 586:19	<b>anymore</b> 555:16	<b>approached</b> 424:18
<b>ambiguous</b> 527:6	424:21 425:8,16	<b>answer</b> 287:21,23	<b>anyway</b> 279:18	<b>approaching</b>
<b>ambush</b> 312:24	425:18 426:4	288:20 343:8	413:8 548:14	283:12
314:13,15 319:8	427:10 428:3,6,8	345:21,22 346:24	<b>apart</b> 405:13	<b>appropriate</b> 302:11
319:10	428:10,13 429:3,6	348:20 357:2,17	<b>apologize</b> 318:15	306:4 325:18
<b>amended</b> 366:23	429:9,14 449:7	360:16,17 361:2	344:13 365:16	326:7 335:6
526:10 560:8	451:17 452:7	366:18,24 371:10	376:3 380:20	371:18 418:14
562:7	457:7 463:20	371:13,22 373:14	407:8 485:21	514:10 535:21
<b>amendment</b> 312:11	465:7 472:10,10	373:18 375:10,17	<b>Appaloosa</b> 387:20	<b>approval</b> 328:6
365:8 541:14	473:6,10,14	375:21,24 377:6	443:6 449:22	366:20 369:13
<b>American</b> 405:18	477:11 480:9	377:25 378:6,8,17	469:17 470:7	<b>approve</b> 350:13
407:11,12,14,24	499:10,13 515:3	378:18 379:6	<b>Appaloosa's</b>	367:3
528:3,9,15 540:7	515:12,15 516:8	380:9,14 381:18	469:11	<b>approved</b> 479:4,14

504:3 506:7	<b>arrived</b> 540:13	<b>assertion</b> 602:19	<b>assignments</b>	<b>Atty</b> 273:17
<b>approving</b> 275:21	<b>Arthur</b> 337:23	603:24	506:24	<b>August</b> 424:22
<b>approximately</b>	338:25 513:6	<b>assertions</b> 295:19	<b>associated</b> 410:15	425:8 426:11,25
333:6 337:20	<b>Article</b> 311:5	453:7 480:13	417:8 484:20	<b>Aurelius</b> 443:17
338:2 341:25	313:15 526:20	481:16 486:2	494:18 501:10	449:23 469:22
352:11 354:6,8	<b>articulate</b> 541:21	487:19 489:14	528:15 598:13	<b>authentication</b>
355:8 362:2	<b>articulated</b> 322:21	<b>assess</b> 298:8 486:9	599:2 603:17	550:13
364:23 368:4	322:22	486:14,15,22	<b>assume</b> 276:16	<b>authority</b> 331:6,19
400:10,12,15	<b>ascribe</b> 452:20	488:8 494:19	508:19 518:7	332:3
401:25 402:8	<b>ascribed</b> 452:18	<b>assessed</b> 288:3	582:10 592:22	<b>authorizing</b> 330:21
403:7 406:16	<b>ascribing</b> 449:11	<b>assessment</b> 287:11	<b>assumed</b> 537:23	<b>automatic</b> 369:25
407:19 408:10	<b>ASHBY</b> 273:11	289:14 341:18	572:22	<b>available</b> 290:24
414:3 426:11	<b>aside</b> 299:4	342:15 343:5	<b>assumes</b> 449:8	327:2 345:14
471:6 473:24	<b>asked</b> 281:12	480:21 481:12	<b>assuming</b> 534:12	347:2 612:4
474:12 518:3	293:22 298:17	484:2 487:2 491:9	534:19 539:9	<b>Ave</b> 273:3,12
534:11 573:5	299:8 302:9	491:16 492:9	579:11,14,25	<b>Avenue</b> 270:21
587:18,19,23	303:12,21 312:15	495:24 500:18	581:17 586:3	272:14,20
603:23	360:7 376:24	<b>assessments</b> 291:18	609:12	<b>average</b> 541:16
<b>April</b> 345:8 423:8	378:19 380:3	479:21	<b>assumption</b> 520:13	<b>avoid</b> 280:6
423:25 424:7,13	385:19 429:22	<b>asset</b> 330:25 352:23	544:19	<b>avoids</b> 279:23
425:21,23 427:5	436:3 437:11	353:6,16 356:19	<b>assumptions</b> 515:7	<b>aware</b> 276:22
458:14 459:4	440:8 492:11,12	369:17 371:23	515:11 519:9	284:22 363:22
<b>ARD</b> 273:7	494:8 526:19	385:15 399:12,18	<b>assure</b> 282:24	380:4 388:11
<b>area</b> 497:2	528:2 529:7	399:22 405:10	393:16	406:25 407:2
<b>areas</b> 288:18	549:23 550:2	441:6 447:19	<b>attach</b> 547:10,24	431:8 435:6,11,16
<b>argue</b> 285:15	565:25 571:18	525:16,18 529:2	<b>attached</b> 436:3	435:20 439:11
304:23 305:3	572:19 576:19	546:9,10,17,18	515:19 547:4,18	442:19 450:14
<b>argued</b> 308:2	578:4 579:12	547:7,9,10	578:21 600:16	454:18 457:17
<b>argument</b> 297:18	581:6 588:15	<b>assets</b> 347:8 353:25	<b>attempt</b> 496:19,21	461:18 462:25
297:21 299:19	600:8 603:10	354:13 358:24	500:6 589:8 597:2	468:2,19 472:9
300:14,23 305:14	605:8	359:3,21 362:13	<b>attempts</b> 289:6	474:20,24 475:16
307:21 310:2	<b>asking</b> 280:10	372:5,16 373:22	<b>attention</b> 346:18	476:15 503:25
319:19 472:25	304:9 328:14	382:9,12 383:3,7	355:24 437:3	530:20 546:25
521:3 540:2	329:6 358:10	383:8 385:14	557:21	547:3,12,13 603:6
544:25 610:24	371:8 385:9 453:9	391:15,25 393:12	<b>attorney</b> 290:11	<b>AXICON</b> 272:13
<b>argumentative</b>	454:9 460:9,12	404:25 417:5	378:22 381:22	<b>A&amp;M</b> 338:24,25
454:15 496:5	519:24 521:14	419:10 436:5,10	481:2 491:14,15	383:25 384:4
562:18	544:9 549:18	437:8 438:19	566:12 599:8	428:11,24 429:3
<b>arguments</b> 302:20	<b>aspects</b> 573:17	509:8 523:5,11	<b>attorneys</b> 379:5	<b>A1</b> 550:22 551:2,4
500:12 514:11	<b>assert</b> 494:12	524:7,16,19	381:22 423:12	<b>A2</b> 551:3,6 558:2,8
521:24	<b>asserted</b> 380:5	533:11,16 534:3	424:2,8 425:24	558:22
<b>arm's-length</b>	382:11 490:16,18	536:23 546:14	427:5 455:4,5	
568:12 569:14	490:21 492:2	547:5 571:10	463:2 560:20	
570:21 589:24	494:13 577:25	578:3 579:23	<b>attorney-client</b>	
604:14 607:8	583:23	580:8,10	294:15 373:15	
<b>Arnie</b> 469:25	<b>asserting</b> 296:16	<b>assignment</b> 369:25	384:15 499:11	
<b>arose</b> 428:14	381:5 555:7	524:17	<b>attributes</b> 363:2	

**B**

**B** 271:9,25 279:24  
**back** 289:6 292:24  
300:4 320:4 322:8  
351:10 355:12

369:15 370:7,11	459:9 461:16	306:18 329:20	516:3,17 518:18	592:3 597:23
370:20 385:25	463:18 495:25	330:14 335:16	522:8 523:19,22	601:3
400:7 420:25	502:19 513:14,23	340:17 347:15	524:24 525:5	<b>better</b> 369:7 610:22
427:19 434:8	522:14 523:12	361:17 380:18	533:21 535:18	<b>beyond</b> 384:16
445:21 472:15	524:13,18 560:11	386:13 506:13,14	542:15,24 543:5,7	388:6 451:20,24
477:10 498:3	574:22 576:8	511:14,23 536:7,9	543:10,10,24,24	482:17 542:8,20
500:13 517:15,19	599:11	537:11 538:19	544:6,15 545:8,10	607:5,5
517:23 537:7	<b>bargain</b> 547:20	568:22 574:14	545:10 546:3,13	<b>big</b> 351:18 465:12
540:15,23 567:14	<b>based</b> 276:19 291:8	585:12 589:19	548:3 554:6	<b>bigger</b> 420:16
574:9 582:20	291:19 292:19	592:19 593:18	555:11 556:7,21	540:8,10
586:11,16 595:5	294:13,14 295:5	601:25 604:14	557:6 562:6 564:4	<b>biggest</b> 413:3
612:12	298:24,25 299:2	<b>belief</b> 521:22,22	573:12 574:20	441:15
<b>backdate</b> 527:17	300:14 312:13,14	<b>believe</b> 292:15	575:2 577:14,21	<b>Bill</b> 441:19 569:21
<b>background</b>	319:20 328:25	296:19 302:15	578:15 579:21	<b>billion</b> 341:16
302:10,14 337:11	361:22 370:13	309:4,5 314:11	581:12 583:10,17	342:2,4 352:11,13
478:13,24	375:22 384:24	315:14 321:15	585:3,19,20 587:2	355:9 358:17,18
<b>back-and-forth</b>	389:11 401:16	328:9 331:22	588:13 591:6	362:2 363:8,19
411:6	402:5 431:8,13	341:19 346:21	596:16 598:13,22	370:9,18 382:16
<b>back-door</b> 312:24	438:15 442:14	349:10 351:23	601:14 603:19,22	382:19 397:14
314:13,15	445:24 455:14	354:15 360:7	604:7 605:6,14,15	400:10,15 401:12
<b>bad</b> 595:18	459:14 465:17	362:22 368:24	606:7	401:16,19,22,23
<b>bailout</b> 363:24	466:3 468:14	369:22 370:5,6,19	<b>believed</b> 420:12	402:9,20 403:8,13
<b>baked</b> 518:12	484:17 490:9,15	374:7,8,9 376:5	576:10,14	403:14,17 404:8
519:9	491:11 492:7	376:17 377:17	<b>believes</b> 523:23	404:20 417:6
<b>balance</b> 276:21	515:11 521:19	385:19 395:8	599:4	419:22 446:8
331:3 359:14,16	558:21 559:7	400:21 403:12	<b>belong</b> 356:14	447:3 451:21
383:9 394:12	595:9 598:6	405:7,20 409:20	362:14 383:20,20	453:3,21 493:12
451:9 485:11	<b>bases</b> 292:5 300:9	410:12 412:9,13	555:10	502:12 510:3,7,9
539:2	<b>basing</b> 488:5	412:16 419:22	<b>belonged</b> 363:11	510:13 532:8,8,17
<b>balanced</b> 343:5	<b>basis</b> 282:9 294:25	425:3 428:9 435:9	<b>belongs</b> 353:16	533:2,10 535:13
<b>ballot</b> 541:23	296:3 331:13	437:19 440:6	556:25	573:5 577:17,20
<b>ballpark</b> 360:12	332:13 361:5	442:25 449:10	<b>BEN</b> 270:24	579:23,24 581:2
368:5	420:18 446:13	450:6,9 451:12	<b>bench</b> 283:9,12	581:23 584:22
<b>bank</b> 269:11	447:2 468:24	452:16 453:4,6,12	424:15,18	585:7 603:17,23
353:14 363:24	521:18 609:17	455:25 456:4	<b>benefit</b> 367:25	<b>billions</b> 532:25
390:24 391:3,5	<b>battle</b> 298:10	457:11,25 462:2	389:10 463:18	<b>binder</b> 346:11
417:18 433:23	<b>bear</b> 415:10	463:25 464:24	503:10 539:19	349:15 350:4
434:3,25 476:14	<b>began</b> 340:20	467:13 469:2	<b>best</b> 317:8 373:18	351:12 386:24
526:2,20,21	502:23 609:20	471:18 473:5,14	387:11,20 388:8	458:3
528:15 569:17,22	<b>beginning</b> 303:9	473:21 475:7	390:19 394:3	<b>binders</b> 336:4
570:19 571:13	387:13 391:23	478:4 481:16	406:2 409:16	340:3,9,9,19
575:3 578:6	478:11 479:2	484:8 492:19,20	461:17 479:24	349:12 585:21
581:10,13 589:16	492:16 496:6,24	493:3 494:6,7	513:10,11,20	608:21
589:17 591:6	499:24 501:4	495:12,15 500:14	520:19 521:15	<b>biographies</b> 607:14
<b>banking</b> 393:12	<b>begins</b> 375:10	501:16 502:17,21	522:5 540:25	607:20,21,22
<b>bankruptcy</b> 269:2	490:8	507:13 508:22,23	541:5 556:23	608:3
431:11 450:12	<b>behalf</b> 275:7 284:7	514:10 515:10,23	557:2,9 591:21	<b>birthday</b> 594:4



<b>bit</b> 414:17 483:16 514:2 517:7 526:16	603:13	<b>broad</b> 271:13 584:8	<b>calculated</b> 474:14 475:8	<b>CARTY</b> 272:9
<b>BLACK</b> 269:8	<b>bought</b> 458:15	<b>Broadbill</b> 272:18 307:10,16	<b>calculating</b> 522:19	<b>case</b> 269:5 286:2,3
<b>BlackBerry</b> 446:17	<b>bound</b> 364:8	<b>Broadfield</b> 569:3	<b>calculation</b> 474:5,8 530:23	286:24 292:11
<b>Bldg</b> 273:20	<b>box</b> 273:13 309:18 351:18 405:7,24	<b>broadly</b> 480:5 481:24	<b>calculations</b> 498:25	295:12 301:6,8,10
<b>block</b> 351:18	<b>boxes</b> 541:24	<b>Broker</b> 469:21	<b>calculator</b> 403:15	301:13,19,20
<b>blocked</b> 297:15	<b>brackets</b> 512:18	<b>brought</b> 280:9 506:24 574:21 576:9	<b>Caleb</b> 273:20	302:6,10,13
<b>blowup</b> 350:6	<b>Bradley</b> 284:6,7 285:4	<b>Brown</b> 271:4,10 285:19 329:19,20 477:7	<b>call</b> 279:11 281:25 282:13 298:21,21 298:22 306:21 307:11 308:6,6 318:21 324:13,16 333:7,10 336:9 505:7 561:16,18 562:3	308:10 318:19
<b>board</b> 367:2 369:13 372:13 382:8 463:10 468:23 475:16,17,22,24 476:4,6,12 507:4 543:3,6 586:20 587:13 588:16,19 588:23	<b>breach</b> 317:23 547:22	<b>Bryant</b> 272:5	<b>called</b> 303:18 315:25 316:15,19 328:16 331:16 337:2 425:3 524:3 528:14 552:3	325:2,8,11,15,19
<b>bog</b> 315:19	<b>break</b> 333:4 334:14 341:7,16,21,24 342:11,18 345:12 420:24 422:23 476:21 592:24 593:12	<b>build</b> 538:9	<b>calling</b> 283:2 324:6 327:14	327:6,16,22
<b>Boggs</b> 273:20	<b>breaking</b> 420:22 593:24	<b>bullet</b> 388:18 389:8 397:11 398:3,5 408:6	<b>calls</b> 312:8 431:5 432:2 546:22 562:17,25 565:18	328:11,17 329:4
<b>Bolen</b> 469:14	<b>BRENT</b> 271:18	<b>bunch</b> 278:19 362:10 524:19	<b>camera</b> 280:9,12 281:5	332:21 388:23
<b>BOLI/COLI</b>	<b>Brian</b> 270:7 271:17 275:6 387:5 441:10	<b>burden</b> 295:4	<b>candid</b> 326:11	394:9 431:10
354:16,24 374:13 382:15,15 383:11 383:19 384:24 385:6 408:24 409:25	<b>bridge</b> 282:16	<b>business</b> 337:12 389:9 427:7 438:22 439:3,5,15 440:5,11 441:4 448:8,15 449:3,4 449:8,13 450:3 452:13 467:2 481:19,20 482:23 483:15 485:4 487:5,21 488:2,25 489:23 491:17,25 492:4,14 495:8,11 495:19 496:10 497:25 498:5,19 499:3,19 567:18 568:13 569:9 605:4,24	<b>care</b> 392:8 441:6,20 591:25	445:5 450:18
<b>BOLLER</b> 272:8	<b>brief</b> 295:16,21 311:3 314:25 526:7 567:12 571:25 585:13	<b>businessperson</b> 439:21,21 498:17 568:2	<b>careful</b> 297:25	451:7 460:3,5
<b>bond</b> 434:19 473:3 575:3	<b>briefed</b> 555:20	<b>buy</b> 314:7 466:16 467:11	<b>cargo</b> 338:23	468:4 472:24
<b>bondholder</b> 434:17 557:23 558:4 561:17,19 569:23	<b>briefe</b> 611:17	<b>C</b>	<b>Carreon</b> 334:9	484:11,12 486:2,3
<b>bondholders</b>	<b>briefing</b> 361:8	<b>C</b> 270:2 349:10,20 473:21 608:18	<b>carried</b> 445:21,22	486:4 489:16,16
417:18 433:10,23 434:3,25 559:2,6 569:17 570:19 589:16,17 591:7	<b>briefings</b> 555:21		<b>carrier</b> 338:23	495:25 500:13
<b>bonds</b> 557:13 563:8	<b>briefly</b> 275:13 297:2 310:5 311:15 313:13 336:11 338:17 339:7 347:7 423:7 455:2 554:15 583:7 607:11		<b>carrying</b> 445:23	503:21 504:25
<b>book</b> 394:24 441:10	<b>bring</b> 280:2 289:4 315:18 327:23 439:7,13 506:22 515:18 567:14			505:11,21 506:5
<b>books</b> 352:24 353:7 359:3,11,17,19 460:20,24 461:3	<b>bringing</b> 292:23			513:25 514:10,12
<b>Bos</b> 271:22	<b>brings</b> 297:24 513:21			521:20,23 527:13
<b>Boston</b> 271:6				529:11 538:13,13
<b>bottom</b> 375:13 509:7 600:19				552:17,21,24

<b>caveat</b> 372:2	344:2,25 366:14	358:10,14,16,17	493:19,20,23	452:19 454:2,8
<b>CCD</b> 516:15 517:2	366:16 368:6,18	358:22 541:24	494:3,6,19 496:20	465:5,7 472:11
517:22 521:13	420:12 439:11	<b>checks</b> 358:25	496:22 500:9,13	475:6 479:21
<b>cc'd</b> 441:11	475:24 537:6	<b>chief</b> 325:19 326:24	500:16,22 501:9	480:3,4 482:24
<b>Center</b> 271:5	541:14 580:10,12	327:16 332:22	502:12,14 510:7	483:11,17,19,20
<b>Centerbridge</b>	<b>changed</b> 368:15	333:18 338:12,19	514:22 519:3,17	483:22,23,25
387:21 443:13	387:13 510:15	338:21 339:4,8	520:3,5 522:2,2,3	484:19 485:3,9,12
449:22 469:24	549:9,18 562:9,10	345:6 431:9	522:5,7 530:13	486:8,10 487:8,17
<b>CEO</b> 338:21	564:17	459:15 460:13	544:6 546:17	487:22 488:4,10
<b>certain</b> 334:24,25	<b>changes</b> 332:2	475:15	547:7,10,18,23	488:24,25 490:16
369:21 384:2	367:24 368:13	<b>chips</b> 537:15	548:3,5,13 553:11	490:17,20,23
426:21 430:17	<b>channels</b> 398:13	540:22	553:12 560:5	492:2,3,19 495:24
431:19 434:15	<b>Chapter</b> 269:4	<b>choice</b> 588:18	563:5 565:3	496:10,16 497:5,8
436:13 454:7	339:11 423:14	<b>choose</b> 498:10	570:14 576:9,15	497:12,18 498:13
466:15,18 467:10	500:24 513:22	<b>chose</b> 303:14	581:22 582:6	498:21 499:10,19
468:7 484:20	516:12 519:23	<b>chosen</b> 304:3	583:18 584:18,19	499:20,21 500:3,6
489:2 492:18	520:2,3,10,11,19	<b>CHRISTOPHER</b>	584:25 603:22,25	500:8,10 501:6,8
536:3 539:9	538:4,10 560:10	272:9	604:6,9	501:16,22 503:22
550:13 607:15	<b>characterization</b>	<b>CHUN</b> 270:16	<b>claimant</b> 566:2	504:10,11,20
<b>certainly</b> 326:3	372:12,15	<b>circle</b> 287:4 352:9	<b>claimants</b> 560:24	510:7 514:3 515:2
341:10 358:5	<b>characterize</b> 335:3	<b>circuit</b> 301:10	563:5	515:8,9 516:19
360:6 361:5	371:16 372:11	554:9	<b>claimed</b> 581:23	519:20 520:21
363:10 364:6	398:23 399:2	<b>circular</b> 472:25	<b>claims</b> 276:4 287:8	521:6,16,18
370:24 372:10	436:7 568:11	518:14,20,23	287:10 288:3	523:22,23 525:5
378:23 398:24	570:17	<b>circumstances</b>	290:13,14,21,22	531:2 532:12,13
413:18 417:7,22	<b>Charles</b> 284:7	571:2	291:7 294:6	532:24 534:24
423:16 430:24	334:9	<b>cite</b> 295:21 301:6	308:25 316:10	535:2,5,14 536:21
436:10,21 450:5	<b>chart</b> 347:11,13	301:13,18,23	317:15,24 342:8	543:17 544:11,20
453:5 457:10	354:20 356:4	302:6 304:12,12	343:6,23 344:2,25	546:12,19 549:16
462:18 469:5	357:22 358:6	304:13 376:19	345:4,9 358:3,12	555:8,15 557:10
473:19 476:11	461:13 572:10,15	<b>cited</b> 302:18 378:22	358:21 360:5	557:15,24 558:4
482:8 489:22	600:10,11 601:24	<b>claim</b> 287:18 316:8	369:22 370:5,7	558:25 559:17
494:22 577:24	<b>charts</b> 609:10	320:20,23 365:4	372:4,5 374:22	561:17,19 562:4
588:25 599:3	<b>Chase</b> 269:11	370:10,17,23	376:15 377:3,24	562:13,20,23
612:17	276:2 328:4	371:3,4 375:8	378:24 381:12	564:24 565:13,14
<b>certificate</b> 275:19	360:13 366:4	389:12 412:7,17	382:20,22 386:3	565:15 571:13
275:22 525:22	567:8,23 568:3	413:2,4 420:13	392:9 394:13	572:21 573:4,9,15
<b>cetera</b> 291:14	573:16,22,23	427:11 428:7,18	406:9,18 408:18	575:8,12,23 576:4
<b>CFO</b> 338:22	574:3,14 575:6	428:22 429:7,15	411:15 412:20	582:13 584:13,24
<b>challenged</b> 573:16	576:20,24 578:12	438:23 439:10	413:5,5 414:10	585:6 591:24
<b>Chamberlain</b>	578:25 579:10,14	440:12 444:7	417:9,10,17	592:2 595:19,20
308:12 310:15,18	580:4 581:10,16	452:9,14 480:10	419:12,22 424:4	595:21 596:2,8,11
311:4	584:12,17 605:21	480:11,17,22	426:2 427:7,21	596:12
<b>chance</b> 280:2	<b>Chase's</b> 571:24	481:11,17 482:7	434:4 439:5,7,8	<b>claim's</b> 544:7
284:13 493:18,19	574:15 578:5	482:10,21 483:5,5	439:12,16 440:2,5	<b>clarification</b>
593:5	584:19	484:3 489:19	441:4 443:20	396:24
<b>change</b> 312:12	<b>check</b> 309:18	492:20 493:2,13	451:13,18 452:14	<b>clarify</b> 323:10

353:5 518:22 565:8 610:7 <b>clarifying</b> 359:18 <b>class</b> 307:17 309:17 451:12,13 464:2 464:14 465:2,3,4 465:10,11,12,12 466:2,3,6,7 467:9 467:11,20 470:10 470:11 548:2,4,13 587:21,23 592:10 597:25 598:4,15 <b>classes</b> 522:11 597:20,20 <b>classic</b> 300:24 302:12 <b>classified</b> 464:2 <b>clause</b> 555:6 559:18 <b>clean</b> 390:11 <b>cleanly</b> 388:25 389:6 392:8 <b>clear</b> 295:12 297:8 299:14 330:3 343:10 359:13 368:24 417:25 458:20 482:16 493:12 528:23 529:2 546:11 547:9 578:18,24 579:2 <b>clearly</b> 313:20 358:3 369:23 374:22 499:13 512:21 537:17 564:16 <b>CLERK</b> 336:20,24 <b>client</b> 441:19 505:8 553:13 <b>clients</b> 387:21 443:13,24 504:21 505:3,13 547:14 554:24 557:4 <b>client's</b> 284:23 <b>close</b> 283:8 344:7 344:15 373:10 416:23 442:16	446:18 517:6 <b>closed</b> 283:16 <b>closing</b> 610:24 611:22 612:15 <b>Clothestime</b> 339:2 <b>CLR</b> 269:23 <b>COBB</b> 271:20 <b>Code</b> 513:14,23 522:14 523:12 524:18 560:11 <b>COFFEY</b> 271:9 <b>coincidence</b> 416:6 <b>collective</b> 418:6,24 <b>COLLINS</b> 270:15 <b>Columbia</b> 552:14 552:15 <b>column</b> 415:5 603:13 <b>columns</b> 415:9 602:2 <b>combination</b> 354:11 541:20 <b>combined</b> 403:3,5 407:17 <b>come</b> 280:8,14 283:19 287:4 292:2 326:17 327:3 357:10 399:22 401:17 420:25 439:8,22 441:2 479:22 514:4 515:2,9 581:20 582:2 595:5 607:23 611:9 <b>comes</b> 329:15,16 332:5 355:13 374:15 477:16,17 506:10 <b>comfortable</b> 327:9 <b>coming</b> 344:7,15 351:3 352:8 356:23 357:8 373:10 419:10 586:12 606:8 <b>commenced</b> 425:6 <b>comment</b> 327:17	507:23 527:22 598:14 610:13 <b>comments</b> 307:19 556:21 <b>commercial</b> 570:23 <b>COMMITTEE</b> 272:25 <b>committee</b> 272:2 278:8 279:5 280:12,25 281:7 281:13 283:11 285:13 287:16 290:9 303:4 327:5 327:8 338:8 340:3 441:23 445:4 450:20,25 452:3 455:3 537:16 538:2 542:17 585:19 586:2 588:17 589:11 596:22 597:3,8,11 597:14 610:6,10 <b>committee's</b> 284:11 588:18 <b>common</b> 451:24 458:11 459:6 470:10,17,23,25 471:5,6,11 <b>commons</b> 452:4 472:4,5 <b>communication</b> 293:6,7 <b>communications</b> 292:8 322:4 423:23 430:9 432:21 491:14 492:8 <b>companies</b> 391:13 506:16 <b>company</b> 326:16 424:21 444:16 447:3,4 448:9 462:10,12 466:16 469:9 476:13 486:20 487:25 502:11 552:10 571:8 586:6,15	587:11 598:20 599:10,14,20 <b>company's</b> 323:12 389:11 <b>compare</b> 401:8 519:23 <b>compared</b> 539:20 <b>comparing</b> 520:4 <b>comparison</b> 412:2 <b>competent</b> 486:13 <b>complained</b> 454:21 <b>complete</b> 427:4,17 <b>completed</b> 381:21 384:4 400:22 425:7,14 426:4 427:10,13,23,24 428:3,10,24 429:3 429:9 <b>completely</b> 292:21 296:18 297:11 398:10 438:20 442:17 591:9 <b>complex</b> 356:17 360:3,9 388:22 532:11,21 571:12 571:14 589:23 <b>complexity</b> 486:7 <b>complicated</b> 353:20 370:24 571:3,4,6 <b>comply</b> 278:10 <b>component</b> 483:4 <b>components</b> 483:2 483:3 498:20 572:2 <b>comprised</b> 540:14 <b>compromise</b> 524:12 <b>conceded</b> 596:7 <b>conceived</b> 449:13 <b>concern</b> 548:11 <b>concerning</b> 310:24 <b>conclude</b> 279:13,18 <b>concluded</b> 298:13 569:5 <b>conclusion</b> 305:3,4 341:3 431:6	455:11 460:10 479:23 482:8 487:5 488:3 489:9 492:4 526:24 546:22 562:17,25 565:18 <b>conclusions</b> 289:13 291:18 292:5,19 292:21 293:10 294:8,12,22 296:6 299:13,15 300:10 300:21 301:9,16 302:14 304:7,18 304:22 <b>conditional</b> 322:7,9 369:24 <b>conduct</b> 377:23 380:10 <b>conducted</b> 287:18 375:6 377:2 381:5 381:21 383:10,13 383:18,21 384:6 511:23 <b>conducting</b> 289:11 <b>conference</b> 318:21 393:13 511:7 <b>confess</b> 541:15 <b>confidential</b> 278:19 278:21 321:21 323:2 331:13 332:16 340:12 365:18 378:3 <b>confidentiality</b> 277:14 322:3,16 331:4 <b>confirm</b> 316:6,7 440:7 496:13 <b>confirmation</b> 277:21 286:25 294:4 305:12 306:21 307:24 308:18,20 310:9 310:14 312:25 313:4 314:16,17 314:19 315:12,20 317:3,5 318:5 320:3 321:18
--	---	--	---	--

328:8 332:22 333:8 335:21 435:15 457:19 464:25 471:17 513:9 521:24 522:12 525:20 526:7 554:5 560:6 560:8 570:14 594:14 611:24 <b>conflict</b> 607:9 <b>conflicts</b> 504:18 <b>confusing</b> 344:9 405:25 <b>confusion</b> 320:18 405:22 <b>connect</b> 495:9 <b>connection</b> 290:25 312:25 314:15 317:5 318:18 319:5 320:3 450:19 452:21 515:21 555:7 <b>consensual</b> 305:23 394:10,16 538:9 538:11,13 554:7 <b>consent</b> 564:9,12 564:19 <b>consented</b> 563:14 563:19 <b>consider</b> 279:20 299:19 304:21 320:2 328:14 329:7 398:18 417:16 419:25 420:2 486:23 489:23 504:17 590:19 <b>consideration</b> 418:16 489:12 490:16,19 494:23 509:11 534:13 554:8 564:23 <b>considered</b> 299:16 300:22 301:3,4,5 302:19 328:18 504:22 512:20 590:10	<b>considering</b> 373:15 398:14 <b>consisted</b> 441:3 <b>consistent</b> 440:15 440:25 443:15 556:8,20 <b>consolidated</b> 362:21 <b>consortium</b> 285:9 <b>constituencies</b> 386:20 388:15 444:23 537:14 <b>constituency</b> 389:23 <b>construction</b> 544:17 <b>consultant</b> 295:24 326:16 <b>consulted</b> 386:19 428:17 <b>contained</b> 439:4 <b>contemplating</b> 326:20 <b>context</b> 362:5 373:19 390:8,23 392:2,24 393:21 393:25 400:18 405:5 418:18 419:19 433:25 436:15 438:24,24 439:23 440:3 442:14,18 505:11 526:25 536:25 538:10 568:6 <b>continually</b> 370:16 574:21 <b>continue</b> 366:22 476:21 491:23 495:7,9 553:7,10 557:5 574:24 580:5 <b>continued</b> 345:8 490:22 <b>continuing</b> 392:4 <b>contract</b> 317:23 <b>Contracts</b> 411:4 <b>contractual</b> 311:8	522:18,22 539:4 <b>contrast</b> 527:2 <b>contrasted</b> 525:25 <b>contributing</b> 356:13 357:13,23 <b>contribution</b> 359:5 483:14 497:4 524:16 <b>contributions</b> 424:5 498:4 <b>control</b> 383:2 <b>Cont'd</b> 271:2 422:21 <b>conversation</b> 436:22 441:22 495:7 <b>conversations</b> 379:5 441:2 442:9 452:24 453:5 502:25 <b>conveyance</b> 370:21 457:10 481:22 482:23 497:8,21 497:24 498:2 499:20 <b>cooperate</b> 555:7 <b>cooperation</b> 555:5 555:13 <b>coordinate</b> 335:12 <b>copies</b> 347:23,23,24 348:2,5,17 365:11 <b>copy</b> 333:21 335:22 335:23 340:4,5,6 346:11,14 347:18 477:23,24 551:17 560:16,19 561:4,6 563:24 572:10,15 606:18,19 <b>corner</b> 346:20 <b>Cornfield</b> 469:19 <b>Corp</b> 275:9 339:2 <b>corporate</b> 323:15 324:3 346:4 365:3 375:9 377:4 435:12 541:20 <b>correct</b> 318:3 320:17 325:12	341:12 343:12,19 350:22 351:4 352:25 353:8,9 355:6 356:15 357:9,14,16 359:8 360:20 361:2 362:19 363:20,21 364:4 366:17 367:5,10,11,14,20 368:3,21 369:4,10 371:5 376:24 377:9 379:10,15 379:24 380:8 382:9 385:17 386:4,14,21,22 387:7 388:15 389:4,17,18 393:3 395:7,14,23 396:4 396:10,16,17 397:7,20,21 398:4 398:11 400:16 401:13,20 403:8 404:9,16,20 405:4 405:5,10 406:4,10 406:22 407:24 408:13,19 409:3 410:6,16,22,23 411:2,3,18 412:4 412:5 413:19,23 413:24 414:17,18 414:20,21 415:4 416:4,5 419:17 420:14 423:5,6 426:11,12 427:11 428:4,8,18 429:7 430:2,7,16 431:2 431:20 432:13,22 438:5,19 440:21 441:7,12,23 442:11 443:10,20 443:22 444:2,13 444:23 446:8 447:5,6,15 448:10 448:15 449:9,19 449:23 450:3,18 452:4 453:23 454:23 455:6	456:17 458:5,8,9 458:11,18,22 461:9,23 463:19 466:5,10,17 467:3 467:12 468:17 469:12,22 470:5 470:11 471:12 472:12,16,17 473:11 474:22 475:6,18 476:17 476:18 478:19 484:3 492:23 499:22,23 501:13 502:16 511:5,8,9 513:18,19,23,24 516:17 517:3,4,23 517:24 518:4 519:6,11,12,20,21 524:4,9 526:2 528:5,11,17,18 533:13 534:14 539:13,14 543:19 543:20,23 544:14 544:15 546:9 549:3 552:5 553:6 553:8 554:12,19 556:15,16 559:3,4 560:21 564:15 567:18,20,21 568:17,18,20 573:6,7 575:6,13 581:8 584:5,6,7 584:10,11 587:4 587:13 595:19,24 596:4 597:6,16,25 598:2,7,11,20 605:2 612:16 <b>corresponding</b> 370:9 500:13 <b>cost</b> 302:3 601:7 602:3 603:16 <b>costing</b> 341:24 <b>counsel</b> 277:9 281:7 282:13,14 283:2 286:14 287:19,20 292:8 320:17 323:12
--	---	---	---	--

333:21 335:12,24 350:18 370:13 371:8,12 374:15 374:16,25 375:9 375:19 377:5,8 378:2 383:13,21 383:22 384:7,10 384:11,18,20,25 385:3,9 417:12 421:6,9 426:20 428:8,16,17 437:21 441:11 469:12 482:14 487:2,9,16 488:5 488:23 489:5,7 492:8 495:2,4 498:15 501:2,3 503:25 504:2 508:9 511:7 525:23 550:12 554:13 555:24 556:8 569:2,5 600:8 606:18,20 609:16 <b>counselors</b> 425:18 <b>counsel's</b> 381:17 428:21 435:10 495:23 521:22 531:25 <b>counterclaim</b> 381:8 <b>counterclaims</b> 374:23 376:15 378:24 380:5,12 392:10 454:3 486:2 487:18 490:17 492:3 591:24 <b>counterparts</b> 436:18 <b>counterproposal</b> 405:12 <b>counterproposals</b> 395:6 <b>County</b> 552:9 <b>couple</b> 288:11 321:12 372:9 393:23 428:19	430:17 475:13 494:4 506:23 546:7 569:22 600:2,9,19 <b>course</b> 281:10 286:3 292:18 296:4 340:23 341:4 345:4,9 348:8 391:10 438:17 439:24 442:3 489:7 505:22 506:11 510:15 611:19 <b>court</b> 269:2 275:15 275:16,24 276:22 276:25 277:4 278:6 282:25 283:12 286:7 287:7 289:16,18 291:22,23 298:8 299:18 300:16 301:14,15,17,19 301:21 302:16 304:7 306:2 307:21 308:7 319:11 323:19,22 326:10 333:20 336:14 337:11 338:18 340:4 346:14 365:12 366:20 406:9,17 408:17,17 450:15 454:24 525:17 530:25 550:24 552:12,15 574:22 575:2 593:7 611:20 <b>courtroom</b> 269:16 275:11 276:15 277:15,18 278:10 280:11 283:9,17 284:15 298:2 308:8 323:14,17 324:12,15 537:5 612:3 <b>courts</b> 291:12 301:22 304:11	497:25 <b>court's</b> 278:22 326:24 420:23 474:19 475:5 566:18 <b>court-appointed</b> 295:11 <b>cover</b> 582:18 <b>covered</b> 553:2 554:22 555:2 <b>co-counsel</b> 307:17 <b>co-head</b> 338:6 <b>create</b> 425:17 444:16 445:2,13 447:23 448:3,14 448:21 <b>created</b> 341:12 345:18 395:3 429:12 445:19 446:10 447:8 508:2 547:21 591:22 <b>creates</b> 500:16 <b>creation</b> 447:16 <b>credentials</b> 303:22 <b>credit</b> 537:22 549:15 <b>creditor</b> 388:15 389:23 444:23 445:3 463:16 515:9 537:13,22 545:18 548:12 589:8 596:19,24 <b>creditors</b> 272:2 287:15 290:9 317:7,18 321:2 386:7,11,13,17,19 387:12 388:7 430:15,18,20,23 431:12 441:5,11 441:23 445:3 516:14 537:16 538:2 543:17,21 544:18,19 571:12 586:2 587:7 589:11 596:22 610:10	<b>credits</b> 427:18 <b>Creek</b> 443:2,23 449:22 469:18,19 <b>critical</b> 311:7 <b>CRO</b> 549:21 <b>Cromwell</b> 271:12 395:4 484:25 529:12,21 567:7 601:25 <b>Cromwell's</b> 600:8 <b>cross</b> 282:16 312:21 325:9,11 325:15 329:15,16 336:15 339:22 377:14 378:13 421:4,24 566:12 592:17 594:17 607:6 <b>crosses</b> 612:22 <b>cross-examination</b> 283:21 325:25 333:15 339:23 421:10 507:3 <b>cross-examine</b> 566:20,21 <b>cross-examined</b> 306:14 325:22 327:18,22 <b>CSR</b> 269:24 <b>culminate</b> 493:3 <b>culmination</b> 507:16 <b>currency</b> 437:13 <b>current</b> 338:3,10 404:7 408:7 410:11 411:9 412:2,9 413:25 414:4 416:12,15 445:20 449:7 475:16,22 493:25 <b>currently</b> 337:15 408:13 476:7 548:2 598:9 607:18 <b>custodians</b> 455:11 <b>cutting</b> 371:13 <b>C-3</b> 350:21 351:4 355:13,25 516:7	520:6 <b>C1</b> 443:5 <hr/> <b>D</b> <hr/> <b>D</b> 270:15 271:17 <b>damage</b> 498:25 603:25 <b>damages</b> 290:13 498:22 563:4 <b>Dan</b> 469:21 569:21 <b>Daniel</b> 271:10 284:8 329:19 <b>data</b> 351:23 457:11 <b>date</b> 394:6 425:13 442:15 508:15 527:12 551:5,8 572:12 586:3,22 586:24 587:10 588:9 <b>dated</b> 424:22 426:10 455:5 507:9 573:12 <b>David</b> 270:23 272:10 278:25 296:24 334:12 468:3 <b>day</b> 276:21 297:12 303:9 312:18 343:22 393:6,7,14 393:17 427:9 444:24 445:8 535:24 538:5 540:24 549:12 580:10,10,12,13 592:24 593:24 612:7,7 <b>days</b> 316:4 <b>day-to-day</b> 339:12 <b>DC</b> 270:6 483:16 501:6 584:25 <b>DE</b> 269:17 270:14 271:23 273:14,22 <b>deal</b> 280:19,21 284:4 288:15,23 315:4 332:4 366:20 432:11 540:25 541:5
--	---	--	--	---

549:16 591:21 592:3 <b>dealing</b> 319:23 <b>dealt</b> 395:18 <b>Dean</b> 569:24 570:4 <b>debenture</b> 474:13 475:2,11 521:10 <b>debentures</b> 475:9 <b>debits</b> 427:18 <b>debt</b> 308:22 313:18 314:18 450:11 458:7 459:11,18 459:20 460:2,8,15 461:4,6,15 462:4 462:8,9,11,16,19 463:5,9,23,25 464:23,24 514:24 515:2 518:7,9 521:7,16 522:2 <b>debtor</b> 279:2 286:16 294:12 308:9 310:7,11 314:6 315:2 316:2 317:16 324:6,13 324:16,24 332:15 347:16 349:21 374:2 386:9,15 432:6 445:9 447:17 448:4 454:22 486:19,22 493:4,18 495:3 504:2,19 506:14 506:23 511:14,23 518:2 525:2,3 528:8 531:14,21 538:22 539:7 541:11 549:21,21 552:18,22 553:12 553:18 565:13 580:14 585:23,25 590:19 592:4 593:7,10 602:18 603:15 604:14 <b>debtors</b> 269:5 270:3 275:7 276:2 277:11,20,25 278:2,13,17	280:13 281:6 282:24 283:11 286:19,22 287:5 287:15 289:7 290:9 291:10 294:10,19 295:3 295:25 296:11 306:18 309:2 310:2,13 311:21 321:14,21 322:8 322:12 323:4 328:16 329:25 330:14 331:23 332:10,21 333:6 335:16,18 340:5 340:17,24 342:23 349:15 361:17 380:19 423:11 444:17,25 445:13 490:23 504:14 538:5,7,8 542:16 548:17 550:11 555:6 558:25 560:5,7,8,9 561:7 564:23 567:19 592:20 593:19 608:21 <b>debtor's</b> 276:5 305:25 <b>debtor/creditor</b> 374:8 <b>debts</b> 460:6 526:22 556:18 <b>December</b> 269:19 307:23,25 309:6 454:20 455:5 <b>decide</b> 279:19 281:5 304:17 319:23 536:10 540:6 <b>decided</b> 310:6 394:7 419:15 494:23 530:12 535:7,11 539:11 <b>decides</b> 324:16 <b>deciding</b> 537:21 596:11	<b>decision</b> 326:10 426:16 474:25 484:19 536:17 538:24 <b>decisions</b> 486:21 540:15 <b>declaration</b> 310:16 310:19 311:2,23 321:17 330:17,25 333:19 335:19 341:14,23 468:3,7 477:21 478:12 480:12 482:3,15 482:17,19 483:10 483:12,24 484:4,5 490:5 492:17 496:7,9,14,19 497:3 501:15 502:21 503:20 504:13 594:8 <b>declarations</b> 276:23 277:6 333:13 487:15 534:10 546:4 <b>declared</b> 577:22 <b>deduct</b> 581:2 <b>deducting</b> 372:5 <b>deduction</b> 389:12 <b>deemed</b> 494:11 <b>defendant</b> 308:9 <b>Defendants</b> 269:14 271:11 <b>defendant's</b> 308:2 <b>defenses</b> 290:13 378:25 436:24 453:7 454:3 480:13 481:17 482:2 487:19 489:15 490:18 <b>defer</b> 332:8 <b>deference</b> 303:8 <b>deficiencies</b> 455:9 <b>define</b> 354:9 <b>defined</b> 412:18 524:3,8,11 <b>definitely</b> 312:6 318:23 512:5	534:7 538:4 <b>definition</b> 451:19 483:19,21 532:5 556:18 <b>degree</b> 337:12 412:23 <b>Delaware</b> 269:2 273:12 <b>delay</b> 310:8 490:21 <b>demand</b> 483:6 <b>demands</b> 483:14 <b>demonstrative</b> 350:6,10,17 351:3 351:19 361:14,19 515:25 609:22 <b>demonstratives</b> 365:11 609:11 <b>demoted</b> 308:5 <b>denied</b> 299:3 <b>deny</b> 320:9 <b>department</b> 428:11 428:12 <b>depend</b> 514:22 <b>depending</b> 277:4 579:17 <b>depends</b> 421:21 587:5 599:15 <b>depose</b> 311:25 312:19 313:2 319:7 <b>deposed</b> 306:20,23 417:5 564:16 602:15 <b>deposit</b> 395:14,20 395:22,25 396:3,9 396:14,16 397:6 397:25 492:20 493:2,12,24 494:11 503:17 509:22 510:2,3,23 575:19,21 <b>deposition</b> 278:19 287:20 288:19 315:17 329:23 330:7,23 345:23 345:24 360:7,10 373:16 375:3	376:4 378:7 379:8 380:2 381:25 399:3 404:13 417:24 419:3 427:12,17 428:2 435:17 439:18 440:8,22 455:23 457:18 558:25 563:20,24 564:4 594:12 <b>depositions</b> 287:13 296:13 297:14 315:15 456:2 487:15 <b>deposits</b> 352:10,12 358:18 510:13 <b>deprived</b> 544:17 <b>Dept</b> 273:18 <b>DEPUTY</b> 275:2 334:19 422:12 476:23 593:15 <b>derivative</b> 555:9 556:24 557:7 <b>describe</b> 337:10 338:17 339:7 358:6 463:13 569:13 576:22 580:9 581:18 589:20,22 590:2 <b>described</b> 367:7 416:22 481:24 498:12 499:19 509:12 584:24 586:5 <b>describing</b> 465:21 <b>designated</b> 278:18 292:13,14 326:19 330:7 346:3 435:12 <b>designation</b> 322:16 <b>designations</b> 329:23 330:2,16 <b>desires</b> 275:16 <b>Despite</b> 476:12 <b>destroyed</b> 310:3 <b>detail</b> 439:15 440:13,20 441:3
---	--	--	---	---

546:5	324:10 327:21,21	<b>discrete</b> 479:17	310:24 312:6	458:23 459:13
<b>detailed</b> 436:25	328:11 333:14	<b>discuss</b> 296:14	316:8,10 320:19	463:14 467:23
440:4 457:8	335:20 337:6	298:25 317:14	362:18 363:16	481:3 505:18,19
481:19	459:17 468:4	324:11,12 421:5	369:17 371:23	505:19,20 508:6
<b>determination</b>	477:10 502:8,16	428:16 436:17	373:22 382:9	508:20 523:24
372:23 373:2	542:9 557:21	438:22 440:11,18	383:3 385:15,16	526:4 558:16
448:11 461:14	567:16 602:13	478:17 480:8	395:14 396:16,20	560:12,13 591:17
514:21	<b>direction</b> 362:12	496:9 497:3 500:2	405:10 409:21	600:14
<b>determine</b> 279:8	375:18 377:7	501:22 560:14	410:2 543:21	<b>documented</b>
381:11 394:13	<b>directly</b> 310:23	577:5,9 593:12	544:3,11,18,20	573:11
457:3 464:23	355:14 470:7	<b>discussed</b> 310:5	572:25 574:17	<b>documents</b> 278:12
490:23	<b>director</b> 338:5	319:18 366:16	<b>disputes</b> 493:5	279:7,15,20,21
<b>determined</b> 382:18	606:5	370:3 397:22	503:22	280:8,14,18
448:12 459:20	<b>directors</b> 468:23	416:14 433:15	<b>disruption</b> 279:23	281:14,17 282:2
463:22	469:8 476:16	434:2 491:11	280:6	283:6,10,13,25
<b>develop</b> 392:4	543:3 585:22,25	574:12	<b>distance</b> 326:17	284:18 290:11,25
<b>developed</b> 345:5,10	588:16	<b>discusses</b> 397:9	<b>distinct</b> 447:18	294:14 321:19,19
391:11,16 576:13	<b>dis</b> 411:10	398:5	<b>distribute</b> 345:15	321:25 322:6
<b>developing</b> 324:9	<b>disagree</b> 311:13	<b>discussing</b> 284:2	<b>distributed</b> 347:8	340:13,25 454:19
<b>difference</b> 293:24	356:16,20 382:10	286:11 344:15	409:2 586:25	454:21 455:12,14
299:12 364:10	389:25 438:17,20	376:15 379:23	588:10	455:20 456:6,13
409:5 419:13	441:8 446:9	423:4 436:20	<b>distributing</b> 519:18	456:16 457:13
522:23,25 597:19	<b>disagreement</b>	492:18 578:8	<b>distribution</b> 317:6	505:14,17 512:14
598:6 609:23	288:8	<b>discussion</b> 362:16	317:17 321:2,6	512:16 602:17
<b>differences</b> 408:5	<b>disallows</b> 320:23	365:15 378:20	470:24 513:22	606:15 608:20,24
448:24 498:18	<b>disavowing</b> 329:4	379:14 424:19	520:10,18 541:23	608:25
<b>different</b> 301:20,21	<b>disband</b> 450:24	436:8,25 437:17	543:19 555:17	<b>doing</b> 275:14 293:3
345:19,19 387:14	<b>discharge</b> 286:15	437:20 440:4	565:12	474:16
447:17 467:8	<b>disclose</b> 289:22	479:3 503:12	<b>distributions</b>	<b>dollar</b> 359:23 360:2
491:23 500:10	532:20	522:17 550:16	520:14 554:21,25	360:17,23 361:3
537:8 544:10	<b>disclosed</b> 286:2	578:11	<b>district</b> 269:2	409:17,19,22,24
545:3 591:10,25	294:18 295:25	<b>discussions</b> 296:15	408:17 552:13,15	410:4 413:15,16
597:20 607:23	506:20	353:11 370:14,15	574:25	413:21 417:11
<b>differentiation</b>	<b>disclosure</b> 296:10	374:24 377:25	<b>divide</b> 341:8	420:15 453:3,21
597:24	349:6,8,13,14	378:4 390:10	<b>divided</b> 341:17	530:8 532:19
<b>differently</b> 402:2	406:15,19 407:7	417:12 437:5,7	342:5,14 343:9	533:4 535:6
465:17 466:3	458:2 459:2 469:3	438:25 439:14	<b>dividend</b> 458:18	539:15,16,17
527:2	470:21 515:4,20	440:11 444:19	<b>DKK</b> 583:6,8,9	540:10 583:24
<b>difficult</b> 391:23	531:15 532:16	484:23 510:16	600:20,24	584:22
453:16,18 481:2	<b>discount</b> 448:19	530:21 596:14	<b>DKKs</b> 583:17	<b>dollars</b> 304:15
486:9 498:7	<b>discounted</b> 447:22	<b>Dismiss</b> 308:4	<b>docket</b> 469:7	342:2 352:3 363:8
532:18 580:14	<b>discovery</b> 290:2,13	<b>dismissal</b> 551:2,7	<b>document</b> 349:23	368:2 369:2
582:8,12 590:5	291:2,10 292:9	551:13,15 558:3	351:8 394:25	397:14 403:8
<b>Dime</b> 272:12	300:8 302:21	558:14	395:3 425:10	408:10,12 414:3
529:15	303:11,13 313:7	<b>dispute</b> 297:17	429:13 443:11,21	417:7 419:14
<b>DIP</b> 450:10	345:8 439:9	353:12 367:2,4	444:3 449:17	420:4,4 445:10
<b>direct</b> 276:24 277:7	455:15,16	<b>disputed</b> 308:25	455:18 458:12,19	453:3,21 461:25

532:17 533:2,10 533:19 535:14 542:19 548:21 581:2 602:20 <b>dollar-for-dollar</b> 354:3 <b>Dom</b> 567:24 <b>domain</b> 454:5 <b>Dominic</b> 438:11 <b>Don</b> 604:20 <b>door</b> 289:6 320:4 384:17 <b>dotted</b> 352:17 <b>doubt</b> 455:10 <b>dozen</b> 287:6 <b>Dr</b> 308:12 310:15 311:4 <b>draft</b> 425:9 450:6 508:18,19 <b>drafted</b> 512:14 529:15,17 <b>drawn</b> 486:25 <b>dropped</b> 420:10 <b>due</b> 342:6,15 343:16 363:22 364:13 384:20 499:10 <b>duly</b> 336:18 337:3 <b>duty</b> 431:12 <b>D&amp;O</b> 412:7 413:2,6	<b>economic</b> 441:16 450:17 451:6 507:15,19 <b>EDGAR</b> 273:5 <b>edge</b> 470:13 <b>educational</b> 337:10 <b>effect</b> 341:19 <b>effective</b> 586:3,22 586:24 587:10 588:8 <b>effectively</b> 439:3 447:24 500:15,17 583:19 612:22 <b>efficiencies</b> 593:20 <b>efficient</b> 286:6 <b>effort</b> 436:10 <b>efforts</b> 556:23 557:2,9 <b>eight</b> 337:20 495:16,17 <b>Eileen</b> 566:16 <b>either</b> 321:5 359:4 384:14 456:18 457:21 569:11 577:23 593:24 <b>elected</b> 587:8 <b>election</b> 543:18,23 545:6,17,23 546:2 589:2 <b>elections</b> 543:16 587:6 <b>elimination</b> 285:10 <b>Elsberg</b> 270:23 278:2,24,25 296:24,24 297:20 300:17 <b>Emanuel</b> 270:19 278:25 296:25 345:7 423:8 455:4 495:10 511:7,13 512:5,15 <b>embedded</b> 491:17 491:19,20 <b>emergence</b> 599:10 <b>emphasis</b> 337:14 <b>employed</b> 337:16 607:17	<b>employee</b> 326:15 391:3,4 393:10,13 503:2,10 534:24 536:21 <b>employees</b> 383:15 383:24 391:5,17 391:20 536:24 580:6 608:3 <b>emptying</b> 276:15 <b>enable</b> 446:6 <b>enabled</b> 311:24,25 <b>enacted</b> 345:12 346:25 398:24 <b>encompassing</b> 580:3 <b>ended</b> 409:14 410:7 410:10,16 411:5 411:18,21 414:25 557:17 <b>ends</b> 401:10 479:10 <b>engaged</b> 479:20 <b>enormous</b> 427:24 <b>Enron</b> 301:5 <b>ensures</b> 311:9 <b>enter</b> 306:4 494:23 <b>entered</b> 320:22 322:11 345:11 456:19 478:6 511:2 512:3 <b>entire</b> 297:8 325:11 362:23 392:11 395:13 507:14 536:10 577:3 602:7 <b>entirely</b> 387:18 <b>entirety</b> 358:8 <b>entities</b> 290:15 322:5 461:11 505:12 <b>entitled</b> 314:5 362:23 363:5 395:11 468:14 508:18 526:21 543:17,22 578:20 585:22 594:22 <b>entity</b> 331:16,18 445:20 450:13	514:5 517:25 518:11 533:17 545:12 <b>entry</b> 572:24 <b>EPA</b> 603:9 <b>Epes</b> 435:6,8 438:4 438:9,12,17 <b>equates</b> 475:3 <b>equity</b> 272:25 278:8 279:5 280:12,25 281:7 281:12 283:11 284:11 285:13 303:3 308:22 310:7,11 314:5,18 316:23 317:12,15 317:23 327:4,8 340:3 430:25 450:15,20,25 451:3,25 452:2 455:2 458:4,11,15 461:20 463:15,17 464:10,12,24 465:16,22 516:6 522:3 585:19 597:3,3,8,10,14 610:6 <b>equivalent</b> 402:19 404:25 416:14 <b>erase</b> 298:19 488:17,19 492:13 <b>erased</b> 488:11 <b>ERISA</b> 413:11 <b>error</b> 416:11 <b>especially</b> 282:7 505:24 <b>ESQ</b> 270:7,8,15,16 270:17,23,24 271:7,8,9,10,15 271:16,17,18,24 271:25 272:7,8,9 272:10,16,22 <b>essentially</b> 348:10 364:13 404:25 407:18 411:5,8 416:14 474:21 479:19 507:20	513:15 548:14 <b>establish</b> 433:3 548:12 <b>established</b> 299:25 552:23 <b>estate</b> 302:4 317:8 342:24 343:4,10 347:9 348:11,12 348:23 351:25 352:2,8 357:24 360:5 367:25 368:7 369:4,17 382:13 383:18,20 385:16,17 386:16 386:18 387:10,24 390:20 392:9,11 393:4 394:4 399:12,23 401:18 404:7 417:18 444:13 448:5,7 455:13 456:12,15 479:24 483:20 533:7 536:10 537:11 538:6,23 539:18,21 541:6 542:17 555:10 577:10 583:20 584:14,20 585:2 591:22,23 603:23 <b>estates</b> 386:10 432:8 <b>estate's</b> 346:3 371:4 409:18 <b>estimate</b> 309:3 400:19 530:21 590:23 602:6 <b>estimated</b> 342:3 548:5 584:18 602:4 <b>estimates</b> 466:21 <b>estimate's</b> 474:17 <b>estimation</b> 465:7 532:15 549:12,16 <b>estimations</b> 316:12 <b>estopped</b> 299:7 <b>et</b> 269:4,8,12 272:3 291:14
<b>E</b>				
<b>E</b> 270:2,2 <b>earlier</b> 314:21 322:24 392:12 393:8 489:5 492:11 503:2 507:2 509:4,5 515:17 532:9 543:25 544:2,8 565:9 578:5 <b>early</b> 322:11 345:3 394:15 430:13 503:15,24 <b>easier</b> 288:23 336:3 536:20 <b>easy</b> 362:10				



<b>evaluate</b> 489:19	<b>examiner</b> 289:9,10	446:16 455:16	500:24 514:5	<b>F</b>
<b>evaluated</b> 287:10	289:19,20,25,25	460:21 461:7,19	521:19	<b>F</b> 269:20
486:16	290:3,8,10,16,22	468:9,22 478:9	<b>experiences</b> 459:15	<b>face</b> 458:17 563:7
<b>evaluating</b> 488:10	290:23 291:3,8,13	501:11 551:12	<b>expert</b> 292:3,4,4	574:23
492:2 493:12	291:21,24 293:6,8	<b>executive</b> 338:8	295:5,11 299:20	<b>fact</b> 287:22 298:14
<b>evaluation</b> 351:24	293:24,25 294:5	<b>exercise</b> 301:24	300:4,6,6,12,24	301:12 308:14
426:17	294:16,22 295:10	417:23 484:17	301:6,8,11 302:13	310:2 316:12
<b>evening</b> 275:23	295:14,23 296:2,5	557:3	302:25 305:13	325:10 342:12
585:11	296:11,16,17	<b>exercised</b> 491:25	308:12,15 312:9	361:7 368:14
<b>event</b> 279:19	297:23 298:6,11	495:8 598:21	312:17 315:17,18	369:11 370:8
316:20 326:18	298:13,16,20	<b>exert</b> 432:18	319:13 457:10	384:18 392:13
478:7 547:17	299:15 301:14,16	<b>exhibit</b> 281:15	<b>expertise</b> 303:24	399:2 401:17
<b>events</b> 475:17	301:20,25 302:3	349:7,10,12,15,18	304:2,6	407:23 430:19
478:17	303:2,4,5,7,8,17	349:20 351:12	<b>experts</b> 383:25,25	440:8 508:4
<b>eventually</b> 408:25	304:14 305:10,17	355:12,13,25	<b>expert's</b> 292:10	604:17 611:21
<b>everything's</b>	305:21 334:24	386:23 394:24	300:9	<b>factor</b> 485:16
586:12 599:15	<b>examiners's</b> 288:22	433:6 441:9 443:3	<b>explain</b> 283:14	<b>factored</b> 489:8
<b>evidence</b> 277:19	<b>examiner's</b> 285:10	443:5 449:17	300:19 303:2	548:18
289:13 293:13	285:23 288:25	455:3 463:5	555:21 583:7	<b>factors</b> 335:4
294:3 299:13,25	289:3,5,17 290:4	465:20 473:21	598:3	<b>facts</b> 292:18 294:21
300:7 328:13,18	290:8 291:6,9,15	478:4,5,7 508:7	<b>explained</b> 376:10	297:18 299:23
328:25 329:7,14	292:12 293:12	508:14,17 516:2,5	376:12 393:8	300:2 303:19
329:15 332:12	295:19 296:21	551:4,6 557:22,25	<b>explanation</b> 315:13	305:6,22 310:24
335:20 370:3	306:6 335:4,10	561:4 572:10,13	<b>express</b> 432:25	312:6 369:23
464:22 494:8	<b>example</b> 290:7	572:14 600:14	<b>extending</b> 496:7,25	370:3 382:6 420:7
608:13,14 610:23	295:20 296:3	608:14,20	501:5	478:13
<b>exact</b> 334:6 416:24	313:13,17 419:13	<b>exhibits</b> 278:20	<b>extensively</b> 290:23	<b>factual</b> 288:8 294:6
417:11 425:13	<b>exception</b> 340:11	321:16 330:22	<b>extent</b> 280:8,15	294:25 296:3
462:23 476:8,10	396:7 397:2 574:7	331:11 349:12	329:13 348:2	478:24 494:5,15
517:6	<b>exchange</b> 322:8,10	350:4 550:13	447:25 518:19	<b>failure</b> 476:14
<b>exactly</b> 287:3	369:24 416:20	590:17 608:18	537:17 538:11	560:9
298:10 299:7	433:8 510:12,15	609:22 610:6,8	555:8,10,11,16	<b>fair</b> 279:4 325:6,6
300:12,22 376:11	<b>exchanged</b> 430:11	<b>existence</b> 311:5	589:18 598:10,12	341:6,18 368:10
401:9 413:14	511:2	<b>existing</b> 446:11	<b>extinguishing</b>	383:14 385:23
425:2	<b>exclude</b> 305:10	447:7,19 448:2	480:4	388:10 396:25
<b>examination</b>	306:5 307:4	<b>exists</b> 468:13	<b>extra</b> 343:16	399:7,10 401:6
294:11 329:2	486:25,25	<b>expand</b> 450:3	551:16	407:10 412:21
337:6 422:21	<b>excluded</b> 307:5	<b>expect</b> 278:14	<b>Eye</b> 270:5	414:13 416:10
459:17 477:3	324:18 455:11	283:22,24 421:19	<b>e-mail</b> 387:5	430:23 431:17
513:3 551:22	609:12	529:22	388:12,21 389:5,7	447:10 477:18
567:9 585:16	<b>excluding</b> 323:19	<b>expected</b> 421:13	390:2,9 392:20,23	478:13 479:4,14
595:14 599:7	<b>excuse</b> 346:12	<b>expense</b> 490:21	433:8 441:10,15	479:23,25 480:10
600:5,7	349:4,20 351:17	<b>expenses</b> 348:23	441:16 442:13,15	480:17 482:12
<b>examine</b> 283:13	359:15 365:13	351:2	442:18 463:6	484:21 486:17
294:5 312:7	388:2 403:4	<b>experience</b> 431:9	590:8	487:3,9 488:12
<b>examined</b> 337:4	404:19 407:12	431:14 438:15	<b>e-mails</b> 394:19	489:3 490:24
422:19	412:14 441:24	459:9 495:14		491:4 492:5

493:21,22 494:21 495:12 496:16,17 496:23 497:13 500:3,4 501:6,16 501:17 502:14,19 503:23 504:5 505:2 506:19 511:24 532:23 533:24 536:2 540:23 561:15,18 562:13 566:4 580:24 604:8 <b>fairly</b> 440:25 472:25 <b>fairness</b> 298:25 477:12,13,16 502:6 <b>fall</b> 430:13 559:17 <b>false</b> 297:11 318:11 318:17 <b>familiar</b> 526:10,13 526:14 530:12,16 530:24 531:6,7,22 545:22,25 551:24 552:7 559:20 560:4,14 562:21 563:4,7 <b>familiarity</b> 520:18 <b>far</b> 305:2 377:19 405:13 408:5 451:17 472:6 522:24 539:5 <b>fascinating</b> 507:22 <b>fashion</b> 358:20 <b>father's</b> 594:4 <b>favor</b> 297:10 400:5 <b>FDI</b> 377:4,4 <b>FDIC</b> 281:11 343:18 353:4,11 353:14,23 354:4 359:4 360:23 363:6 364:7 365:3 365:4 366:19 367:2,4,10,19 368:13,16 369:9 369:12,14 375:8,8 377:18 391:2	392:7 393:10 412:13,18 417:18 432:15 435:2 440:19 456:3,17 457:18 481:23 483:13 485:6 494:12 532:21 537:13 555:12 556:25 568:19,22 569:2 571:8 575:10,17,20 576:5,9 577:15,22 577:23 578:17 579:5 584:13,23 589:19 591:6 600:20 603:14,15 603:24 <b>FDIC's</b> 353:21 493:5 <b>federal</b> 273:20 406:9,17 408:18 474:18,23 475:4 522:18,25 530:25 552:12 <b>feedback</b> 446:19 478:3 <b>feel</b> 322:14 486:13 <b>feet</b> 393:24 <b>FEL</b> 272:4 <b>Fibermark</b> 301:7 <b>fiduciary</b> 430:25 <b>fight</b> 441:7 <b>fighting</b> 298:3 <b>figuratively</b> 484:10 <b>figure</b> 498:17 <b>figured</b> 390:5,18 392:20 <b>file</b> 284:10 330:22 584:25 <b>filed</b> 275:19,23 276:23 291:11 308:10 310:13,16 310:19 311:22 318:12,19,20 319:4 321:24 329:22 331:7 333:6,8 366:21	367:20 489:18 494:2 511:3,6 520:21 525:14,22 530:25 534:10 541:11,13 548:23 552:8 553:11 554:23 560:5,20 581:22 584:19 585:3 603:22 <b>filing</b> 442:16 502:19 558:22 <b>Filinger</b> 326:12 327:7 <b>filings</b> 489:15 600:17 <b>final</b> 320:21 389:15 396:6 409:2,14 410:10 411:25 425:11 <b>finality</b> 389:21 <b>finally</b> 356:7 414:22 473:18 475:12 584:2 597:17 <b>finance</b> 429:10 <b>financial</b> 271:5 338:25 391:6,8,14 391:25 392:4 429:9 503:3 <b>finding</b> 336:3 <b>fine</b> 284:3 285:17 322:13 335:11 <b>FINESTONE</b> 270:24 <b>FINGER</b> 270:12 <b>finish</b> 485:23 592:24 594:21 595:4 609:16 611:11,21,24 612:8 <b>finished</b> 442:5 <b>finishing</b> 593:5 <b>firm</b> 477:6 529:10 529:17 <b>firms</b> 423:15 <b>first</b> 275:18 277:13 283:2 295:12	306:11 324:2 332:7 333:16 334:7 340:2 342:16 351:3 357:2 361:23 364:11,14,18,19 367:13 368:8,19 372:18,21 376:5 379:13 385:25 393:23 397:10,25 398:3,6 399:17 400:9,14,21,24 401:4,16 402:4,13 402:14,15,23 403:6,11 404:13 404:16 408:8 416:2 426:13 441:18 442:16 455:9 464:20 472:5 502:4 503:5 508:9,23 509:7 512:25 538:23 560:23 572:24,24 577:4,17,21 586:19,22 595:3 597:5 <b>fitted</b> 536:25 <b>five</b> 363:8 566:17 585:14 593:13 <b>five-minute</b> 334:14 <b>five-year</b> 341:21 <b>floating</b> 591:9 <b>flow</b> 427:19 <b>flows</b> 428:25 <b>focus</b> 277:2 395:10 399:16 473:17 <b>focused</b> 530:19 <b>Foley</b> 536:22 <b>follow</b> 302:17 <b>following</b> 378:11 381:17 395:7 408:24 458:25 466:11,12 481:4 511:11 558:6 <b>follows</b> 337:5 422:20 490:14 <b>follow-on</b> 360:21	<b>follow-up</b> 600:3 <b>footnote</b> 471:7,8 548:18 <b>foremost</b> 538:24 <b>forgiving</b> 414:19 <b>form</b> 313:15 358:20 360:15 379:17 418:10 439:10 450:11 477:10 478:21 496:2 512:19 523:16,20,24 527:20 529:24 534:5 536:14 544:23 546:22 549:5 562:15 565:18 591:15 607:20 <b>formation</b> 450:20 <b>formed</b> 597:4 <b>former</b> 326:14 <b>forms</b> 607:23 <b>formula</b> 472:6 548:22 <b>formulate</b> 293:8 <b>forth</b> 292:5 427:19 491:18 513:13 516:10,21 524:12 540:23 574:9 576:9 <b>forward</b> 277:6 389:9 430:4 434:5 434:6 445:22,23 <b>foundation</b> 609:18 <b>four</b> 308:17,24 314:20 387:22 410:9 442:23 443:6 444:9 462:15,22 470:5 475:16,19 590:18 <b>fourth</b> 309:25 443:23 <b>fractional</b> 598:17 <b>frame</b> 297:6 390:23 <b>Francisco</b> 337:13 <b>Frank</b> 274:8 387:6 387:9,16 388:12
--	--	--	---	--

442:19 443:7	520:12	<b>germane</b> 308:22	365:2,23 366:2,5	527:8 537:7
444:10 445:6	<b>funded</b> 354:22	311:18,19	374:5,15 530:3	540:14 542:12
447:12 463:6	548:13	<b>gesture</b> 305:16	532:24 540:22	561:11 572:17,22
585:12 589:14	<b>funding</b> 352:8	<b>getting</b> 302:23	542:2 576:24	578:14,17 580:16
596:23	365:4 580:17	343:11 344:3	<b>glean</b> 489:13	583:5 586:10
<b>frankly</b> 278:15	<b>funds</b> 387:23	348:2 359:24	<b>global</b> 328:7	587:9 588:24
311:20 312:17	436:11 442:21	360:3,13,18 361:4	339:14 343:20	591:14 593:6
313:8	443:7 444:9,15	361:9,10 365:21	390:20 392:5	595:3 599:15
<b>Frank's</b> 387:12	448:14,16 461:21	370:20 393:23	394:2,7 408:2	603:13
443:12 463:2	462:4,15 463:17	396:21 399:4	419:6,9 442:16	<b>goal</b> 275:18 386:6,9
<b>fraudulent</b> 290:21	470:5 509:22	400:11 412:3,10	479:3,13 487:23	432:7,8
370:21 424:4	510:2 537:22	414:2 425:15	490:24 492:5	<b>goals</b> 431:19 433:2
457:9 481:22	<b>further</b> 422:20	426:18 429:4	494:24 523:13	<b>Godfrey</b> 273:2
482:23 497:7,21	559:9 585:9	446:19 454:14	524:2 528:19	278:7
497:24 498:2	592:15 599:25	462:21 471:15	533:12,24 534:2	<b>goes</b> 297:12 304:25
499:20	606:12	473:25 474:2,4	534:13,19 535:25	436:5 492:21
<b>free</b> 296:9 528:23	<b>furtherance</b> 322:24	478:3 514:3	540:11,16,20	522:24 582:16,19
529:2 546:11	<b>futile</b> 305:16	517:15,19,22	541:4 546:8 553:3	582:20 607:7
547:9 557:5 579:2	<b>futility</b> 301:24	518:25 532:15	553:5,8,13,23	<b>going</b> 275:14
612:2	<b>future</b> 284:25	535:18 540:21	556:21 558:19,20	280:24 282:8
<b>freeze</b> 503:16	312:14 544:21	541:4,23 542:21	563:12 589:6	288:9,10,13 293:4
<b>Fried</b> 274:8 387:6,9		542:25 543:8,12	591:16 592:2,7	298:24 305:10
387:11,16 388:12	<b>G</b>	547:25 554:21,25	597:12	313:19,19 314:8
438:11 442:19	<b>G</b> 271:24 273:5	579:2 592:9,12	<b>glory</b> 303:3	315:19 319:22
443:7,12 444:10	<b>Gallery</b> 338:20	<b>give</b> 328:19 332:11	<b>GLUEKSTEIN</b>	320:2 325:4,8,16
445:6 447:12	<b>Galveston</b> 274:4	340:5,8 366:7	271:17	326:2,4 327:16,24
463:2,6 585:12	552:9	395:5 416:24	<b>go</b> 280:11 300:3	328:9,13 329:8,11
589:14 596:23	<b>gamesmanship</b>	454:16 457:23,24	314:6 321:4	329:24 333:3,23
<b>FRIEDMAN</b>	316:3	500:12 540:7	332:24 333:23	347:8 348:15
271:15	<b>garbage</b> 302:5	575:17 583:10	346:22 347:6	353:22,23 355:7
<b>front</b> 351:8 403:16	304:16	606:17	354:3 358:5	358:16 362:7,12
474:13 477:22	<b>gateway</b> 317:22	<b>given</b> 279:9 280:25	359:21 360:6,10	362:16 363:7
563:24 600:11	<b>gather</b> 487:19	294:16 296:10,19	360:11 361:6	364:22 369:18
<b>fruitful</b> 362:16	<b>GEDDES</b> 273:11	300:8 322:15	362:7 369:19	371:25 372:7,16
<b>full</b> 275:10,11	<b>general</b> 323:12	326:24 334:23	370:22 372:10	372:23 374:5
287:4 300:8 303:3	356:20 435:10	340:4 347:18	374:4,12 375:3	380:13 382:3
316:23 326:21	469:11 516:14,18	361:19 365:17	377:20 379:7	384:16 385:5,11
336:20 417:19	532:23 539:21	384:18 454:22	385:25 387:4	389:9 390:10
447:14 517:16,19	543:16 569:2,5	466:15 502:7	389:8 391:12	392:8,14 395:10
517:23	<b>generally</b> 416:10	532:17 588:20	397:15 405:15	399:13 402:4
<b>fully</b> 548:13	445:19 579:18	590:19 609:19	410:13,25 414:10	410:5,21 415:2
<b>fund</b> 355:3,8,23	589:12 595:25	<b>gives</b> 441:21	415:8 417:22	416:3 420:21,23
357:24 388:14	<b>generated</b> 363:2	442:10 463:17	434:5,6 446:22	433:10 434:24
442:24 463:7	<b>generator</b> 363:4	476:15	451:24 464:21,21	438:8 439:23
582:21 601:15	<b>generous</b> 317:6,17	<b>giving</b> 343:23	465:7,13 469:5,6	448:17 450:7
603:8	320:25	358:12 359:12	470:20 480:11	454:15 470:13
<b>fundamental</b> 299:8	<b>gentlemen</b> 569:22	360:4 361:10	490:7 512:25	472:15,18,19,22

473:4 474:10	<b>Gotshal's</b> 487:2	<b>guess</b> 277:16	<b>hard</b> 360:23 390:8	<b>HERZ</b> 274:2
479:16 495:5,6	<b>gotten</b> 304:14	296:17 333:22	392:2 399:11,18	<b>Hexcel</b> 339:2
499:7,17 507:13	417:20 517:5	374:12 417:19	399:21	<b>higher</b> 309:5 475:4
514:8,21 528:21	<b>Goulding</b> 334:8	460:22 484:10	<b>HARRIS</b> 274:8	<b>highlighted</b> 590:8
529:2 535:23	594:3	548:3 587:18	<b>Hart</b> 469:23	590:16
538:14 539:17,20	<b>Goulding's</b> 332:5	<b>guessing</b> 594:9	<b>hate</b> 344:5	<b>highly</b> 365:18
541:21 546:3	<b>Gouling's</b> 330:23	<b>guidance</b> 278:23	<b>HAUER</b> 272:4	<b>hire</b> 391:21 457:10
559:22 576:15,20	<b>government</b> 341:25	<b>gulf</b> 508:2,4	<b>hazardous</b> 583:13	<b>hired</b> 331:23
579:13 580:5	357:9	<b>GUMP</b> 272:4	601:6	332:11 345:7
581:9 583:10	<b>governs</b> 362:24	<b>gut</b> 500:16	<b>head</b> 403:2 475:22	391:19 393:6,7,15
586:25 587:3,12	<b>grant</b> 542:19	<b>guts</b> 500:15	524:23 530:7	393:17,19 423:7
588:16 592:22	<b>granted</b> 314:23	<b>guys</b> 429:18	588:2	424:2 426:14
594:2,6 595:11	315:7 316:20		<b>heads</b> 433:15	502:18 511:7
604:18 608:12	317:10 319:20	<b>H</b>	<b>hear</b> 277:17 284:24	512:15 605:20
610:12 611:3,11	542:18	<b>half</b> 287:5 337:20	320:10 324:8	<b>historical</b> 391:12
611:16 612:24	<b>granting</b> 557:20	352:3 363:8 422:2	565:24 599:7	456:21
613:3	<b>grapes</b> 299:2	422:7 495:17	602:3 603:14,20	<b>history</b> 407:5
<b>going-forward</b>	<b>graph</b> 361:8	535:13 548:21	611:3,6	431:10 464:4
447:2 468:24	<b>great</b> 439:19	<b>hallmark</b> 292:3	<b>heard</b> 318:13	476:14
<b>Golden's</b> 283:20	481:15 485:25	<b>hammer</b> 280:21	319:24 320:5,7	<b>Hochberg's</b>
<b>good</b> 275:4,5 278:5	504:23 537:17	<b>hand</b> 299:13	324:17 366:8	303:21
278:24 284:6	538:3	335:24 508:5	398:12 478:6	<b>Hoffberg</b> 292:15
293:18 298:17	<b>greater</b> 353:25	<b>handed</b> 508:16	527:10 535:19	<b>Hoffman</b> 284:8
306:16 324:25	390:9	<b>Handing</b> 336:8	554:15 603:19	<b>hold</b> 460:7,15
330:12 335:14	<b>greatly</b> 560:16	340:15 346:17	<b>hearing</b> 305:12	461:24 462:15
337:8,9 339:25	<b>GREER</b> 274:2	366:12 436:2	307:24 314:16	<b>holder</b> 461:7
341:5 369:6 394:8	<b>GREGORY</b>	508:10 550:20	315:12,20 323:14	463:17 468:13
427:20 477:5	273:15	558:11 560:18	328:6 548:5 560:6	597:17
512:8 513:5	<b>gross</b> 348:11,22	564:6 572:8	609:20	<b>holders</b> 285:20
525:20 567:11	352:2	606:22	<b>hearsay</b> 292:18	311:9 386:17
585:10 592:23	<b>grossed</b> 352:3	<b>handle</b> 275:18	296:4 298:21,22	387:10 388:14
<b>goodwill</b> 355:2	<b>gross-up</b> 530:16,20	580:5	306:5 574:5	430:24 441:24
405:15,16 408:15	531:2,10,13	<b>handling</b> 276:17	<b>heart</b> 284:23	442:10,23 445:5
509:23 528:3,7	<b>ground</b> 280:4	277:9 278:3	<b>hedge</b> 387:23	447:12 449:18
540:5 581:6	282:22 393:24	<b>happen</b> 328:16	388:14 442:21,24	450:16 451:3
<b>Gotshal</b> 270:4	<b>grounds</b> 380:14	399:14 471:14	443:6 444:9,15	458:15 459:5
275:6 306:17	<b>group</b> 297:9 302:25	499:12,13 520:11	448:14,16 461:21	460:7,14 461:18
321:14 330:13	445:6 463:16	527:16 547:21	462:3,15 463:7,17	461:20 464:10
335:15 347:15	563:9 569:23	573:24 578:12	470:5	465:16,17 466:15
361:16 380:18	589:12,14 591:9	<b>happened</b> 292:11	<b>HEDGES</b> 270:20	467:22 477:8
423:12 488:7,22	596:23	341:6 345:5	<b>held</b> 359:4 448:25	513:7 528:24
491:15 495:9	<b>groups</b> 445:3	366:19 410:21	<b>help</b> 298:7 305:5	529:3 538:20
504:2,4,14,16,19	463:13 589:9	<b>happening</b> 471:20	327:6 441:18	547:15 557:13,16
504:23 506:14	591:2,5 596:19,24	<b>happens</b> 366:8	611:2	557:18 562:4
508:19 511:12,24	596:24	<b>happy</b> 281:3	<b>helped</b> 341:11	585:13 587:17,24
512:13 592:19	<b>guarantees</b> 516:15	402:25 420:22	<b>helpful</b> 526:4	588:8,21 589:13
593:18	517:2,22	433:13	610:18	591:2,8 592:6,8

596:17 599:8,13 599:18 <b>holding</b> 458:21 571:8 <b>holdings</b> 301:10 309:11 598:7 <b>holds</b> 563:9 565:12 <b>Homeowners</b> 341:20 <b>Hon</b> 269:20 <b>Honor</b> 275:6,10,17 276:9,10,16 277:5 277:10,24 278:6 278:25 279:7,13 280:13 281:7 282:6 284:3,7,9 284:12,16,22 285:11,18,21 286:9,19 287:2 289:2,5 292:23 293:15,19 296:25 297:4,12,22,23 298:19,23 299:17 299:21 300:11,18 301:12 303:20 304:8,21 305:5,7 306:11,17 307:2,8 307:20 310:7 314:24 316:18 318:11 320:12,13 321:9,13 323:8 324:23 325:5,10 325:13 326:2 328:3,19 329:6,18 329:19 330:13 331:9 332:2,19,20 333:5,11,21 334:17,21 335:13 335:15,17,22,24 336:6,9,11 339:20 340:2,16,22 341:4 344:5 346:13 347:11,14 348:8 348:14 349:16 350:15 351:7 357:5 358:2 361:16 365:9,17	365:22,25 366:3 366:10 369:20 371:7,20 373:5 376:2 377:10,16 378:9,15 379:17 380:18,25 384:9 384:13 385:7,19 385:24 386:25 390:24 392:16 399:8 403:9 406:24 416:17 418:10 420:20 421:20 422:4,16 431:4 435:24 440:15 446:23 453:11,15 454:17 460:18 461:15 465:20 466:8 477:2 480:24 482:14 485:17 499:4,14 500:21 508:5 510:19 512:22 513:2 514:16 527:20 529:24 531:25 535:18 536:14 539:24 542:4,14 544:23 545:2 549:5 550:8,11,17 551:10,18 552:16 553:6,22 554:14 555:18 559:13 561:3,13 562:15 562:25 565:2,6 566:8,11 570:10 572:5 573:18 574:4 575:14,24 585:11 592:18 593:4,17,23 594:20 595:7,13 599:22,24 602:23 603:11 606:13,14 606:16 607:4 608:11,23 609:15 610:15 611:13,19 612:10,23 613:5 <b>Honor's</b> 334:23	<b>hope</b> 321:11 612:8 <b>hoped</b> 298:13 <b>hopefully</b> 312:20 421:20 473:17 <b>HORSE</b> 269:8 <b>host</b> 313:16 <b>hour</b> 421:14 422:2 422:7 594:19 <b>hours</b> 312:24 <b>housekeeping</b> 330:19 608:10 <b>hundred</b> 433:9 434:6,7 500:15 <b>hundreds</b> 316:10 <b>hurdles</b> 436:13 <b>hypocrisy</b> 299:5 <hr/> <b>I</b> <b>idea</b> 298:17 324:25 361:21 389:9 394:8 594:16 <b>ideas</b> 450:10 591:6 591:7,8,10,13 <b>identical</b> 319:16,18 <b>identifiable</b> 418:16 <b>identification</b> 281:23 282:3 508:15 551:5,7 572:11 <b>identified</b> 291:13 505:6,6,12 579:8 604:17 608:21 <b>identify</b> 281:13 288:16 470:4,8 503:11,12 <b>identifying</b> 504:23 <b>ignore</b> 495:23 <b>III</b> 270:9 <b>imagine</b> 427:3 <b>imbedded</b> 491:20 <b>immediately</b> 276:17 447:21 448:25 502:18,23 503:11 <b>impact</b> 507:19 <b>impaired</b> 513:15 <b>impeached</b> 325:22	<b>impeachment</b> 281:19 329:17 <b>impediment</b> 302:22 <b>implement</b> 523:21 523:24 <b>important</b> 343:3 364:25 445:9 448:17 <b>importantly</b> 434:20 <b>imposed</b> 309:16 <b>impressed</b> 596:2 <b>improper</b> 376:19 <b>improved</b> 343:18 <b>improvement</b> 342:6 <b>inaccuracies</b> 494:5 <b>inappropriate</b> 314:12 325:23 330:8 <b>inaudible</b> 276:7 284:16 286:17 309:8,23 310:4 319:15 327:6,12 331:22 395:9 410:15 411:11 412:18 431:2,12 441:7 443:2 447:22 466:23 470:7 483:14 486:8 500:11 513:7 521:13 525:17 533:11 558:5 559:11 569:24 576:2 584:4 595:12 598:16 600:9 601:12 <b>inclined</b> 322:25 331:10 <b>include</b> 444:11 472:15 493:16 556:19 562:20 589:8 597:2,13 <b>included</b> 350:13 355:4 398:15 536:4 589:10 596:18	<b>including</b> 281:10 292:7 346:5 387:7 395:15 463:21 491:10 494:4 <b>income</b> 458:4 <b>inconsistent</b> 376:6 376:18 377:12 <b>incorrect</b> 359:9 <b>increase</b> 364:21 <b>incredibly</b> 360:3 571:5,14 <b>indemnification</b> 365:2 367:18 <b>indemnifying</b> 583:20 <b>indemnity</b> 367:9 <b>independent</b> 291:12 <b>independently</b> 300:2 <b>indicated</b> 284:16 306:20 333:11 568:15 581:15 <b>indicates</b> 573:3 <b>indicating</b> 385:15 571:23 <b>indication</b> 611:14 <b>individual</b> 417:2 418:4,22 420:6 436:9 569:12 604:23 <b>individuals</b> 290:16 568:22,24,25 569:8,10 570:3,5 <b>Industries</b> 339:3 <b>information</b> 282:9 290:24 294:15 296:14 297:16 302:23 303:17 344:8,16,23 365:19 371:11 373:11 384:16 392:5 400:25 487:20 489:14 491:11 503:6,8 <b>informed</b> 512:10 <b>initial</b> 588:23
---	---	--	--	---

<b>initially</b> 309:2 588:9	386:17 414:17,24 444:5,12 450:18	<b>investment</b> 275:8 355:21 356:5	504:24,24 555:14 573:25 609:13	<b>JPM</b> 352:21 353:21 360:24 361:7
<b>input</b> 384:2,11 385:3 428:21 512:16	451:6 473:18,24 474:3,9,14,19,20 474:25 475:5,7,9 475:11 504:18	<b>Investments</b> 272:18 307:10,16	<b>issuing</b> 598:16	363:6 364:5,25 370:15 382:20 390:15 392:6 393:11 441:21 442:10 483:13 509:12 537:2 608:18
<b>insert</b> 325:14 529:7	509:14,22 513:10 513:11,21 514:4,8	<b>invited</b> 306:12	<b>item</b> 275:18 321:15 330:20 409:6 576:18	<b>JPMC</b> 276:4 290:15 291:8 360:23 411:16 440:12 509:20 562:5 572:9,10,14 600:13 608:19
<b>inserted</b> 529:5	516:11,21,24 517:8 518:6,16 519:8,14,19	<b>involve</b> 375:9 377:5 562:22	<b>items</b> 276:11 428:20 572:18 578:23	<b>JPMorgan</b> 271:11 276:2 281:11 328:4 343:18 353:5,11 356:7,12 357:13,22 358:2 358:18 359:5,7,22 359:24 360:18 361:4,25 363:18 364:2 366:4 367:4 367:9,19 369:9,18 370:6 371:25 372:17 374:21 380:7 382:25 383:4,6,20 385:16 386:3 390:20 394:23 395:4,12 395:13 397:15 402:7 403:4 404:24 405:7,24 410:5,17,22,25 411:13,23 412:11 414:15,19 415:3,7 415:14 416:3,9 417:17 419:19 423:5 427:7,22 429:25 430:21 431:19,24 432:3,5 432:13,16,21,24 433:9 434:6 435:9 435:22 436:19,21 438:5,11,23 439:6 439:11,15 440:6
<b>insisted</b> 584:8	520:19,20 521:6 521:11,15,17	<b>involved</b> 339:13 430:15 431:11 445:3,4,6,7 505:25 512:6,7 530:13,22 537:17 537:19 538:4 542:17 570:23 589:7,13,15,16 596:3,6 600:25	<b>iteration</b> 435:2	
<b>insolvency</b> 498:3 498:24	522:5,6,10,15,20 522:22,25 525:24 543:4 593:20 607:9	<b>invokes</b> 557:12	<b>i.e</b> 427:21	
<b>insolvent</b> 514:13	<b>interested</b> 315:5 503:18 611:6	<b>involvement</b> 592:7		
<b>instance</b> 382:15 579:23	<b>interesting</b> 416:6	<b>involves</b> 557:12	<b>J</b>	
<b>instruct</b> 360:15 380:13	<b>interestingly</b> 312:8	<b>involving</b> 553:5 575:23	<b>J</b> 271:7,10,18 273:20	
<b>instructed</b> 287:19 425:17	<b>interests</b> 394:4 479:24	<b>irrelevant</b> 279:18	<b>JACOBSON</b> 274:8	
<b>instructions</b> 381:18	<b>interim</b> 338:20 343:18 391:4 425:12 569:4	<b>issue</b> 278:23 283:23 284:10,22 286:11 297:3,6 308:21 310:10 313:5 316:5,5,24 317:22 319:23 324:23 326:22 328:22,24 329:21 344:17 363:16 367:12,17 367:22 396:14 434:17 530:16 542:5 554:18 607:7	<b>James</b> 271:8 274:5 285:18 334:9 477:6 550:8	
<b>instrument</b> 463:23 463:25	<b>interrupt</b> 288:7 344:6 361:15 370:12 373:5 482:13 485:20 607:3	<b>issued</b> 289:18 290:3 370:2 458:7 458:10 581:25	<b>JANE</b> 273:17	
<b>insulated</b> 289:25	<b>interrupting</b> 280:20 344:13 380:20	<b>issues</b> 282:18 286:14 308:18,24 314:9,20 317:13 317:20 327:2 367:7 374:11 388:23 408:25 428:14 441:15 446:15,25 449:3 454:7 503:9,12	<b>JANG</b> 270:16	
<b>insurance</b> 412:6,23 413:2,23 552:10	<b>intersect</b> 286:3		<b>January</b> 451:4 597:4	
<b>integrative</b> 434:14	<b>interviews</b> 294:14		<b>Jeff</b> 469:23 605:11	
<b>intellectual</b> 411:12 425:25 426:8,17	<b>inter-co</b> 353:2		<b>JENNIFER</b> 270:17	
<b>intellectually</b> 509:16	<b>introduce</b> 283:7 312:2 313:2 336:13 550:14		<b>JEREMY</b> 271:9	
<b>intend</b> 333:10 340:10	<b>introduced</b> 300:7		<b>Jim</b> 469:14	
<b>intended</b> 315:3 351:14 541:2	<b>investigate</b> 294:2		<b>job</b> 269:25 304:6 361:7 386:15 448:4 504:23 538:6,7,8,22	
<b>intends</b> 292:16	<b>investigation</b> 290:18 293:9 294:7		<b>jog</b> 394:20	
<b>intense</b> 589:25			<b>John</b> 270:9 306:17 330:13 335:15 340:16 347:14 361:16 380:17 592:18 593:17	
<b>intent</b> 310:25 312:5 317:13 421:24			<b>JOHNSON</b> 272:7 465:19 610:5	
<b>intention</b> 295:14 306:21 315:24 333:7 448:13			<b>join</b> 565:5 598:19	
<b>interchange</b> 419:21 535:3 581:21 582:7			<b>joint</b> 560:9 583:24 602:7	
<b>intercompany</b> 352:16,19 414:14 414:16 535:2			<b>Jointly</b> 269:6	
<b>interest</b> 291:4 310:4 317:8			<b>Jonathan</b> 334:8	
			<b>Jones</b> 606:3,4 607:16 610:10	
			<b>JP</b> 269:11	

452:14 454:19,21	286:8 288:6,12	496:4 499:6,16	<b>judicially</b> 299:6	359:23 360:17
455:24 456:8,13	293:17 296:22	508:8,11 512:24	<b>jurisdiction</b> 301:13	361:3,18 367:6
481:23 494:2,10	297:17 300:3,13	514:17 515:18,24	<b>jurisdictional</b>	372:9,11,20
502:25 503:6,15	305:8 306:15	521:2 523:8,17	573:16	382:22 383:5,6
503:22 504:5,10	307:3,13 309:13	524:22 526:9	<b>jurisdictions</b> 486:3	387:19 389:6
504:20,20 505:4	309:20 311:11	527:21,23 532:2	<b>justice</b> 273:18	390:7,21 392:3
505:12 506:6,18	313:22 314:10	534:6 535:22	583:11	393:5 394:6,18,21
506:21,23 507:24	316:16 317:2,19	536:16 540:2	<b>justification</b> 279:11	398:21,22,22
510:14 511:3,14	317:25 318:6,13	542:6,12 544:24	<b>justify</b> 279:16	401:9 402:6
523:13,22 525:14	319:22 321:7,10	546:23 549:6	282:10	406:11 407:4
528:10,21 529:11	322:18,23 323:23	550:6,19,21,25	<b>Justin</b> 273:6 278:7	413:4,8 414:9
530:4,25 531:9,20	324:17 325:3,7	551:11,16,20		415:21,22 416:21
532:7,18 533:8,13	329:11 331:12,20	552:19 553:2,20	<b>K</b>	416:21,23 417:19
534:3,8,12 536:11	332:10,24 333:2	554:10,16 556:3	<b>K</b> 337:2 422:17	421:11 425:12
536:24 537:12,23	333:22 334:3,13	558:8 559:14,25	<b>Kastenbaum</b>	430:11 433:4
538:21 539:8	335:11 336:2,7,16	561:9,21,24	469:25	442:14,18 448:16
542:23 546:11	339:21 340:14,21	562:16 563:3	<b>KCC</b> 546:4	451:23 455:22
547:19 556:12	341:2 344:10,19	565:4,7,19,22	<b>keep</b> 322:25 420:21	456:14,18 457:6
559:2 562:11,13	346:10,16 347:12	566:9,14,19,23	420:22 578:20	457:15,15,20
564:24 565:16	348:4,18 349:7,11	567:3 570:15	612:24	461:12 462:6,17
567:7,23 568:3	349:17,19,24	572:7,9 573:20	<b>keeping</b> 332:14	462:20 463:10,23
570:12 571:24	350:20,23 357:6	574:11 575:16	414:25 528:9,10	464:4,7 468:24
573:4,15,21,22	358:9,13 365:23	576:2 577:18	<b>keeps</b> 608:2	469:4,13,14,16,25
574:3,14,15,20	366:11,13 371:15	585:15 586:9	<b>Ken</b> 470:7	470:6,18 471:25
575:6 576:20,24	373:7,12,23 374:2	587:15 590:13	<b>kept</b> 430:8 512:7	472:7,20,20 476:8
577:3,16,19,23,25	377:13 378:12,18	592:16 593:2,9,13	512:10 582:9	476:10 478:5
578:5,12,16,25	379:18 380:21	594:5,10,16 595:2	<b>key</b> 303:16	480:2 485:5 489:4
579:4,10,14 580:4	384:21 385:4,11	595:11 599:23	<b>kind</b> 365:5 427:18	491:22 500:17
581:10,16 582:10	385:21 387:3	600:4 602:25	498:20 518:14	504:8 505:7,16
583:18 584:7,12	392:17 399:4	603:12 605:10	541:24 543:22	509:2 513:11
584:16,19 591:3	402:21,23 407:2	606:17,24 607:10	544:13 548:10	515:15 520:19,22
595:18 600:15	416:18 420:24	608:9,15 609:2,6	<b>King</b> 270:13	521:5,16 522:4,23
601:25 604:13,23	421:17,23 422:5,8	610:2,9,12 611:3	273:21 513:6	523:3 524:22
605:5,21 606:9	422:14 424:16	611:10,25 612:6	<b>Klamser</b> 334:11	526:17 527:14,14
608:14	429:18,24 431:5	612:11,17 613:6	<b>knew</b> 399:13 504:7	527:15 529:10,13
<b>JPMorgan's</b>	431:15 432:4	<b>judgment</b> 307:22	<b>know</b> 275:23	529:15,17 530:19
356:23 395:6	435:25 438:7	308:3 311:19,23	281:20,21 282:12	531:8,18 532:3,10
430:10 433:12	440:16 446:16	315:4,6 316:20	284:24 286:10	532:14,15 533:3
435:12 455:5	453:13 454:14	317:9 319:6,11,12	293:6,8,9,11	535:24 536:6
494:14 525:11	459:21,25 460:19	319:19,25 320:6,8	297:17 308:7	539:24 540:14
531:13 547:24	460:22 462:8,11	320:9 406:9,17,21	312:13,15 314:6,8	548:23,25 549:9
573:12 595:16	465:23,25 466:6	407:18,23 408:18	320:13 324:24	549:11,15,22,22
596:10 609:24	466:10 476:20,25	487:5,21 488:2,25	325:3 326:2,3,5,6	550:3 559:16,16
<b>JPM's</b> 433:4 455:9	477:25 478:22	489:23 491:17,25	327:24 332:13	559:25 560:2,3
<b>judge</b> 275:4 276:6	480:25 482:18	492:4,14 494:9	340:18 342:20	563:16 567:12
277:13 278:4	485:19,22 487:12	495:8,11 522:18	343:21 344:17	583:21 584:17
284:4 285:2,5,17	488:15 492:12	522:25 574:23	353:20 358:9	586:11 587:16,22

588:17 591:11	<b>lacks</b> 303:23	<b>leading</b> 570:11	441:9 455:2	500:7 501:9,11
595:3 599:16	351:23	573:19 575:15,25	470:20 473:20	<b>likewise</b> 555:11
601:16,22 603:2,7	<b>laid</b> 343:13	586:8 587:14	480:5 540:2,5	<b>limine</b> 276:13,14
604:24 605:11	<b>land</b> 347:7	589:5 590:11	541:7 576:17	285:22,24 292:24
606:3,11 608:11	<b>landfill</b> 583:9,13	<b>LEAMY</b> 273:17	578:23 579:6,22	<b>limit</b> 480:3
609:8	600:25 601:2,4,5	<b>learned</b> 374:23	583:5 584:2	<b>limited</b> 278:15
<b>knowing</b> 302:9,13	601:11 602:20	498:14	593:13 595:2	283:20 455:14
<b>knowledge</b> 294:17	<b>LANDIS</b> 271:20,24	<b>leave</b> 275:14	603:13 605:10	<b>line</b> 344:7 346:20
369:12 374:20	<b>language</b> 527:3	280:11 306:25	<b>level</b> 540:21 571:13	352:18 360:6
378:23 382:6,20	528:20 529:4	391:5 400:15	<b>levels</b> 330:9 444:14	375:4,11,16,24
387:11,20 388:9	<b>large</b> 352:9 389:11	526:8	589:11 592:11	398:14 409:6
390:9 406:2	389:17 451:15	<b>led</b> 366:22 367:2	<b>leverage</b> 432:19	418:2 436:7 437:4
409:16 458:25	480:4 503:16	475:18 591:15	463:3	440:9 490:9
461:17 470:14	<b>largely</b> 284:13	597:12	<b>Lexington</b> 272:20	560:23 564:6
521:19 552:24	325:7 368:12,14	<b>left</b> 346:20 350:21	<b>liabilities</b> 353:24	<b>lines</b> 490:7
556:9 568:7	383:23 514:21	355:7 520:6	359:12 372:3,6	<b>line-by-line</b> 382:16
592:13 597:24	589:18 598:16	533:16 535:9	391:25 410:15	<b>lion's</b> 462:4,6,16,17
601:3	<b>larger</b> 368:9	536:4 537:24	419:11 451:9	463:4,9,12
<b>known</b> 399:11,17	<b>largest</b> 476:14	<b>legacy</b> 583:15	534:15,19,21	<b>liquidate</b> 580:19
404:25 439:6	<b>late</b> 284:11 303:11	<b>legal</b> 378:4 384:2	535:7,8 536:11,19	<b>liquidated</b> 382:21
570:4	308:7 335:7	431:6 460:9	536:23 537:3	382:24 383:4
<b>knows</b> 344:20	520:21 567:12	463:21 486:15	539:3,9,10,16	584:18
373:12	<b>Laughter</b> 320:15	487:7 500:18	572:22 579:7,11	<b>liquidating</b> 544:5
<b>Kosturos</b> 333:17	491:8,21 529:25	504:24 512:8	579:24 580:5	<b>liquidation</b> 349:21
334:2,7 335:19	565:23 583:4	522:15 542:5	581:18 582:11,23	350:23 513:18
336:10,12,22	<b>law</b> 295:12 298:24	546:22 562:17,25	583:21 600:19	515:3,12,15 516:8
337:8 339:19	302:10,13 341:15	565:18	<b>liability</b> 331:2	518:8,12 519:10
341:5 346:19	342:18 346:24	<b>lenders</b> 505:25	419:21 534:11	520:2,14
348:9 350:25	363:23 398:19,24	506:2	579:14,25 581:17	<b>liquidity</b> 348:10,24
361:24 366:14	423:15 477:6	<b>lengths</b> 481:15	581:21 582:5,8	349:3,4 351:16
376:6,9,25 379:8	529:10 535:4	<b>letter</b> 322:6,8 455:3	583:9,14,15,19	472:9 473:14
422:23 424:20	554:9	<b>letting</b> 611:9	600:20 601:2,5,11	<b>list</b> 281:15 310:14
477:5,9 508:16	<b>lawyer</b> 486:11	<b>let's</b> 277:22 284:4	602:4,19 603:5,17	334:4 472:10
513:5 551:24	541:20 597:18	285:2,7 300:3	<b>liable</b> 601:17	478:5 497:20
556:4 567:11	<b>lawyers</b> 450:14	302:5 333:2	<b>licenses</b> 411:4,12	578:24 594:14
572:14,17 585:18	452:22 454:20	334:14 341:2	<b>lien</b> 546:17 547:4,6	<b>listed</b> 310:16,21
593:22 594:25	463:8,21 484:14	345:23 348:4,6	<b>liens</b> 546:11,18	334:3 351:22
<b>Kurth</b> 272:19	484:14,25 485:12	349:10 356:24,24	<b>lieu</b> 277:8	469:2 481:18
307:9	514:9	356:24 359:20	<b>life</b> 410:2	517:25 523:19
<b>K-O-S-T-U-R-O-S</b>	<b>lawyer's</b> 556:20	360:11 361:13	<b>liked</b> 537:5	524:6 594:13
336:23	<b>lay</b> 294:9 347:7	375:3 377:20	<b>likelihood</b> 287:17	603:15
	<b>Layton</b> 270:12	379:7 382:14	287:24 377:23	<b>listened</b> 526:16
	423:13,18	394:22 399:16	480:9 481:12	<b>lists</b> 333:9 509:14
<b>L</b>	<b>lead</b> 339:16 438:4	400:7 403:9 404:2	482:11 483:8	524:19
<b>L</b> 270:17,23 337:2	438:10,12 504:12	404:2,4 405:15	484:2 487:8 492:9	<b>literally</b> 283:25
337:2 422:17,17	512:11,12 567:18	408:4 410:13	494:20 496:15	594:22
<b>lack</b> 421:15 454:22	567:22 611:20	414:13 419:18	497:12,17 498:9	<b>litigants</b> 273:25
455:12				



554:8 558:21	425:5 436:8	489:18 492:14	<b>macro</b> 540:20	<b>marked</b> 278:21
559:6,10,21	450:17 451:6	498:18 546:10	<b>Madison</b> 270:21	508:14,17 551:4,7
560:24 563:14	483:16 517:7	572:24 574:24	<b>magnitude</b> 582:22	572:9,11,13
<b>litigation</b> 272:12	520:17 526:16	576:13	585:5	600:13 608:18
281:11 290:24	543:15 548:21	<b>looks</b> 350:20	<b>main</b> 388:7 582:5,5	609:10
306:3 308:19	<b>live</b> 329:24 330:6	458:12	<b>maintain</b> 317:22	<b>market</b> 269:16
309:23 315:10	330:18	<b>lose</b> 289:23 382:4	553:7	271:21 314:7
316:22,25 317:11	<b>LLC</b> 272:13	547:11 573:24	<b>maintains</b> 607:13	579:17
355:2 362:18,20	<b>LLP</b> 270:4,20	574:2,22	<b>major</b> 295:23	<b>Marsal</b> 337:17,19
363:14 382:12	271:12,20 272:4	<b>loss</b> 445:16,18,20	387:22 388:14	338:4 605:16,18
388:24 405:16,16	272:19 273:2	445:25	442:22 444:22	605:24
405:23 406:8	274:2,8	<b>losses</b> 363:3,4	589:8 592:2	<b>Mary</b> 269:20
407:11,12,14	<b>loan</b> 353:2 450:8	582:21	<b>majority</b> 363:5,11	<b>Mastando</b> 270:9
408:16 418:17	457:2,8,14	<b>lot</b> 314:9 345:5	461:19,25 503:16	306:16,17 330:12
419:5 425:18	<b>loans</b> 352:16,19	384:3 391:9	587:2 588:12,14	330:13 331:14,25
426:20 436:18	414:22	393:11 419:23	588:21	332:18,25 333:5
438:25 439:2	<b>lodge</b> 281:16	433:20 436:11	<b>making</b> 386:20	333:25 334:5,16
453:17 455:4	<b>logical</b> 315:7,13	439:4 453:25	486:21 521:23	335:14,15 336:5,8
456:17 478:18	<b>logistics</b> 594:22	461:10 489:13	611:6	337:7 339:18
490:22 493:25	<b>long</b> 326:17 337:18	494:8 512:14	<b>managing</b> 338:5	340:16,17 344:5
497:21 498:10	337:25 390:18	536:22 580:16	538:10 606:5	344:12 347:14,15
509:23 511:3	393:2 421:9	588:22 589:4,23	<b>Manges</b> 270:4	348:14 349:16,18
523:5,11 524:6,20	433:14 441:20	589:25 591:24,24	275:7 508:19	350:15 351:6
525:4,7,10,16,23	593:9 594:5,16	596:3 609:23	<b>map</b> 474:10	357:4 361:15,16
526:11,21,25	<b>longer</b> 365:2,4	<b>lots</b> 313:23 411:6	<b>maps</b> 372:8	371:6 373:4,8
528:4,4,9,10,13	421:17 571:17	486:22	<b>March</b> 344:2 345:2	376:2 377:10,15
528:14,16,16,22	<b>look</b> 280:13 342:21	<b>lot-sharing</b> 582:15	345:6 364:11	378:9,14 379:16
528:24 529:3,16	345:23 376:4,8	582:20	366:15,21 367:3	380:17,17,24
530:2,18 531:5	405:6 406:18	<b>love</b> 454:5,6	367:22 368:25	384:8 385:7,18
534:7 535:12	411:19 419:6	<b>loved</b> 390:13	369:5,9 386:4,20	392:16 406:23
536:8 538:20	439:9 447:17,20	<b>lower</b> 369:2	387:7,16 388:8	416:16 418:9,13
547:15,19,25	451:8 457:8,11	<b>lowest</b> 474:21	389:3,23 390:6,12	424:17 429:16,20
548:19 550:10	479:16 486:5	<b>LOWRY</b> 274:11	390:14,22 392:19	431:3 440:14
551:25 552:4,5,8	492:22 498:3	<b>LP</b> 269:8	393:3 394:23	453:10 454:11
553:18,23 554:2,2	517:13 520:24	<b>LPWs</b> 308:22	395:12 397:16	460:11,17 480:23
556:6,15,19,24	572:13 576:17	<b>LT</b> 547:2	398:9,18,24	482:13 485:17
557:6,12 560:15	578:23 579:6,9	<b>LTW</b> 309:11 311:9	399:10 402:7,13	487:10 488:13
562:20,21 563:5	<b>looked</b> 342:25	319:23	403:7 404:24	489:21 496:2
573:17 576:4	358:7 460:6	<b>LTWs</b> 308:25	405:3,17 406:7	499:14 500:20
581:7,8,9 582:2	479:22 494:17	310:6,10 314:18	410:25 411:17	510:18 514:15
582:18 600:24,25	532:10 540:20	314:20	414:5 416:3,9	523:15 527:19
<b>litigations</b> 405:23	586:12	<b>Luncheon</b> 422:10	419:17 423:4	529:23 531:24
406:3 528:3 540:6	<b>looking</b> 313:18		429:25 442:24	534:4 535:17
595:22	343:7 349:9	<b>M</b>	456:12 507:5,9,10	536:13 539:23
<b>little</b> 303:11 352:17	351:20 356:11	<b>M</b> 273:17 274:5	507:16 573:13	542:8 544:22
395:24 401:5	371:22 408:6	337:2 422:17	<b>mark</b> 270:15 508:6	546:21 549:4,23
403:17 414:17	423:21 424:12	<b>MA</b> 271:6	508:11	559:12 561:3

562:14,24 564:3 565:5,17 592:18 592:19 593:11,17 593:18 594:7,11 595:7 599:21 601:20 602:22 603:10 605:8 606:19,23 607:3 608:23 609:4,14 <b>MASTRANDO</b> 478:20 <b>material</b> 286:21 291:19 292:6,7,20 292:25 <b>materials</b> 281:2 285:25 286:23 289:10,21,22,24 290:6,14 291:10 <b>math</b> 401:24 402:25 403:10 404:21,23 474:16 517:6 <b>mathematical</b> 474:8 <b>matter</b> 277:21 278:3 308:9 323:9 330:20 353:20 369:12 445:12 508:25 568:6 608:11 <b>matters</b> 285:8 332:23 338:18 <b>MATTHEW</b> 271:25 <b>max</b> 531:3 <b>maximize</b> 342:24 386:10,16 432:7 445:9 448:5,6 538:6,22 <b>maximized</b> 343:4 369:3 <b>maximizing</b> 343:22 <b>McCree</b> 434:8 567:24 568:2,6,8 568:9,12 574:13 576:22 577:5,24 578:9,24 604:19	604:20,21,22 <b>McCree's</b> 577:2,12 579:3 <b>McGUIRE</b> 271:25 <b>McINTOSH</b> 271:18 <b>mean</b> 300:19 326:11 349:2 350:8 354:21 373:24 418:18 430:8 433:18 445:17 462:20 483:19 494:25 518:10,20 524:25 527:9 549:20 601:5 604:6 <b>means</b> 315:7 462:7 462:18 487:6 508:19 524:12 <b>meant</b> 389:6 <b>mechanics</b> 548:8,9 <b>mechanism</b> 434:23 <b>medical</b> 579:10 <b>meet</b> 295:3 303:4 <b>meeting</b> 503:5 586:19 <b>meetings</b> 438:13 <b>member</b> 338:7 476:4 597:3 <b>members</b> 411:24 466:3 467:8,11 468:19,21 475:16 475:22,25 476:6 476:12 485:5 597:25 <b>memorandum</b> 322:10 <b>memory</b> 394:20 474:22 492:13 <b>mentioned</b> 314:21 318:22 <b>mentions</b> 312:12 <b>merely</b> 374:21 382:5 523:24 604:9 <b>merged</b> 461:11 464:5	<b>merits</b> 287:17,25 288:3,5 315:10,21 316:4,24 368:19 436:9,17,21 437:2 438:18 482:12 492:10 501:10,12 <b>merit-based</b> 437:20 <b>Messrs</b> 424:17 <b>met</b> 568:9 569:11 570:5 606:4 <b>metrics</b> 431:23 433:2,4 <b>mic</b> 373:7 <b>microphone</b> 429:19 446:18 499:7 552:20 <b>middle</b> 490:8 507:9 <b>Mike</b> 569:2 <b>million</b> 302:4 309:2 309:4 351:22 352:3,17 354:7,8 354:11,14,23 355:3,5,17,18,22 356:3,8,14 357:14 357:25 358:22 359:6 368:2,25 369:2 392:12 396:2 397:24 398:2 400:4,13 402:3 403:13,19 403:20,21 404:3 404:15,19 406:10 406:16,20 407:13 407:15,20,23 408:10,11,18 409:20 410:17 411:23 412:3,19 413:11,15,16,21 413:25 414:3,20 414:23 415:4,15 416:4,7 419:14 420:11,11 433:10 433:23 443:8,8,9 443:13,14,17,18 443:25 467:3,14 468:9,9,16 471:6 471:15,20 472:11	472:14,15,18,21 473:23,24 474:2 474:11 508:4 516:23,24 517:2,6 517:7,11 518:3,5 518:10 519:4,10 519:14,15,17 530:7,8,10,11 531:3,4,5 533:8,9 533:19,22 534:11 534:22 545:11 547:25 548:21,25 549:10,10,15 575:23 576:11 579:20 580:22 581:3 583:24 598:5,23,25 602:5 602:20 <b>millions</b> 304:14 <b>mind</b> 297:24 298:20 418:8 441:25 482:10,21 488:12,18,20 581:21 <b>minimum</b> 309:7 476:16 531:3 <b>minor</b> 329:21 330:19 <b>minute</b> 282:21 356:25 441:25 457:23 <b>minutes</b> 421:21 422:3 461:23 566:17 585:14 593:14 594:23 <b>mischaracterizes</b> 434:13 487:11 488:14 496:3 <b>mischaracterizing</b> 465:20 467:4 <b>misconstrues</b> 299:10 <b>misspoke</b> 402:16 <b>misspoken</b> 383:6 <b>mistake</b> 548:24 549:2 <b>modest</b> 299:20	302:16 <b>modification</b> 312:11 554:23 <b>modified</b> 554:20 556:10 557:14 <b>moment</b> 308:16 395:10 424:15 479:18 576:17 584:3 604:5 606:14 <b>Monday</b> 612:2,4,7 612:8 <b>money</b> 341:8 342:5 342:14 343:2,2,8 345:14 347:2 354:24 357:12,23 358:19 363:25 364:14 396:9,22 434:24 451:24 542:22 543:2,9 <b>month</b> 280:3 287:14 303:13 393:18 576:7 <b>months</b> 538:16 586:22 <b>Moody</b> 274:3 <b>MORGAN</b> 269:11 <b>morning</b> 275:4,5 276:7,11 278:5,24 284:6 293:18 306:16 330:12 334:24 335:14 337:8,9 339:25 341:5 477:5 478:7 535:20 585:10 592:25 612:25 <b>motion</b> 275:19,22 276:13 277:25 284:11 285:9,22 285:23,24 286:18 288:13,17 292:24 294:9 297:9,24 298:24 299:9 307:11,22 308:3,4 309:3,6 311:19,22 313:9 314:22 315:3,5,6 317:10
---	--	---	--	---

319:5 320:7,9 321:16 329:22 330:21 331:7 334:24 450:24 494:2 548:23 573:12 <b>motions</b> 276:13,14 277:3,10 285:14 306:9 321:11 544:2 551:12 <b>move</b> 277:6 288:25 297:21 322:15 340:24 359:20 384:13 392:15 414:13 526:9 574:25 <b>moved</b> 552:12 <b>movement</b> 430:10 430:12 <b>moves</b> 434:15 <b>Movie</b> 338:20 <b>moving</b> 293:21 430:4 471:23 504:24 593:21 <b>mute</b> 478:2 <b>Mutual</b> 269:4 272:3 275:8 323:16 326:15 339:12 446:7 458:8,16 514:13 515:13 525:25 526:2,23,24 533:25 534:18,20 539:10 557:23 558:3 568:10 581:10,11,13 <b>myriad</b> 534:9 <b>mystery</b> 326:12	477:6 604:18 <b>narrow</b> 278:14 316:24 <b>National</b> 550:10 552:4,9 <b>natural</b> 498:6 <b>naturally</b> 536:25 <b>nature</b> 536:20 <b>near</b> 284:23 580:22 <b>necessarily</b> 354:2 354:12 358:25 359:10 <b>necessary</b> 306:24 <b>need</b> 278:16 279:10 280:19 282:6,19 282:20 297:18,20 306:24 313:24 317:2,12 326:18 326:23 394:12 411:19 472:4 525:4 575:3 578:22 <b>needed</b> 335:25 431:24 433:3 <b>needs</b> 376:20 420:5 445:21 580:16 <b>negotiable</b> 433:11 <b>negotiate</b> 433:14 434:9 503:6 537:15 568:21 569:19 592:4 <b>negotiated</b> 434:7 539:8 540:25 569:16 589:19 <b>negotiating</b> 342:17 369:15 386:13 436:22 504:9 506:13,15 511:13 536:7,9 539:12 <b>negotiation</b> 339:14 374:19 386:6 394:14 411:7 432:15,17 433:5 435:4 504:11 506:12 507:25 511:13 535:10 567:20 568:5,13	569:6,20 573:10 573:21 574:12 584:9 589:17,21 590:4 596:7 <b>negotiations</b> 341:11,17 342:12 342:22 345:20 346:5 366:22 368:23 374:21 379:2 430:5,16 432:12 433:2 435:14,21 438:18 438:22 463:3 484:23 487:20 502:22 504:19 506:18 507:16 511:11,22 537:2 567:15,17 568:12 568:17 569:7,14 570:18,23 571:3,4 571:5,12,16 574:10 576:21 589:5,7,9 590:5 591:14 592:6 595:17 596:4,14 596:19 597:12,14 604:13,25 607:8 <b>negotiator</b> 339:17 438:4,12 504:12 512:13 567:19,22 <b>negotiators</b> 438:10 506:13 512:11 <b>neither</b> 429:12 <b>Nelson</b> 273:6 278:5 278:7 282:24 285:11 293:18 296:23 323:25 339:24 340:2,15 340:22 341:4 346:12,17 347:10 347:13,22 348:8 349:9 350:9,22 365:9,16,25 366:9 366:12 371:19 373:17,25 376:22 381:2 384:13 385:23 386:25	392:11 399:7 402:22 420:20 421:13,19 422:16 422:22 424:14,17 431:17 435:24 436:2 446:23 454:17 460:21,25 462:9,13 463:20 466:7 476:19 507:3,15,23 515:16 571:19 576:19 590:11 593:4 594:18 595:6,13,15 599:24 609:11,21 612:14,19 <b>Nelson's</b> 358:6 588:5 604:4 <b>net</b> 330:25 348:12 348:22 351:2,25 420:18 445:16,18 <b>never</b> 291:25 292:12,13 295:14 303:23 312:16 324:17 383:2 452:7,18 455:20 456:15 510:15 525:6 527:9 538:14 541:23 564:8 568:9 569:11 570:5 577:22 579:15 <b>new</b> 270:22 271:14 272:6,15,21 274:9 274:10 341:15 342:15 343:8,11 345:12 346:22,24 398:19 447:4 448:8,8,14 449:3 449:4,8 466:16 549:3 586:17 598:19 <b>NG</b> 270:10 <b>nice</b> 361:7 416:20 <b>night</b> 284:12 369:25 <b>NOL</b> 364:22	368:12,16 389:11 389:17 444:17 445:15,16 446:2,8 447:3,14 448:10 448:15 577:11,13 577:24 578:13 <b>NOLs</b> 364:19 400:24 402:15,18 448:2,21 449:12 449:12 577:4,4,6 577:17,21 <b>nominated</b> 475:23 <b>nonconsensual</b> 309:10,16 <b>nonprivileged</b> 296:14,15 382:7 <b>nonresponsive</b> 392:15 <b>nonvoting</b> 309:17 <b>non-appealable</b> 320:21 <b>non-debtor</b> 561:19 562:5 565:14,15 601:14 <b>non-debtors</b> 566:5 583:17 <b>non-disputed</b> 354:13 <b>non-lawyer</b> 439:4 <b>normal</b> 313:7 <b>normally</b> 607:21 <b>north</b> 270:13 532:7 532:8 534:21,23 <b>Nos</b> 269:13 <b>Notary</b> 337:4 422:19 <b>note</b> 282:11 306:25 344:6,14 347:19 348:15 373:9 377:10 378:10 380:19 388:13 430:24 441:24 442:9,22 445:5 447:11 449:18 557:15,18 559:19 559:21 560:25 562:4 585:13
---	---	--	--	--

---

**N**


---

N 269:16 270:2  
**Nagle** 274:11  
585:10,11,17  
592:14  
**nail** 298:3,4  
**name** 336:21,21  
339:3 469:6,6

587:17,24 588:8	411:24 416:22	487:10 488:13	504:12	399:16,18 401:22
588:21 589:13	444:4 512:18,21	489:21 499:4,17	<b>occurring</b> 295:2	405:22 406:15
591:2,7 592:6,8	516:16	500:20 510:18	<b>October</b> 339:6	407:10,17 408:4
596:17 597:17	<b>numerator</b> 314:5	514:15 523:15	502:18	408:23 409:13,23
599:8 609:4	<b>numerous</b> 290:10	527:19 529:23	<b>odd</b> 533:10	410:13,19 412:19
612:21	346:4 502:24	531:24 534:4	<b>offer</b> 312:15 328:13	413:16 414:11
<b>notebook</b> 433:7	537:4	535:17 536:13	332:12,21 333:17	415:3,18 416:25
<b>noted</b> 313:11	<b>NY</b> 270:22 271:14	539:23 542:4	335:18 386:2,21	422:8 425:23
348:19 613:8	272:6,15,21	544:22 546:21	395:12 408:12	437:16 438:21
<b>NOTEHOLDERS</b>	274:10	549:4,23 553:16	416:8,9 429:25	442:7 444:8 451:2
274:7	<b>N.A</b> 269:11	559:12 562:14,24	434:3 608:13	452:12 465:25
<b>notes</b> 414:14,16	<b>N.W</b> 270:5	565:2,6,17 570:10	<b>offered</b> 323:3	475:12 476:12,19
443:8,9,18,24,25		573:18 574:4	327:15 329:13	479:8,16 480:7
475:10,10 516:12	<b>O</b>	575:14,24 586:8	366:6 394:23	482:4 484:7
516:13,24,25	<b>O</b> 337:2,2 370:18	587:14 590:11	609:9 610:3	486:13 487:6
517:15,18 521:12	422:17,17	593:2 599:21	<b>offering</b> 328:5,15	488:7 489:8
521:12 561:22	<b>oath</b> 421:3 429:11	601:20 602:22	333:14 468:5	493:11,16 494:17
<b>notice</b> 312:24	<b>object</b> 282:5	603:10 605:8	574:8	499:18 503:13
315:21 316:4	305:18 344:6	610:11	<b>office</b> 271:22	504:17 505:21
333:7 469:7 551:2	350:16 351:6	<b>objections</b> 281:16	273:19 321:19	507:2 508:8 509:3
551:6,15 557:22	366:5 371:7 373:6	560:7 608:22	435:10	509:6 510:25
558:3,14	373:9 376:3	609:5,7	<b>officer</b> 333:18	513:13 520:17,23
<b>notices</b> 551:13	392:16 482:14	<b>objectors</b> 328:12	338:13,20,21	521:4 522:13
<b>noting</b> 494:4	485:18 496:2	329:2	339:5,9 431:9	523:4 524:2
<b>notion</b> 314:4	552:16 570:11	<b>obligated</b> 322:15	459:15 460:13	525:20 528:19
315:19 320:24	595:8 607:4	<b>obligation</b> 430:25	475:15	529:10,20 530:15
<b>November</b> 307:20	608:17 609:14	535:16	<b>official</b> 274:14	531:8,12 532:4
310:15,18 333:9	<b>objected</b> 303:23	<b>obligations</b> 535:15	<b>offset</b> 494:13,14	537:10 541:7
342:19 344:2	554:3,3,4	<b>obligor</b> 353:13	576:15	543:15 545:22
345:3,6,24 454:19	<b>objecting</b> 429:20	<b>observe</b> 326:8	<b>off-the-record</b>	546:7 548:17
548:22 564:5	<b>objection</b> 275:20	<b>obtain</b> 331:6	424:19	552:3,7 556:17
<b>now's</b> 593:8	275:22 278:9	<b>obvious</b> 503:20	<b>oftentimes</b> 505:24	560:4,23 573:3
<b>number</b> 280:10	284:15 296:9	<b>obviously</b> 276:12	<b>Oh</b> 353:18 356:16	575:10 580:8
309:4 349:17	324:2 327:5	282:18 308:5	405:9 409:6	583:2 584:16
355:13,18 401:3,8	340:23 348:15	310:19 323:20	439:23 451:20	585:8,15 586:16
402:19 403:17	357:4 360:15	326:9 353:22	536:18 606:14	586:24 587:10,21
404:2,10 408:8	366:9 371:6 373:4	378:2,22 403:23	<b>okay</b> 288:24 290:2	589:20 595:6
462:23 469:7	377:11 378:10	413:22 417:16	306:15 311:14	601:4 603:20
476:8,11 498:25	379:16 380:19,23	439:9 451:10,21	314:2 332:25	605:3 611:10
508:2 533:21	384:8 385:18	452:23 464:21	333:25 334:13	612:9,19
534:21,24 548:20	406:23 416:16	485:10 486:20	338:3 339:7,18	<b>old</b> 297:24
548:24 549:3,10	418:9 429:16	494:10 498:19,21	340:7,21 350:5	<b>OLIVER</b> 270:19
549:13,14,19	431:3,16 432:2	503:15,17 537:12	351:14 352:6	<b>omnibus</b> 560:7
571:18 579:6	438:6 440:14	538:3 546:25	353:6 359:20,20	561:7
591:4	453:10 454:11	<b>occurred</b> 287:13	361:13 366:11	<b>once</b> 280:16,22
<b>numbers</b> 348:23	460:11,17 465:19	324:11 369:24	371:19 374:3	285:15 303:24
351:15 362:10	478:20 480:23	441:22 478:18	385:23 397:22	306:2 345:12

346:24 353:13 582:2 <b>ones</b> 293:11 358:23 387:14 441:16 509:4,5 536:12 581:20 609:2 <b>ongoing</b> 467:2 <b>on-line</b> 346:22,23 <b>open</b> 278:10 283:17 295:17 296:10 308:17 364:3,6 <b>opening</b> 295:21 384:17 <b>operating</b> 445:16 445:18 <b>operation</b> 544:13 <b>operations</b> 339:12 <b>operative</b> 311:8 <b>opinion</b> 292:10 353:15 477:12 481:13 495:22 598:18 <b>opinions</b> 299:19 <b>opponent</b> 489:19 <b>opportunities</b> 447:18 <b>opportunity</b> 309:18 316:21 319:7 544:12 <b>opposed</b> 286:18 309:10 405:23 <b>opposing</b> 484:14 <b>opposite</b> 498:6 <b>opposition</b> 277:20 313:3 <b>opted</b> 545:23 <b>oral</b> 299:19 300:14 300:23 305:14 307:21 <b>order</b> 281:3 283:4 289:18,19 292:10 320:21 322:2 323:11 330:21 333:4,23 334:3,6 334:22 335:8 467:15 488:2 551:2,4 612:21	<b>orders</b> 278:11 551:12 <b>organizational</b> 461:13 <b>original</b> 329:17 333:19 335:22 548:17 <b>originally</b> 291:22 326:19 541:11 549:19 552:8 <b>Osterman</b> 569:4 <b>OTS</b> 321:25 322:7 322:9,17,18 <b>ought</b> 302:21 <b>outcome</b> 431:20 536:3 538:14 <b>outcomes</b> 429:15 <b>outlays</b> 357:19 <b>outlined</b> 612:24 <b>outlining</b> 290:12 <b>outset</b> 503:21 <b>outside</b> 282:13,14 283:2 316:9 331:16,18 391:22 <b>out-of-court</b> 574:5 <b>out-of-pocket</b> 356:12 357:12,19 357:23 359:6 <b>overall</b> 610:16 <b>overfunded</b> 579:18 579:19 580:9 <b>overfunding</b> 579:21 580:23 <b>overrule</b> 499:17 609:6 <b>Overruled</b> 357:6 379:18 392:17 438:7 440:16 478:22 480:25 487:12 488:15 514:17 523:17 536:16 546:24 565:19 574:11 586:9 <b>oversee</b> 339:10,11 <b>oversight</b> 476:13 <b>overtalk</b> 485:22	<b>overwhelming</b> 461:19 <b>owe</b> 370:23 374:9 430:25 431:12 <b>owed</b> 581:23 <b>Owl</b> 442:25 443:23 449:22 469:18,19 <b>owned</b> 362:8,19 363:9 372:18,21 372:24 373:3 382:13 383:8 387:23 446:11 471:8 525:8,10 577:3,13,16,18,19 577:23 587:17 <b>owner</b> 470:16,23 <b>owners</b> 461:20 586:13 <b>ownership</b> 362:5 363:15 380:6 381:13 383:12 470:18 524:15 <b>owns</b> 466:4 471:11 526:20,24 <b>oyur</b> 425:10 439:20 439:23 454:10 462:21 464:3,22 467:4 470:12 482:22 493:7 498:18 499:7 503:25 505:18 509:4 518:2 519:24 520:4,8,8 532:24 546:10 547:13 548:2 549:21 551:24 552:7,19 554:12 562:9,10,21 564:19 582:23 604:2 608:12 611:6	350:21 360:11 375:4,12,13 376:8 376:20 377:20 379:7 380:2 392:21 395:19 396:18 397:9 410:13 418:2 433:7 436:3 437:4 440:9,17 449:25 458:2 467:25 469:5 470:21 471:2 478:11,25 479:5,6,8,10,10 489:25 490:4 492:18 493:4 496:6,8,24,25 497:2 499:25 500:2 501:4 509:7 516:7 520:6 560:14 563:23 564:6 <b>pages</b> 478:16 <b>paid</b> 295:24 303:7 410:17 411:23 466:24 472:5 473:2 474:4 514:3 517:14 518:6,9,25 519:2,2,8,14 520:20 521:7,17 522:6 539:17 548:14 598:19,24 <b>paper</b> 462:22 <b>papers</b> 319:20 343:14 350:13 <b>par</b> 444:7 <b>paragraph</b> 330:24 341:15 346:23 455:9 463:8 468:6 468:12 477:20,20 478:8,11,16 479:2 479:9,9 490:2,4 492:16,21 493:3 496:7,8,24,25 499:24,25 501:4,5 509:19 <b>paragraphs</b> 288:17 335:2,9 477:17	479:17 493:2,13 497:16 501:21 <b>pari</b> 464:12,18 <b>Park</b> 272:5 <b>parse</b> 420:6 <b>parses</b> 291:16 <b>parsing</b> 419:7 <b>part</b> 287:11 311:7 315:11 321:23 322:13 323:3,5 325:8 326:23 328:7,11,17 343:24 352:9,21 359:22 363:18 365:18 368:23 384:10,19 396:3 397:4,23 432:25 434:9 435:4 436:11,12 457:7 459:3 462:19 464:25 470:25 471:16 499:8 510:21 518:8 523:6,13 524:7 534:18 535:10 539:14,21 540:11 540:12 541:8 546:3 561:7,9 569:20 575:5,11 576:16 578:6 584:9 599:5 <b>partial</b> 476:16 <b>participants</b> 582:21 <b>participate</b> 537:21 544:16 <b>participated</b> 282:14 302:24 383:22 537:25 568:16 <b>participating</b> 363:25 <b>participation</b> 294:17 <b>particular</b> 290:20 305:3 327:8 335:8 431:23 433:2,21
<hr/> <b>P</b> <hr/>				
<b>P</b> 270:2,2,9 <b>PAC</b> 410:2 <b>page</b> 290:7,19 291:6 346:19				

441:6 452:18	472:20 473:2	474:12 475:3	402:2	473:21 476:15
480:10,17,21	509:21 514:8	493:18,19 500:15	<b>phrased</b> 354:10	513:9,16 515:5,22
481:11,12 482:7	518:16 519:13,19	504:11 516:18	<b>pick</b> 535:15 591:19	519:8 520:9,13,25
482:10,11 483:8	521:10 537:23	518:16 519:2,16	<b>picked</b> 591:20	521:8 522:9 523:6
500:8	538:25,25 539:4	526:22 531:21,21	<b>pie</b> 352:15 356:4	523:14 524:13,15
<b>particularly</b> 452:23	539:15 582:3	544:4 587:20	357:22 358:6	524:17 527:11
486:6	<b>payables</b> 415:23	588:3	<b>piece</b> 419:8,8	528:8 533:15
<b>particulars</b> 311:12	<b>paying</b> 352:22	<b>percentage</b> 436:6	434:14	541:8,11,22 542:2
<b>parties</b> 276:25	359:7 414:15	444:13	<b>piecemeal</b> 280:17	542:11,22 543:2,9
277:12,17 278:18	471:18,21 472:6,7	<b>percentages</b> 343:14	<b>pieces</b> 417:2 418:4	544:17 545:24
281:9 291:3	500:14 516:11,18	<b>perfectly</b> 302:11	418:22	546:23 547:16
305:18,23 323:24	522:9,17,22,24	326:11	<b>PIER</b> 443:20	548:11,18 554:4
331:20 340:6	547:24	<b>perform</b> 331:24	<b>PIERs</b> 443:10,15	555:22 556:4,11
341:8,13 342:23	<b>payment</b> 354:3	<b>perilously</b> 344:7,15	444:2 457:22	556:14 560:6,9
348:6 376:16	356:8,12 357:3,7	373:10	459:13 460:7,15	561:18 562:3,8
389:19 400:16	414:23 415:4,13	<b>period</b> 386:7	464:10,19 465:3	563:12,15 564:12
401:11 419:11	415:15,15,18,19	437:18 473:25	465:17 466:2,4,14	565:11,12 566:3
421:2 432:18	575:23	511:10 589:2	466:15,18 467:8	579:16,16 580:3
437:13 477:25	<b>payments</b> 411:16	<b>permit</b> 586:20	467:11,17,20,22	580:15,20,21
507:18 519:18	412:20	<b>permitted</b> 323:13	470:9,10,11,16	585:20,24 586:5
568:16,19 594:24	<b>payor</b> 362:21	<b>Perrin</b> 331:17	473:6,25 474:2	586:17 592:9
595:12 603:3,5	<b>payout</b> 472:22	332:13	518:2,17,24 521:9	<b>planning</b> 278:16
611:4 612:4,12	<b>PC</b> 509:12	<b>person</b> 466:4	587:3,16 592:12	290:17 612:14,15
<b>partly</b> 421:21	<b>peak</b> 391:20	530:13 545:16	596:16 598:4,7	<b>plans</b> 324:6 503:10
<b>partner</b> 605:13,14	<b>pendency</b> 450:12	<b>personal</b> 431:13	<b>pile</b> 342:25 343:2	579:10
<b>PARTNERS</b>	<b>pending</b> 290:24	458:24 552:23	<b>Pine</b> 569:21	<b>play</b> 513:21
272:12,13	442:8 552:14	569:9 570:2	<b>place</b> 283:18,18	<b>Plaza</b> 274:3,9
<b>party</b> 286:16	<b>penny</b> 396:15	610:20	291:15 316:14	<b>Plea</b> 517:9
289:21,23 305:21	<b>pension</b> 331:3	<b>personally</b> 484:10	372:19,21 452:8	<b>pleading</b> 489:18
305:24 414:22	410:24 579:10,16	502:15	569:4 586:21	530:24 560:20
506:17 513:15	579:16 580:3,15	<b>perspective</b> 321:22	<b>plainly</b> 343:13	<b>pleadings</b> 484:11
525:24 542:3	580:20,21	376:21	<b>plaintiff</b> 561:16	484:12,13,18
553:19 555:3	<b>people</b> 280:10	<b>pertinent</b> 478:24	<b>plaintiffs</b> 269:9	485:25 486:14
561:20 562:5,18	323:16 325:21	<b>Perusing</b> 349:23	271:3 558:13	<b>please</b> 278:6 286:7
565:14,16 570:12	328:12 347:25	606:15	564:22	336:20 375:4
581:9,12 601:10	391:12,21,22	<b>petition</b> 527:15	<b>plaintiff's</b> 478:5	377:14 378:13
601:17	393:11 453:8	<b>Pfeiffer</b> 387:6	557:22 558:2	380:22 433:7
<b>pass</b> 540:23	468:4 485:4 537:4	<b>PG&amp;E</b> 339:2	<b>plan</b> 276:5 277:21	473:20 485:19
<b>passu</b> 464:13,18	544:10 580:6	<b>ph</b> 284:7 303:21	282:13,25 294:3	497:15 566:18
<b>path</b> 275:15	591:12,12 598:19	326:12 387:6	316:6,8 320:19	576:18 606:25
<b>patience</b> 475:14	598:21 599:17	438:11 443:13	328:8 331:3	<b>pleasure</b> 278:22
<b>Paul</b> 272:22 307:9	611:14	463:12 469:14,19	350:14 409:2	347:25 420:23
307:15 318:16	<b>percent</b> 364:20,20	469:21,23,25	410:24 422:6	<b>plenty</b> 454:4 486:4
<b>pay</b> 310:3 353:22	364:23 368:15	536:22 569:24	435:14 447:25	486:5,6
353:23 386:7	401:22 402:5,17	<b>phone</b> 438:13	450:2 457:19	<b>plus</b> 310:4 397:25
395:13 416:3	403:11,14,18,25	478:2,2	464:9 465:15	402:4 403:13,18
451:18 466:24	441:18 458:18	<b>phrase</b> 357:20	470:25 472:23	403:23,23 410:17

<b>PO</b> 273:13	<b>portions</b> 387:23 537:8	323:17 326:21 370:5,17,20 382:22 394:13 398:6,10,19 413:5 427:21 428:14 431:20 436:23,24 439:5,12 449:12 451:23 453:6 480:13 481:22 482:22 483:13 490:17 492:3 494:13,14 498:4 498:22,25 582:22 595:22 596:2 603:25	474:2 477:8 501:23 502:2,8 509:15 510:6,14 510:21 538:13	411:24 412:20 472:11 473:7,22 473:23 481:19 519:16
<b>pocket</b> 356:23	<b>positing</b> 520:9		<b>preferreds</b> 452:3 464:11 472:4	<b>pre-seizure</b> 456:21 457:13
<b>podium</b> 323:10 594:20	<b>position</b> 293:21 299:21 311:8 321:20 322:12,20 322:21 331:21 338:4,11 374:24 377:9 380:16 381:24 388:13 390:6 391:14 395:21,22 430:10 436:4 437:11 450:15 461:25 522:8,21 525:3,9 561:15 577:2,12 578:15 579:3 582:9		<b>preliminary</b> 285:7 306:8 312:9,16 321:11 332:23 388:17 425:12	<b>price</b> 420:10,17 441:17 468:8,16
<b>point</b> 283:15 284:21 288:18 300:5 303:5 324:19 325:14 332:20 334:22 346:18 355:24 370:25 382:14 387:20 388:3,5 389:3,8,19 390:3 392:3 394:21 397:11 398:5,9 399:21 400:20,23 406:4,13,21 407:19 415:25 420:22 423:11 432:24 434:4,20 439:18 442:23,25 447:6 452:20 461:14 480:12 507:22 511:25 512:2,2,17 514:14 514:20 519:22 526:3 544:21 553:17 578:18 582:3,12 599:13	<b>positional</b> 582:21	<b>potentially</b> 363:9 382:19 424:12 439:8 448:6 450:12 451:15 465:13,13 481:25 494:18 499:2,3 549:14 574:25 583:2 592:23 601:10	<b>premise</b> 288:8 297:9,11 536:14	<b>primarily</b> 378:3 428:23 568:25
<b>pointed</b> 295:13	<b>positions</b> 436:18,23	<b>potentials</b> 345:19	<b>prepare</b> 281:17 282:5 612:22	<b>primary</b> 423:14
<b>pointing</b> 350:18 449:25	<b>positive</b> 485:13	<b>precedents</b> 302:17	<b>prepared</b> 327:19 332:21 361:21 375:18 377:7 483:9 515:20 600:14	<b>principal</b> 414:23 473:23 505:3,8 506:13,17 517:13 517:16,19,23 518:9 519:3 571:25
<b>points</b> 388:18 389:21,22 398:3 408:7	<b>possession</b> 332:15	<b>precise</b> 361:5 393:25	<b>preparing</b> 502:15	<b>prior</b> 324:8 337:22 337:23 362:6,14 376:20 384:14 392:21 393:2 423:18,25 424:7 425:23 431:10 445:25 568:5,7,9 569:7,9 570:2 576:8 604:24 605:20 606:8
<b>policies</b> 354:16,24 409:10,17,19 410:5 412:8,23 413:2	<b>possibility</b> 430:6 586:14 599:9,19	<b>precisely</b> 288:2 293:2,11 304:4 360:24	<b>preposterous</b> 315:23	<b>principally</b> 478:18
<b>policy</b> 409:22,25 410:2 413:6 414:8 414:10	<b>possible</b> 280:16 317:7,18 328:24 538:12	<b>preclusion</b> 297:10	<b>present</b> 274:13 325:4 437:25	<b>prior</b> 324:8 337:22 337:23 362:6,14 376:20 384:14 392:21 393:2 423:18,25 424:7 425:23 431:10 445:25 568:5,7,9 569:7,9 570:2 576:8 604:24 605:20 606:8
<b>portfolio</b> 457:3,14	<b>Post</b> 271:22	<b>preexisting</b> 354:5,8 354:19	<b>presentation</b> 335:5	<b>priority</b> 365:4 370:10,17 412:7 412:10,11,15,17 412:25 471:24 472:2
<b>portion</b> 343:11,16 368:8,9 396:8 575:7,12 584:18 590:10	<b>post-confirmation</b> 316:11,14	<b>preference</b> 500:3 576:10	<b>presented</b> 300:15 324:21	<b>private</b> 313:19 338:23
	<b>post-judgment</b> 475:5	<b>prefer</b> 583:3	<b>presenting</b> 347:13 350:9 464:22	<b>privilege</b> 279:16,24 282:16 289:23 296:17 297:2 375:23 378:23 380:15 381:5,23 382:5 481:3
	<b>post-petition</b> 395:15,17 396:8 396:19,23 397:3 444:5,11 474:3,20 474:25 475:23 476:2 514:4,8 516:11,21,23 518:6,15 519:8,13 519:19 520:20 521:6,11,17 522:6 522:10,15,20 543:4,13	<b>preferred</b> 285:20 326:22 379:10,15 379:24 380:3,6 381:7,14 397:19 451:21 458:4,10 458:14 459:4 461:20 463:15 464:10,12,18 465:16,21 472:3	<b>preserve</b> 322:3	<b>privileged</b> 279:6,21 281:2 282:9 285:25 286:21,23 289:9,20,22 290:6 291:19 292:19,25 293:5,7 297:16
	<b>post-judgment</b> 475:5	<b>preference</b> 500:3 576:10	<b>preserved</b> 546:19	
	<b>post-petition</b> 395:15,17 396:8 396:19,23 397:3 444:5,11 474:3,20 474:25 475:23 476:2 514:4,8 516:11,21,23 518:6,15 519:8,13 519:19 520:20 521:6,11,17 522:6 522:10,15,20 543:4,13	<b>preclusion</b> 297:10	<b>preserving</b> 541:25	
	<b>Post</b> 271:22	<b>preexisting</b> 354:5,8 354:19	<b>press</b> 370:2	
	<b>post-confirmation</b> 316:11,14	<b>preface</b> 490:13	<b>pressed</b> 470:11	
	<b>post-judgment</b> 475:5	<b>prefer</b> 583:3	<b>presume</b> 352:20 472:19 474:17 586:23	
	<b>post-petition</b> 395:15,17 396:8 396:19,23 397:3 444:5,11 474:3,20 474:25 475:23 476:2 514:4,8 516:11,21,23 518:6,15 519:8,13 519:19 520:20 521:6,11,17 522:6 522:10,15,20 543:4,13	<b>preference</b> 500:3 576:10	<b>pretty</b> 284:23 324:25 325:14 405:13	
	<b>Post</b> 271:22	<b>preferred</b> 285:20 326:22 379:10,15 379:24 380:3,6 381:7,14 397:19 451:21 458:4,10 458:14 459:4 461:20 463:15 464:10,12,18 465:16,21 472:3	<b>previous</b> 338:24 360:22 489:11 530:5	
	<b>post-confirmation</b> 316:11,14	<b>preclusion</b> 297:10	<b>previously</b> 422:18 430:5 550:11 557:15	
	<b>post-judgment</b> 475:5	<b>preexisting</b> 354:5,8 354:19	<b>pre-petition</b> 411:15	
	<b>post-petition</b> 395:15,17 396:8 396:19,23 397:3 444:5,11 474:3,20 474:25 475:23 476:2 514:4,8 516:11,21,23 518:6,15 519:8,13 519:19 520:20 521:6,11,17 522:6 522:10,15,20 543:4,13	<b>preference</b> 500:3 576:10		

344:8,16,22 371:11 373:11,15 376:14 378:2 379:5 384:15 417:13 452:24 453:4,23 <b>pro</b> 468:14 <b>probably</b> 284:12 356:19 362:15 382:21 412:24 437:20 538:15 583:10 593:25 594:19 <b>problem</b> 279:5 299:9 301:21 <b>Proc</b> 269:10 <b>procedural</b> 323:9 407:5 <b>procedure</b> 549:16 <b>proceed</b> 276:20 297:7 333:12 348:5 422:15 457:9 476:25 498:8,9 551:19 <b>proceeding</b> 269:18 307:23 308:11 310:8,12,23 311:20 312:23 313:6 314:19 315:15 316:13 318:24 319:3 525:13 535:19 <b>proceedings</b> 274:25 326:8 456:7 593:21 610:21 <b>proceeds</b> 347:9 348:12,12 351:2,2 351:25 352:2 509:12,20,24 546:19 <b>process</b> 295:16 302:25 303:20 321:4 339:11 354:4 391:23 464:25 465:8 468:6 532:24 549:12 580:17	591:12 <b>produce</b> 286:20 <b>produced</b> 284:19 290:25 332:15 455:15,16 456:7 456:16 602:18 <b>product</b> 278:13 282:15 283:6 290:11,17 291:2 291:11 292:7 294:15 295:8 296:5 304:15 378:22 381:23 423:20 424:3,8 425:16,25 427:6 428:23 453:22 481:3,5 491:15 <b>production</b> 454:23 455:10 456:6,10 <b>professional</b> 570:8 <b>professionals</b> 291:5 506:3 607:13 <b>proffer</b> 281:4 282:8 312:2 <b>proffered</b> 308:14 323:4 <b>proffering</b> 279:6 279:15 <b>profit</b> 445:24 <b>prohibiting</b> 363:24 <b>promise</b> 571:17 <b>proof</b> 295:4 553:11 <b>proper</b> 292:9 296:7 309:24 <b>properly</b> 312:22 314:14 319:8 <b>property</b> 411:13 426:2,8,17 509:16 <b>proposal</b> 395:11 397:13,15,23 400:3 401:18 408:8 410:24 411:17 451:16 510:12 <b>proposals</b> 395:5 447:12 590:22 <b>propose</b> 282:23	412:6 <b>proposed</b> 297:4 327:20 335:7 342:13 352:13 354:18 355:9 357:13 364:11 369:18 390:15 402:7 404:24 408:11 410:11 412:9 416:12,15 433:9 444:22 465:15 471:16 477:13 507:18 <b>proposes</b> 415:3 <b>proposing</b> 415:14 <b>proposition</b> 302:7 <b>propounding</b> 464:9 <b>prospective</b> 469:8 <b>protective</b> 278:11 <b>protects</b> 279:24 <b>prove</b> 285:25 286:17,24 300:2 498:3,20,23 519:25 548:3 <b>proven</b> 370:22 <b>provide</b> 289:9 317:5,17 335:6 389:20 415:9 423:19 483:25 496:15 497:11,17 547:16 554:7,20 556:4 <b>provided</b> 290:10 291:3 296:12 348:16 350:16 423:5 424:2 425:24 427:6 500:7 502:13 555:20 558:5 600:10 601:25 <b>provides</b> 505:23 513:15 520:13 533:15 <b>providing</b> 289:24 505:22 520:5 <b>provision</b> 562:10 563:14 564:9,13	564:14 <b>provisions</b> 367:18 526:15 555:13 556:17 563:12 584:4 <b>proxy</b> 579:20 <b>public</b> 277:22 321:23 322:14 323:6 337:4 422:19 454:5 481:3 586:6,15 587:11 588:24 599:10,15,20 <b>publicly</b> 290:23 331:7 332:4 <b>publishes</b> 607:14 <b>purchase</b> 420:10 459:4,6 468:5,16 509:13 <b>purchased</b> 578:2,2 579:4 <b>purchaser</b> 571:9 <b>purely</b> 434:16,18 <b>purport</b> 553:25 <b>purported</b> 309:22 <b>purpose</b> 276:4 330:11 446:5 447:8 488:10 <b>purposes</b> 435:14 445:23 446:5 515:4 522:19 531:9 570:14 612:14 <b>pursuant</b> 331:14 331:15 524:17 527:11 560:10 585:24 <b>pursue</b> 439:25 <b>pursuing</b> 485:12 <b>pursuit</b> 557:6 <b>put</b> 328:10 329:3,8 341:7 351:10 360:23 361:13 362:5 373:18 376:21 386:2 390:14,23 392:2 392:11,24 393:20	393:25 400:17 405:6 407:13 413:3,14 417:11 419:18 448:8 450:10 453:20 466:25 480:16,20 481:2,4 482:8 494:7 503:16 507:4 527:2 531:14 532:18 533:4 544:3,4 545:5,20 <b>putting</b> 277:7 282:14 299:4 330:5 360:24 450:8 514:11 522:11 <b>P.A</b> 270:12 <b>p.m</b> 422:11 613:8 <hr/> <b>Q</b> <hr/> <b>qualifications</b> 459:16 <b>quantify</b> 582:12 <b>quarrel</b> 539:22 <b>question</b> 287:21,23 288:20 299:5 303:18 334:22 344:8,21 345:21 346:21 348:21,22 351:14 353:3,19 353:19,21 357:2 357:18 360:4,9,12 360:21,22 364:4,6 364:7 366:24 371:16 372:20 373:20 375:5,10 375:20 376:10,24 377:22 378:11,19 379:9,13,21 380:4 381:3,4,11,16,19 392:18 398:17 399:9 418:11,15 418:20 419:3 431:22 432:20 436:4 437:22,25 440:10 442:8
--	---	--	--	--



453:14,16,19	409:9,13	472:13 479:15	<b>recall</b> 289:16 379:8	556:11
459:14,19,22	<b>Rainier</b> 601:14	484:18 492:24	379:13 406:13	<b>recess</b> 334:18 421:7
460:23 461:2	<b>raise</b> 282:18 318:2	586:2	423:3 424:6,20	422:9,10 476:22
462:14 466:13	377:13 378:12	<b>real</b> 325:21 497:24	437:22 522:16	610:14,16
490:13 497:14	380:22 548:10	525:24 586:14	526:3 571:21,23	<b>recitation</b> 478:13
518:20 521:14	<b>raised</b> 376:16	<b>reality</b> 308:13	572:3 573:22	<b>recited</b> 299:24
526:19 527:7	453:8	604:8	574:13,15 575:22	<b>recognition</b> 504:4
528:2 536:15	<b>raises</b> 313:16	<b>reallocating</b> 368:7	576:3 577:8 578:6	<b>recognize</b> 293:23
539:25 544:10	<b>ramifications</b>	<b>reallocation</b> 364:13	578:8,11 597:21	394:25
545:3 564:7	434:15	364:19	<b>recalling</b> 407:8	<b>recognized</b> 301:22
565:25 576:21	<b>range</b> 413:15,17	<b>really</b> 284:19	<b>receipt</b> 396:19	<b>recollection</b> 394:6
604:12	452:22 480:20	300:13 308:17	<b>receive</b> 289:20	424:23
<b>questioned</b> 596:17	530:8 581:3	314:25 324:24	362:23 364:2,5,9	<b>recommendation</b>
597:18	583:24 584:22	358:7 362:15	368:9 396:9	610:22
<b>questioning</b> 381:10	588:4 590:24	391:7 399:5	400:14 402:4,8,17	<b>reconciled</b> 408:20
553:17 555:24	591:11 602:4	427:17 430:9,12	407:23 408:11	<b>record</b> 277:16,22
595:8,10,17	<b>ranges</b> 452:22	432:14 437:12	444:10 448:24	300:15 304:25
<b>questions</b> 288:11	<b>rank</b> 292:18 298:21	442:17 445:11,11	450:16 451:5	305:11 306:7
313:16 336:13	<b>rarely</b> 438:19	486:9 498:8	456:6 487:7	307:2,15 318:14
371:8 373:18	571:6 596:9	519:22 523:20	488:22 562:8	321:23 322:14
375:21 379:6	<b>rata</b> 468:14	533:5 548:24	564:11 566:3	323:6 347:20
385:8,12 475:13	<b>rate</b> 474:19,21,21	556:25 579:22	578:16 590:22,25	365:15 374:7
491:23 546:7	475:5,8,11 522:16	<b>reason</b> 279:14	<b>received</b> 278:12	454:24 456:21
550:5 554:11	522:18,19 531:8	289:4 307:4	340:18 362:17	490:12 499:8
566:7 570:11	531:13,15,17,20	310:20,20 328:9	363:24 396:24	509:11 550:16
571:19 572:19,21	<b>rates</b> 474:23	389:2 420:9	397:24 403:24	555:25 561:8,10
578:4 579:12	<b>RATH</b> 271:20	446:10 588:25	404:4 405:2	564:3 566:15
581:6 594:25	<b>reach</b> 293:10	<b>reasonable</b> 287:12	416:12 417:6	577:22
600:3,9 604:5	294:12 296:6	298:15 479:23	426:25 434:3	<b>records</b> 359:18,19
<b>quick</b> 492:22	304:6 305:23	489:3,10 490:25	456:13,16 459:5	391:6 460:20,24
<b>Quinn</b> 270:19	317:12 437:14	492:5 495:12	564:22 580:25	461:4 503:3,4
278:25 296:25	482:7 488:2	501:17,18 536:3	<b>receiver</b> 375:8	<b>recover</b> 473:11
345:7 423:8,25	<b>reached</b> 294:7,23	556:23 557:2,9	377:4 391:2	498:4
425:16 426:20,23	304:19 488:24	<b>reasonableness</b>	555:12 589:19	<b>recovery</b> 345:20
429:5,12 455:4	<b>reaching</b> 495:24	289:14 298:8	<b>receivership</b> 353:4	349:5 350:7,12
495:9 511:6,12	<b>read</b> 313:15 376:21	<b>reasons</b> 305:14	353:21,24 354:4	351:16 352:13
512:5,15	442:2 484:10,12	357:16 455:10	364:8 365:3,5	444:9 450:16
<b>quite</b> 275:10,11	484:13 486:5,14	<b>rebuild</b> 391:7,8	562:23 571:9	451:5 452:8
351:15 433:20	490:12,14 491:2	<b>rebut</b> 325:16,19,21	<b>receives</b> 292:6	464:13,15,17
462:21 498:24	509:10 543:11	329:14	396:15	472:10 473:10
<b>quotas</b> 466:18	560:12,13,19	<b>rebuttal</b> 323:18	<b>receiving</b> 354:17	526:22
<b>quote</b> 303:7	<b>reading</b> 355:11	324:18 326:7	359:22 362:2	<b>recross</b> 594:23
	356:2 378:24	327:3,14 328:2,20	363:19 364:20	<b>red</b> 352:9,15
<b>R</b>	379:19 388:20	328:25 329:10	397:5 404:8 408:2	<b>redeemable</b> 458:4
<b>R</b> 270:2 271:15	390:2 395:8,24	<b>rebuttals</b> 327:14	408:9,13,16	<b>redirect</b> 592:17,20
337:2 422:17	411:20 417:25	<b>rebutting</b> 324:20	409:19 413:17	593:8,22 595:9
<b>rabbi</b> 408:23,24	442:4,12 449:20	325:17	466:18 555:17	<b>redo</b> 537:7

<b>reduce</b> 312:20	420:4 427:11	429:25	556:5 562:7	451:2 475:21
<b>reduced</b> 420:17	428:18,22 429:6	<b>related</b> 389:12	563:15 564:17	507:5,10,10,20
<b>reduction</b> 412:22	429:15	418:17 428:19	575:17 584:3,8	510:22 529:4,7
413:9	<b>refunds</b> 345:14	434:18 436:9	600:21 603:14,15	549:13 557:14,16
<b>Ref</b> 269:13	347:3 355:8	470:14 489:14	<b>releasing</b> 358:3,21	563:20 587:25
<b>refer</b> 305:2 405:17	356:18,22 357:8	503:9 536:21	417:10 532:13	590:17 600:23
467:23 482:21	357:10 359:10	556:18 571:20	534:25,25 535:4	<b>remind</b> 344:18
515:14 523:10	361:25 362:3,19	574:17 575:18	542:22 543:3,6,13	<b>removed</b> 324:14
563:23	362:25 363:6,9,11	576:6 596:13	556:12 557:7,8	592:3
<b>reference</b> 306:6	363:15,16,20	<b>relates</b> 310:23	562:9,10 565:13	<b>renegotiate</b> 369:8
319:12 335:3,9	367:8,13 368:7	374:12 378:20	565:15 566:4	<b>reorg</b> 447:25
520:24 525:22	374:10 395:16,17	417:9 427:15,25	573:4 575:11,20	448:20 473:16
592:5	396:11,13,23	432:6 447:18	584:13	<b>reorganization</b>
<b>referenced</b> 330:24	400:19 401:4	454:8 471:25	<b>relevance</b> 607:5	316:7 513:16
383:11 528:25	402:12,18 403:3,5	486:7 494:3	<b>relevant</b> 310:22	523:7,14
<b>references</b> 296:20	403:12 404:9,15	495:11 502:3,5	320:6,8 399:5	<b>reorganized</b> 351:22
296:21 354:6	427:15 577:3	538:25 577:15	455:12	355:16 389:10,16
413:7 442:13	578:21	596:21 598:8	<b>reliance</b> 286:14	444:16 446:6
<b>referencing</b> 483:12	<b>refused</b> 281:18	<b>relating</b> 290:14	291:17 335:10	447:13 466:16
<b>referred</b> 365:17	296:13 301:15	434:16 437:17	370:13 384:17	469:9 533:17
405:20 406:6	<b>refusing</b> 375:20	526:11 535:15	<b>relied</b> 290:5 375:2	543:18 544:14
450:9 483:23	457:18	576:4	429:10	545:6,11,24
496:12 577:20	<b>regard</b> 542:3 554:5	<b>relationship</b> 374:9	<b>relies</b> 295:24 499:5	585:22,25 586:6
<b>referring</b> 352:20	555:24 560:5	506:21 568:7	<b>relieved</b> 534:20	586:18 588:10,12
379:11 413:12	563:11	569:9 570:3,7	<b>reluctant</b> 277:18	598:20
425:10 427:16	<b>regarding</b> 286:13	<b>relationships</b> 505:5	<b>rely</b> 286:23 289:11	<b>repeat</b> 342:9
433:16 434:11	300:9 322:7,9	<b>relative</b> 287:9	500:25 501:3	359:15 398:16
459:12 464:3	375:21 384:23	288:4 488:3	554:12 596:10	401:14 413:20
482:22 493:8	385:5 431:19	<b>release</b> 331:6,19	<b>relying</b> 374:16	497:14 605:10
515:16,19 519:24	457:19 477:15	332:3 370:2	379:3,4	<b>repeated</b> 375:10
572:15 596:25	484:2 487:7	476:17 542:18	<b>remain</b> 322:2	381:16
608:24	488:23 501:11,22	553:4,14,25	323:13 324:4	<b>repeatedly</b> 290:4
<b>reflect</b> 590:10	507:3 524:14	554:17 555:3	326:14	<b>rephrase</b> 344:21
<b>reflected</b> 411:8	556:5 595:17	556:9,14 557:9,20	<b>remainder</b> 400:4,7	379:20 402:24
460:23 461:3	<b>region</b> 338:6	561:16,18 562:3,7	401:18 402:5	403:4 431:7 449:6
<b>refresh</b> 424:22	<b>regulated</b> 322:5	562:13 564:15,24	<b>remained</b> 507:19	456:9 460:19
<b>refund</b> 343:12	<b>regulator</b> 322:4	565:3 576:16	533:16	465:24 467:6
356:25 359:14	<b>rehabilitate</b> 327:13	<b>released</b> 417:21	<b>remedy</b> 296:8	468:11 523:8
362:22,23 363:23	327:25	499:21 532:12	<b>remember</b> 298:5	549:7 561:25
363:25 364:3,14	<b>rehabilitation</b>	572:21 575:8	400:18 401:2	597:9
364:15,15 368:9	601:7	582:4 585:6	404:10 409:24	<b>replaced</b> 476:4
368:10,20,21	<b>reinvigorated</b>	<b>releases</b> 309:10,16	413:13 415:24	569:24
396:8,19 397:3,4	341:17 342:12	343:24 419:12	416:6 423:24	<b>reply</b> 295:16
398:6,7,10 399:11	430:6	541:8,9,13,15	424:11,13 425:2	<b>report</b> 285:10
399:17 400:9,11	<b>reinvigorating</b>	542:16,19 543:11	425:10,13 426:3	288:22 289:2,3,5
400:22 401:2,9,11	430:16	553:25 554:6,7,19	426:13,15,22,24	289:11,12,17
401:17 402:6,16	<b>rejected</b> 390:16	554:22 555:14,22	436:20,25 450:23	290:3,5,8,19

291:7,16 292:2,3 292:12,17 293:12 293:22 295:5 296:21 299:10,11 299:15,24 300:5,7 300:12,20,21,24 301:7,8 303:6 304:22 305:11,13 305:18 306:6 312:9,10,17 318:6 319:13 320:3 331:24 332:11,14 335:4,10 426:8,25 449:11 484:9 <b>Reported</b> 269:22 <b>reports</b> 292:4 301:11 331:3,17 427:4 <b>represent</b> 386:17 387:17 388:4 477:7 504:19 513:7 <b>representation</b> 350:12 352:19 387:12 559:23 <b>representations</b> 387:19 559:7 <b>representative</b> 323:15 324:3 346:4 435:13 <b>representatives</b> 569:16 570:18 <b>represented</b> 351:17 356:4 387:22 388:8,13 442:21 443:7 444:10 504:5 <b>representing</b> 285:19 352:10,12 442:22,23 504:14 506:17 508:24 550:9 <b>represents</b> 387:9 452:3 529:11 589:13 <b>request</b> 281:22 294:11 302:16	314:22 331:8 366:16 530:11 <b>requested</b> 291:25 322:17 366:25 <b>require</b> 506:2 <b>required</b> 286:20 304:5 313:21 506:7 <b>requirement</b> 599:14 <b>requirements</b> 513:9 <b>requires</b> 293:25 333:20 <b>requisite</b> 303:24 <b>reserve</b> 308:25 320:20 321:3 544:3 548:19 595:8 <b>reserves</b> 316:13 514:22 <b>resignation</b> 475:25 <b>resolution</b> 305:23 332:6 390:19 393:4 394:3 538:9 538:12,14 <b>resolve</b> 388:24 544:6 <b>resolved</b> 316:9,11 388:25 <b>resources</b> 486:20 486:24 <b>respect</b> 275:25 276:3,14 277:7,14 283:4,5,7,21 284:9 285:22,24 290:20 293:14 308:18 310:17 312:3,5 314:3 318:7 320:22 323:25 324:5 327:7 340:10 348:11 361:25 363:3 375:6 377:2 377:23 379:14 380:5 381:13 383:18 395:20	396:14 398:3 399:20 402:12 406:7 408:9,15 409:8 410:4,9 415:13 416:8 424:3 425:25 427:6 428:22 429:13 435:13 436:5 437:11 446:15 467:21 470:9 474:18 477:11 482:6 502:7,14 524:15 555:13 573:24 576:25 579:11 584:16,23 594:24 595:16 597:18 604:12 607:12 608:12 610:5,21 <b>respectfully</b> 304:20 392:14 <b>respective</b> 277:10 291:4 <b>respond</b> 285:16 297:5 390:4 441:19 553:20 <b>responding</b> 441:15 <b>response</b> 284:10,14 294:20 315:2 376:10 379:9 433:12 434:8 560:7 561:7 596:18 604:4 <b>responses</b> 286:13 490:18 <b>responsibilities</b> 339:8 <b>responsibility</b> 286:15 444:25 538:24 <b>responsible</b> 495:23 <b>rest</b> 279:23 411:19 412:17 <b>restarted</b> 430:14 <b>restricted</b> 581:25 582:4,17 <b>restrictions</b> 331:5	<b>restructuring</b> 333:18 338:7,8,12 338:19,21 339:5,8 431:9 459:15 460:13 475:15 495:19 <b>restructurings</b> 338:15 505:24 <b>result</b> 354:17 367:24 507:15 <b>results</b> 546:2 <b>resumed</b> 422:17 <b>resumes</b> 607:22 <b>retained</b> 423:16 426:23 504:3 <b>retention</b> 504:3 505:10 506:2,7 <b>retired</b> 569:3 <b>retroactive</b> 527:9 <b>retroactively</b> 527:12 <b>return</b> 420:16 428:25 436:13 611:24 <b>reveal</b> 406:16 <b>revealed</b> 382:4 <b>revealing</b> 344:22 371:11 373:20 376:13 384:15 <b>revelation</b> 343:17 <b>review</b> 284:13 291:9 305:21 340:24 384:3 425:3,4 486:23 487:18,18 490:9 490:15 512:6 <b>reviewed</b> 288:2 290:16,23 435:17 <b>revise</b> 518:17 <b>re-parse</b> 540:15 <b>Richards</b> 270:12 423:12,18 <b>Rick</b> 569:4 <b>rid</b> 285:8 <b>right</b> 278:4 286:8 300:11,23,25 306:8 307:12	316:16 317:21 328:20 332:18 334:13 339:21 340:14,19 342:2 345:16,25 346:6 348:18,25 352:4 353:17 354:19 355:5,10,19 356:9 356:10 360:21 361:4 364:16 368:19,20 374:15 374:17 375:25 378:12 379:4 383:4 386:8 387:24 388:19 392:6 394:5 397:10 398:2,7 400:5,12 401:21 401:23 402:9 404:11 407:9,15 407:16,25 412:12 414:8 415:16 421:6 422:5,14 423:9,13 425:8 427:3 430:21 441:13 444:5,18 445:25 449:5 452:9 454:2 455:17 462:3,5 466:15 467:6,22 468:13 470:13,20 474:16,17 476:2,3 477:14 478:25 479:15 480:16,22 481:6 482:24,25 483:6,24 484:11 484:15 485:3,9 489:10 491:5,12 491:18 492:10,25 493:5,9,14 494:16 495:16 496:10,20 497:8,9 500:8 501:10,18,19,23 501:24 502:2,9,23 503:19 504:7,15 510:4,8,11,17 511:4,15 516:20
---	---	---	---	--

517:5,16,20 518:3 519:5 520:6 523:7 524:21 525:11 526:6 527:25 528:6 529:12 530:9 533:7 537:18 538:17 539:6 545:19 547:11,17 550:25 551:17,25 553:10 556:3 561:24 564:10 567:4 570:15 573:8 582:7 586:12 587:2 595:9 596:20 600:4,15 600:18 601:2 604:15,25 605:18 606:6,7,10 607:18 609:19 610:2,4 612:6,11 <b>rights</b> 391:15,24 414:8 466:19 467:12,19,20 468:5,7 493:7 494:10,12,13,14 509:13,21 528:23 539:2,4 544:18 557:3,4,5,7 575:7 575:21 576:14 577:25 598:5,9,10 598:22 599:5 <b>right-hand</b> 351:19 <b>rise</b> 275:2 328:20 334:19 422:12 476:23 593:15 <b>risk</b> 480:21 484:20 486:10 489:2 <b>risks</b> 486:14,15 490:22 494:18,20 497:20,20 <b>risky</b> 489:20 <b>Robert</b> 271:7,16 272:7,8,16 328:3 334:11 366:4 567:6 <b>role</b> 338:24	<b>Romanette</b> 524:20 <b>room</b> 306:25 307:6 327:10 328:23 393:13 484:24 <b>Roquemoire</b> 274:5 550:8,9,17,20,23 551:9,14,18,21,23 553:22 554:18 555:18 558:11 560:18 561:5,12 561:23 564:5 566:6 <b>Roquemoire's</b> 554:24 <b>Rosen</b> 270:7 275:5 275:6 276:8 277:24 306:10 441:10,14 610:15 611:13 612:9,23 613:4 <b>rounding</b> 416:11 <b>RPR</b> 269:23 <b>Rudnick</b> 271:4 285:19 477:7 <b>rule</b> 295:11 306:12 308:4 319:11 456:5,10 524:13 <b>rules</b> 277:4 280:5 282:22 <b>ruling</b> 305:9 326:24 334:23 <b>rulings</b> 276:19,20 <b>rumor</b> 398:11,20 398:23 399:3,6 <b>run</b> 571:11 587:12 <b>running</b> 479:10 497:2 499:25 <b>runoff</b> 446:13 <hr/> <b>S</b> <hr/> <b>S</b> 270:2,7 337:2,2 422:17,17 <b>Sacks</b> 271:16 328:3 328:4 366:3,4 552:16,21 553:4 565:2 567:6,6,10 572:5,8 574:8	585:8 600:3 604:12 608:10 609:8 <b>sadly</b> 287:2 <b>sale</b> 309:22 509:8 509:12 523:20 524:4,8,16 527:8 546:9,15,20 586:4 <b>sales</b> 509:20 <b>San</b> 337:13 <b>SARGENT</b> 273:5 <b>sat</b> 461:13 484:9,24 <b>satisfied</b> 535:25 <b>save</b> 521:2 540:2 544:25 562:18 <b>savings</b> 405:18 406:8 407:11,12 407:14,15,24 528:4,9,15 540:7 540:10 581:8 <b>saw</b> 275:24 392:21 <b>saying</b> 297:24 298:6,18 299:11 299:16,21,23,25 302:5 303:10 376:11 405:12 412:25 424:24 488:4 505:18 509:4 520:8 521:15 564:19 604:2,3 <b>says</b> 290:5 302:11 302:14 303:6 312:10,14 407:13 415:17 433:13 436:7 437:5 441:14 443:11,21 444:3 450:4,6 455:18 458:13,19 458:24 463:14 468:18 471:8 509:7,10,19 524:11 526:20 528:20 555:6 560:24 604:10 <b>scenario</b> 516:12 <b>schedule</b> 571:24	610:17 <b>scheduled</b> 307:21 315:16,22 318:21 <b>schedules</b> 429:2 <b>scheduling</b> 308:6 <b>scheme</b> 513:22 520:10,18 <b>SCHIFFMAN</b> 316:18 317:4,21 318:3,9,25 319:9 319:17 320:11 <b>scope</b> 326:25 384:16 607:6 <b>SCOTT</b> 272:16 <b>screen</b> 349:25 350:3 351:11 365:20,24 588:5 590:9 <b>seal</b> 277:18 321:16 321:24 322:2,15 322:25 330:22 331:8,9 <b>sealing</b> 277:15 284:15 <b>seated</b> 275:3 334:20 336:25 422:13 476:24 593:16 <b>Seattle</b> 273:4 <b>second</b> 280:23 295:15 303:10,25 309:13 347:25 363:23,25 364:3 364:15,22 365:8 365:14 367:8 368:10,12,16,20 376:8 398:7,10 399:11 400:23 402:17,18,18 410:20 415:11 430:7 433:7 441:19 463:8 492:22 498:21 558:10 577:4,6,11 577:13,24 594:21 606:21 <b>secondly</b> 309:9	<b>section</b> 283:20 309:24 478:24 493:24 496:9,14 496:18 497:10,20 501:15 513:13 519:24 520:24 522:2,13 523:12 585:21 586:16 <b>sections</b> 524:18 <b>secured</b> 505:25 506:2 <b>securities</b> 369:16 371:5,23 379:10 379:15,24 380:3,7 381:14 397:10,14 397:20 458:5 470:19,23,25 471:5,7,8,11 472:8 473:15 501:23 502:2,8 509:15 510:6,14 510:21 <b>security</b> 285:20 370:20 381:7 458:15,20,21 459:5 461:8,8 470:15,17 477:8 <b>see</b> 274:14 276:6 285:2,7 288:12 297:12,13 308:16 324:8 332:6 348:6 349:10,22,24 350:2,8 352:17 360:11 362:11 372:9 375:13 389:13 390:8 401:8,24 409:11 418:11 433:10,12 437:4 451:19 459:7 464:3 468:10 471:2 490:9 493:6 497:5 509:8,17,24 516:10,15 518:22 554:12 555:21,25 558:13 572:25 591:13 600:21
--	--	--	---	---

603:24 607:21 612:12 <b>seeing</b> 361:22 <b>seek</b> 289:12 369:8 370:11 455:13 <b>seeks</b> 371:16 <b>seen</b> 312:16 347:17 451:17 452:7 459:10,17,25 508:20 558:16 <b>seized</b> 353:8,14 390:25 <b>seizure</b> 352:24 446:12 457:5 475:18 <b>select</b> 586:19 <b>selected</b> 588:17 599:16,18 <b>selects</b> 585:24 <b>sell</b> 447:20 448:19 448:19 546:10 605:11 607:16 <b>selling</b> 534:2 547:5 <b>semantics</b> 399:5 <b>senior</b> 388:13 430:24 431:11 441:24 442:9,22 443:8,9,14,18,19 443:24,24 445:5 447:11 475:10 516:12,13,24,25 517:15,18 521:12 521:12 557:18 568:2 587:7,22 589:13 591:7 592:11,11 605:17 <b>seniors</b> 390:5,18 392:20 <b>sense</b> 285:14 300:25 305:4 421:9 427:20 465:8 588:19,22 <b>sensitive</b> 344:17 <b>sent</b> 430:20 449:18 578:22 <b>sentence</b> 490:8 491:18	<b>separate</b> 354:18 396:2,13 <b>separately</b> 342:21 396:12 545:13 <b>September</b> 322:11 <b>series</b> 286:12 <b>served</b> 475:17 <b>service</b> 415:2 <b>services</b> 505:23 <b>set</b> 275:13 292:5 307:24 316:12 340:8 400:24 401:4,8 402:14,15 403:11 491:17 513:13 514:23 516:10,21 524:12 542:16 544:3 577:17,21 <b>SETH</b> 273:7 <b>setoff</b> 493:5 <b>sets</b> 485:11 <b>setting</b> 283:17 446:5 <b>settle</b> 386:2 434:4 434:25 487:22 504:10 578:25 596:12 <b>settled</b> 483:5,6 489:20 525:6,7 <b>settlement</b> 274:7 279:17 282:10 286:17 287:12,12 289:15 298:9,14 328:7 331:2 339:14 341:6 342:13,17 343:20 345:2,11,15 346:5 350:14 352:21 354:9,18,22 355:4 355:9 356:13 357:14 359:23,25 361:6 362:15 363:18 364:12,12 366:15,23 367:3 367:14,16,21,22 368:25 369:3,5,6 369:6,7,9,18	370:15 371:24 372:15,24 374:20 379:2 386:12,14 388:18 389:3,16 389:20 390:11,13 390:20 392:5 393:4 394:3,8,16 394:22 396:6 397:5,18 402:13 403:7 404:14 405:3 407:22 408:3,7,21 409:2 409:14 410:11 411:25 412:2,10 412:22 413:11,17 413:18,22 416:2 416:13,15 417:3 418:4,19,22 419:6 419:9 427:22 430:7 431:20,25 432:22,25 433:22 435:13 436:12 437:15 438:21 439:25 440:10 442:17 443:4 455:20 456:12,20 460:14 471:16 476:15 477:13,16 479:3,13,22 483:3 483:4,7 484:23 486:16 487:20,23 489:2 490:24 492:6 494:24 495:13 499:22 501:17,18 502:5,6 502:13,22,24 506:12 507:18 508:24 510:16 511:22,22 512:3 523:13,21,25 524:2,4,8,12 528:20 533:9,12 533:25 534:2,8,13 535:23 536:2 537:7,8,10,15 540:12 541:4 546:8 553:3,6,9	553:14,24 555:4 555:22 556:22 558:19,20 563:13 567:19 572:2 575:5,11,18 576:16 584:4,9 585:12 587:17,24 588:8,20 589:6,6 590:4,22 591:2,16 592:2,6,7,8,10 596:13,17 597:5,8 597:13,17 599:8 <b>settlements</b> 488:11 489:9 495:25 <b>settlement's</b> 534:19 <b>settling</b> 557:19 570:12 594:24 595:12 <b>seven</b> 611:12 <b>severally</b> 583:25 <b>SHANNON</b> 274:11 <b>share</b> 402:5 403:19 420:10,16 462:6 462:16,18 463:4,9 463:12 468:14 <b>shareholder</b> 587:2 610:19 <b>shareholders</b> 464:12,18 467:21 468:22 586:7,18 588:12,14 <b>shares</b> 314:4,7 356:8 358:23 359:7 410:14,21 415:20 416:4 419:15,16,20 441:17 459:6 462:4 467:17 468:15 509:15 581:15,24,25 582:4,14,17 586:25 588:9 598:17 <b>sharing</b> 397:4 419:23 535:4 <b>Sharon</b> 585:11 <b>Sharp</b> 334:12	468:3 <b>SHAUNA</b> 269:23 <b>sheet</b> 274:14 359:14,16 383:9 390:15 394:23 408:21 423:4 430:12,20 433:19 433:21 434:10,21 434:23 435:3 436:8 444:22 449:18,21 450:4,5 451:9 507:4,8,14 508:14,18,24 510:22,25 511:11 511:19 512:20 539:2 591:17 <b>sheets</b> 433:20 462:22 508:3 512:17 590:7,15 590:19,21 <b>she'd</b> 610:19 <b>shifted</b> 295:9 <b>Shiller</b> 463:11 <b>short</b> 315:21 333:4 476:21 593:12 <b>shorter</b> 594:2,19 <b>show</b> 316:21 317:10 508:8 <b>showed</b> 507:5 <b>showing</b> 392:25 <b>showstopper</b> 316:5 <b>SHRIVER</b> 274:8 <b>shy</b> 518:2 <b>sic</b> 285:23 377:19 443:10 455:12 458:11 475:6 598:17 <b>side</b> 277:11,25 278:2 298:4 321:5 350:21 351:19 353:13 506:18 520:6 544:4 571:10 596:7 <b>sides</b> 302:18 581:3 <b>sign</b> 527:10 <b>signed</b> 333:19 335:22
---	--	--	---	--

<b>significant</b> 358:4 359:11 360:5 370:7 372:3 374:10 387:23 427:14 451:10 457:12 462:19 483:20 497:22 535:6 580:18 581:17,20 583:22 588:2	481:7 482:5,25 486:11 489:17 491:2 492:17,23 495:14,22 496:7 505:3,13,15,21 508:21 567:20 570:18 576:18 580:11 581:5 582:24 584:2 585:8 600:7 601:15,18 602:14 602:21 605:11 606:6,10	547:7,9 <b>solely</b> 276:4 287:18 310:22 408:4 <b>solicitation</b> 515:21 <b>solution</b> 540:13 <b>solvency</b> 424:9,21 425:7,17 <b>solvent</b> 457:4 514:6 515:13 518:13 <b>somebody</b> 327:15 327:17 332:11 446:17 <b>somebody's</b> 587:12 <b>Someone's</b> 542:25 <b>somewhat</b> 293:20 <b>SONTERRA</b> 272:12 <b>soon</b> 391:4 589:2 <b>sorry</b> 314:14 343:7 344:12 349:3 356:21 361:15 366:3 370:12 373:5,8,25 375:12 379:11 381:2 382:23 383:5 398:16 401:14 402:15 403:22 409:6,7 413:20 442:5,7 446:4 456:15,18 464:16 466:12 467:16 468:21 482:13 485:24 490:3 499:15 511:17 514:25 517:11 540:4 557:25 558:6 561:5 566:25 567:2 590:15 602:9 607:3	<b>sought</b> 286:13 292:13 <b>sounds</b> 279:3 280:17 281:21 284:2 325:23 371:12 527:6 541:19 <b>sour</b> 299:2 <b>source</b> 374:19 538:3 605:23 <b>so-called</b> 290:21 308:12 312:9 341:20 497:7 500:3 501:6 <b>Spalding</b> 513:6 <b>speak</b> 309:19 344:10 393:24 406:19 422:24 429:18 454:24 505:14 540:17 <b>speaking</b> 281:14 285:5 416:10 453:11 485:15 526:18 529:13 533:5 540:19 597:10,11 602:11 <b>speaks</b> 376:22 537:9 609:24 <b>special</b> 282:18 303:7 <b>species</b> 305:25 <b>specific</b> 281:14 288:17 401:2 428:20 435:4 441:3,6 459:19 470:14 480:14 482:5 515:15 534:15 536:5 596:22 <b>specifically</b> 275:17 362:21 394:2 395:18 437:23,24 459:12 470:8 481:21 492:19 506:6 513:10 528:22,25 539:20 541:9 547:14	576:5 585:21 600:20 601:12 <b>speculate</b> 326:4 <b>speculation</b> 432:3 <b>speculative</b> 398:11 <b>spell</b> 336:21 <b>spend</b> 492:25 <b>spent</b> 304:15 <b>Spiegel</b> 338:22 <b>spin</b> 448:20 <b>spinning</b> 447:24 <b>split</b> 396:12,22,23 397:3 400:5,15 401:12,19 409:10 409:17,19,22 410:4 433:24 436:6 437:8 <b>splits</b> 368:13 <b>splitting</b> 414:7 <b>spoke</b> 322:19 <b>spoken</b> 276:24 <b>Spreckels</b> 339:3 <b>STACEY</b> 271:15 <b>stage</b> 566:24 <b>stand</b> 330:10 336:10,16 341:23 345:22 346:8 347:4 378:8 381:25 418:25 427:20 457:22 489:11 525:12 613:6 <b>standing</b> 380:23 473:11 <b>standpoint</b> 342:23 399:24 <b>stands</b> 302:7 343:21 392:22 419:9 458:3 470:24 557:12 <b>STARK</b> 271:7 610:18 <b>start</b> 297:2 334:15 478:10 555:23 613:3 <b>started</b> 342:16 344:25 424:11
<b>significantly</b> 311:2 345:13 346:25 353:25 420:3 507:25	<b>sit</b> 388:11 394:5,18 409:21 452:25 457:16,18 460:12 <b>site</b> 601:6,11,15,18 602:7,20 603:8	<b>somebody's</b> 587:12 <b>Someone's</b> 542:25 <b>somewhat</b> 293:20 <b>SONTERRA</b> 272:12 <b>soon</b> 391:4 589:2 <b>sorry</b> 314:14 343:7 344:12 349:3 356:21 361:15 366:3 370:12 373:5,8,25 375:12 379:11 381:2 382:23 383:5 398:16 401:14 402:15 403:22 409:6,7 413:20 442:5,7 446:4 456:15,18 464:16 466:12 467:16 468:21 482:13 485:24 490:3 499:15 511:17 514:25 517:11 540:4 557:25 558:6 561:5 566:25 567:2 590:15 602:9 607:3 <b>sort</b> 302:22 316:2 322:2 393:9 480:20 482:7,9 483:7 541:16 603:4 <b>sorted</b> 370:25 <b>sorts</b> 486:3	<b>so-called</b> 290:21 308:12 312:9 341:20 497:7 500:3 501:6 <b>Spalding</b> 513:6 <b>speak</b> 309:19 344:10 393:24 406:19 422:24 429:18 454:24 505:14 540:17 <b>speaking</b> 281:14 285:5 416:10 453:11 485:15 526:18 529:13 533:5 540:19 597:10,11 602:11 <b>speaks</b> 376:22 537:9 609:24 <b>special</b> 282:18 303:7 <b>species</b> 305:25 <b>specific</b> 281:14 288:17 401:2 428:20 435:4 441:3,6 459:19 470:14 480:14 482:5 515:15 534:15 536:5 596:22 <b>specifically</b> 275:17 362:21 394:2 395:18 437:23,24 459:12 470:8 481:21 492:19 506:6 513:10 528:22,25 539:20 541:9 547:14	<b>sitting</b> 407:9 439:19 <b>situation</b> 370:24 465:11 527:10 532:12 571:7 <b>six</b> 470:3,4,4 490:7 586:22 <b>sixth</b> 560:8 <b>size</b> 465:8 584:17 <b>SLATKO</b> 611:8 <b>slide</b> 365:17 372:8 <b>slides</b> 365:21 366:5 530:6 <b>slight</b> 351:21 <b>slit</b> 409:24 <b>Slotko</b> 566:11,16 566:16,21,25 567:5 610:13,19 <b>small</b> 352:15 467:21,22 516:14 <b>smaller</b> 368:8 401:5 508:2 <b>smart</b> 541:16 <b>Smith</b> 321:17 323:11 334:10 <b>sold</b> 391:3 448:25 523:6,12 529:2 532:6,7 546:18
<b>sign-in</b> 274:14 <b>Silversteain</b> 307:16 <b>Silverstein</b> 272:22 307:8,9,14 309:15 309:21 311:14 314:2,11 318:10 318:15,16 319:2 319:15 321:8 <b>similar</b> 285:14 294:9 299:18 300:18 411:5 <b>similarly</b> 281:24 575:10 <b>Simms</b> 334:10 <b>simple</b> 351:15 432:21 <b>simply</b> 292:17 298:19 329:4,16 416:8 489:18 555:15 <b>simultaneously</b> 285:6 485:15 526:18 529:14 533:6 540:19 602:11 <b>single</b> 287:14,21 302:6 356:22 382:12 385:14 396:15 <b>sir</b> 383:17 385:13 392:14 398:16 418:20 468:2 478:12 479:18	<b>sits</b> 461:12 <b>sitting</b> 407:9 439:19 <b>situation</b> 370:24 465:11 527:10 532:12 571:7 <b>six</b> 470:3,4,4 490:7 586:22 <b>sixth</b> 560:8 <b>size</b> 465:8 584:17 <b>SLATKO</b> 611:8 <b>slide</b> 365:17 372:8 <b>slides</b> 365:21 366:5 530:6 <b>slight</b> 351:21 <b>slit</b> 409:24 <b>Slotko</b> 566:11,16 566:16,21,25 567:5 610:13,19 <b>small</b> 352:15 467:21,22 516:14 <b>smaller</b> 368:8 401:5 508:2 <b>smart</b> 541:16 <b>Smith</b> 321:17 323:11 334:10 <b>sold</b> 391:3 448:25 523:6,12 529:2 532:6,7 546:18	<b>sorted</b> 370:25 <b>sorts</b> 486:3	<b>split</b> 396:12,22,23 397:3 400:5,15 401:12,19 409:10 409:17,19,22 410:4 433:24 436:6 437:8 <b>splits</b> 368:13 <b>splitting</b> 414:7 <b>spoke</b> 322:19 <b>spoken</b> 276:24 <b>Spreckels</b> 339:3 <b>STACEY</b> 271:15 <b>stage</b> 566:24 <b>stand</b> 330:10 336:10,16 341:23 345:22 346:8 347:4 378:8 381:25 418:25 427:20 457:22 489:11 525:12 613:6 <b>standing</b> 380:23 473:11 <b>standpoint</b> 342:23 399:24 <b>stands</b> 302:7 343:21 392:22 419:9 458:3 470:24 557:12 <b>STARK</b> 271:7 610:18 <b>start</b> 297:2 334:15 478:10 555:23 613:3 <b>started</b> 342:16 344:25 424:11	

425:4 426:5,14,22 504:9 507:24 <b>starting</b> 393:11 437:4 520:12 <b>starts</b> 346:21 388:22 <b>state</b> 291:17 295:15 336:20 341:15 342:11 346:20 390:4 419:23 525:15 532:22 579:19,21 580:23 581:22 <b>stated</b> 290:22 355:17 374:6,22 382:3,5 417:17 427:12 451:9,11 452:6,16 475:8,10 479:19 493:25 499:9 503:19 510:9 545:8 555:25 556:22 595:18 597:23 <b>statement</b> 313:4 320:17 322:24 341:12 343:21 349:6,8,13,14 356:17,20 368:10 370:13 384:23 406:15,19 407:7 419:9,25 436:16 446:9 458:2 459:2 469:3 470:21 489:11 491:4 493:4 515:4,20 531:15 532:16 574:6 610:20 611:4,23 <b>statements</b> 297:5 378:25 391:8 450:19 556:7 612:16 <b>states</b> 269:2 273:18 273:19 290:8 357:8 449:21 560:10 579:17 <b>stating</b> 604:9	<b>status</b> 407:4 412:7 578:5 <b>statute</b> 293:25 <b>stay</b> 329:12 422:8 433:14 571:15 <b>staying</b> 327:9 <b>STEIN</b> 613:2 <b>Steinberg</b> 307:18 314:24 317:14 320:13,16 513:4,6 521:4 532:4 540:4 542:10 545:2 549:8,25 550:4 612:20 <b>step</b> 537:19 608:16 <b>stepping</b> 277:12 <b>steps</b> 580:16 <b>Steven</b> 334:10,11 <b>stipulate</b> 550:12 <b>stipulation</b> 275:21 275:25 <b>stock</b> 389:12,13 451:22 459:7 543:16,18,22 544:14 545:6,17 545:24 587:8 588:22 <b>stockholder</b> 557:24 558:4 <b>Stoll</b> 271:8 285:18 285:18 286:9 295:13 325:13 327:11 329:18 334:21 335:13 421:25 477:2,4,6 477:24 485:21,24 508:5,10,13 512:22 574:4 600:2,6 606:12,21 606:25 607:7 608:8 <b>STOLTZ-LAUR...</b> 269:23 <b>stopped</b> 445:10 <b>store</b> 611:15 <b>straight</b> 474:16 <b>STRATTON</b>	272:10 288:9,24 <b>STRAUSS</b> 272:4 <b>Street</b> 269:16 270:5 270:13 271:13,21 273:21 <b>strength</b> 420:13 596:8 <b>strengths</b> 287:9 288:4 342:7 343:6 343:17 344:24 371:3 375:7 376:13 377:3 378:21 485:8 487:16 488:3,9,23 489:6 490:19 491:10,16 492:15 <b>strength/weakne...</b> 429:14 <b>stricken</b> 296:20 385:8 <b>strike</b> 276:13 293:21 304:25 313:9 329:22 384:14 385:5,12 392:15 <b>strikes</b> 335:8 <b>stripped</b> 547:8 <b>strive</b> 394:12,17 <b>Strochak</b> 270:8 321:12,13 322:19 323:7 325:24 421:8 422:6 554:14,17 <b>structure</b> 433:21 479:11 518:7 537:6 546:14 <b>structured</b> 548:11 <b>structures</b> 591:5,10 <b>struggle</b> 533:5 <b>struggling</b> 459:23 483:18,21 <b>stuff</b> 525:21 <b>sub</b> 475:10 521:12 <b>subclass</b> 587:22 <b>subject</b> 292:9 310:11 312:10,12 313:6 329:9 331:4	339:15 340:22 411:6,10 465:5 518:11 545:14 567:15,17 571:15 574:21 578:9 601:10 <b>submit</b> 287:5 304:20 594:8 <b>submitted</b> 285:13 286:12 318:4,7,18 321:17 468:3,12 484:14,15 505:9 505:10 507:17 602:13 <b>submitting</b> 333:12 <b>subordinated</b> 317:15,24 443:9 443:14,19,25 451:13,18 452:8 465:5 516:13,25 517:18 521:7,16 522:3,4 559:10,11 559:19,21 560:25 561:22 562:4 <b>subs</b> 592:12 <b>subscribe</b> 466:20 467:15,18 468:15 598:19 <b>subscription</b> 466:19 467:12,19 468:7,8,13 598:4 598:8,9 599:5 <b>subsequently</b> 390:14 391:18 <b>subsidiaries</b> 355:21 356:5 583:16 601:9 <b>subsidiary</b> 446:11 447:7 464:5 <b>substance</b> 308:3 375:22 422:24 423:23 426:7,18 429:5 <b>substantial</b> 287:7 291:11 583:2 605:4,23 <b>substantially</b> 365:7	475:4 534:3,23 594:19 <b>substantive</b> 310:10 <b>Subtracting</b> 404:18 <b>success</b> 287:17,24 377:24 480:9 481:13 482:11 483:8 484:3 487:8 492:9 496:16 497:12,18 500:8 501:9,12 <b>successful</b> 381:12 <b>successors</b> 578:22 601:13 <b>sudden</b> 298:15,18 342:6 <b>suddenly</b> 419:16 <b>sue</b> 439:23 <b>suffered</b> 476:13 <b>sufficient</b> 583:12 <b>suggest</b> 280:7,15 283:8 285:21 593:23 <b>suggesting</b> 559:18 <b>suggestion</b> 277:16 285:12 <b>suit</b> 439:7 506:22 <b>suits</b> 506:24 <b>Sullivan</b> 271:12 395:4 484:25 529:12,21 567:7 600:8 601:24 <b>summarize</b> 479:18 <b>summarized</b> 395:5 571:25 <b>summary</b> 307:22 308:3 311:18,22 315:4,6 316:20 317:9 319:5,11,12 319:18,25 320:6,8 320:9 331:2 348:9 361:11 395:9 494:9 574:23 <b>summation</b> 494:15 <b>summer</b> 286:10 430:13 <b>Super</b> 601:15 603:8
---	---	--	--	--

<b>Supervision</b> 321:20	565:4,7 570:16	374:24 413:22	355:7 356:18,22	573:22 601:12
<b>support</b> 277:19	573:20 575:16	419:11 421:7	356:25 357:7,10	<b>telling</b> 573:23
321:18 335:21	587:15 599:23	422:10 450:15	359:9,13 361:25	574:14,16
428:8 444:22	603:12	476:22 522:9	362:3,19,22,23,25	<b>tenor</b> 437:16
494:6	<b>switch</b> 571:16	536:11 591:25	363:2,2,5,8,11,15	<b>tension</b> 497:25
<b>supporting</b> 429:2	<b>sworn</b> 336:17,19	<b>takes</b> 321:20	363:15,19,23	498:6,12,13
602:19	337:3 422:19	397:24 412:7,25	364:14,19 367:8	499:18
<b>supposed</b> 513:16		<b>talk</b> 277:22 282:2	367:13 368:7,8,10	<b>term</b> 390:15 394:23
547:19	<b>T</b>	313:9 332:16	368:19,20 374:10	408:20 423:4
<b>supposedly</b> 297:15	<b>T</b> 272:16 337:2	333:2 356:24	395:15,17 396:8	430:12,20 433:19
<b>sure</b> 277:11 279:22	422:17	362:13 363:7,10	396:11,13,19,23	433:20,21 434:10
280:24 323:21	<b>tab</b> 458:3	373:7 391:17	397:3,4,22 398:19	434:21,22 435:3
330:3,4 337:12	<b>table</b> 341:8 369:15	453:5 454:5,6	399:17,24 400:9	436:8 444:22
338:19 339:10	386:2 536:6,9	481:15 483:16	400:11,19,22	445:19 449:17,21
341:13 342:10	537:10,14 539:12	499:6 507:24	401:2,4,9,11,17	450:4,5,9 497:4
349:2 350:18	<b>tables</b> 446:20	513:8 540:5 541:7	402:6,12,15 403:3	507:4,8,14 508:3
362:9 366:18,24	<b>tactic</b> 303:15	543:15 546:4,5	403:5,12 404:8,14	508:14,18,23
369:20 372:7,11	<b>take</b> 275:15 293:15	584:2 610:16	404:25 405:11,11	510:22,25 511:11
379:22 387:18	299:22 312:19	<b>talked</b> 374:11	420:3,4,15 427:11	511:18 512:17,20
399:13,19 400:23	315:17 316:13	377:18 433:22	427:15 428:11,11	522:15 524:3,8,11
400:24 401:15	333:4 334:14	452:21 481:20,21	428:18,22,25	528:6 586:4 590:7
407:21 411:6	368:8 382:15	481:25 489:4,6	429:6,15 430:7	590:15,19,21
413:8 415:12	388:24 392:8	507:2 514:9	436:5 445:19,25	591:16
421:13 439:22	393:12 400:3,13	547:22 595:18	530:15 531:2,8,13	<b>terminate</b> 580:15
444:20,21 448:23	407:18 419:13	600:18	531:15 541:20	<b>terms</b> 308:23
465:14 467:24	420:5 421:14	<b>talking</b> 283:24	549:15 576:11	354:21 357:18,21
482:20 484:24	427:4 434:24	313:24 354:23	577:3	399:22 402:3
485:5,7 487:24	441:25 444:16	377:17 396:7	<b>taxes</b> 374:7 403:24	410:20 444:8
492:12,23 506:10	446:7,20 447:3,4	413:10 419:19	408:9 420:16	446:25 508:24
506:10 537:4,4	447:14 448:9	426:7 439:20	437:12,12,17	512:7 521:8
563:22 566:23	449:4 451:22	456:11 458:24	576:17,25 580:18	532:23 565:11
590:23 591:18	455:23 456:2	461:22 472:3	<b>taxing</b> 398:13	<b>test</b> 292:10 294:24
592:21	465:9 476:20	482:15,16 483:2	<b>tax-sharing</b> 362:24	295:18 296:18
<b>surprise</b> 529:20	477:9 488:21	483:13 493:2	363:12 578:19	445:13 513:10,11
531:12	492:21 498:24	499:11 503:18	<b>TAYLOR</b> 273:15	513:21 521:15
<b>surrendering</b>	518:15 522:21	538:16 545:9	<b>team</b> 378:5 384:4,5	522:5
502:12	528:21 531:4	547:13 552:19	429:9,10 463:21	<b>testified</b> 287:16
<b>surrounding</b>	535:8,12 537:2	561:21 582:23	512:8	337:5 345:17
287:24	539:9,16 540:6	590:14 610:7	<b>technical</b> 445:19	360:9 376:7
<b>Susman</b> 273:2	543:17,18,22	<b>talks</b> 522:14	<b>telephone</b> 322:20	383:19 384:19
278:7	544:12,13 545:6	<b>tallied</b> 599:16	<b>tell</b> 276:18 277:5	404:6,12 406:24
<b>suspect</b> 311:21	545:17,24 547:20	<b>tandem</b> 286:5	287:6 384:21	417:4 422:20
<b>sustain</b> 431:15	559:24 577:6	<b>TARP</b> 364:9	390:7 449:16	423:7 429:17
<b>Sustained</b> 429:24	586:21 593:11,13	<b>tax</b> 341:7,15,16,21	453:2,2 463:24	430:5 442:20
432:4 496:4	594:6 607:12	341:24 342:11,18	464:7 530:9	480:18 483:10
527:21 534:6	<b>taken</b> 299:24	343:11 345:12,14	532:14 542:7	487:14 502:25
562:16 563:3	334:18 345:24	346:24 347:2	550:21 566:15	532:9 558:24



562:6 565:9 567:15 600:24 603:21 604:11 605:6 607:17 <b>testify</b> 292:16 293:5,16 300:6 312:4 314:13 324:6 326:19 327:19 330:6 371:2 428:2 533:20 565:10 602:4 <b>testifying</b> 297:13 297:16 330:17 407:6 448:22 460:14 481:7,10 531:25 <b>testimonial</b> 291:24 292:14 <b>testimony</b> 276:24 278:20 307:6 311:13 312:19,20 323:4,14 324:8,12 324:20 325:17 330:8,9 332:5,9 333:14 335:20 340:19 346:8 347:4 371:17 376:19,22 385:5 417:14 421:5 422:25 429:11,22 434:13 435:18 440:21 467:5,7 477:10,15 479:12 480:7 482:9 483:25 487:11 488:14 489:17 491:5,6,7 493:17 496:3,12,15 497:11,17 500:7 501:11,21,25 502:3,7,13,16 522:11 545:15 548:15,16 554:13 556:13 581:16 589:4 597:21 599:6 600:23	602:12,13 611:5 <b>testing</b> 305:25 <b>Texas</b> 273:25 418:17 550:10 551:25 552:8 553:23 554:2,8 556:5,15,19 557:12 558:21 559:5,9,20 560:15 560:24 562:19,21 563:5,8,13 564:21 564:22 <b>thank</b> 276:8 285:4 293:17 296:22,23 305:7 307:14 316:16 320:11 321:8 323:7 329:18 332:19 334:16 335:13 336:24 339:18,20 349:19 352:6 371:19 375:15 377:15 378:14 380:24 405:14 422:16 442:4,5 446:21,23 454:17 475:13 476:19 477:2 478:3 516:4 526:5 550:6 551:9 551:21 558:12 561:12 566:7,9 567:5 572:8 581:14 585:8 589:3 592:14,16 595:13 599:24 606:23 608:8 611:10 612:9,19 613:4 <b>theirs</b> 494:3 <b>theoretical</b> 485:7 548:10 <b>theory</b> 303:2 <b>thereto</b> 490:18 <b>they'd</b> 298:13 591:13 <b>thing</b> 295:6 315:8 325:19 343:3	364:24 392:6 400:17 420:2 421:14 424:25 425:5 448:18 453:18 475:3 532:14 555:4 <b>things</b> 311:16 312:3 313:10,11 345:5 354:11 364:17 371:9 376:16 377:18 379:3 382:4 385:10 391:9 392:10 417:15 419:24 420:6 432:17 453:25 454:4 480:13 483:17 486:4,5,6 486:22 494:4 497:23 503:5 524:14 536:4,4 547:22 583:6 591:25 <b>think</b> 275:13 278:15 279:13,17 280:4 281:24 284:19 286:4,6 288:7 289:2 296:8 297:11 298:16 305:12,16,19 306:2,3,4,23 307:3,5 314:7 320:4 323:5 324:22 326:22 327:5 331:25 334:6 341:14 342:3,20 343:2,13 343:20 344:14,19 345:17 354:10 355:13 359:20 360:8 361:7,11 362:15 368:4 369:5 371:7,15,17 374:4,6 375:17 376:20 377:6 382:2,3 383:14 385:10,21 387:14	391:19 392:5,12 392:18,22 393:3,7 393:8 394:15 395:18 400:12 401:3,21 403:14 403:16 404:3,11 406:3,5,19 410:7 411:10 413:14 414:25 417:4,13 418:13 419:18 425:9 429:17,21 430:4,19 432:10 438:7,16 439:11 440:24 442:7,20 444:6,24 448:11 450:7,22 451:8,16 452:6,10,13 453:19 454:7,11 459:20 460:4 461:14 462:21 463:20 464:24 467:24 470:12,12 471:21 474:4,5 478:23 480:11,18 481:18,21,23 482:2,22 483:11 487:4,10,14 488:19 489:4,22 492:11,17 494:15 497:19 498:16,24 499:16 500:9,23 505:10,18 506:20 507:8,22 508:3,4 510:20 512:19 517:10 520:11 521:21 525:19 527:25 530:5,6,7 532:6,9 533:15,20 533:23 534:9,23 535:22,25 536:18 540:16,24 541:16 565:21 577:14,15 578:18 579:19 583:22 584:21 587:19 588:2,18 588:20,22 589:24 590:17 591:4,20	594:18 595:4 600:13,24 602:15 604:7 605:19,25 607:22 609:9,17 610:12,24 611:11 611:15,15 <b>thinking</b> 401:3 409:10 428:15 <b>third</b> 273:3 281:12 301:10 305:21,24 309:12,21 398:5 414:22 443:17 464:14 542:3 555:3 561:19 562:5,18 565:14 565:16 <b>third-party</b> 456:5 541:9,12,14 <b>thought</b> 288:22 298:20 302:12 347:23 359:17 390:19 394:2,7 463:2 485:2 504:22 566:25 571:25 591:11,21 591:22 <b>thoughts</b> 312:16 <b>three</b> 321:18 322:6 330:9 505:11 527:9 538:16 590:18 <b>three-way</b> 432:15 432:17 <b>Thrift</b> 321:20 <b>throw</b> 302:5 <b>thrown</b> 304:16 437:21 <b>Thursday</b> 269:19 <b>till</b> 344:2 <b>tilted</b> 437:9 <b>time</b> 286:21,24 289:17 293:15 296:2,7 307:12 324:15 335:17 342:16,18 344:25 352:24 353:7 361:23 385:25
---	---	--	---	---

387:25 390:5,17 390:23 391:16 392:3,19 403:18 405:13 406:14 408:17 414:5 415:25 427:4 432:18 434:4,21 434:23 435:5 439:10 451:4 456:19 457:4 461:11 464:6 465:9 488:8 506:6 506:6,16 511:10 511:21 514:14 521:25 550:15 566:18 569:2 570:4 573:9 592:23 593:8,23 597:5 611:20 613:8 <b>times</b> 280:20 429:23 511:12,18 <b>timing</b> 308:20,23 594:2 <b>title</b> 354:17 509:13 509:21 <b>today</b> 275:12,18 307:24 308:23 312:4 340:11 381:24 388:12 394:18 396:7 400:11 402:6 440:23 448:19 452:25 457:16 460:13 496:13 543:25 567:2,16 589:4 590:8,16 608:25 609:3 610:8 611:13,18 <b>told</b> 374:18,25 459:16 485:2,8 488:11 529:21 531:13,20 <b>Tom</b> 606:3,4 <b>tomorrow</b> 335:7 593:6 595:5 611:12,17,21,22	612:7,12,16 613:3 <b>tonight</b> 335:6,7 595:4 610:14 <b>tooth</b> 298:3,3 <b>top</b> 375:24 381:15 404:5 440:17 449:21 475:21 524:23 530:6 587:25 <b>topic</b> 545:4 571:16 <b>topics</b> 344:9 346:4 <b>topped</b> 519:15 <b>tort</b> 427:7 438:23 439:5,15 440:5,12 441:4 452:13 482:23 496:10 498:19 499:19 <b>torts</b> 481:20 483:15 498:5 499:3 <b>total</b> 351:2 403:16 444:12 473:12 583:21 <b>totaling</b> 414:16 <b>totality</b> 360:8 <b>totalled</b> 354:14 <b>totally</b> 320:23 <b>Tower</b> 331:23 412:6,23 413:2,7 413:22 <b>Towers</b> 331:17 332:13 <b>TPG</b> 313:18 <b>TPS</b> 285:9,12 297:9 302:25 329:20 369:16,22 371:4,4 371:23 374:11,12 374:19 381:7 508:12,13,14,17 606:24 608:19 609:5 <b>track</b> 370:22 <b>tracking</b> 308:19 315:11 316:22 317:11 526:12 528:14,16,24 529:3,16 535:12 535:16 536:8	538:20 547:15 548:19 <b>transaction</b> 313:20 361:12 391:6 448:18 586:4 <b>transcript</b> 269:18 376:5 377:21 <b>transfer</b> 290:22 370:18,19 424:4 509:21 524:16 527:12,18 536:20 576:11 <b>transferred</b> 382:24 410:14 411:13 533:12 552:13 571:21 572:20 576:6 <b>transferring</b> 473:15 <b>Travis</b> 435:6,8 438:4,9,12 <b>treat</b> 474:25 <b>treated</b> 459:10,18 460:2 464:11 466:2 467:9 <b>Treating</b> 463:15 <b>treatment</b> 597:19 598:6 <b>treats</b> 465:15 <b>trial</b> 273:17 279:24 279:25 280:20 303:9 312:21 315:10,20 316:3 316:23 320:10 326:21,25 526:17 <b>tried</b> 316:2 340:5 432:9 454:18 503:10 519:25 538:17,18,19 <b>true</b> 300:17 356:3 359:2 389:15 427:9 431:18 441:5 452:12 456:22,23 463:7 464:14 465:18 467:10,13 470:22 474:3 520:16	557:11 560:23 563:11 564:21,25 597:7 <b>TRuPS</b> 578:24 579:2 <b>trust</b> 285:20 326:21 379:23 380:3,6 381:14 397:9,13 397:19 408:23,24 409:9,13 458:8,16 477:7 501:23,25 502:7 509:15 510:6,13,20 544:5 579:4 581:25 582:2,3,18 <b>trustee</b> 273:19 304:4 <b>truth</b> 574:10 <b>truthful</b> 608:6 <b>try</b> 281:4 289:12 303:14 314:25 342:24 347:22 362:17 385:13 391:24 403:10 434:25 445:13 448:5 482:5 497:19 498:3 503:6,7 526:6 537:2 538:20 542:7,13 544:5 580:19 608:4,5 <b>trying</b> 278:10 294:20 295:2,7 327:12 365:12 371:9,10 373:17 393:9 396:17 401:7 420:8 436:12 450:22 481:6 482:4 498:2 498:5,23 503:12 530:21 537:14 541:18 580:24 582:12 594:3 610:25 <b>Tully</b> 536:22 <b>turn</b> 298:12 336:14 355:12 375:4	381:15 386:23 394:22 414:24 433:6 437:3 441:9 443:3 447:23 455:2 463:5 472:25 473:20 489:25 509:6 516:7 523:4 585:18 <b>turned</b> 395:23 401:13 411:2 414:15 415:19 <b>turning</b> 358:24 <b>TWF</b> 301:10 <b>two</b> 316:4 330:22 333:6 340:3,8,9 364:17 367:7 388:7 391:10 398:3 419:24 423:17 430:12 432:18 441:16 442:21 443:24 447:17 474:8,11 498:13,19 506:12 508:3 527:18 528:3 538:15 551:11,12 568:25 581:20 594:14,23 602:2 <b>two-year</b> 473:25 <b>TX</b> 274:4 <b>tying</b> 427:18 <b>type</b> 279:20 281:15 302:8 412:7 503:9 <b>types</b> 279:12,14 505:22 571:11 <b>T&amp;A</b> 579:5
<hr/> <b>U</b> <hr/>				
U 337:2 422:17 <b>Uh-huh</b> 459:8 <b>ultimate</b> 408:21 489:9 514:23 <b>ultimately</b> 366:22 435:3 445:12 507:17 538:7 544:20 552:13				

591:15	<b>undertaken</b> 287:8 424:8	270:19	535:6 538:6,23	415:20 416:4
<b>Um-hm</b> 469:10	<b>undertook</b> 428:6 429:5	<b>use</b> 278:17 281:5	539:15,18,20	419:15,16 420:10
471:4,10 473:8	<b>undisputed</b> 392:13	285:24 291:24	540:10,25 545:5	441:17 509:15
481:9 490:6,11	<b>undoubtedly</b> 328:24 438:12	292:17 295:7	545:13,16,20	535:3,3 581:15,24
511:20 516:9	<b>unfair</b> 562:2	305:17 340:10	562:8 563:8 566:3	582:7,14
517:12	<b>unfortunate</b> 282:20	401:7,7 448:2,14	571:20 572:20	<b>visas</b> 420:17
<b>unable</b> 296:18	<b>unfortunately</b> 334:5 351:5	448:21 449:4	577:11 579:12,15	<b>vis-a-vis</b> 292:25
366:20 369:13	390:16 588:5	489:23 491:19	580:10,12,21,25	<b>VOICE</b> 300:11
<b>uncertain</b> 580:14	611:25	556:23 557:2,8	581:4 591:23	324:22 325:5,10
<b>uncertainty</b> 490:22	<b>United</b> 269:2	589:22,25 612:3	598:9,13 599:2,4	327:4 331:22
<b>unclear</b> 425:5	273:18,19 357:8	<b>uses</b> 296:5 522:15	602:3 603:16	422:3 432:2 438:6
563:17,18 586:13	560:10	<b>usually</b> 538:12	<b>valued</b> 533:18	499:4,9 512:25
<b>uncomfortable</b> 293:20	<b>University</b> 337:13	571:11	<b>values</b> 359:23	516:2,5 542:4
<b>underfunded</b> 580:9	<b>unliquidated</b> 451:14 465:6	<b>utilized</b> 290:17	360:2,18 361:3	570:10 573:18
<b>underlined</b> 433:13	<b>UNOFFICIAL</b> 269:18	<b>U.S</b> 304:4 341:25	452:22,23 533:4	575:14,24 586:8
<b>underlying</b> 294:21	<b>unquantifiable</b> 582:25 583:3	<b>V</b>	<b>valuing</b> 453:16	587:14
294:25 373:21	<b>unquantified</b> 602:2	<b>vague</b> 590:12	<b>valuable</b> 419:16	<b>voted</b> 563:16,18
437:10 438:19	602:3 603:16,16	<b>valid</b> 576:14	<b>valuation</b> 446:25	<b>voting</b> 275:21
<b>undermining</b> 329:5	<b>unquestioned</b> 303:22	596:11	<b>valuations</b> 479:21	276:5
<b>understand</b> 281:19	<b>unreliable</b> 292:21	<b>validity</b> 295:18	<b>value</b> 311:10	<b>vouch</b> 611:18
313:17,22 317:25	298:22	<b>valuable</b> 419:16	330:25 341:13	<b>vs</b> 269:9
321:7 323:3,19	<b>unsecured</b> 272:2	<b>valuation</b> 446:25	342:24 343:4,23	
325:8 327:12	514:3 515:8	<b>valuations</b> 479:21	358:4 360:8,13,24	<b>W</b>
347:7 391:24	516:14,19 519:19	<b>value</b> 311:10	362:17 365:8	<b>W</b> 271:8 337:2
405:9 406:20	521:6,18 522:7,10	330:25 341:13	369:3 386:10,16	422:17
415:6 426:6,7,10	537:16,22 538:2	342:24 343:4,23	413:9 417:2,8,11	<b>WA</b> 273:4
431:21 433:16	543:16 589:10	358:4 360:8,13,24	418:3,21 419:4,20	<b>wait</b> 303:10,15,25
436:15 446:14,24	<b>unsworn</b> 294:13	362:17 365:8	420:18 428:7,18	341:2 387:2 409:6
448:13 449:2,6,15	<b>untestable</b> 292:22	369:3 386:10,16	432:7 437:14	610:23
452:2 459:3 464:8	<b>unusual</b> 514:2	413:9 417:2,8,11	444:7 445:2,10,14	<b>waited</b> 279:25
466:14 467:7	527:17	418:3,21 419:4,20	447:16,22,22,24	<b>waiting</b> 550:23
479:11 481:7	<b>unwilling</b> 434:5	420:18 428:7,18	448:3,5,7,22	<b>waive</b> 411:16
484:7 487:24	<b>update</b> 351:21	432:7 437:14	449:3,7,12 452:15	<b>waiver</b> 280:25
541:17 553:15	<b>updated</b> 608:2	444:7 445:2,10,14	452:17,19,20	281:9 426:19
559:5 562:19	<b>updated</b> 608:2	447:16,22,22,24	453:3,20 454:10	<b>walk</b> 288:10 448:23
567:25 573:8,14	<b>upped</b> 309:3	448:3,5,7,22	458:17 466:20,22	<b>walked</b> 434:22
591:18	<b>upper</b> 346:19 355:7	449:3,7,12 452:15	466:22,24,25	<b>Walrath</b> 269:20
<b>understanding</b>	<b>up-to-date</b> 512:7	452:17,19,20	480:14,17 496:20	275:4 276:6
281:8 305:6	<b>urged</b> 444:15	453:3,20 454:10	496:21 498:22	277:13 278:4
322:11 514:7	<b>URQUHART</b>	458:17 466:20,22	500:16 510:9	284:4 285:2,5,17
554:24 556:14		466:22,24,25	522:24 530:4	286:8 288:6,12
558:18 566:2		480:14,17 496:20	532:6,19 533:11	293:17 296:22
582:15 588:7,11		496:21 498:22		297:17 300:3,13
<b>understood</b> 309:20		500:16 510:9		305:8 306:15
386:11 405:14		522:24 530:4		307:3,13 309:13
580:4		532:6,19 533:11		309:20 311:11
				313:22 314:10

316:16 317:2,19 317:25 318:6,13 319:22 321:7,10 322:18,23 323:23 324:17 325:3,7 329:11 331:12,20 332:10,24 333:2 333:22 334:3,13 335:11 336:2,7,16 339:21 340:14,21 341:2 344:10,19 346:10,16 347:12 348:4,18 349:7,11 349:17,19,24 350:20,23 357:6 358:9,13 365:23 366:11 371:15 373:7,12,23 374:2 377:13 378:12,18 379:18 380:21 384:21 385:4,11 385:21 387:3 392:17 399:4 402:21,23 407:2 416:18 420:24 421:17,23 422:5,8 422:14 424:16 429:18,24 431:5 431:15 432:4 435:25 438:7 440:16 446:16 453:13 454:14 459:21,25 460:19 460:22 462:8,11 465:23,25 466:6 466:10 476:20,25 477:25 478:22 480:25 482:18 485:19,22 487:12 488:15 496:4 499:6,16 508:8,11 512:24 514:17 515:18,24 521:2 523:8,17 524:22 526:9 527:21,23 532:2 534:6 535:22 536:16	540:2 542:6,12 544:24 546:23 549:6 550:6,19,21 550:25 551:11,16 551:20 552:19 553:2,20 554:10 554:16 556:3 558:8 559:14,25 561:9,21,24 562:16 563:3 565:4,7,19,22 566:9,14,19,23 567:3 570:15 572:7,9 573:20 574:11 575:16 576:2 577:18 585:15 586:9 587:15 590:13 592:16 593:2,9,13 594:5,10,16 595:2 595:11 599:23 600:4 602:25 603:12 605:10 606:17,24 607:10 608:9,15 609:2,6 610:2,9,12 611:3 611:10,25 612:6 612:11,17 613:6 <b>WaMu's</b> 436:4 <b>want</b> 279:19,21 280:23 281:4,25 282:4,5 284:21 288:6 291:23 292:17 297:4 303:10 311:15 312:4,7 315:8,9 315:17 320:16,24 323:21 326:25 328:4 330:4 332:12,16 344:14 344:18 347:19 362:7,12 371:12 379:20 385:25 390:11 394:12 401:8 423:22 434:12 439:18 443:3 454:16	462:23 463:10 467:7 477:9 482:14,20 496:13 523:10 524:23 527:11 543:15 544:24 549:6 550:21 553:20 588:2 610:6 <b>wanted</b> 294:10 298:11 302:3,24 303:6 362:9 389:2 394:16 434:6,7 444:21 447:13 513:8 520:23 532:22 565:8 610:16 612:20 <b>wants</b> 317:14 324:13 <b>warrant</b> 311:6 459:6,10,18 460:2 513:7 526:11 528:24 529:3 536:8 538:20 547:15 <b>warrants</b> 308:19 315:11 316:22 317:11 460:5 526:12 528:14,17 529:16,17 535:12 535:16 547:2 548:20 <b>wash</b> 500:17 <b>Washington</b> 269:4 270:6 272:3 275:8 323:15 326:15 339:12 446:7 458:7,16 514:13 515:13 525:25 526:2,22,24 533:25 534:18,20 539:10 557:23 558:3 568:10 581:10,11,13 <b>Washington/WMI</b> 570:13 <b>wasn't</b> 315:6 318:22 347:18	348:16 354:12 406:25 427:17 430:10 450:5 453:11 465:12 473:2 482:16 521:14 578:16 <b>waste</b> 302:8 601:6 <b>waterfall</b> 445:11 473:3 <b>way</b> 279:22 297:3 298:12 299:18 300:20 301:2,3,5 302:2,20 316:3 347:20 356:17 357:20 363:22 376:18 387:9 392:7 406:5 410:7 410:10 411:2,18 444:4 448:6 472:14 478:10 480:8 491:24 496:19 501:22 521:9 525:3 527:16 531:22 532:11 537:20 542:15 581:24 590:9 <b>ways</b> 370:20 <b>WBI</b> 432:6 <b>weakness</b> 420:13 <b>weaknesses</b> 287:9 288:4 342:7 343:6 344:24 371:3 375:7 376:13 377:3 378:21 453:7 487:17 488:4,9,24 489:6 490:20 491:10,16 492:15 <b>website</b> 607:13,24 607:25,25 608:3 <b>week</b> 276:23 322:20 395:7 <b>weeks</b> 306:22 333:6 393:23 594:15 <b>weighed</b> 591:5 <b>weight</b> 279:9	<b>Weil</b> 270:4 275:6 306:17 321:14 330:13 335:15 347:15 361:16 380:18 423:12 429:4,5,12 487:2 488:7,22 491:15 495:9 503:25 504:4,13,16,18,23 506:14 508:19 511:12,24 512:13 592:19 593:18 <b>went</b> 335:4 356:21 359:4 365:6 381:10 382:16 391:6,11,18 396:20 420:4 465:12 536:23 574:9 590:3 <b>weren't</b> 368:14 437:25 595:25 <b>west</b> 338:6 <b>we'll</b> 276:17 308:16 326:9 332:18 333:4 334:15 365:21 395:19 410:19 421:25 422:6,8 439:25 464:20 465:8 508:11 514:11 521:23 545:15 595:4 613:6 <b>we're</b> 275:13 278:10,16,22 279:15 281:3 283:24 284:2 295:2 299:10,16 299:21,23,25 314:4 315:19 321:22 322:13 333:3 343:22 347:25 349:9 361:9,22 362:7 363:7 365:12,19 374:5 377:17 382:3 392:4 394:14 396:6,18
--	---	---	--	--

396:21,21,22	<b>WINE</b> 270:17	293:3,4,14 295:23	366:16,24 368:14	468:20,22,23
400:23 417:10	<b>winning</b> 493:18,20	297:13,15 303:16	368:17 373:25	473:4 586:18
438:8 446:19	<b>wire</b> 358:19	303:19 306:13,19	375:6 377:2,22	588:10,12,14
454:14 471:18,21	<b>wishes</b> 323:22	307:7 310:14,17	380:4,10 381:5,11	599:9
472:19,21 478:2	<b>withdraw</b> 330:15	310:21 313:3	382:18 383:8,15	<b>WNI</b> 601:14
479:16 494:16	331:11	323:11,18,20	383:24,24 384:5	<b>won</b> 298:9 320:14
495:5,6 500:14	<b>withdrawn</b> 330:2	324:10,18 325:21	387:24 389:10,16	<b>wonderful</b> 361:11
516:18 530:3	<b>witness</b> 282:7	326:7 327:13,20	391:3,7,7,20	432:16
532:12,13,15	283:7 287:14,19	328:10,15,22	393:10 395:11,21	<b>word</b> 320:25 389:6
533:22 538:15	287:22 288:14,15	329:3,17,23 330:5	395:23 396:15	463:12 491:19
540:22 547:5	288:19 291:25	330:16 333:8,10	397:5,24 400:5,14	589:23,25 596:10
557:7,8,19 566:23	292:14 306:11	333:13,15,24	402:8,12 403:6	<b>words</b> 341:22
592:21 593:7	308:14,15 310:21	334:4,15 340:11	404:24 405:2	393:22 425:20
611:11 612:5,15	312:3,7 315:8,9	594:14 611:12	407:22,25 408:9	434:12 514:2,2
<b>we've</b> 276:24	315:24 316:15,19	612:21	410:14 412:7,14	589:23 590:2
281:12 287:3	319:7 324:8	<b>witness's</b> 325:17	412:16 413:7	<b>work</b> 278:13 280:3
321:10 333:11	325:20 326:13,20	421:22	414:2,7 415:4	282:15 283:6
340:4 377:18	327:15,23,25	<b>WM</b> 559:9	424:9 427:19	289:18 290:11,17
406:5 416:13	329:5,6,8,13	<b>WMB</b> 353:2,7,7	428:11,24 429:3	291:2,11 292:7
417:20,21 457:7	330:10 332:8	359:4 363:3,12	435:21 439:12	294:15 295:7
461:22 481:21,23	333:16 336:18,22	374:10 383:9	441:6 442:10	296:4 312:14
481:24 483:15	337:3 340:8	389:13 413:8	446:11 448:20	337:22 356:18
494:8 508:17	344:18,19 348:20	414:7 427:19,21	456:20 457:4	378:22 381:21,22
514:8 522:8 525:6	350:2,19 358:2,11	432:16 457:4	458:7 459:6 460:8	383:15 389:20
532:17 554:2	358:15 360:16	525:8 557:13,17	460:15 461:4,11	391:21 423:19
579:20 589:4,24	365:13 371:8	557:18 559:2,6,10	461:15 464:5	424:3,8 425:16,24
<b>WGM</b> 508:18	373:12 378:17	559:19 560:25	468:12 470:22,23	427:6,14,24
<b>whatsoever</b> 319:13	380:13 385:2	561:16,18 562:3	471:9,11,15	428:23 431:25
487:7 502:2	403:9 406:24	562:21,23 563:9	472:15 473:10,15	435:3 453:22
<b>White</b> 445:5	407:3 421:11	576:12 578:3,22	475:17 495:3	465:9 469:4 481:3
589:12 591:9	422:18 453:11,15	583:16 589:17	503:20 506:15	481:5 491:15
596:23	454:12 459:23	601:13,17 602:5	509:16 510:13	581:24 606:9
<b>wholesale</b> 304:24	460:4 466:11	<b>WMB's</b> 352:24	536:3 556:25	<b>worked</b> 337:23
<b>wholly</b> 446:12	485:20 508:7	456:20 559:21	557:15 576:12	338:14,18 435:9
<b>wide</b> 508:2 591:11	514:19 516:4	<b>WMC</b> 458:10	578:20 580:22	470:4 605:15,21
<b>William</b> 333:17	536:18 542:10,13	<b>WMCT</b> 458:22	586:6 597:11	606:9
334:2,7 335:19	552:22 553:17	461:8,12,16,21	<b>WMI's</b> 343:17	<b>working</b> 388:17
336:22	554:12 558:9,12	463:16 464:10	353:19 359:3	495:15 506:8
<b>willing</b> 331:10	560:3 565:21	465:16	364:21 368:19	606:8
<b>Willmington</b>	566:13,20,22	<b>WMF</b> 275:8	375:7 377:3 416:9	<b>workout</b> 506:3
273:14	577:19 592:21	<b>WMI</b> 333:18	509:13	<b>works</b> 420:25
<b>Wilmington</b> 269:17	593:25 595:5	338:11,13 339:5	<b>WMI/WMB</b> 601:9	435:10 470:7,19
270:14 271:23	606:16 608:16	339:17 343:11	<b>WMRIC</b> 446:6,10	518:18 521:9
273:22	<b>witnesses</b> 277:8	351:22 353:6,16	446:10,13,25	<b>world</b> 423:16
<b>win</b> 380:11 381:7	279:11,12 281:17	353:16 355:16	447:7,13,20 449:8	<b>worried</b> 393:9
382:4 494:9	281:25 282:4,12	356:14 363:9,13	450:2 466:16	<b>worse</b> 294:23
500:11	283:22 289:8	364:19 365:7	467:2,18,21	<b>worth</b> 299:17,22

304:23,24 429:6	<b>yesterday</b> 307:11	356:14 357:14,25	<b>\$9</b> 473:24	500:24 516:12
530:3 535:14	308:2 310:5	358:22 359:6	<b>\$900</b> 354:7,8,11,14	520:3,10 538:4,10
545:7,18 580:13	314:25 319:19	410:17 420:11	354:23 355:5	560:10
580:22	320:5 369:21	<b>\$250</b> 397:24 404:3	392:12 533:8	<b>11/29</b> 308:6
<b>worthless</b> 389:12	370:4 526:17	548:25 549:10	<b>\$922</b> 575:23 576:11	<b>110</b> 269:13
598:12,18,24	547:23	<b>\$270</b> 414:20		<b>1129(a)(7)</b> 513:14
<b>wouldn't</b> 372:10	<b>York</b> 270:22	<b>\$3</b> 341:16 403:13	<b>0</b>	513:20
389:25 393:20	271:14 272:6,15	577:20	<b>02111</b> 271:6	<b>1150</b> 273:13
433:4 436:15	272:21 274:9,10	<b>\$300</b> 404:15	<b>08-12229(MFW)</b>	<b>118</b> 269:13
451:19 505:7	<b>Young</b> 569:25	<b>\$31</b> 598:23,25	269:5	<b>12</b> 352:3 548:4
509:2 527:3,5,22	<b>Yup</b> 507:12	<b>\$32.33</b> 458:17		584:21
531:18 559:16		<b>\$350</b> 579:20 580:22	<b>1</b>	<b>12(b)(6)</b> 308:4
605:25 611:22	<b>Z</b>	581:3	<b>1</b> 307:23 321:16	<b>12:25</b> 422:11
<b>wrap</b> 482:6	<b>Zeal</b> 569:24 570:4	<b>\$356</b> 406:10,16,20	453:3,21,21	<b>1201</b> 273:3
<b>write</b> 358:16,25	570:7	408:18 530:10	493:19 501:21	<b>122</b> 377:20
445:24 541:19	<b>Zelin</b> 334:11	<b>\$4</b> 352:11 358:17	508:12,13,14,17	<b>123</b> 376:9
<b>writing</b> 358:10,13	448:22 533:20	358:18 370:9,18	572:9,10,14	<b>124</b> 375:4,13
358:15,22	545:9 594:12	493:12 502:12	600:14 608:14,18	<b>125</b> 271:13 375:24
<b>written</b> 320:19	595:4 599:3 613:2	510:3,7,9,13	608:19,19,19	<b>128</b> 379:7 380:2
423:19 424:3	<b>Zelin's</b> 449:10	532:8 573:5	<b>1.12</b> 403:15,18	443:19
425:24 508:24	<b>zero</b> 405:8 465:11	<b>\$400</b> 519:15,17	<b>1.2</b> 459:6	<b>129</b> 381:15
544:7 567:16	466:19,21 598:10	<b>\$410</b> 407:20	<b>1.25</b> 579:24	<b>13</b> 290:7 478:4,16
<b>wrong</b> 603:19,20		<b>\$48</b> 409:20	<b>1.6</b> 579:23	478:25
604:18	<b>\$</b>	<b>\$5</b> 382:16,19	<b>1.92</b> 402:20 403:8	<b>1300</b> 270:5
<b>wrote</b> 291:8 392:23	<b>\$1.12</b> 401:23	419:22 446:8	<b>1.95</b> 401:22 403:8	<b>1325</b> 272:14
541:21	<b>\$1.92</b> 402:9	447:3 581:23	<b>1:30</b> 420:25 422:9	<b>139</b> 269:13
<b>W.F</b> 270:10	<b>\$1.95</b> 400:15	<b>\$50</b> 411:23 412:3	<b>10</b> 315:15 437:4	<b>145</b> 351:22 355:17
	401:12,19 404:20	412:19 413:25	474:12 475:3	<b>149</b> 269:13
<b>Y</b>	<b>\$104</b> 531:3	415:4,15 416:4,7	492:25 493:13	<b>15</b> 479:6,7,8 584:22
<b>yeah</b> 350:2 371:15	<b>\$144</b> 531:4	420:11 458:17	504:11 590:24	<b>15th</b> 310:15 333:9
385:21 395:24	<b>\$154</b> 474:2	<b>\$500</b> 398:2 433:23	<b>10-5138(MFW)</b>	<b>150</b> 533:18
404:21 409:9	<b>\$157.5</b> 355:18	534:22	269:10	<b>157.5</b> 351:24
418:13 431:15	467:3 545:11	<b>\$55</b> 355:3 407:23	<b>100</b> 368:15 453:3	533:22
442:25 444:6	<b>\$183</b> 549:10	<b>\$550</b> 531:5	516:18 518:16	<b>16</b> 464:2 465:11
493:10 505:17	<b>\$2</b> 403:17 468:9,9	<b>\$580</b> 534:11	519:2,16 526:22	564:6
507:21 511:17	468:16 508:4	<b>\$6</b> 302:4	544:4	<b>16th</b> 345:24 564:4
528:6 549:8 561:9	532:8	<b>\$6.8</b> 417:6	<b>10004</b> 274:10	564:5
563:3 579:15	<b>\$2.195</b> 355:9 404:8	<b>\$600</b> 517:11 518:5	<b>10004-2498</b> 271:14	<b>168</b> 414:16
<b>year</b> 405:2 445:21	<b>\$2.36</b> 362:2 363:19	519:10,14 547:25	<b>10006</b> 272:6	<b>17</b> 338:2 451:12
474:12 475:4	<b>\$2.7</b> 400:10 401:16	<b>\$63</b> 530:11	<b>10010</b> 270:22	465:12
519:15	<b>\$2.8</b> 342:4	<b>\$7</b> 451:21	<b>10017</b> 272:21	<b>17B</b> 559:18
<b>years</b> 337:21 338:2	<b>\$20</b> 413:11 467:14	<b>\$7.5</b> 533:9	<b>10019</b> 272:15	<b>17D</b> 559:18
388:24 391:10	585:7 603:17,23	<b>\$700</b> 517:6,7	<b>105</b> 269:13	<b>17th</b> 548:22
474:8,11 495:16	<b>\$200</b> 518:3,10	<b>\$750</b> 400:4,13	<b>106</b> 269:13	<b>179</b> 436:3
495:17,18 527:9	<b>\$201</b> 519:4	402:3	<b>108</b> 269:13	<b>18</b> 451:13 465:4,12
527:18 538:15	<b>\$23</b> 471:15 472:18	<b>\$756</b> 473:23	<b>109</b> 269:13	<b>180</b> 352:16 437:4
606:10	<b>\$24</b> 414:23	<b>\$789</b> 472:11,14	<b>11</b> 269:4 339:11	<b>183</b> 309:2 548:20
	<b>\$25</b> 355:22 356:3,8		346:22 423:14	

549:19	404:24 405:17	<b>3</b>	41 497:2 499:25	413:15,21 414:3
<b>187</b> 290:19	406:7 410:25	<b>3</b> 330:20 341:25	<b>42</b> 458:2 501:4	<b>60/40</b> 400:5,16
<b>190</b> 352:17	411:17 414:5	389:8 577:17	560:14	401:12,19
<b>194</b> 360:11	416:9 423:4,8,18	585:19 606:24	<b>42.4</b> 585:21	<b>600</b> 517:10
<b>19801</b> 270:14	423:25 424:7,13	608:19 609:5	<b>43</b> 479:10,15	<b>6188</b> 469:7
273:22	424:22 425:8,21	<b>3/12/09</b> 395:11	<b>439</b> 516:23	<b>62</b> 493:3
<b>19899</b> 271:23	425:23 426:11	<b>3/5/09</b> 508:20	<b>44</b> 479:10,15 490:2	<b>63</b> 492:21
273:14	427:2,5 430:14	510:25	490:4	<b>64</b> 496:7
<b>2</b>	454:20 455:5	<b>30</b> 364:20 403:11	<b>45.5</b> 531:21	<b>65</b> 364:23
<b>2</b> 269:19 307:25	507:10,17	403:18,25 421:21	<b>450</b> 272:20	<b>66</b> 587:20
321:15,16,16	<b>2010</b> 269:19 345:25	422:3 479:2,9	<b>4688</b> 269:25	<b>69</b> 443:14
418:2 443:3 598:5	402:13 403:7	<b>30.4</b> 402:17	<b>47</b> 433:6	<b>7</b>
606:24 608:19	405:3 416:3	<b>30.6</b> 555:3	<b>48</b> 449:17,17	<b>7</b> 513:22 519:23
609:5	419:17 442:24	<b>300</b> 368:2 369:2	<b>49</b> 517:9	520:2,11,19
<b>2.195</b> 359:13	451:4 456:12	404:18,19 408:10	<b>5</b>	<b>7th</b> 309:6
404:18,19	597:4,6	408:11 583:23	<b>5</b> 269:16 349:18	<b>7.6</b> 520:24
<b>2.7</b> 341:25	<b>2087</b> 271:22	586:7 599:13	441:17 478:11	<b>70/30</b> 402:14
<b>2.8</b> 403:14	<b>21</b> 346:20,23	602:5,19	<b>5th</b> 387:7	<b>706</b> 295:11
<b>20</b> 364:20 375:11	391:19 548:2	<b>3018</b> 275:21	<b>5.38</b> 458:18	<b>71</b> 496:8
375:16 391:19	<b>210</b> 443:18	<b>32</b> 493:4	<b>5:38</b> 613:8	<b>72</b> 496:24
476:9,11 477:17	<b>215</b> 418:2	<b>33</b> 496:6	<b>50</b> 413:15,21 414:3	<b>726</b> 522:13
495:20,21 590:24	<b>216</b> 563:23 564:6	<b>34</b> 441:9	415:25 419:14	<b>75</b> 404:5
606:10	<b>22</b> 440:9	<b>35</b> 341:15	420:5,17 588:3	<b>756</b> 474:11
<b>200</b> 533:19	<b>22nd</b> 563:21	<b>356</b> 407:18	<b>50-60</b> 413:16	<b>765</b> 472:20
<b>20005-3314</b> 270:6	<b>229</b> 291:6	<b>36</b> 394:24 496:8	<b>50/50</b> 433:24	<b>77550</b> 274:4
<b>2001</b> 458:8,10,14	<b>23</b> 360:11 471:6,20	<b>360</b> 530:7	434:10	<b>78</b> 443:17
458:16,22 459:4	472:15,21	<b>363</b> 509:8,20	<b>500</b> 273:12 407:13	<b>789</b> 473:7
461:8,16,21	<b>24</b> 312:24 463:5	523:12,23 524:3,8	549:15 583:23	<b>8</b>
463:16	489:25 490:4	524:18 527:8	602:5,20	<b>8</b> 375:4 436:7
<b>2004</b> 291:2 456:5	<b>24th</b> 310:18 573:13	532:24 546:14	<b>502(d)</b> 281:3	478:11 517:2
456:10	<b>25</b> 419:14 420:5,17	<b>363F</b> 309:24	<b>51</b> 270:21	<b>80</b> 496:25
<b>2007</b> 313:17	478:8	<b>365</b> 370:18 524:18	<b>510(b)</b> 309:25	<b>80th</b> 594:4
<b>2008</b> 322:12 339:6	<b>250</b> 309:4,7 443:25	530:8	317:16 522:2	<b>800</b> 403:19,20
400:22 502:18	549:20	<b>37</b> 351:12 355:13	<b>53</b> 492:16	<b>81</b> 499:24
527:13	<b>258</b> 516:24	496:24 516:2,6	<b>55</b> 407:15,19	<b>810490</b> 269:24
<b>2009</b> 341:7,19	<b>26</b> 477:19,20	<b>371</b> 443:9	<b>584</b> 443:8	<b>82</b> 557:22
342:19 344:3	<b>262</b> 440:9	<b>38</b> 455:3	<b>59</b> 589:11	<b>84</b> 499:25
345:2,3,3,6,6,8,9	<b>27</b> 386:23	<b>38.7</b> 531:21	<b>6</b>	<b>844</b> 273:21
345:10 386:4	<b>270</b> 368:2,25	<b>4</b>	<b>6</b> 375:24 458:3	<b>85</b> 501:5
387:7,16 388:8	408:10,11	<b>4</b> 311:5 313:15	465:20 468:6,12	<b>9</b>
389:3,24 390:6,12	<b>275</b> 443:13	352:13 389:19	516:5,6 533:10	<b>9.5</b> 493:7 494:12
390:14,22 392:19	<b>279</b> 443:24	397:14	<b>6.1</b> 417:6 532:17	575:20 576:13
393:3 394:24	<b>28</b> 455:5	<b>40</b> 403:14 496:25	580:25	<b>9:30</b> 276:11 612:13
395:12 397:16	<b>29</b> 330:24 492:18	588:3	<b>6.3</b> 526:20	<b>90</b> 477:18,20 479:9
398:9,18,25	<b>29th</b> 307:20 318:22	<b>40.6</b> 364:22	<b>6.8</b> 532:17 580:25	501:5,21 502:4
399:11 402:8	<b>290</b> 346:19 443:8	<b>405</b> 450:2	<b>60</b> 401:22 402:5	
	<b>292</b> 396:2			

<p><b>900</b> 403:13,21 <b>9019</b> 524:13 <b>919</b> 271:21 <b>920</b> 270:13 <b>922</b> 576:15 <b>924</b> 269:16 <b>98101-3000</b> 273:4 <b>99.9</b> 493:18 <b>990</b> 433:8</p>				
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# **EXHIBIT C**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In Re:  
WASHINGTON MUTUAL, INC., Chapter 11  
Et al.,  
Case No. 08-12229(MFW)

Debtors.  
Jointly Administered)

-----)

BLACK HORSE CAPITAL LP,  
et al.,

Plaintiffs,  
vs.

Adv. Proc. No. 10-5138(MFW)

JP MORGAN CHASE BANK, N.A.,  
et al.,

Ref. Nos. 105, 106, 108,  
109, 110, 118, 139, 149  
Defendants.

-----)

924 N. Market Street, Courtroom 5

Wilmington, DE

UNOFFICIAL DAILY TRANSCRIPT

Friday, December 3, 2010

BEFORE: Hon. Mary F. Walrath

Reported by:

SHAUNA STOLTZ-LAURIE, RPR, CLR

CSR NO. 810490

JOB NO. 4689

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 6 SHANNON LOWRY NAGLE  
 7  
 8 ALSO PRESENT:  
 9 (See official sign-in sheet)  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1  
 2 filing with the court the appropriate  
 3 papers for that settlement, and as part  
 4 of it the deceased plaintiffs, which had  
 5 some issues concerning releases, they  
 6 will be withdrawing their objection to  
 7 the plan.  
 8 Additionally, your Honor, there was  
 9 a claim that was filed in the bankruptcy  
 10 case by the Alexander & Reed people, and  
 11 that also relates to a purported class  
 12 action that's pending outside of this  
 13 court against WMRIC, the FDIC and FSB,  
 14 which was the subsidiary of the bank,  
 15 your Honor, and that matter has been  
 16 resolved. There will be no cost to the  
 17 estate, and the claim will actually be  
 18 withdrawn against the estate. That is  
 19 subject to documentation and, we're  
 20 hoping to finish that resolution over  
 21 the weekend, your Honor.  
 22 The Tranquility Master Fund also  
 23 filed an objection relating to certain  
 24 of the release language. If the court  
 25 will recall, that was a subject of an

1  
 2 PROCEEDINGS  
 3 THE DEPUTY: All rise. You may be  
 4 seated.  
 5 JUDGE WALRATH: Okay.  
 6 MR. ROSEN: Good morning, your  
 7 Honor. Brian Rosen, Weil Gotshal on  
 8 behalf of the debtors.  
 9 Your Honor, I'd like to start this  
 10 morning's proceeding by announcing we've  
 11 reached resolution on a certain number  
 12 of objections, and that they either have  
 13 or will be withdrawn.  
 14 Your Honor, with respect to the  
 15 objection that has been interposed by  
 16 the deceased plaintiffs. As the court  
 17 will record, that was the subject of an  
 18 adversary proceeding -- a litigation in  
 19 the Eastern District of New York and  
 20 before that provided relief from the  
 21 automatic stay to allow proceeding, and  
 22 it has been proceeding for over a year  
 23 or so, your Honor, I believe.  
 24 The debtors have actually reached a  
 25 resolution on that litigation. We'll be

1  
 2 objection to claim process. The court  
 3 ruled, they file an amended Proof of  
 4 Claim I believe on November 30th, your  
 5 Honor. We have agreed with Tranquility  
 6 group with some language with respect to  
 7 the releases, and they will be  
 8 withdrawing their objection to the plan  
 9 as well.  
 10 The California Franchise Tax Force  
 11 had some concerns about their efforts  
 12 with respect to some of the debtors'  
 13 affiliates and releases, and we have  
 14 agreed with them on language as well,  
 15 and they will be withdrawing. I believe  
 16 they have withdrawn their objection to  
 17 the plan.  
 18 The Relizon company has already  
 19 filed a Notice of Withdrawal of their  
 20 objection to the form.  
 21 Stephen Rotella, a former officer  
 22 with the company, had filed an objection  
 23 because of concerns regarding  
 24 indemnification obligations, and that  
 25 matter has been resolved and he will be

1  
2 withdrawing or that objection has been  
3 withdrawn as well to the plan.

4 The Keystone entities, your Honor,  
5 that is an entity associated with the  
6 American Savings litigation, it's  
7 another party in connection with that  
8 and has some residual rights to that  
9 litigation proceeds. They filed an  
10 objection to the plan on several bases,  
11 all relating to their ongoing rights in  
12 the litigation proceeds. We have been  
13 working with the Keystone entities and  
14 have resolved their objections to the  
15 plan. That is subject to documentation  
16 your Honor, and we will be finishing  
17 those today if not over the weekend.  
18 And they will be also withdrawing their  
19 objection to the plan.

20 Likewise, your Honor, lastly there  
21 was a filing made by the WMI note  
22 holders group. Do you want to read that  
23 into the record?

24 MS. NAGLE: You can do it.

25 MR. ROSEN: There is a reservation

1  
2 that the parties have agreed on the  
3 senior note versus the subordinate note  
4 basis. I will read that into the record  
5 at the beginning of the afternoon's  
6 proceedings.

7 There are others that are in the  
8 process of resolution, but they're not  
9 at the level we can say they're done so  
10 I didn't want to announce them.

11 JUDGE WALRATH: Okay.

12 Just for a timing perspective, I  
13 think my clerk advised we'll be ending  
14 today at 4:30. We do have Monday.  
15 There's a possibly of Tuesday. I'm  
16 waiting for the agendas to come in to  
17 see if we can use Tuesday.

18 MR. ROSEN: Thank you, your Honor.

19 JUDGE WALRATH: Other parties?

20 MR. ROSEN: Excuse me. The note  
21 holders, the senior note holders, have  
22 said they're not withdrawing their  
23 objection; they're just deferring their  
24 objection based upon what we will  
25 announce into the record.

1  
2 JUDGE WALRATH: Okay.

3 MR. STROCHAK: Good morning, your  
4 Honor. Adam Strochak for Weil Gotshal  
5 for the debtors.

6 I have just a housekeeping matter.  
7 I know Mr. Stoll wants to take the  
8 podium also. We've learned to share.

9 (Laughter.)

10 MR. STROCHAK: Just on a  
11 housekeeping note, as we were going  
12 through exhibits last night and thinking  
13 about the record of the confirmation  
14 hearings, one thing we thought about is  
15 that we do have the extensive summary  
16 judgment record from the Trust Preferred  
17 Black Horse adversary.

18 We're working under the assumption  
19 that that is included as a part of the  
20 confirmation record but I thought I'd  
21 just ask for clarification. We  
22 obviously would want some of those  
23 documents included as exhibits in the  
24 confirmation hearing as well. So if  
25 it's not a part of the record already,

1  
2 we just want to get some clarification  
3 on that.

4 JUDGE WALRATH: If the parties  
5 don't object, that can be incorporated.

6 MR. STARK: Your Honor, Robert  
7 Stark from Brown Rudnick on behalf of  
8 plaintiffs.

9 I'm wary of getting up and saying I  
10 object, but I do want to take a look.  
11 You know, to be honest with you, we  
12 prepared these separately and I just  
13 don't want to be ambushed on the morning  
14 of the hearing and say, "Okay, you know,  
15 everything that's in those pair of  
16 binders, everything is entered by  
17 osmosis, so I think we need to come back  
18 on that.

19 JUDGE WALRATH: All right. You can  
20 let us know.

21 MR. STROCHAK: I will look through  
22 it over the weekend to make sure there's  
23 no problems. And I'll turn over to  
24 Mr. Stoll now.

25 MR. STOLL: Good morning, your

1  
2 Honor. Jim Stoll from Brown & Rudnick  
3 on behalf of the Trust Preferred  
4 Securities.

5 At the end of the motion in limine  
6 order yesterday, Judge, you allowed us  
7 or instructed us to submit an order  
8 addressing the paragraphs in the  
9 affidavits with reference to the  
10 examiner's report. We did that last  
11 night. We got some comments back this  
12 morning. We're not quite in complete  
13 agreement and there's two points I  
14 wanted to bring up with your Honor to  
15 make sure we don't have an unnecessary  
16 fight. And they deal with paragraph 77  
17 and 79 in Mr. Kosturos' deposition or,  
18 excuse me, affidavit.

19 Paragraph 79, the last sentence of  
20 that paragraph has a summary of  
21 Mr. Kosturos's characterization of the  
22 capital contribution claim, the FDIC  
23 receiver potential claims, et cetera,  
24 and then he cites to the examiner  
25 report.

1  
2 We propose that that be stricken.  
3 The debtors have said, "No, but only  
4 strike the actual citation to the  
5 examiner's report." When we go back to  
6 the examiner's report, which is at this  
7 point the citation is to page 199, and  
8 you compare that last sentence to the  
9 sentence in the second paragraph, this  
10 last sentence in the second paragraph on  
11 page 199 and the cited footnote, you  
12 basically see that what Mr. Kosturos has  
13 done as he's paraphrased and summarized  
14 what the examiner said and put the  
15 examiner's citation in there.

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

22 JUDGE WALRATH: Doesn't the  
23 footnote -- I mean the footnote cites  
24 the -- (Reading) perhaps other sources  
25 of those assertions. I'd just strike

1  
2 the reference to the examiner's report.

3 Mr. Stoll: All right. Maybe that  
4 will answer the second question I had,  
5 your Honor, which is paragraph 77.

6 Again a statement is made by  
7 Mr. Kosturos and his citation for the  
8 source of his statements are the  
9 examiner's report at page 197 and also  
10 the JPMorgan submission at pages 17 and  
11 18. That's their confirmation brief  
12 which if you look at the JPMorgan  
13 submission at paragraph 17 and 18, there  
14 again you find JPMorgan quoting to the  
15 examiner's report and actually quoting  
16 the examiner's report on page 18 and  
17 with appropriate -- at least with  
18 citation 2 to the examiner's report.

19 So again it appears to be a method  
20 of bringing into his testimony the  
21 actual statements of the examiner  
22 through citations to a pleading filed by  
23 JPMorgan. Again, it seems to us that I  
24 guess if we're going to only strike the  
25 citations, then the support for his

1  
2 record should not be the citations  
3 through a pleading that in turn quotes  
4 and cites to the examiner's report.

5 JUDGE WALRATH: Let me look at the  
6 JPMorgan -- what paragraph of JPMorgan?

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

10 JUDGE WALRATH: (Reading). Well,  
11 I'm going to ignore the last quotation  
12 on page 18 and otherwise I will consider  
13 the JPMC submission as supportive after  
14 paragraph 17.

15 MR. STOLL: All right. Thank you,  
16 your Honor.

17 And then I think the declarations  
18 revised with the paragraphs and  
19 references I believe filed, except for  
20 Mr. Zelin, which is just an oversight  
21 and a revised declaration deleting the  
22 one paragraph for the one reference,  
23 Mr. Zelin's reference to the examiner's  
24 report. And that would satisfy us.

25 JUDGE WALRATH: Thank you.

1  
2 MR. STROCHAK: Just one brief  
3 housekeeping note. We're providing  
4 comments on the in limine motion to  
5 counsel, but one thing we want to  
6 request from the court: We'd like to  
7 attach a copy of the examiner's report  
8 just to keep a complete -- just in case  
9 of appeal if you send up in the District  
10 Court or Circuit Court on appeal. Just  
11 to make sure it's reflected we've  
12 proffered the examiner's report and your  
13 Honor has ruled on it, so we have a  
14 complete record for purposes of appeal.

15 JUDGE WALRATH: I don't think it's  
16 necessary, if it's all right --

17 MR. STROCHAK: As long as the  
18 document is clear it was proffered and  
19 it was excluded from evidence. We're  
20 comfortable with that, your Honor.

21 JUDGE WALRATH: You can make that  
22 clear on the --

23 MR. STROCHACK: We'll put that  
24 language in the order, your Honor.  
25 Thank you.

1 exhibits so those have never seen it --

2 JUDGE WALRATH: If you want to be  
3 part of the record, you have to use the  
4 mic.

5 A VOICE: My apologies.

6 JUDGE WALRATH: All right. Copies  
7 are available?

8 MR. MASTANDO: I call Mr. Goulding,  
9 okay?

10 JUDGE WALRATH: Please remain  
11 standing so you can be sworn.

12 (Whereupon, the witness was duly  
13 sworn.)

14 THE CLERK: Please state your full  
15 name and spell your last name for the  
16 record.

17 THE WITNESS: John Goulding. The  
18 last name is G-O-U-L-D-I-N-G.

19 MR. MASTANDO: We offer Mr.  
20 Goulding for cross-examination, your  
21 Honor.

22 JUDGE WALRATH: Just for the  
23 record, can you confirm that your  
24 Declaration is true and correct and a  
25

1 MR. MASTANDO: Good morning, your  
2 Honor. John Mastando, Weil Gotshal, on  
3 behalf of the debtor.

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

13 And also, your Honor, yesterday  
14 there was an uncontested motion by the  
15 debtors to file exhibits A and B to  
16 Mr. Goulding's declaration under seal.  
17 We will now withdraw that motion and the  
18 exhibits are attached and are no longer  
19 sealed and are attached to the  
20 declaration.

21 May I approach?

22 JUDGE WALRATH: You may.

23 MR. MASTANDO: (Hanging.)

24 A VOICE: Do you have extra  
25

1 representation of your direct  
2 examination?

3 THE WITNESS: I can.

4 JUDGE WALRATH: Okay.

5 MR. NELSON: Your Honor, may I  
6 approach with copies of the deposition  
7 of Jonathan Goulding?

8 JUDGE WALRATH: You may.

9 MR. NELSON: (Hanging).

10 JUDGE WALRATH: Please don't forget  
11 to identify yourself for the record.

12 MR. NELSON: Justin Nelson from  
13 Sussman Godfrey representing the Equity  
14 Committee.

15 JOHN GOULDING, called  
16 as a witness, having been duly sworn by  
17 a Notary Public, was examined and  
18 testified as follows:  
19

20 CROSS-EXAMINATION

21 BY MR. NELSON:

22 Q. Good morning.

23 A. Good morning.

24 Q. Mr. Goulding, first of all, have  
25 you discussed the testimony or the

1  
2 proceedings in court in any form or fashion  
3 since trial began yesterday?  
4 A. No.  
5 Q. Have you reviewed any new exhibits  
6 or documents over the past 24 hours?  
7 A. No. I've reviewed the some of the  
8 same, nothing new.  
9 Q. Thank you.  
10 You are the treasurer of WMI,  
11 correct?  
12 A. I am.  
13 Q. You have been designated to discuss  
14 certain assets of WMI that have been resolved  
15 by the proposed settlement; is that true?  
16 A. That's true.  
17 Q. You have also and been designated  
18 to discuss the liquidation and recovery  
19 analysis; is that right?  
20 A. The liquidation analysis, that's  
21 correct.  
22 Q. You've prepared an analysis of the  
23 recovery analysis as well?  
24 A. I did.  
25 Q. You state in your declaration that

1  
2 the estate will receive approximately  
3 7.5 billion of total funds available for  
4 distribution to the debtors' stakeholders; is  
5 that correct?  
6 A. There will be approximately seven  
7 and a half billion available to the  
8 stakeholders pursuant to the settlement.  
9 Q. Okay, thank you.  
10 MR. NELSON: May I approach the  
11 easel for the demonstrative, your Honor?  
12 JUDGE WALRATH: You may.  
13 MR. NELSON: (Presenting  
14 demonstrative).  
15 Q. This is a blowup of the liquidation  
16 analysis that is -- and recovery analysis  
17 that is Exhibit C to your declaration; is  
18 that right?  
19 A. This is a section of it, yes,  
20 that's correct.  
21 Q. And it discusses the recovery  
22 analysis and states that there will be  
23 \$7.446 billion of distribution; is that  
24 right?  
25 A. Again, net proceeds, sure.

1  
2 Q. Net proceeds.  
3 That is based on the reorganized  
4 WMI value of 7 -- excuse me, \$145 million; is  
5 that right?  
6 A. That's right.  
7 Q. So we would have to increase that  
8 to make it essentially -- by 12 and a half  
9 million now, correct?  
10 A. I believe the new number is 157 and  
11 a half.  
12 Q. And we would say the new number is  
13 about 7.458 approximately.  
14 A. Approximately, sure.  
15 Q. Okay.  
16 MR. NELSON: May I approach again  
17 with another demonstrative, your Honor?  
18 JUDGE WALRATH: You may.  
19 MR. NELSON: Your Honor, the  
20 parties have this exhibit. May I  
21 approach the court with a copy for the  
22 court?  
23 JUDGE WALRATH: You may.  
24 MR. NELSON: (Handing.) And it's  
25 not an exhibit, it's a demonstrative.

1  
2 Q. Mr. Goulding, the \$361 million and  
3 the left-hand column, that's the difference  
4 between your recovery analysis and the amount  
5 under your recovery analysis where the  
6 preferred equity would start to be in the  
7 (inaudible), correct?  
8 A. I don't know. You just covered up  
9 the piece that would --  
10 Q. If you go to Exhibit 37 in the  
11 binders behind you, it has the exhibit.  
12 A. That's correct.  
13 Q. The other sources on the right are  
14 some of the potential other categories for  
15 recovery; is that right?  
16 MR. MASTANDO: Objection, your  
17 Honor. Counsel is testifying.  
18 JUDGE WALRATH: Overruled.  
19 A. Well, no. I mean a lot of the  
20 items that you've listed on the right-hand  
21 side are included in the settlement  
22 agreement. Therefore, the proceeds there are  
23 included in the seven and a half billion we  
24 were talking about before.  
25 Q. Fair enough.



1  
2 These are some of the potential  
3 values of the some of the assets that are  
4 being transferred, correct?

5 MR. MASTANDO: Objection to the  
6 form and the foundation of the exhibit  
7 as we discussed yesterday.

8 JUDGE WALRATH: Overruled.

9 A. Can you repeat the question.

10 Q. These are the values of some of the  
11 assets that are being transferred and/or  
12 released under the proposed settlement,  
13 correct?

14 A. Well, these are values -- I don't  
15 know, there are certain of these values that  
16 would probably be misleading, but I'm sure  
17 there are certain values or other values that  
18 would be on this page. I don't think this as  
19 fair representation of a comparison.

20 Q. Well, we'll get to that in a  
21 second.

22 You would agree, and we'll get to  
23 this later, for now that WMRIC and a  
24 reorganized WMI has a \$5 billion NOL,  
25 correct?

1  
2 Q. Yes.

3 A. Well, no. I mean I think the  
4 initial work that was done on the asset  
5 allocation with respect to BOLI/COLI, when we  
6 got there we didn't have a lot of books and  
7 records but we worked with folks to gain  
8 access to books and records. We worked with  
9 the team who oversaw the BOLI/COLI program  
10 within the treasury department of Washington  
11 Mutual. We received documentation from them  
12 that would support the books and records.

13 There was approximately 90 million  
14 of value on the books and records of WMI and  
15 about 5 billion on the books of WMB. We  
16 reviewed those. We also -- we added all the  
17 documents, submitted them to counsel. They  
18 did an analysis as well, but we can certainly  
19 look at the information, the support for what  
20 was on the books and records.

21 Q. I think you just said this in your  
22 answer. You relied in part on counsel's  
23 advice to determine the ownership of assets  
24 of BOLI/COLI.

25 And by BOLI/COLI, the rabbi trust,

1  
2 A. It could have a \$5 billion NOL.

3 Q. And by NOL you mean a tax shelter  
4 of \$5 billion for future profits, correct?

5 A. Net operating loss carried forward,  
6 sure.

7 Q. And in your deposition you call  
8 that a tax shelter for \$5 billion, correct?

9 A. I don't know if I used those exact  
10 words but if that's what's in the deposition,  
11 I don't remember every word in my deposition.

12 Q. Okay. Well, we can check if you  
13 want.

14 A. No. That's a fair statement.

15 Q. Okay. BOLI/COLI, the assets that  
16 are going to either JPMorgan or to WMI are  
17 approximately \$5 billion, correct?

18 A. That's correct.

19 Q. The analysis that was performed to  
20 determine what was owned by JPMorgan and what  
21 was owned by WMI was done on reliance of  
22 counsel, correct?

23 MR. MASTANDO: Object to the form.

24 A. Are you talking about with respect  
25 to BOLI/COLI?

1  
2 you understand it's part of the same type of  
3 analysis here; it's all grouped together?

4 MR. MASTANDO: Objection to the  
5 form.

6 JUDGE WALRATH: Sustained.

7 Rephrase.

8 Q. By BOLI/COLI -- well, let me  
9 rephrase again.

10 Are rabbi trusts part of BOLI/COLI  
11 assets?

12 A. Some of the BOLI/COLI are held  
13 within rabbi trusts. There are additional --  
14 other securities that have been held within  
15 the rabbi trust.

16 Q. Okay. So they're sort of --  
17 they're intermingled, the BOLI/COLI and the  
18 rabbi trust?

19 A. A little bit, yes.

20 Q. Okay. With respect to the assets  
21 of determining ownership, valuation and value  
22 of BOLI/COLI and the rabbi trusts, you relied  
23 in part on counsel, correct?

24 A. Well, for the purposes of value  
25 you'd be looking at the cash surrender value

1  
2 of BOLI/COLI policies, and for that we  
3 wouldn't be looking to counsel for an answer.  
4 We looked at a number of factors to determine  
5 ownership and certainly -- and, you know,  
6 looking at the books and records as well as  
7 getting an understanding from the legacy  
8 personnel who managed the BOLI/COLI. But  
9 certainly we submitted documentation to  
10 counsel to continue their review.

11 Q. With respect to the determination  
12 of ownership it was always a counsel issue,  
13 wasn't it?

14 MR. MASTANDO: Objection, your  
15 Honor. Asked and answered.

16 JUDGE WALRATH: Sustained.

17 MR. NELSON: Okay. Your Honor, I'm  
18 trying to be clear. I want to make sure  
19 there's record evidence that --

20 JUDGE WALRATH: Well, he's answered  
21 so I think you're stuck with it.

22 MR. NELSON: Okay. Thank you, your  
23 Honor. Well, then --

24 Can we have the overhead, please?

25 Q. Let's go to page 76 of your

1  
2 deposition.

3 "Question: In your early  
4 investigation did you conclude that our  
5 trusts were rightfully WMI's?

6 "Objection. No privilege.

7 "With respect to the termination of  
8 ownership, it was always a counsel  
9 issue, so we were always relying on  
10 counsel's advice with respect to that."

11 Is that your testimony?

12 A. Yeah. I think the final  
13 determination it certainly -- you know, it's  
14 a legal title analysis to determine  
15 definitively, but there were a number of  
16 factors that we used initially to understand  
17 what the assets were that we were looking at.

18 Q. With respect to how the disputed  
19 assets should be resolved, that was a counsel  
20 issue?

21 MR. MASTANDO: Same objection, your  
22 Honor, asked and answered again.

23 JUDGE WALRATH: Sustained.

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

25 Q. You stated here, and I'm only

1  
2 looking for a yes or no answer here, I think  
3 as Mr. Kosturos also stated that you believe  
4 the settlement is fair and reasonable,  
5 correct?

6 A. Correct.

7 Q. And again, yes or no. You believe  
8 that the settlement maximizes the value of  
9 the estate, correct?

10 A. Correct.

11 Q. In order to make these  
12 determinations, you need to decide the  
13 likelihood of success on all of the disputed  
14 assets, correct?

15 MR. MASTANDO: Objection.

16 JUDGE WALRATH: What is the  
17 objection?

18 MR. MASTANDO: I object to the  
19 form.

20 JUDGE WALRATH: Overruled.

21 A. I think that it's difficult to  
22 ascertain a specific value for all of the  
23 elements of this case, and so you're looking  
24 at whether or not a sum is fair and  
25 reasonable in the context of evaluating all

1  
2 of the outcomes on all of the disputed items.  
3 I don't think we can look at it as I'm just  
4 going to define this one number.

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

8 A. Well, there are a number of them we  
9 can discuss for sure.

10 The best example of this issue is  
11 with respect to the Visa shares that we could  
12 talk about at length, but you'd be hard  
13 pressed to determine what the exact value of  
14 the Visa shares are. You have dispute with  
15 respect to ownership of the Visa shares. You  
16 don't know what the value of the Visa shares  
17 is. You have shares that are currently  
18 restricted that will be converted into Visa  
19 Class A shares when that restriction is  
20 lifted. You have the settlement of an  
21 interchange litigation for which we don't  
22 know what the ultimate resolution of that  
23 would be.

24 So to put a number on any one of  
25 these and say that's my number would be very

1  
2 difficult. I think you have to look at the  
3 whole range of possibilities with any one of  
4 these assets.  
5 Q. Fair enough.  
6 In other words, I think what you're  
7 saying, if I can summarize, is there might be  
8 a value on the Visa claims. That you  
9 attempted to do, correct?  
10 A. We looked at -- again, similar to  
11 all of the assets, we looked at a range of  
12 possible outcomes as to what those assets  
13 were worth.  
14 Q. Well, whether the settlement, for  
15 example, is substantial depends upon the  
16 likelihood of success of prevailing on the  
17 disputed claims; whether, for example,  
18 whatever the value of the Visa claims, it  
19 belongs to JPMorgan or WMI. Correct?  
20 MR. MASTANDO: Objection to the  
21 form, and I think counsel's testifying.  
22 JUDGE WALRATH: Overruled.  
23 A. Well, I think you have to look at  
24 the possible outcomes, but I don't think that  
25 everybody would agree as to what the

1  
2 interpretation or the likelihood of success  
3 is on any of those. So I think you look at  
4 the possible range of outcomes, and in the  
5 context of looking at this possible range of  
6 outcomes, you can determine whether or not  
7 the settlement is within the zone of  
8 reasonableness.  
9 Q. In order to determine whether the  
10 settlement is within the zone of  
11 reasonableness, you have to know what the  
12 likelihood of success of prevailing with  
13 respect to ownership disputes about the  
14 assets, correct?  
15 MR. MASTANDO: Objection, your  
16 Honor. Calls for a legal conclusion as  
17 well.  
18 JUDGE WALRATH: Overruled.  
19 A. I don't think you have to know a  
20 specific likelihood. I think you have to  
21 understand the strengths and weaknesses of  
22 arguments, but I don't think you have to  
23 know --  
24 There's not going to be a point  
25 value. There's not going to be one answer

1  
2 for how you would ascribe value to anything  
3 created within the settlement agreement.  
4 Q. You did not conduct any analysis  
5 into the fairness and reasonableness of the  
6 settlement without input from counsel; isn't  
7 that true?  
8 MR. MASTANDO: Object to the form.  
9 JUDGE WALRATH: It's been asked and  
10 answered.  
11 MR. NELSON: If the answer is yes  
12 I'm okay, but I want the record to be  
13 clear.  
14 JUDGE WALRATH: You've asked this  
15 three times now.  
16 Sustained.  
17 MR. NELSON: Okay. May I approach,  
18 your Honor?  
19 JUDGE WALRATH: You may.  
20 (Messrs. Nelson and Mastando  
21 approached the bench for an  
22 off-the-record discussion with the  
23 judge.)  
24 Q. In your deposition, this is page  
25 142 of your deposition, you stated that the

1  
2 factual basis for your determination that the  
3 settlement is fair and reasonable is  
4 privileged. Correct?  
5 A. That's what it says here on the  
6 page, yeah. But I think as we have  
7 discussed, I mean we obviously would have  
8 solicited advice of counsel on any number of  
9 issues. But I think you can determine, one  
10 can determine, whether the settlement is fair  
11 and reasonable without the advice of counsel.  
12 Q. When you were asked at your  
13 deposition whether you did any analysis into  
14 the fairness and reasonableness of the  
15 settlement without input of counsel, your  
16 answer was no, you did not. Correct?  
17 A. Right. You're asking me if I did  
18 anything without counsel and I didn't. But I  
19 don't think you need that for the  
20 determination of the fairness and  
21 reasonableness of the settlement.  
22 Q. Okay, thank you.  
23 You stated you don't need it for  
24 the fairness and reasonableness of the  
25 settlement?

1  
2 A. Yes.  
3 Q. Just to be clear, the measurement  
4 that you did was privileged and taken under  
5 counsel, correct?  
6 MR. MASTANDO: Objection to the  
7 form and completely mischaracterizing  
8 the testimony.  
9 JUDGE WALRATH: Sustained.  
10 Q. In your deposition isn't it true  
11 that when asked -- I'm looking now at page  
12 129, line 12:  
13 "Question: What was the metric by  
14 which you measured the reasonableness of  
15 the settlement?  
16 "Answer: We discussed with counsel  
17 how you would evaluate the merits of the  
18 settlement.  
19 "But what did you look into and to  
20 evaluate the reasonableness of the  
21 settlement?  
22 "Answer: We discussed with counsel  
23 the criteria for what would make the  
24 settlement fair and reasonable."  
25 Do you stand by that answer?

1  
2 MR. MASTANDO: Your Honor, I object  
3 also because, for the completeness the  
4 deposition, from page 128 through 131  
5 must be read where Mr. Goulding clearly  
6 testified as to fairness and  
7 reasonableness.  
8 JUDGE WALRATH: Well, you can raise  
9 that on redirect.  
10 A. Can you put the paper up there?  
11 Again, I guess the same answer as  
12 what I've been saying, which is: For the  
13 purposes of determination for your support  
14 for the debtors as to whether or not the  
15 settlement was fair and reasonable, we would  
16 have discussed it with counsel. I don't  
17 think that that's necessary for just making  
18 the determination as to whether or not the  
19 settlement is fair and reasonable.  
20 Q. Okay, I'll move on.  
21 You can't tell us, though, for  
22 example, the value of the intellectual  
23 property that the estate is giving to  
24 JPMorgan, correct?  
25 A. I can't? I'm not an intellectual

1  
2 property valuation expert. I wouldn't want  
3 would try to opine on the value of  
4 intellectual property. I'm sure you can get  
5 any number of people that could give you the  
6 value or ideas that would have a relatively  
7 wide range, given the set of circumstances.  
8 Q. Well, you are here testifying with  
9 respect to some of the assets that were  
10 transferred, correct?  
11 A. Correct.  
12 Q. And with respect to intellectual  
13 property in particular, the estate had a  
14 report on what the value of intellectual  
15 property is, correct?  
16 A. We engaged in intellectual property  
17 evaluation as the firm did some work for the  
18 estate.  
19 Q. And you are asserting privilege  
20 over the result of that valuation report,  
21 correct?  
22 A. Correct.  
23 Q. The result of that report could be  
24 a dollar, correct?  
25 MR. MASTANDO: Objection, your

1  
2 Honor. Calls for speculation and  
3 attempting to get into a privileged area  
4 I believe.  
5 Q. Well, let me rephrase then.  
6 Without knowing the results, that  
7 result could be any range from a dollar up to  
8 a hundred billion dollars, correct?  
9 MR. MASTANDO: Your Honor, it's a  
10 hypothetical that calls for speculation  
11 and frankly (inaudible).  
12 JUDGE WALRATH: Overruled.  
13 A. Well, I mean saying it's worth a  
14 hundred billion is probably a little  
15 aggressive. I don't know that you could --  
16 (Laughter.)  
17 A. I mean I'd have to sort of  
18 speculate as to what sort of range seemed  
19 plausible within the context of the report.  
20 Q. Well, how are you able to say that  
21 a hundred billion dollars is aggressive if we  
22 have no way to judge it, if the report that  
23 you're relying on and that you've done is  
24 privileged?  
25 A. Again, I don't think we're relying

1  
2 entirely on the report that was done and  
3 prepared in the context of a litigation  
4 position. We're looking at what's been  
5 asserted with respect to ownership by  
6 JPMorgan, what defenses do they have with  
7 respect to whether or not WMB owns the  
8 intellectual property. We're looking at what  
9 are the merits of the arguments that WMI has  
10 with respect to ownership of intellectual  
11 property. We're looking at what the assets  
12 are that we're having, how could you monetize  
13 those assets. Would you need to win on  
14 litigation for intellectual property  
15 infringement? If you won that the IP was  
16 yours and there was no infringement, what  
17 would you do with those assets? Would you  
18 sell those assets? Who would you sell them  
19 to?

20 There's just a range. Like all of  
21 these outcomes you're trying to pin down a  
22 point estimate. There is a range of possible  
23 outcomes here for all any of any number of  
24 those assets. You can't look at it that way.  
25 You have to look at what could happen. Could

1  
2 we win on an IP that is ours? Could JPMorgan  
3 win on that it's theirs? All of those types  
4 of issues.

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

8 MR. MASTANDO: Objection.  
9 Mischaracterizing the testimony.

10 JUDGE WALRATH: Sustained.

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

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

16 Q. In the determination of who has  
17 that ownership you relied on counsel,  
18 correct?

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

21 JUDGE WALRATH: Overruled.

22 A. We discussed with counsel that  
23 issue but you can look at the various  
24 assertions of the various parties in their  
25 pleadings to understand the legal arguments

1  
2 being made with respect to ownership.

3 Q. Well, with respect to whether you  
4 believe that the assertion of an opposing  
5 party is likely to be correct, you relied on  
6 counsel. Correct?

7 A. If it's a legal issue we would have  
8 discussed it with counsel, but I think  
9 there's nothing privileged about the  
10 arguments that were put into the pleading.

11 Q. Fair enough. So you're just  
12 relying on the assertions that you made  
13 versus the assertions that JPMorgan made; is  
14 that right?

15 A. That's not what I said. I said we  
16 would have discussed it with counsel, but  
17 anyone looking at evaluating the fairness and  
18 reasonableness of the settlement could see  
19 the arguments that would have been made by  
20 both sets of counsel with respect to  
21 ownership.

22 Q. With respect to the value of  
23 intellectual property in particular, without  
24 getting into who owns it, you are unable to  
25 tell us right now any potential range of that

1  
2 value. Correct?

3 A. That's correct. I frankly even --  
4 Well, yes, that's correct.

5 Q. And that value, because you can't  
6 tell us a range, could be as high as billions  
7 and billions of dollars; isn't that right?

8 MR. MASTANDO: Objection to the  
9 form, your Honor. Calls for  
10 speculation. There is no foundation.

11 JUDGE WALRATH: Overruled.

12 A. It's highly speculative. I  
13 wouldn't want to try to value what the IP is.

14 MR. NELSON: Your Honor, may we  
15 approach?

16 JUDGE WALRATH: Yes.

17 (Messrs. Nelson and Mastando  
18 approached the bench for an off-the  
19 record discussion with the judge.)

20 Q. Just to be clear for the record,  
21 you cannot tell us with respect to the  
22 intellectual property whether, in terms of  
23 how much it's worth, the value of it is in  
24 the billions and billions of dollars,  
25 correct? Yes or no?

1  
2 MR. MASTANDO: Object to the form.

3 A. I wouldn't be able to testify on  
4 the value of the IP.

5 Q. With respect to the pension plan,  
6 you state that it's been overfunded by about  
7 \$350 million; is that right?

8 A. I don't think that's what we  
9 reference.

10 Q. Well, how did you determine the  
11 value of the pension plan asset that was  
12 going to be transferred?

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

23 Q. I see it. Okay.

24 So you're relying on it in terms of  
25 the net value as of -- the underlying assets

1  
2 So we don't view that when you're  
3 looking at it on a settlement liability  
4 estimate versus the plan assets, that it's  
5 probably within a fair range of  
6 reasonableness of that 39 million.  
7 Otherwise, we would have felt compelled to  
8 change that answer.

9 Q. Have you or your counsel done any  
10 other analysis of what the pension plan is  
11 worth as of today?

12 A. There are requirements to be filed,  
13 an annual funding notice as well as a  
14 Form 5500 that sets forth what the funding  
15 status of the plan would look like.

16 Q. Have you or your counsel done any  
17 other analysis since December 2nd, 2008?

18 A. We rely on others to perform  
19 certain liability calculations for the  
20 purposes of the pension plan. We don't do  
21 them ourselves. We can look at the asset  
22 value at any point in time. In connection  
23 with the annual funding notice, we would be  
24 asking those that value the assets for us and  
25 those that value the liabilities for us to

1  
2 of the pension plan as of December 2nd 2008,  
3 correct?

4 A. The plan assets as of 2008, yes.  
5 (Speaking simultaneously).

6 Q. I'm sorry I interrupted you.

7 A. That's okay.

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

11 A. Actually, no.

12 Q. The market bottomed what? March  
13 2009?

14 A. I think October is significantly  
15 worse. The market has responded by December.  
16 A lot of what's in the pension plan assets  
17 are fixed-income securities so you have a  
18 very different view of what the market value  
19 looks like. But you also have significant  
20 other changes when you're talking about the  
21 value of the pension plan as you move forward  
22 from 2008 given the interest rate environment  
23 that's declined substantially. You're  
24 looking at annualizing the plan liabilities.  
25 That becomes considerably more expensive.

1  
2 prepare that information in connection with  
3 those notices.

4 Q. Have you done that since  
5 December 2nd, 2008?

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

8 Q. When is the last estimated value?

9 A. Well, it depends substantially on  
10 under what context you wish to value it.

11 So the difficulty with the pension  
12 plan is that on a go-forward basis the  
13 liabilities and what the discount rate is  
14 that's used to value those liabilities is  
15 substantially different than what you could  
16 settle those liabilities for today. So there  
17 is a lot of -- similar to a lot of the other  
18 assets, there's a lot of different possible  
19 outcomes here with respect to what happens  
20 with the pension plan.

21 Q. In other words, if the asset is  
22 disposed now it's worth one thing, but if  
23 it's kept on and transferred to JPMorgan,  
24 then it might be worth more. Correct?

25 A. The way that the accounting rules

1  
2 work, yes. If you didn't -- if you have to  
3 terminate the plan today or if you attempt to  
4 basically immunize the plan from further  
5 market activity, those two actions taking  
6 place today cause an increase in the  
7 liabilities, given the interest rate  
8 environment as compared to the discount rate  
9 that would be used to carry the liability  
10 forward.

11 Q. You stated that as of December 2nd,  
12 2008, there is a \$39 million overfunding,  
13 correct?

14 A. That's right.

15 Q. Do you have an idea about what the  
16 overfunding would be as of say December 31st,  
17 2010?

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

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

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

1  
2 so, no, we don't look at it that way. The  
3 Plan Investment Committee and the Plan  
4 Administration Committee look at all the  
5 factors of the plan. We don't ask for  
6 valuations from counsel.

7 Q. You did not place a value on the  
8 liabilities that you were transferring from  
9 the estate; isn't that true?

10 A. I don't know what you mean.

11 Q. All right, let's go to your  
12 deposition.

13 A. Are you talking about with respect  
14 to the pension plan liabilities?

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

19 A. Again, I think you'd have to look  
20 at it in the context of liabilities being  
21 similar to assets so that any of the items  
22 included within the settlement agreement have  
23 a number of disputes, so that the range of  
24 possible outcomes -- so, for example,  
25 deferred compensation programs that JPMorgan

1  
2 performing a settlement liability estimate  
3 with interest rates that have declined and  
4 purchasing annuities to satisfy those  
5 liabilities, that liability will have  
6 increased substantially. So the net number  
7 is probably relatively close.

8 Q. Has your counsel ever performed an  
9 analysis that suggests differently? I'm not  
10 asking you to get into what it is, but do you  
11 know whether your counsel has done an  
12 analysis that suggests differently?

13 MR. MASTANDO: Object to the form.

14 Your Honor, it sounds like the question  
15 calls for privileged information.

16 JUDGE WALRATH: Well, yes or no?

17 Can you answer?

18 A. Counsel doesn't prepare an analysis  
19 of the value of the pension plan.

20 Q. Counsel has never come to a  
21 conclusion with respect to what the pension  
22 plan -- the overfunded pension plan is?

23 A. No. The value of the pension plan  
24 assets and the value of the liabilities are  
25 done by actuaries retained by the plan and

1  
2 is taking pursuant to the settlement  
3 agreement, there are questions about whether  
4 or not they're the true -- whether that  
5 liability is their liability or not their  
6 liability. So you have to look at the range  
7 of outcomes as to whether or not that  
8 represents a -- you know, what that number  
9 looks like.

10 Q. And in the range of outcomes, that  
11 analysis is privileged, and you're not  
12 relying on it, correct?

13 A. Well, yeah. Again, I think you can  
14 see from most of what the end outcome is --  
15 there's a lot of paper filed in this case.  
16 You can see what positions people assert and  
17 you can look at what's there.

18 Q. Okay let's go to your deposition,  
19 the bottom of page 124, line 25:

20 "Question: For purposes of  
21 settlement did you consider this a  
22 \$275 million liability?"

23 "Answer: As I said, we didn't have  
24 a way to sort of place a value on it, so  
25 we looked at a range of possible

1  
2 outcomes. We looked at whatever it  
3 might represent and does it represent  
4 significant value, but we didn't have a  
5 way of quantifying that issue.  
6 "Did you say that you added up the  
7 value of all these assets?  
8 "Answer: There is analysis that  
9 was done in connection with counsel  
10 where we looked at different outcomes  
11 associated with the settlement  
12 agreement."  
13 MR. MASTANDO: I'm going to object,  
14 your Honor. The deposition is not  
15 inconsistent with the witness's  
16 testimony.  
17 JUDGE WALRATH: You can save it for  
18 argument.  
19 Is that what you testified to?  
20 Q. Do you stand by that testimony?  
21 A. Yeah.  
22 Q. Okay. And the range of ways to  
23 assess value is all privileged, correct?  
24 MR. MASTANDO: Objection, asked and  
25 answered already.

1  
2 Q. I'll go to your deposition.  
3 JUDGE WALRATH: All right.  
4 Overruled.  
5 Q. We'll continue.  
6 "Question: What does that mean,  
7 different outcomes?"  
8 Same question on the top of page  
9 128: "What do you mean by different  
10 outcomes?"  
11 "Answer: A range of ways to assess  
12 values."  
13 "Question: Such as?"  
14 "Answer: I think that would be  
15 privilege for me to disclose what the  
16 nature is of that analysis."  
17 "Question: This is an analysis  
18 that you performed?"  
19 Answer, line 15: "In connection  
20 with counsel."  
21 Is that true?  
22 A. Yes, I think as I said before, we  
23 would have involved counsel in evaluating for  
24 ourselves the reasonableness of the  
25 settlement but I don't think that somebody

1  
2 needs the input of counsel to determine  
3 whether or not the settlement is within the  
4 zone of reasonableness.  
5 Q. All of the analysis that you and  
6 WMI performed was done in connection with  
7 counsel, correct?  
8 MR. MASTANDO: Objection, asked and  
9 answered and mischaracterizing the  
10 testimony.  
11 JUDGE WALRATH: Overruled.  
12 You can answer.  
13 A. Again, it's the same issue. We  
14 would have -- with all of these being legal  
15 disputes with respect to ownership of assets  
16 or different outcomes, we would have  
17 discussed them with counsel, as is prudent.  
18 But I don't think that you need to know -- I  
19 think that there's enough information in the  
20 pleadings that I don't think you need to know  
21 what those conversations were in order to  
22 determine whether or not the settlement is  
23 reasonable.  
24 Q. Okay. I'm sorry, but let's just go  
25 back to your deposition. Now we're going to

1  
2 the bottom of that same page, line 24:  
3 "Question: Did you perform any  
4 numerical analysis yourself? Did you  
5 perform any numerical analysis on this  
6 issue?"  
7 "Answer: On which issue?"  
8 "Question: On the issue of looking  
9 at different outcomes, the total value  
10 of these assets under different outcomes  
11 of the settlement."  
12 Objection.  
13 "Answer: I don't think there is  
14 anything that I could answer with  
15 respect to the form of an analysis that  
16 was done in connection with analyzing  
17 with counsel."  
18 Do you stand by that testimony?  
19 A. Right. I don't think I can share  
20 with you the privileged information that we  
21 discussed with counsel. I don't think you  
22 need that information to determine whether  
23 the settlement is reasonable or not.  
24 Q. Okay. With respect to the Visa  
25 shares, JPMorgan is buying those for



1 \$25 million; is that right?  
 2  
 3 A. It's -- I wouldn't characterize it  
 4 that way. The Visa line item pursuant to the  
 5 settlement agreement contemplate that  
 6 JPMorgan pays \$25 million, assumes liability  
 7 under the loss-sharing agreement and assumes  
 8 liability with respect to the plaintiffs in  
 9 the interchange litigation group of claims  
 10 filed against the estate. You also can't  
 11 look at any line item within the context of  
 12 the settlement agreement and look and see if  
 13 that treatment is fair and reasonable unless  
 14 looking at it as a whole.

15 Q. Well, let me unpack that. The  
 16 first -- actually the last thing you said,  
 17 you can't just look at that \$25 million line  
 18 item standing around, correct?

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

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

1 Q. So even -- for example, the Visa  
 2 shares are worth more than \$25 million.  
 3 There might be other assets that the estate  
 4 is getting to offset that. Is that your  
 5 testimony?

6 A. It's possible, if that were the  
 7 determination of value, sure.

8 Q. You have made a determination of  
 9 the value taking into account the assets and  
 10 liabilities of the Visa shares, correct?

11 A. We didn't make a specific  
 12 valuation. We used a range similar to what I  
 13 discussed before, where we looked at what the  
 14 value would be of the Visa shares, assuming  
 15 that there was no -- that the value of the  
 16 interchange settlement was a zero, and that  
 17 would give you a maximum possible value. We  
 18 looked at the -- what the value of the  
 19 interchange litigation settlement would be  
 20 for the shares to be determined to be awards  
 21 list, and we knew that beyond that there was  
 22 liability exposure.

23 For the purposes of settlement, we  
 24 looked at that range and we thought about  
 25

1 that range in the context of settlement  
 2 negotiations.

3 Q. So you placed a range as between  
 4 the likely outcome of the -- excuse me, let  
 5 me rephrase it.

6 You placed a range based on the  
 7 potential outcomes of the Visa litigation; is  
 8 that right?

9 A. The interchange litigation, okay.

10 Q. And you say that there is  
 11 substantial risk --

12 This is your analysis by the way,  
 13 not counsel's analysis.

14 A. That's right.

15 Q. Okay. You say that there is  
 16 substantial risk with the Visa shares because  
 17 of this possibility of ongoing litigation,  
 18 correct?

19 A. There's a contingent liability  
 20 associated with the ongoing litigation,  
 21 that's correct.

22 Q. How much on the open market are the  
 23 Visa shares worth today?

24 A. My understanding is that the  
 25

1 Class B shares are restricted shares so they  
 2 don't trade, so I wouldn't know what they're  
 3 worth.

4 Q. We do know what the unrestricted  
 5 Visa shares trade at today, correct?

6 A. We do, but there's a conversion  
 7 rate here under the restrictions with respect  
 8 to the Class B shares.

9 Q. Let's take a one at a time.

10 What do the common Visa shares  
 11 trade at roughly today?

12 A. I think it's roughly \$75 a share.

13 Q. So the estate has about 3.15  
 14 million shares, something like that?

15 A. 3.147 of Class B shares.

16 Q. And if you do the math, that comes  
 17 out to approximately 250 some odd million  
 18 dollars, correct?

19 MR. SACKS: Objection, your Honor.  
 20 Those weren't the shares they own.

21 JUDGE WALRATH: Sustained.

22 A. The shares themselves, regardless  
 23 of who they're owned by, convert from Class B  
 24 shares into Class A shares, so you can't  
 25

1 multiply 3.147 times 75 and get the maximum  
2 value of those shares.

3 Q. Well, we're getting there. I'm  
4 asking you just a simple math question. In  
5 terms of if on a hypothetical basis those  
6 were common shares, 3.15 million times 75 is  
7 approximately \$250 million; is that correct?

8 MR. MASTANDO: Same objection.

9 MR. SACKS: Objection to the form  
10 your Honor.

11 JUDGE WALRATH: Overruled. I'll  
12 allow it.

13 A. You're asking me to testify on  
14 math?

15 (Laughter).

16 Q. Do you want to do the math?

17 A. Is that what you're asking me? I'm  
18 trying to clarify the question.

19 Q. I'm trying to get on the same page  
20 so we can get to the value of what these Visa  
21 shares are worth today.

22 You would agree the first step in  
23 determining that value is what the common  
24 shares are worth, correct?  
25

1 A. Correct.

2 Q. You understand that Visa has an  
3 obligation to estimate that as practically as  
4 possible, correct?

5 A. Correct.

6 Q. And based upon its sworn  
7 independent judgment, its value to put things  
8 in escrow that make the current exchange .56,  
9 correct?

10 A. Correct.

11 Q. If you multiply the .56 by the  
12 approximately \$75 a share, you get what?  
13 Approximately 40 -- low 40's, right? \$42,  
14 \$43 a share, correct?

15 A. That sounds about right.

16 Q. Okay. Then if you multiply that by  
17 3.15 million shares you're talking about a  
18 value, based upon those criteria, that is a  
19 little less than \$150 million, correct?

20 A. That sounds about right.

21 Q. Okay. Thank you.

22 So based upon the analysis that  
23 Visa did and the conversion ratio that Visa  
24 established, according to those you're  
25

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

4 Q. All right. Well, so that's what  
5 I'm trying to do with you right now.

6 So if with the -- converting the  
7 B's into the A's, looking just at the A's,  
8 you would agree that it's approximately  
9 \$250 million if it was common A stock,  
10 correct?

11 A. Well, the conversion ratio as is  
12 currently set forth, based on what's funded  
13 into the escrow so far, it's not a one-to-one  
14 conversion from Class B shares into Class A  
15 shares.

16 Q. Let me approach it a different  
17 way.

18 The conversion ratio that Visa has  
19 established is .56; is that correct?

20 A. Currently, yes.

21 Q. That is the current -- and that is  
22 set by the amount of money in the escrow  
23 account to fund settlements in exposure from  
24 those potential liabilities, correct?  
25

1 walking about a value between 140 and  
2 150 million dollars?

3 MR. MASTANDO: Objection to the  
4 form.

5 JUDGE WALRATH: Sustained.

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

7 Q. You are aware that WMI will emerge  
8 as a reorganized company; is that right?

9 A. I am aware.

10 Q. The board will be composed by a  
11 chief executive of the reorganized company  
12 and six people associated with the creditors  
13 committee; is that right?

14 A. I don't know exactly who's there.

15 Q. Who will be the chief executive of  
16 the reorganized company?

17 A. I haven't been keeping up on that  
18 issue, to be honest.

19 Q. You do give in your declaration  
20 analysis of what WMI did to value the  
21 reorganized company and WMRIC, correct?

22 A. We hired someone to do a valuation  
23 with respect to the reorganized company.

24 Q. You provided them some assumption  
25

1  
2 and analysis as part of that, correct?  
3 A. We prepared financial projections  
4 in connection with that valuation.  
5 Q. Well, let's first go to docket  
6 number 6188.  
7 MR. NELSON: Your Honor, would you  
8 like me to move to admit this or is  
9 being on a docket sufficient?  
10 JUDGE WALRATH: I think you need to  
11 admit it.  
12 MR. NELSON: Okay. I move to admit  
13 this.  
14 JUDGE WALRATH: Any objection?  
15 MR. MASTANDO: No objection, your  
16 Honor.  
17 JUDGE WALRATH: Okay. What's the  
18 docket number again?  
19 MR. NELSON: 6188.  
20 JUDGE WALRATH: Thank you.  
21 Q. This is a notice filed on  
22 Wednesday, correct, by you? Meaning WMI.  
23 A. I'm not sure if it was filed on  
24 Wednesday or not. I'm not familiar with  
25 every filing in this case.

1  
2 Q. Okay. You understand that this is  
3 the appointment of directors of the  
4 reorganized debtors, correct?  
5 A. Yes. That's what it says.  
6 Q. Exhibit A then lists their  
7 biographies; is that right?  
8 A. It appears to, yes.  
9 Q. Every single one of these  
10 reorganized board of directors is associated  
11 with either -- well, let's go through them.  
12 Daniel Krueger is with Owl Creek?  
13 A. That's what it says.  
14 Q. Mark Rondel, Owl Creek?  
15 A. Yes.  
16 MR. MASTANDO: Objection. I think  
17 we went through this yesterday.  
18 JUDGE WALRATH: Yeah. Do we need  
19 to?  
20 Q. Well, you are aware that all seven  
21 are actually members of these four hedge  
22 funds, correct?  
23 A. I am.  
24 MS. NAGLE: Objection, your Honor.  
25 That's not what the --

1  
2 JUDGE WALRATH: Yes.  
3 Sustained.  
4 MR. NELSON: Your Honor, may I go  
5 through it then?  
6 JUDGE WALRATH: No. The documents  
7 speak for themselves.  
8 MR. NELSON: Okay.  
9 Q. One of the reasons why you didn't  
10 consider -- let me back up.  
11 The valuation you referred to done  
12 by an independent company is the Blackstone  
13 valuation, correct?  
14 A. That's correct.  
15 Q. They put a range of between 135 and  
16 180 million of what could be the reasonable  
17 outcomes of reorganized WMI based on the  
18 current assumptions, correct?  
19 A. Correct.  
20 Q. The midpoint of that is 157.5,  
21 right?  
22 A. Right.  
23 Q. And you used that midpoint in  
24 determining valuation, correct?  
25 A. We used a midpoint in determining

1  
2 valuation?  
3 Q. In determining the worth of  
4 reorganized WMI for the purposes of  
5 liquidated and recovery analysis.  
6 A. Right. The 157.5 is a revision  
7 from the version that was filed but, yes, a  
8 reasonable midpoint of that range.  
9 Q. And you gave Blackstone the  
10 assumption that reorganized WMI would not  
11 take on new business, correct?  
12 A. We gave Blackstone a set of  
13 financial projections which projected the  
14 only operating asset of reorganized WMI which  
15 is WMRIC, which is a captive insurance  
16 company in runoff. We gave them a projection  
17 that was based solely on the captive  
18 reinsurance company, WMRIC, continuing to run  
19 off its business through the runoff period.  
20 Q. Those assumptions and projections  
21 did not consider whether WMRIC would take on  
22 new business, correct?  
23 A. We didn't -- did not project new  
24 business.  
25 Q. That was in fact your primary

1  
2 assumption, correct?

3 A. I don't know if it would be the  
4 primary assumption but certainly one of the  
5 main assumptions.

6 Q. Well, the projections are the  
7 primary assumption that was used to value the  
8 new business, correct?

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

15 Q. Well, let's go to your declaration.  
16 Let's go to paragraph 137, last sentence:

17 "The projections are based on the  
18 primary assumption that 100 percent of the  
19 operating results of reorganized WMI will  
20 stem from the operation of its only remaining  
21 actively operating subsidiary, WMRIC."

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

1  
2 about the valuation or what Blackstone  
3 considered in their valuation.

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

11 A. That's correct.

12 Q. Okay. Thank you.

13 If that assumption turns out to be  
14 faulty, then we cannot rely on the results in  
15 the Blackstone report, correct?

16 A. I think their projections will  
17 probably won't hit every number exactly, but  
18 that doesn't mean the valuation is  
19 inaccurate.

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

25 A. That's right. We don't actually

1  
2 still know exactly who the owners of the  
3 reorganized WMI stock will be.

4 Q. Well, we have a pretty good idea of  
5 who they're going to be, right?

6 A. It's still a little bit difficult  
7 to determine. It will depend significantly  
8 on the size of the general unsecured claims  
9 pool at the effective date and therefore  
10 whether or not the senior notes will be  
11 entitled to receive stock that they've  
12 elected, whether or not there will be  
13 redistribution of stock to various classes  
14 and whether or not it will all be pro rata  
15 across the PIERS, assuming that we pay down  
16 to that level. So we don't know until we set  
17 the disputed claims reserve where the stock  
18 will actually go.

19 Q. You do know that of the senior  
20 notes, \$31 million worth have opted in,  
21 correct?

22 A. We do.

23 Q. Do you know who among the senior  
24 notes have opted in?

25 A. I don't (inaudible).

1  
2 Q. The remaining value would then go  
3 to PIERS, correct?

4 A. No. The senior notes alike and  
5 then the sub notes and then the PIERS.  
6 There's also a provision in the ballot that  
7 allows for redistribution to the extent  
8 there's a deficiency so that could be  
9 redistributed up to senior notes or  
10 subordinated notes.

11 Q. And any remaining distribution goes  
12 to PIERS?

13 A. That's correct.

14 Q. Okay. And we do know that that the  
15 PIERS are primarily owned by the four hedge  
16 funds we discussed, correct?

17 A. I believe based on their holdings  
18 that they hold more than a majority.

19 MR. NELSON: Okay. May we  
20 approach, your Honor?

21 (Messrs. Nelson and Mastando  
22 approach the bench for an off-the record  
23 discussion with the judge.)

24 JUDGE WALRATH: All right, we're  
25 going to take a five-minute break.

1  
2 You're still on the cross so you  
3 should not discuss anything with  
4 counsel.

5 MR. NELSON: Thank you, your Honor.  
6 (Recess taken.)

7 THE DEPUTY: All rise.  
8 You may be seated.

9 JUDGE WALRATH: Okay.

10 MR. MASTANDO: May we approach,  
11 please, your Honor?

12 JUDGE WALRATH: Yes.  
13 (Messrs. Nelson and Mastando  
14 approach the bench for an off-the record  
15 discussion with the judge.)

16 JUDGE WALRATH: All right.

17 Q. If confirmation is approved, which  
18 assets will belong to reorganized WMI and  
19 which assets will go into the liquidating  
20 trust?

21 A. Reorg WMI is composed of Washington  
22 Mutual, Inc., WMI Investment Corp. and WMRIC,  
23 and whatever assets aren't distributed other  
24 than that will go into the liquidating trust.

25 Q. If there are any distributions that

1  
2 confirmed, the liquidating trust will start  
3 with at least the 29 and the 30 million  
4 dollars that WMI is getting from the PIERS  
5 settlement?

6 A. No.

7 Q. It will just be distributed as part  
8 of the liquidating trust?

9 A. No. I'm sorry. I think maybe we  
10 should go through what the PIERS structure is  
11 to make sure what we're talking about.

12 Q. Okay.

13 A. So the PIERS show up here on the  
14 bottom here where you see that it's  
15 pre-petition 789. Of that 789 million,  
16 there's about 35 million of that number that  
17 represents common securities.

18 Q. Okay.

19 A. But the structure itself is  
20 relatively complex, so maybe we should go  
21 through that.

22 So the way that the structure  
23 actually works, WMI issued debt to a trust --

24 Q. Correct.

25 A. -- as well as putting 30 million

1  
2 the estate itself is getting from the  
3 proposed plan and settlement, those will then  
4 be transferred into reorganized WMI?

5 A. No.

6 Q. Where will those go to?

7 A. You're talking about with respect  
8 to the PIERS, the ownership of --

9 Q. Correct.

10 A. Yeah, those -- those would flow  
11 back into the liquidating trust and be  
12 available for distribution more further down  
13 the chain.

14 Q. That's exactly my question. Those  
15 are going into the liquidating trust; is that  
16 right?

17 A. Well, I think the way it was being  
18 clarified is that WMI would waive any  
19 distribution with respect to the ownership  
20 and therefore the distribution -- initial  
21 distribution will be made and then we  
22 wouldn't take a distribution on account of  
23 the common securities of the PIERS.

24 Q. So, in other words, when the  
25 liquidation -- excuse me. When the plan is

1  
2 into the trust and that trust issued PIERS  
3 units.

4 Q. Okay.

5 A. And those PIERS units are in the  
6 amount of \$1.15 billion face amount.

7 Q. Correct.

8 A. And the trust when it issued  
9 debt --

10 Q. I'm sorry. When the --

11 A. When WMI issued debt to the trust,  
12 it's in the amount of 1.85 billion.

13 Q. Okay.

14 A. And they put 35 billion into the  
15 trust, then the trust issued the PIERS units  
16 worth 1.15 billion.

17 Q. So there's \$35 million left over.

18 A. No.

19 Q. I'm sorry, go on. I didn't mean to  
20 interrupt. Go on.

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

24 Q. Okay.

25 A. It's reduced to the 789 pursuant to

1  
2 original issued discount associated with  
3 warrants that were attached to the PIERS  
4 units.  
5 Q. Okay.  
6 A. So for the purposes of setting a  
7 claim amount as between the trust and WMI, we  
8 use the full amount, that it's the 789.  
9 Q. Okay.  
10 A. That's relevant only realistically  
11 from the standpoint of paying pro rata to the  
12 various classes of creditors. But what will  
13 ultimately happen is if you were to get past  
14 the recovery, as indicated here, and pay all  
15 the way down, you would essentially pay 765  
16 of pre-petition claim and you would pay a  
17 portion of that 160. I don't know the number  
18 off the top of my head, but let's just say  
19 it's about 150 million.  
20 And then if there were still money  
21 left, it would trickle down to the last  
22 classes. No money is going into reorganized  
23 WMI on account of those and no money would  
24 stay in the liquidating trust on account of  
25 those.

1  
2 Q. I understand what you're saying.  
3 You're saying because it's coming a little  
4 bit short, there is no money going into the  
5 liquidating trust.  
6 A. No, we're not taking a distribution  
7 on account of common securities. The claim  
8 as it relates from the trust is for the gross  
9 amount, but we wouldn't do anything, I mean  
10 if we ever got past that, the money would  
11 flow back into the trust and continue to pay  
12 down the waterfall.  
13 Q. The next step in the waterfall  
14 would be the preferred equity, right?  
15 A. The subordinated claims and then  
16 preferred equity.  
17 Q. The subordinated claims being?  
18 A. 510(b) subordinated claims.  
19 Q. 510(b) subordinated claims are the  
20 same level of common, right?  
21 A. Well, it depends on who it is. My  
22 understanding is it depends on who it is that  
23 brought the claim itself.  
24 So if a debt holder brought  
25 something subordinate under 510(b), I

1  
2 think -- I'm not exactly how those last  
3 pieces work, but it goes whoever would have  
4 the actual priority there.  
5 Q. Okay. Assuming no 510(b) claims or  
6 whatever, preferreds are next, right?  
7 A. Right. Assuming there was a zero  
8 for preferreds, then preferred equity would  
9 be next.  
10 Q. Okay. So what assets will the  
11 liquidating trust have when it starts?  
12 A. It will likely have some amount of  
13 cash when it starts.  
14 We need to make a determination  
15 with respect to certain of the BOLI/COLI  
16 policies as to whether we monetize them on  
17 the effective date or hold them for a  
18 persistency bonus.  
19 There is an insurance trust  
20 associated with the wrap-up of the Marion  
21 Insurance Company which will have to wait for  
22 a period of time in order to liquidate.  
23 And then there will be an income  
24 tax receivable for the remaining amounts that  
25 haven't been received from the tax escrow or

1  
2 received from taxing authorities.  
3 Q. Okay.  
4 A. There are other smaller items, but  
5 those are the principal assets.  
6 Q. Okay, I got you.  
7 And then those will be distributed  
8 according to the waterfall, correct?  
9 A. That's right.  
10 Q. The liquidating trust will also  
11 have the claims against third parties that  
12 aren't released?  
13 A. I believe that's correct.  
14 Q. So all of the claims that aren't  
15 released will (inaudible), correct?  
16 A. That's my understanding.  
17 Q. The liquidating trust will have a  
18 trustee?  
19 A. Yes.  
20 Q. That's Mr. Kosturos?  
21 A. It is.  
22 Q. The liquidating trust will have a  
23 trust advisory board; is that right?  
24 A. That's right.  
25 Q. In that same notice that we

1  
2 discussed, you list the members of the trust  
3 advisory board.

4 A. (Perusing document). Sorry, I'm  
5 not that familiar with this notice. I'm sure  
6 you can find it.

7 Q. It's the second page.

8 A. Okay.

9 Q. Okay?

10 Go to the actual exhibits. One of  
11 them is Mr. Thomas Korsman, if I'm  
12 pronouncing that right. Is that right?

13 A. Right.

14 Q. Wells Fargo is the trustee for the  
15 PIERS; is that right?

16 A. That's correct.

17 Q. Okay. There is essentially a  
18 representative of the PIERS on the trust  
19 advisory board?

20 A. That's correct.

21 Q. Okay. The three members were  
22 jointly selected by the debtors, creditors  
23 committee and settlement note holders; is  
24 that right?

25 A. I believe that's how that happened.

1  
2 Q. What happens to the extent there  
3 are third-party claims that make it so that  
4 the liquidating trust has gone through the  
5 waterfall and preferreds start recovering?

6 A. What happens to the liquidating  
7 trust?

8 Q. Well, will they still -- is the  
9 intention still that these three members  
10 jointly selected by the debtors, creditors  
11 committee and settlement note holders would  
12 dictate the recovery going forward for  
13 preferreds and common equity?

14 A. You know, I'm not exactly sure what  
15 the mechanism is with respect to replacing  
16 the liquidating trust advisory board or how  
17 those mechanics would work. So I think it's  
18 laid out in the plan or the plan supplement  
19 as to how that -- how that would actually  
20 work.

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

25 A. I don't know exactly what the

1  
2 provisions are for replacing the liquidating  
3 trust advisory board.

4 Q. Okay. Did the board approve this  
5 proposed settlement?

6 A. So you're changing topics?

7 Q. Yes.

8 A. Did the board approve the global  
9 settlement agreement.

10 Q. Yes?

11 A. Yes.

12 Q. Did they rely on advice of counsel  
13 when they did so?

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

16 Q. What did WMI tell the board in  
17 order to approve the plan?

18 A. The conversation would have been in  
19 connection with counsel, so I think that  
20 would be a privileged conversation.

21 Q. So you're unable to tell me what  
22 conversation occurred with the board that  
23 justified there being a fair and reasonable  
24 settlement here; is that your testimony?

25 A. I guess I shouldn't have been

1  
2 speculating. I wasn't on the call in which  
3 the board actually approved the plan, so I  
4 don't know. I assume counsel was represented  
5 but I don't know what the conversation was.

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

10 MR. MASTANDO: Objection to the  
11 form. He's talking about when?

12 JUDGE WALRATH: Yes. And with  
13 whom?

14 MR. NELSON: Excuse me.

15 JUDGE WALRATH: And with whom.

16 MR. NELSON: Yeah. Well, I will  
17 rephrase.

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

23 MR. MASTANDO: Objection. I think  
24 the witness just answered he wasn't  
25 present.

1  
2 MR. SACKS: Lack of foundation.  
3 JUDGE WALRATH: Sustained.  
4 Q. You oversaw the preparation and  
5 review of the recovery analysis, I think you  
6 stated.  
7 A. I didn't refer to this as the  
8 liquidation analysis but this chart that  
9 you're referring to, yes.  
10 Q. You had an obligation to get things  
11 as nearly as correct as possible, I would  
12 assume; is that correct?  
13 A. That's correct.  
14 Q. There was an earlier recovery  
15 analysis as well, correct?  
16 A. Again, there's a different document  
17 that I referred to as the recovery analysis.  
18 This document is the liquidation analysis.  
19 Q. All right. In your binder, turn to  
20 Exhibit 39, please.  
21 This is the recovery analysis done  
22 on October 5th, 2010; is that right?  
23 A. That's right.  
24 Q. Did you participate in this?  
25 A. Sure.

1  
2 Q. This was the day before the  
3 disclosure statement was submitted to this  
4 court, correct?  
5 A. That's right.  
6 Q. Let's turn to page 4 of this  
7 document. Cash and cash equivalents is at  
8 the top; is that right?  
9 A. You're on page 5?  
10 Q. I believe it's the page marked 004.  
11 A. (Perusing document) (Inaudible).  
12 This is 39 in the binder?  
13 Q. Exhibit 39. And you see there's a  
14 Bates number at the bottom, sir, and it says  
15 00004.  
16 A. Sorry. There are page numbers as  
17 well on the pages that follow.  
18 Q. Oh, I'm sorry. Yeah.  
19 Are you with me?  
20 A. I am.  
21 Q. Okay. Now, it says cash and cash  
22 equivalents of \$4.58 billion; is that right?  
23 A. That's right.  
24 Q. Now going back to the liquidation  
25 analysis and the recovery analysis, there's a

1  
2 category for cash; is that right?  
3 A. That's right.  
4 Q. The category of cash, if you go to  
5 the note, states that cash is comprised of  
6 cash, including WMI share of tax refunds,  
7 restricted cash, WMI Investment Corp. and its  
8 subs, plus payments from JPMC for Visa and  
9 intercompany loans, proceeds related to the  
10 (inaudible) litigation, BOLI/COLI and rabbi  
11 trust assets; is that right?  
12 A. That's right.  
13 Q. Okay. Okay, this cash and cash  
14 equivalents is a part of the cash that's used  
15 to calculate the cash number; is that right?  
16 A. It is part of that number, yup.  
17 Q. Okay. And on page 4 you concluded  
18 that the net estimated recovery is 4.34; is  
19 that right?  
20 A. Right.  
21 Q. Okay. And it's slightly -- it's  
22 \$12 million or so off, but it's essentially  
23 the same what is we're talking about here.  
24 And you conclude at the bottom the gap is the  
25 residual negative 228 million, so we're 228

1  
2 in the hole, right?  
3 A. Right.  
4 Q. So you understand if we adjust back  
5 for the WMI reorganized WMI, on this it's  
6 listed at 145 million, we increase it and so  
7 another 12 and a half million dollars ahead,  
8 correct?  
9 A. Correct.  
10 Q. Okay. The other categories of  
11 assets are -- then that are part of your cash  
12 contribution on the liquidity and recovery  
13 analysis here are then broken down here  
14 (indicating); is that right?  
15 A. Right.  
16 Q. Okay. And so, and that's how we  
17 get the total; is that right?  
18 A. Right.  
19 Q. This category, all other assets,  
20 for \$62 million, is that included in the cash  
21 total?  
22 A. Certain components of all other  
23 assets would be -- would be included I  
24 believe.  
25 Q. Okay. What components?



1  
2 A. Principally there's cash in  
3 subsidiaries that -- so I guess to give you  
4 some context, to get from the cash number  
5 that's in the liquidation analysis to the  
6 cash number that's shown here, what we did  
7 for the purposes of the Chapter 11 plan is  
8 assuming what we would have available in cash  
9 at the effective date. So, for example,  
10 certain assets we anticipated monetizing,  
11 like BOLI/COLI policies, in anticipation of  
12 paying those out as of the effective date.

13 So there's actually a separate  
14 schedule that breaks down a buildup to get to  
15 that cash number. There's -- in all the  
16 other assets there's approximately 40 million  
17 of cash in subsidiaries that would be  
18 divided up prior to getting to the  
19 effective date and making an initial  
20 distribution, so that would also be included  
21 in the cash number.

22 Q. The cash and cash equivalents at  
23 the top comes from where, the monthly  
24 operating report?

25 A. Excluding the post-petition refund

1 JUDGE WALRATH: Thank you.

2 Q. And if I go to I believe it's  
3 page 3 of that document, the cash for WIC is  
4 the same but the cash for WMI is about  
5 \$250 million more; is that right?

6 A. Right. The cash that's listed in  
7 this schedule, it says cash excluding  
8 post-petition refunds. And the cash on the  
9 balance sheet would include post-petition  
10 refunds. On the monthly operating report the  
11 number includes post-petition refunds.

12 Q. Where on the balance sheet here --  
13 It says tax refunds and it's  
14 23 million in post-petition refunds; is that  
15 right?

16 A. That's correct.

17 Q. Okay. And --

18 A. Yeah, I think the name here where  
19 it says post-petition refunds includes the  
20 refunds that were received before the  
21 petition was filed.

22 Q. Then on your draft recovery  
23 analysis, page 4, there is a different  
24 category for post-petition refunds, right?  
25

1 component, yes.

2 Q. Okay. And if you go to page 6, I  
3 believe, of this document, the top line if  
4 you can see states that --

5 I'll try to zoom in. Oops.

6 A. Sure.

7 Q. -- that the cash and cash  
8 equivalents is 4.3 for WMI, 275 for WIC with  
9 a combined 4.81, and that's where the number  
10 on page 4 came from.

11 A. Right, that 4.58 one, correct.

12 Q. Okay. Now, this is the balance  
13 sheet as of June 30th, 2010.

14 A. Um-hm.

15 Q. Right?

16 A. That's right.

17 Q. If you go to the monthly operating  
18 report, which is Exhibit 40 in the binder.

19 JUDGE WALRATH: For which month?

20 MR. NELSON: Exhibit 40. I believe  
21 its in the second binder, your Honor.

22 JUDGE WALRATH: For which month?

23 MR. NELSON: It's the June 30th  
24 monthly operating report.  
25

1 A. Right. That's our share of the  
2 post-petition tax refunds.

3 Q. Okay.

4 A. So that number represents --

5 Q. (Speaking simultaneously) --

6 MR. MASTANDO: Let the witness  
7 finish, please.

8 MR. NELSON: I'm just trying to  
9 figure this out.

10 Q. I thought you told me that on  
11 page 6, that this is a balance sheet. The  
12 4.308 is also included in the post-petition  
13 tax refund, right?

14 A. That's right.

15 Q. Okay. And so we'd have to then  
16 subtract -- what about -- is that \$23 million  
17 to --

18 A. Actually, if you go back to page 6.

19 Q. Sure.

20 A. You can see that the post-petition  
21 tax refund number is this for 250 million.  
22 And what you see on the other pages, the  
23 20 percent of that number, that's WMI's share  
24 for 50 million.  
25

1  
2 Q. Okay, where are you looking?  
3 A. So right underneath the 4.306, cash  
4 and cash equivalents excluding post-petition  
5 refunds, and you see it says post-petition  
6 fax refunds 250 million.  
7 Q. I see. And so based upon the  
8 number here, this includes post-petition tax  
9 refunds?  
10 A. That's right.  
11 Q. Ah. Okay, I got you.  
12 So, in other words, when the asset  
13 is distributed or -when it's distributed,  
14 only something like, what, your share of the  
15 first settlements of tax refunds will be  
16 included?  
17 A. Right. The 250 is included in the  
18 first set of tax refunds and WMI gets  
19 20 percent of that, which corresponds to the  
20 50 million.  
21 Q. Okay. And just to be clear, I'm  
22 changing subjects a little bit.  
23 With respect to your own analysis  
24 and the analysis that you've done on the  
25 assets that you're testifying about, all of

1  
2 those analyses were done with the advice of  
3 counsel, correct?  
4 MR. MASTANDO: Objection, your  
5 Honor. Mischaracterizes the testimony  
6 and asked and answered.  
7 JUDGE WALRATH: Sustained.  
8 MR. NELSON: Okay. No further  
9 questions.  
10 EXAMINATION BY  
11 MR. STOLL:  
12 Q. Good morning, Mr. Goulding. My  
13 name is Jim Stoll and I represent the Trust  
14 Preferred Security holders. I have a few  
15 questions to follow up on Mr. Nelson's  
16 questions.  
17 Now, I was a little, frankly,  
18 confused by some of your testimony so I want  
19 to start if can back at the beginning, which  
20 I define as your declaration that you've  
21 submitted. And your declaration constitutes  
22 your direct testimony in this case; is that  
23 fair, sir?  
24 A. Yeah.  
25 Q. In that direct testimony, as I

1  
2 understand it, you have articulated or  
3 described a series of claims that are subject  
4 to the global settlement agreement and have  
5 expressed your view as to the fairness and  
6 reasonableness of those claims; is that fair?  
7 A. Yeah. In the context of overall  
8 agreement I expressed that view, yes.  
9 Q. Okay. And just to make sure I can,  
10 I guess, carry your declaration up as that of  
11 Mr. Kosturos, you're discussing claims that  
12 Mr. Kosturos did not discuss in his  
13 declaration; is that right?  
14 A. I think that's fair.  
15 Q. And am I right that you discussed  
16 all other claims in the settlement of the  
17 claim that Mr. Kosturos discussed other than  
18 the tax claim?  
19 MR. MASTANDO: Objection.  
20 JUDGE WALRATH: Overruled.  
21 A. What do you mean by the tax claim?  
22 Q. Mr. Perrera --  
23 A. I'm sorry. Mr. Carreon will be  
24 discussing various tax issues.  
25 Q. I'm sorry. That what's I meant.

1  
2 The distribution and resolution of the tax  
3 issues is Mr. -- is it --  
4 A. Carreon.  
5 Q. That's the subject of his  
6 declaration, not yours; is that fair?  
7 A. Yes.  
8 Q. Okay. Now, despite testimony that  
9 I heard with respect to Mr. Nelson's cross,  
10 it is the case that your declaration is  
11 submitted on the premise that you are not  
12 relying in any way on the advice of counsel,  
13 is that fair?  
14 MR. MASTANDO: Objection. I think  
15 it mischaracterizing the testimony.  
16 JUDGE WALRATH: Well, let him  
17 answer.  
18 Overruled.  
19 A. We're submitting the declaration  
20 with information that's not privileged.  
21 Q. That's right.  
22 So it's as if when I look at the  
23 declaration, the statements that you make are  
24 made without regard to anything that counsel  
25 may have told you.

1  
 2 A. Right. We talked about the  
 3 insertions in there and the like.  
 4 Q. So it's as if -- with respect to  
 5 looking at your declaration and reading the  
 6 statements and conclusions, it is as if you  
 7 never spoke to counsel; is that fair?  
 8 MR. MASTANDO: Object to the form,  
 9 your Honor.  
 10 JUDGE WALRATH: Overruled.  
 11 A. I guess you could characterize it  
 12 that way.  
 13 Q. Sure.  
 14 Now, I thought I heard you say when  
 15 Mr. Nelson was going over these questions and  
 16 asking you specifically about certain claims,  
 17 say that "Well, I did talk to counsel but  
 18 somebody could read this, the pleadings, and  
 19 come to the conclusion as if they didn't talk  
 20 to counsel"; is that fair?  
 21 A. That's right.  
 22 Q. Okay. And so that somebody I would  
 23 take it could mean anybody? Anybody could  
 24 sit down in the room with all the pleadings  
 25 and read those pleadings and determine that

1  
 2 the settlement was fair and reasonable; is  
 3 that right?  
 4 MR. MASTANDO: Objection. Calls  
 5 for speculation.  
 6 JUDGE WALRATH: Overruled.  
 7 A. Sure. I mean, somebody who had  
 8 enough knowledge. I don't know that any  
 9 individual could do it, but certainly a  
 10 person who was competent in financial matters  
 11 and the like probably could come to a  
 12 conclusion.  
 13 Q. Sure. You certainly don't need to  
 14 be a lawyer to do that, right?  
 15 A. No. I think you can look at the  
 16 arguments that are asserted. I think you can  
 17 at what's out there and make a conclusion.  
 18 Q. Right. You're not a lawyer?  
 19 A. I'm not.  
 20 Q. You didn't need to be a lawyer to  
 21 look at those pleadings and determine that  
 22 the settlement was fair and reasonable,  
 23 right?  
 24 A. I think you can look at what's laid  
 25 out in the settlement in terms of strength

1  
 2 and weaknesses.  
 3 Q. So anybody could do that, but  
 4 that's not what you did, is it, sir?  
 5 A. Well, we thought it would be  
 6 prudent to involve counsel in the  
 7 conversation to make sure we understood all  
 8 the legal issues.  
 9 Q. Sure. I mean, you paid counsel  
 10 over \$30 million in this case. I'm hoping  
 11 that you did that. And you did do that.  
 12 MR. MASTANDO: Objection, your  
 13 Honor.  
 14 JUDGE WALRATH: Sustained.  
 15 Argumentative.  
 16 Q. But when you actually sat in the  
 17 room before this trial and you sat down to  
 18 figure out this is a fair and reasonable  
 19 settlement, you did it talking to your  
 20 lawyers; is that right, sir?  
 21 A. Well, I didn't sit in preparation  
 22 for this to do that. In the context of the  
 23 case, we certainly looked at the fairness and  
 24 reasonableness of the settlement. We did do  
 25 it in connection with attorneys but I don't

1  
 2 think it's necessary to do it in connection  
 3 with attorneys.  
 4 Q. Right. And you want the court to  
 5 pretend when they -- when the court reads  
 6 your declaration that you never talked with  
 7 counsel; is that right, sir?  
 8 MR. MASTANDO: Object to the form,  
 9 your Honor.  
 10 JUDGE WALRATH: Overruled.  
 11 MR. MASTANDO: Object to the  
 12 characterization of the testimony.  
 13 JUDGE WALRATH: Overruled.  
 14 A. I don't think we're putting any  
 15 privileged information into the declaration.  
 16 Q. Okay, thank you, sir.  
 17 Now, sir, I'm going to shift gears  
 18 a little bit here. I'd like to talk with you  
 19 about your liquidation analysis.  
 20 MR. STOLL: And, your Honor, I'd  
 21 like to hand up -- I think there will be  
 22 five or six exhibits all at once.  
 23 They're all debtors' exhibits. And just  
 24 give me a moment to compile them and  
 25 I'll hand them out. Is that all right,

1 your Honor?

2 JUDGE WALRATH: That's fine.

3 Would the parties on the phone mute  
4 their lines?

5 A VOICE: May I approach, your  
6 Honor?

7 JUDGE WALRATH: Yes.

8 We're up to TPS 4; is that right?

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

14 First of all, there will be a copy  
15 of a liquidation analysis in the report  
16 already, I believe Debtors' Exhibit 5C.  
17 It will be the full copy of the exhibit,  
18 but ultimately it will be the page that  
19 you see on the board.

20 I'm also going to hand to the  
21 witness what I believe is has marked on  
22 the debtors' exhibit list as Exhibit 4,  
23 which is the Second Modification of  
24 Sixth Amended Joint Plan of Affiliated  
25

1 I'm going to ask you a series of  
2 questions regarding the liquidation analysis,  
3 sir, which is Debtor's Exhibit 5C, and if you  
4 could turn to the third page.

5 Before I ask you a question about  
6 the liquidation analysis, sir, how long have  
7 you been with Alvarez?

8 A. Since 2002.

9 Q. Eight years, right?

10 A. Yup.

11 Q. And I take it doing restructuring  
12 work in the Bankruptcy Court is what you do?

13 A. I'm a restructuring person for A&M.

14 Q. And is this the first analysis  
15 you've done?

16 A. No.

17 Q. How many have you done?

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

20 Q. Now, you're aware that the purpose  
21 of a liquidation analysis, at least in part,  
22 is to satisfy the best interests of creditors  
23 test in the Bankruptcy Code?

24 A. Yes.  
25

1 Debtors.

2 I'm going to be handing to the  
3 witness what has been marked on debtors'  
4 exhibit list as Exhibit 2, which is a  
5 Sixth Amended Plan.

6 And then I have two samples of the  
7 ballots that are used in this particular  
8 case. I don't believe the sample  
9 ballots are marked, but I do believe  
10 that the ballots are otherwise in  
11 records to the extent that they've  
12 actually been voted and they appear as  
13 Debtors' Exhibit 148.

14 JUDGE WALRATH: All right. Well,  
15 all of those are I guess part of the  
16 record already or identified as  
17 exhibits, so I'm not going to mark them  
18 at TPS exhibits.

19 MR. STOLL: May I approach the  
20 bench, your Honor?

21 JUDGE WALRATH: You may.

22 MR. STOLL: (Handing.)

23 Q. Okay, sir. Thank you for bearing  
24 with me while I got organized there.  
25

1 Q. And the purpose of that test is to  
2 establish that the recoveries that each and  
3 every creditor would get or could get under  
4 the plan is better than what they would do in  
5 a liquidation?

6 A. Sure. I mean, for unimpaired I  
7 think it's at least as good if not better for  
8 those that are.

9 Q. Okay. And as part of that analysis  
10 you have to value all the claims that  
11 creditors possess that they will otherwise be  
12 having discharged as a result of the plan; is  
13 that right?

14 A. I'm not sure I follow you.

15 Q. Sure.

16 Well, in order to understand if a  
17 creditor is doing as well under the plan as  
18 they were doing in liquidation, you have to  
19 look at all the rights that a creditor has  
20 that are being compromised by the plan; is  
21 that fair?

22 MR. MASTANDO: Objection to the  
23 form and calls for a legal conclusion.

24 JUDGE WALRATH: Sustained.  
25

1  
2 Q. Do you understand all of the types  
3 of claims that you are supposed to value in  
4 coming up with a liquidation analysis?  
5 A. I guess.  
6 MR. MASTANDO: Same objection, your  
7 Honor.  
8 JUDGE WALRATH: Overruled.  
9 A. I guess I understand most of the  
10 differences between Chapter 11 and a  
11 Chapter 7, but I don't know if I would  
12 understand every one of them.  
13 Q. Okay. Well, let me ask it this  
14 way. Do you understand that if a creditor is  
15 being compelled to give up a claim against a  
16 third party non-debtor as part of a plan,  
17 that you have to value that claim for the  
18 purposes of determining whether the creditor  
19 is doing better under the plan or would do  
20 better under liquidation?  
21 MR. MASTANDO: Objection to the  
22 form and calls for a legal conclusion.  
23 JUDGE WALRATH: Overruled.  
24 A. I guess I would understand that.  
25 Q. Okay. Now, in no place in your

1  
2 liquidation analysis have you provided any  
3 valuation for the claims that creditors are  
4 being compelled to give up against third  
5 parties, have you?  
6 A. No.  
7 Q. But creditors are being compelled  
8 to give up claims against third parties, are  
9 they not?  
10 A. I'm not as familiar with the  
11 release section of the plan, so I understand  
12 that there are certain releases being  
13 granted.  
14 Q. Sure. I mean there's releases and  
15 there's other provisions in the plan that  
16 compel third parties to give up -- that  
17 compel creditors to give up claims against  
18 third parties. You understand that, right?  
19 MR. MASTANDO: Objection to the  
20 form. Asked and answered and calls for  
21 a legal conclusion.  
22 JUDGE WALRATH: Overruled.  
23 A. Yeah, I understand that there are  
24 certain release provisions in (inaudible).  
25 Q. I mean, you'd have to know that in

1  
2 order to be able to discharge your  
3 responsibility to prepare the liquidation  
4 plan, correct?  
5 A. Correct.  
6 Q. Okay. Now, I want you to look at  
7 what's been marked as Debtor's Exhibit 4,  
8 which is the second modification of the Sixth  
9 Amended Plan filed on November 24, 2010. Are  
10 you with me, sir?  
11 A. Just a second. (Perusing  
12 document). Yup.  
13 Q. I'm going to try to walk through  
14 some of the release language to make sure I  
15 understand what claims are being compelled to  
16 be released by creditors that you've not  
17 valued. And this may get a little tedious,  
18 sir. So if I put you to sleep, you can ask  
19 me for a red bull or something like that and  
20 I'd be happy to wake you up.  
21 A. Okay.  
22 Q. But the provision that we should be  
23 looking at is on page 3 of Exhibit 4, I  
24 believe. That is identified as Exhibit --  
25 or, excuse me, Section number 7. And if at

1  
2 the same time, sir --  
3 JUDGE WALRATH: Excuse me. This is  
4 Debtor's Exhibit 2?  
5 MR. STOLL: Debtors' Exhibit 4.  
6 JUDGE WALRATH: Okay, go ahead.  
7 MR. STOLL: Thank you, your Honor.  
8 JUDGE WALRATH: I have it.  
9 Q. And at the same time, sir, if you  
10 could open up Debtors' Exhibit 2, which is  
11 the actual full text plan, Sixth Amended  
12 Plan, to page 86 so we have the two  
13 paragraphs of release language that we can  
14 talk about together. And just tell me when  
15 you get there, sir.  
16 A. Okay.  
17 MR. MASTANDO: Your Honor, I'll  
18 just object and note the witness was not  
19 designated on this topic and there has  
20 been, you know, no foundation for his  
21 knowledge is no reason for his knowledge  
22 or privileges.  
23 JUDGE WALRATH: All right, so  
24 acknowledged. Go ahead.  
25 MR. STOLL: Thank you, your Honor.

1  
2 Q. Now, sir, if you would look at  
3 Section 7 of Exhibit 4 on page 3, the  
4 preamble of that section says that  
5 Section 43.6 of the plan is hereby amended by  
6 deleting the provisions in their entirety and  
7 replacing them with what is Exhibit 4. Is  
8 that fair?

9 A. Yeah, that's what it says.

10 Q. Okay. And Exhibit 4, Section 43.6  
11 is now the release language that tells us  
12 whether a party is being compelled to release  
13 their claims -- a creditor a being compelled  
14 to release their claims against non-debtor  
15 third parties, correct?

16 MR. MASTANDO: Objection. Calls  
17 for a legal conclusion.

18 JUDGE WALRATH: Sustained.

19 Q. Did you look at Exhibit 4,  
20 specifically the revised language, 43.6, to  
21 determine what claims third-party creditors  
22 were being compelled to give up against --  
23 excuse me, what claims creditors were being  
24 compelled to give up against non-debtor third  
25 parties when you did your liquidation

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

7 A. No, we didn't.

8 Q. Did not.

9 A. We did not.

10 MR. STOLL: Your Honor, that's all  
11 I have for this witness.

12 JUDGE WALRATH: Okay.

13 CROSS-EXAMINATION

14 BY MR. STEINBERG:

15 Q. Good morning, Mr. Goulding. I'm  
16 Arthur Steinberg from King & Spalding and I  
17 represent the Dime warrant holders. I have a  
18 few questions to ask you with regard to your  
19 declaration, and I'd like to first turn to  
20 the topic of the global settlement.

21 I asked Mr. Kosturos yesterday a  
22 bunch of questions and he was not able to  
23 answer me, answer to me the response for  
24 these question. So I'm going to ask the same  
25 to you with regard to the global settlements,

1 analysis?

2 MR. MASTANDO: Objection to the  
3 form.

4 JUDGE WALRATH: Overruled.

5 A. As we discussed, I didn't -- this  
6 modification was subsequent to the one we  
7 filed but we didn't file releases for the  
8 purpose of liquidation analysis.

9 Q. Did you perform your liquidation  
10 analysis before or after Exhibit 4 was filed  
11 on November 24, 2010?

12 A. They would have been before.

13 Q. Now, were you told by anyone not to  
14 value told by anyone not to value third --  
15 private claims that were being released  
16 against third parties?

17 A. No.

18 Q. Did you consider at all the claims  
19 of creditors that were being compelled to be  
20 released against third parties?

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

1 some particular aspects of that.

2 The first is the global settlement  
3 provides for a Section 363 sale and transfer  
4 of assets to JPMorgan retroactive to two  
5 years back to 2008. Why is this sale being  
6 retroactive for two years?

7 A. My understanding it's then  
8 corresponding with the time of the P&A so  
9 assets would transfer with the P&A.

10 Q. But did the debtor make the request  
11 to make a sale to be approved by the court  
12 retroactive two years from bankruptcy filing  
13 date?

14 A. I don't know who made the request.

15 Q. And what's the purpose of doing a  
16 sale now pursuant to plan and making it  
17 retroactive for two years?

18 A. I just think it was done as a  
19 mechanism to transfer the assets to the  
20 respective parties.

21 Q. I don't understand that. Why  
22 couldn't it be done as a mechanism to  
23 transfer it as of the current date? In my  
24 experience, this is the normal way things are  
25

1 done.  
 2  
 3 MR. MASTANDO: Objection to  
 4 (Speaking simultaneously).  
 5 JUDGE WALRATH: Sustained. No  
 6 testifying.  
 7 MR. STEINBERG: All right.  
 8 Q. Why?  
 9 A. I'm sorry. Why what?  
 10 MR. MASTANDO: Same objection.  
 11 JUDGE WALRATH: Overruled.  
 12 Q. Why didn't you do it under the  
 13 current date?  
 14 A. I wasn't involved in the discussion  
 15 with respect to that issue.  
 16 Q. All right. Now, I asked  
 17 Mr. Kosturos and he told me that there was  
 18 more than a half a billion dollars of  
 19 liabilities that Washington Mutual, Inc. has  
 20 that are being transferred to JPMorgan as  
 21 part of the global settlement, and I asked  
 22 him how it was decided which liabilities  
 23 would get transferred, assumed by JPMorgan,  
 24 and which ones would stay behind with  
 25 Washington Mutual and he didn't know the

1 answer. Do you know the answer?  
 2  
 3 MR. MASTRANDO: Objection. Object  
 4 to the form and mischaracterization of  
 5 the testimony.  
 6 JUDGE WALRATH: Yeah, let's not  
 7 talk about others. Tell me, just ask  
 8 the question.  
 9 Q. Do you know how liabilities were  
 10 decided to be assumed under the global  
 11 settlement?  
 12 A. It would depend specifically with  
 13 respect to each of the liabilities that  
 14 you're discussing.  
 15 So, for example, with respect to  
 16 different compensation liabilities in the  
 17 context of discussing the settlement  
 18 agreement we felt that it was fair and  
 19 reasonable to the extent an asset went to one  
 20 party the corresponding compensation  
 21 liabilities would go regardless of who might  
 22 be the sponsor of those plans.  
 23 So it's a sort of a case-by-case  
 24 basis. It would depend greatly on which  
 25 liabilities specifically you're talking

1 about.  
 2  
 3 Q. So with respect for at least some  
 4 of the liabilities that were transferred, the  
 5 debtor advocated for Washington Mutual, Inc.  
 6 to be relieved of that obligation and for  
 7 JPMorgan to assume that obligation?  
 8 A. It was certainly important for us  
 9 to have certain liabilities be transferred,  
 10 sure.  
 11 Q. So you were an advocate in a  
 12 certain sense at least in selecting which  
 13 liabilities should be assumed by JPMorgan,  
 14 and that was the subject matter at the  
 15 negotiating table of the global settlement;  
 16 isn't that correct?  
 17 MR. MASTANDO: Objection to the  
 18 form.  
 19 JUDGE WALRATH: Overruled.  
 20 A. Sure. There are lots of  
 21 discussions about transferring different  
 22 liabilities and negotiating different items.  
 23 Q. And were you involved personally in  
 24 these discussions?  
 25 A. I was involved in some but not all.

1  
 2 Q. Okay. Were you involved -- was  
 3 there a criterion that was used that if an  
 4 asset was actually being transferred to  
 5 JPMorgan, that the liabilities associated  
 6 with that asset should also be transferred?  
 7 A. Not globally no.  
 8 Q. Okay. So in which circumstances  
 9 was an asset transferred to JPMorgan where  
 10 the associated liabilities were not?  
 11 A. It would be difficult for me to go  
 12 through each and every one of the items of  
 13 the settlement agreement in order to  
 14 determine which ones might have had assets  
 15 going in one direction and liabilities going  
 16 in another.  
 17 Q. Does any come to mind at all?  
 18 A. Do any come to mind where the  
 19 assets --  
 20 Q. Where the assets went to JPMorgan  
 21 and the liabilities stayed behind associated  
 22 with that asset.  
 23 A. I'm not sure if I can recall any at  
 24 the moment.  
 25 Q. How about the Dime warrant and the

1  
2 litigation tracking warrants? Were you  
3 involved in those discussions as to whether  
4 JPMorgan should take on the litigation  
5 tracking warrant liability that was  
6 associated with the Anchor litigation which  
7 was being transferred to JPMorgan?

8 A. I was involved in the discussion  
9 with respect to the splits on the awards on  
10 the goodwill litigations.

11 Q. Right.

12 Were you involved in asking  
13 JPMorgan to take on the associated liability  
14 with regard to the Anchor litigation?

15 A. I think that the liability, to the  
16 extent that it exists, was under the amended  
17 and restated warrant agreement and ran to  
18 WMI. I think we -- I don't recall having a  
19 discussion about that topic with people from  
20 JPMorgan.

21 Q. Do you know that -- are you  
22 familiar with the language in the global  
23 settlement agreement that the Anchor  
24 litigation is going to be transferred free  
25 and clear of any liability relating to

1  
2 agreement and looking at the arguments that  
3 each raised, that's where it fell out.

4 Q. Okay, I'd like you to turn to your  
5 declaration. I want to ask you a couple  
6 questions specifically.

7 On page 42, which is paragraph 97,  
8 which is where you're talking about the  
9 Anchor Savings litigation --

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

12 Q. All right. Well, I'll just read it  
13 to you.

14 JUDGE WALRATH: Do you need a  
15 paragraph number?

16 Q. Paragraph 97, top of page 42. I'll  
17 read you up to the point that I want you to  
18 comment on.

19 "Ultimately on March 14, 2008 the  
20 United States Court of Federal Claims entered  
21 a judgment against the United States in the  
22 amount of approximately 382 million (together  
23 with any and all additional future proceeds  
24 and recoveries from the Anchor Savings  
25 litigation)" which you define then as the

1  
2 litigation tracking warrants?

3 A. That's a vague document. I'm not  
4 sure I know all the language in there.

5 Q. Do you recall the discussion about  
6 how that language got inserted into the  
7 agreement?

8 A. No. I wasn't involved in the  
9 drafting of the settlement agreement.

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

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

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

22 MR. MASTANDO: Objection to the  
23 form. Calls for speculation.

24 JUDGE WALRATH: Overruled.

25 A. In the context of the settlement

1  
2 Anchor Savings (inaudible) proceeds. "This  
3 decision held that Anchor Savings Bank was  
4 entitled to recover lost profits and other  
5 damages in the amount of approximately  
6 382 million plus an undetermined amount for a  
7 gross-up of tax liabilities. This decision  
8 ruled that certain portions of a recovery  
9 will be grossed up to pay for the taxes  
10 associated therewith." My questions relate  
11 to the gross-up?

12 MR. MASTANDO: Your Honor, may I  
13 approach and give the witness a copy of  
14 the declaration?

15 JUDGE WALRATH: You may.

16 MR. MASTANDO: (Handing.)

17 A. Go ahead.

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

19 A. Well, I think it's still to be  
20 determined with respect to what the amount of  
21 the gross-up is, but my understanding from  
22 the two items that are included in what the  
23 anticipated gross-up is and the motion that's  
24 filed from JPMorgan that the gross-up would  
25 be something like 144 million.



1  
 2 Q. Okay. So when the debtor filed its  
 3 estimation motion for establishing a cash  
 4 reserve for the litigation tracking warrants,  
 5 it said that the amount would be  
 6 \$250 million. Were you involved in the  
 7 calculation of that amount?  
 8 A. Yes, I was.  
 9 Q. All right. And you remember that  
 10 the disclosure statement originally had a  
 11 small number, like \$184 million; is that  
 12 correct?  
 13 A. That's correct.  
 14 Q. You said the debtor voluntarily  
 15 changed it from 184 million to 250 million.  
 16 Was it because they forgot about the  
 17 gross-up?  
 18 A. Actually, there was a difficulty  
 19 initially determining whether or not there  
 20 had been any award with respect to a gross-up  
 21 and then the actual amount of the  
 22 calculation. So subsequently we were able to  
 23 go back and take a further look at that.  
 24 Q. Okay. But the difference in  
 25 numbers is because you hadn't factored in the

1  
 2 gross-up amount, correct?  
 3 A. That's correct.  
 4 Well, sorry. There are other  
 5 factors that changed the number from roughly  
 6 184 to 250.  
 7 Q. What were the other factors that  
 8 would increase the number of gross-up?  
 9 A. What were increasing the number --  
 10 Q. -- besides the gross-up.  
 11 A. There aren't any other factors  
 12 increasing the number. There are other  
 13 factors decreasing the number.  
 14 Q. But the number went up on a raw  
 15 basis from 184 to the debtors' calculation of  
 16 250, right?  
 17 A. That's correct.  
 18 Q. Break it down. What were the  
 19 factors that increased the number and what  
 20 were the decreased so it landed at the 250?  
 21 A. We added 144 million into the  
 22 calculation based on the tax gross-up, and  
 23 then we were able to fine-tune our estimate  
 24 of the expenses and fees associated with the  
 25 Dime warrants that are deductions to the

1  
 2 calculation. And so we added some additional  
 3 numbers to that.  
 4 Q. And how much was that reduction for  
 5 the added expenses that you did your further  
 6 refinement?  
 7 A. That's difficult for me to recall  
 8 exactly but I would say something like 10 to  
 9 20 million.  
 10 Q. You left out 10 to 20 million  
 11 dollars the first time you did the  
 12 calculation?  
 13 A. We didn't have access to the  
 14 information at the time.  
 15 Q. Where did you get the information  
 16 to ultimately get a better number?  
 17 A. We had to go back to the counsel  
 18 and those folks involved in the original  
 19 draft of the Dime warrants to understand  
 20 those expenses.  
 21 Q. Did you talk Sullivan & Cromwell?  
 22 A. I believe there were conversations  
 23 with some folks from Sullivan & Cromwell.  
 24 Q. Jones Day, the counsel for the  
 25 Anchor litigation, to try to get an updated

1  
 2 litigation number?  
 3 A. Sure.  
 4 Q. And you think that number was a 10  
 5 to 20 million dollar number?  
 6 A. I think that we had to revise the  
 7 number for (inaudible) expenses by that  
 8 amount.  
 9 Q. But the gross-up number you used  
 10 was the \$144 million number that was in the  
 11 JPMorgan pleading, right?  
 12 A. That's right.  
 13 Q. So what was the tax rate that  
 14 JPMorgan used in their gross-up pleading that  
 15 was the basis of their \$140 million number?  
 16 MR. MASTANDO: Object to the form  
 17 and the capacity of the witness.  
 18 JUDGE WALRATH: Overruled.  
 19 Can you answer?  
 20 A. I don't recall exactly but  
 21 something like 38.7 or thereabouts.  
 22 Q. 38.7 percent is very good!  
 23 And what was the --  
 24 (Laughter.)  
 25 Q. What was the amount that the debtor

1  
2 used in its \$184 million calculation as to  
3 what the appropriate tax rate will be when  
4 this award is issued?

5 A. I'm not sure I follow your  
6 question.

7 Q. Doesn't the debtor use a 45.5  
8 percent rate when it calculates what the  
9 effective taxes are in connection with this  
10 award?

11 A. Actually the calculation that  
12 you're referring to is a deduction pursuant  
13 to the amended and restated warrant agreement  
14 that sets forth that the calculation will be  
15 based on the highest federal state -- the  
16 highest federal income tax rate, state tax  
17 state rate and city tax rate in the state of  
18 New York, and it sets forth that rate. So  
19 based on those rates as prescribed in the  
20 amended and restated warrant agreement, it's  
21 45 and a half percent.

22 Q. But the rate fluctuates each year,  
23 right?

24 A. Sure. It could go up and down. It  
25 depends when the judgment is awarded.

1  
2 Q. And didn't JPMorgan file its  
3 pleading and say that "I'm going to be taxed  
4 at the highest rate for both federal, state  
5 and local and therefore I can calculate that  
6 amount now and my amount is 38.7 percent"?

7 MR. MASTRANDO: Objection to the  
8 form, your Honor. Mischaracterization  
9 of the --

10 JUDGE WALRATH: Overruled.  
11 Is that what JPMorgan said?

12 A. My understanding is it's JPMorgan's  
13 effective tax rate but that's not what's  
14 prescribed in the amended and restated  
15 warrant agreement.

16 Q. They don't pay local taxes?

17 A. I don't know how they derived their  
18 38.7 number. I know how to derive the 45.5  
19 percent number.

20 Q. If JPMorgan had used a 45.5 percent  
21 number, would that affect the gross-up  
22 number?

23 A. Sure.

24 Q. And it would increase it pretty  
25 substantially, right?

1  
2 A. Sure.

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

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

10 I don't know. I don't know what  
11 those two numbers are in the breakdown of the  
12 (Speaking simultaneously).

13 Q. I won't ask you to do the math off  
14 the top of your head. I know it's a  
15 difficult calculation.

16 In your declaration on page -- on  
17 paragraph 100, paragraph 40 -- page 43,  
18 paragraph 100, you describe what the Anchor  
19 litigation proceeds are and you say that it's  
20 356 million plus 63 million, right?

21 A. It's okay.

22 Q. That's a mistake, isn't it? Didn't  
23 you leave out the gross-up here? Isn't the  
24 number at least \$144 million more than this?

25 A. I guess for the purposes of this we

1  
2 had left out the gross-up number.

3 Q. So it's a mistake of that  
4 magnitude. And if I'm right about the  
5 difference in the percentage of interest  
6 rates, the tax rates and you should use a  
7 different amount for the tax rate, the  
8 number's even bigger than \$144 million; is  
9 that correct?

10 A. I'm not sure I want to speculate on  
11 whether or not you're correct on changes in  
12 the tax rate.

13 Q. Just assume I'm correct. It would  
14 be a bigger number?

15 MR. MASTANDO: Objection to the  
16 form, your Honor.

17 JUDGE WALRATH: Overruled.

18 A. Correct.

19 Q. So when you negotiated with  
20 JPMorgan over this split of the assets, did  
21 you forget about the gross-up then, too, the  
22 144 million plus of value that is not  
23 reflected in the declaration?

24 A. I think we knew there was a  
25 potential for a gross-up, but the motion that

1  
2 was filed by JPMorgan with respect to the  
3 effective tax rate that they included was  
4 filed post-settlement.

5 Q. It was filed in the summer of this  
6 year, right?

7 A. That's right.

8 Q. But when you filed your declaration  
9 you also knew about the gross-up and that  
10 number should have been in here, right?

11 A. Yeah. I think there's a reference  
12 in the prior section. This is just intended  
13 to be a summary. There's a reference to the  
14 gross-up.

15 Q. But it's a summary of numbers where  
16 you left out a \$144 million plus number,  
17 right?

18 A. It should have been included, yeah.

19 Q. Okay, all right. Let's stay with  
20 your declaration.

21 Look at page 42, footnote 38. This  
22 was the footnote that I couldn't remember  
23 when I was talking to Mr. Kosturos.

24 Can you tell me, is -- the impact  
25 of that statement is that the lawyer in the

1  
2 Anchor litigation on September 22, 2008,  
3 filed a pleading saying that the real party  
4 in interest in the Anchor litigation was  
5 Washington Mutual, Inc. as contrasted to  
6 Washington Mutual Bank.

7 A. Right.

8 Q. And you put that in your  
9 declaration to indicate that that was one of  
10 the arguments that you have as to why this is  
11 a disputed asset and why you believe it  
12 belonged to the Washington Mutual, Inc.  
13 estate as opposed to Washington Mutual Bank;  
14 isn't that right?

15 A. Right. We were trying to set forth  
16 a (inaudible) statement of that.

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

20 A. (No response.)

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

1  
2 A. I reviewed certain sections of the  
3 amended and restated warrant agreement for  
4 purposes of performing a calculation, but I  
5 haven't reviewed it in its entirety and  
6 wouldn't know.

7 Q. As you sit here today do you recall  
8 anything in the amended warrant agreement  
9 that would give you comfort that this asset  
10 was really owned by Washington Mutual, Inc.  
11 instead of Washington Mutual Bank?

12 A. Well, it's executed by Washington  
13 Mutual, Inc.

14 Q. Okay.

15 A. Maybe that would be helpful.

16 Q. Other than that? Other than the  
17 signature line?

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

21 Q. Okay. But the debtors took this  
22 position also in the JPMorgan adversary  
23 proceeding, that it was the owner of the  
24 Anchor litigation, correct?

25 A. That's correct.

1  
2 Q. And even the creditors committee  
3 joined in and said that Washington Mutual,  
4 Inc. is the owner of that asset, right?

5 A. No.

6 Q. So they must have seen something in  
7 the amended warrant agreement that neither  
8 one of us can recollect right now that must  
9 have given them a basis for saying that?

10 MR. MASTANDO: Objection to the.

11 JUDGE WALRATH: Same. Save it for  
12 argument.

13 MR. STEINBERG: Okay. Just want to  
14 make sure people are listening.  
15 (Laughter.)

16 MR. MASTANDO: We are, I assure  
17 you.

18 Q. Okay. So let's talk about -- you  
19 used the word in describing your overall  
20 assessment of the global settlement, I have  
21 to confess that I went to the dictionary  
22 because I never saw it used this way, and  
23 it's in paragraph 127 on page 54.

24 And you say, "I believe that taking  
25 a holistic view of the global settlement

1  
2 agreement and the various facts, issues  
3 claims and defenses and including the risks  
4 and uncertainties" and then it goes on saying  
5 that why you believe the settlement is fair  
6 and reasonable. But I was struck by the word  
7 "holistic" used in that way.

8 Did you mean to say that you looked  
9 at it from almost like a macro view from the  
10 totality of what the estate was getting and  
11 what was giving up and it fit within your  
12 range of what you thought was fair and  
13 reasonable?

14 MR. MASTANDO: Your Honor, I'd just  
15 like to object to the fortunately and  
16 note counsel's testifying again.

17 JUDGE WALRATH: Overruled.

18 A. Yeah, we were looking at it in the  
19 context of the overall agreement. That's  
20 what I intended.

21 Q. Right. And if one component was a  
22 little shy, you made up for it with another  
23 component; is that right?

24 Because in the overall, your  
25 approach to this deal was in the context of

1  
2 projected in the plan."

3 As the PIERS claim being the  
4 fulcrum security and the major impact from  
5 going from Chapter 11 to Chapter 7; is that  
6 right?

7 A. Right.

8 Q. Okay. But creditors -- just to --  
9 not to try to parse your words too much.  
10 Creditors would get -- senior creditors would  
11 actually more dollars, right? Because  
12 they're getting more post-petition interest  
13 for a longer period of time.

14 A. Right. I think that those guys  
15 would want that post-petition interest.

16 Q. I'm sorry?

17 A. I don't think they want to delay to  
18 get the post-petition interest at that level.

19 Q. Because it's too low?

20 A. Yeah. I think that (Speaking  
21 simultaneously). They'd rather put it  
22 someplace else.

23 Q. So it really wouldn't be the same  
24 value, would it? It's more dollars to the  
25 senior creditors, isn't it, in the Chapter 7?

1  
2 the holistic view, right?

3 A. Right.

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

16 A. That's correct.

17 Q. Okay. Let's turn to the  
18 liquidation analysis.

19 On page 57 you talk about the  
20 impact of Chapter 7 versus Chapter 11, and in  
21 paragraph 134 you say, "For most creditors  
22 this will result in the same value recovered  
23 but only after a significant delay. For  
24 (inaudible) PIERS claims, however, this would  
25 mean a smaller recovery than what is

1  
2 A. It's the same recovery.

3 Q. Well, it's 100 percent plus  
4 post-petition interest but it is more  
5 post-petition interest, right?

6 A. Correct, on account of the case  
7 lasting longer.

8 Q. Right.

9 And I think your testimony was that  
10 there is a substantial overlap between the  
11 PIERS creditors and the senior creditors,  
12 right?

13 A. The subordinated note holders, is  
14 that what you mean?

15 Q. Yeah.

16 A. I think there is an overlap between  
17 the subordinated note holders and the PIERS.

18 Q. And the senior note holders as  
19 well?

20 A. I'm sure that there are some that  
21 hold seniors as well as -- there is a lot of  
22 cross holdings among the capital structure.

23 Q. So with respect to those people in  
24 some respects taking a holistic view, it's  
25 the left pocket becoming a little less and

1  
2 the right pocket becoming a little more?  
3 A. Well, again I think when you're  
4 looking at capital and repayment of capital,  
5 there's an expected rate of return on that  
6 capital. So the delay would mean they would  
7 get -- would be entitled to additional money.  
8 So I don't think you can look at it  
9 as getting a certain amount of money and you  
10 get more because post-petition interest  
11 continues to run. And the cross holdings  
12 between senior note holders, subordinated  
13 note holders and PIERS are not the same  
14 holdings. So the same guys don't hold the  
15 same amount of each of those individual  
16 classes.  
17 Q. Now, when you did a calculation of  
18 what is being paid on post-petition interest  
19 on these unsecured creditors, you're using  
20 the contractual rate, right?  
21 A. That's correct.  
22 Q. Did you look at what the difference  
23 would be if you used the federal judgment  
24 rate?  
25 A. We didn't perform that calculation.

1  
2 Q. Do you have any idea what it would  
3 be?  
4 A. I don't know, no.  
5 Q. Would it be more than \$100 million  
6 difference?  
7 A. I'm not certain.  
8 Q. Okay. I think I want to turn to  
9 the page 64 and your discussion about the  
10 value of the reorganized entity.  
11 I think when you talked about the  
12 valuation, you said that there was no --  
13 well, I take that back.  
14 Under the valuation of a  
15 reorganized company, is there a contemplation  
16 that there will be full utilization of the  
17 \$100 million of NOL that is subsumed as part  
18 of the valuation?  
19 A. In the financial projections that  
20 we prepared, the net income is approximately  
21 100 million and the assumption for tax  
22 expense was that there would be enough net  
23 operating loss to shelter that net income.  
24 Q. Would there be more net operating  
25 loss left over if the company had greater

1  
2 profits to be utilized?  
3 A. Depending on when the effective  
4 date occurs, there could be more in operating  
5 loss than what's projected.  
6 Q. How much extra net operating losses  
7 would there be on the optimal circumstances  
8 (inaudible)?  
9 A. You can add as much as 5 billion.  
10 Q. 5 billion, okay.  
11 A. Um-hm.  
12 Q. And under this plan there's a  
13 rights offering for \$100 million?  
14 A. Up to 100 million, yes.  
15 Q. And the purpose of raising that  
16 capital is to acquire additional  
17 income-generating assets and utilize the up  
18 to \$5 billion of NOL?  
19 A. I'm not quite sure what they're  
20 going to use the rights offering for, but  
21 presumably something to do with the business.  
22 Q. And they'll try to use that  
23 5 billion of NOL?  
24 A. I would assume they'll try. I  
25 think this is a -- that to look at this in

1  
2 the context, reorganized WMI is effectively a  
3 Hawaii captive reinsurance company that's  
4 been in runoff since its receivership days.  
5 So whatever capital is being put up I would  
6 say is akin to startup money. They're  
7 looking at restarting up a business that's  
8 been, you know, not really operating, not  
9 doing any new business for two years. We're  
10 investing in some business that's similar.  
11 And I think if you look at the  
12 subsection of startup ventures and the like,  
13 I think it's difficult to know whether they  
14 would ever be able to generate any income to  
15 utilize at all.  
16 Q. But someone drafted a plan for  
17 provide for the potential raising of  
18 \$100 million so they can utilize all this  
19 extra NOL; isn't that correct?  
20 A. They are going to raise some  
21 additional money to attempt to utilize --  
22 that could attempt to utilize NOL.  
23 Q. Wasn't that why they're raising the  
24 money and having a rights offering in this  
25 case? Am I missing something?

1  
 2 A. They're raising money to attempt to  
 3 go forward with a reorganized entity.  
 4 Q. The reorganized entity if they  
 5 didn't raise the rights offering money would  
 6 be a liquidating insurance portfolio that is  
 7 in runoff for two years, right?  
 8 A. It is in runoff, that's true.  
 9 Q. So why would someone put capital in  
 10 a runoff with an insurance company if they  
 11 didn't have an NOL?  
 12 MR. MASTANDO: Objection to the  
 13 form.  
 14 JUDGE WALRATH: Overruled.  
 15 Can you answer?  
 16 A. Well, I think you could put money  
 17 in to continue to invest those proceeds,  
 18 restart the business. That's one option,  
 19 that you could do other things with that  
 20 money that might not satisfy the business  
 21 continuity argument. You could want to own  
 22 the stock because you take a different view  
 23 with respect to the projections than what's  
 24 been prepared.  
 25 Q. Okay. Let me finish by asking you

1  
 2 to turn to paragraph 97 of your declaration.  
 3 It's the sentence that starts at the bottom  
 4 of page 41 and goes over to --  
 5 I'm sorry, the bottom of page 42  
 6 and goes over to page 43. It says, "The  
 7 amended warrant agreement executed by WMI and  
 8 the warrant agreement in 2003 provides that  
 9 while the LTWs are convertible into shares of  
 10 WMI, the LTWs become exercisable when the  
 11 bank receives the proceeds of the Anchor  
 12 litigation."  
 13 Do I understand that the reason you  
 14 put this in is to show the balance of the  
 15 argument that JPMorgan potentially had a  
 16 claim for this asset?  
 17 A. Yeah, we put it in because we just  
 18 tried to put as much as we could in about the  
 19 facts and circumstances of all the assets.  
 20 Q. The statement that the 2003  
 21 warrants provide that the LTWs are converted  
 22 into shares of WMI, that's not always the  
 23 case, right? The amended warrant agreement  
 24 also provides that if there is a combination  
 25 before a trigger event, that it could be

1  
 2 converted and payable in cash, right?  
 3 MR. MASTRANDO: Objection. Calls  
 4 for a legal conclusion, your Honor.  
 5 JUDGE WALRATH: Sustained.  
 6 Q. Are you familiar with the  
 7 adjustment section of the amended warrants  
 8 agreement, Article 4?  
 9 A. I'm not.  
 10 Q. Oh, so you wrote this statement  
 11 without regard to what Article 4 might say  
 12 about adjustments as to how the LTWs get  
 13 paid?  
 14 A. I wrote this section in the context  
 15 of putting it forward in my declaration.  
 16 Q. Took the holistic view?  
 17 A. I attempted to, yes.  
 18 Q. But do you think that there's an  
 19 entire article of the amended warrant  
 20 agreement which talks about having to make  
 21 adjustments and pay the LTWs in something  
 22 other than stock, that that would be relevant  
 23 if you're going set forth a statement in your  
 24 declaration?  
 25 MR. MASTANDO: Objection. Calls

1  
 2 for a legal conclusion, argumentative,  
 3 your Honor.  
 4 JUDGE WALRATH: Sustained.  
 5 MR. STEINBERG: No more questions.  
 6 JUDGE WALRATH: Thank you.  
 7 MR. SACKS: I'll be relatively  
 8 brief, your Honor.  
 9 EXAMINATION BY  
 10 MR. SACKS:  
 11 Q. Good morning, Mr. Goulding.  
 12 A. Good afternoon.  
 13 Q. Good afternoon, I guess. I'm sorry  
 14 about that.  
 15 I'm just going to ask you some  
 16 questions on a few limited subjects, if I  
 17 could.  
 18 First, you were shown a chart that  
 19 was up there before and had a lot of bars on  
 20 it and one of them related to BOLI/COLI and  
 21 you were asked some questions about  
 22 BOLI/COLI; is that correct?  
 23 A. Correct.  
 24 Q. Am I correct that in connection  
 25 with your analysis you spent time, you and

1  
2 your people spent time looking through the  
3 actual BOLI/COLI policies to determine  
4 whether the bank or the holding company owned  
5 those?

6 A. We did in connection with counsel  
7 as well as looking and reviewing the books  
8 and records and where each of those policies  
9 fell in the books and records.

10 Q. Am I correct there was a number  
11 that was put up there of 5 billion?

12 MR. NELSON: Your Honor, objection,  
13 leading.

14 MR. SACKS: I'm just bringing him  
15 to the subject.

16 JUDGE WALRATH: Overruled.

17 Q. There was a number that was up  
18 there that was 5 billion. Of that 5, you  
19 indicate in paragraph 46 of your declaration  
20 that in most instances JPMC and the debtors  
21 have agreed as to ownership of particular  
22 BOLI/COLI policies. Of the 5, approximately  
23 5 billion, how much did you agree was  
24 properly owned by the bank?

25 A. We agreed that it was approximately

1  
2 5 billion.

3 Q. And that was -- those were the  
4 bank's not WMI's?

5 A. Well, right. We agreed in the  
6 context of reviewing and settlement  
7 discussions.

8 Q. Okay.

9 MR. NELSON: Your Honor, objection.  
10 We move to strike. He's previously  
11 testified that analysis was done on the  
12 basis of counsel, both he and  
13 Mr. Kosturos.

14 MR. MASTANDO: If I may, the  
15 witness was testifying about what they  
16 agreed to in connection with  
17 negotiations. That's purely the subject  
18 of the back-and-forth.

19 JUDGE WALRATH: I'll allow it.  
20 He's not saying the basis for it --  
21 well, excuse me.

22 MR. SACKS: Let me -- maybe I can  
23 clarify.

24 JUDGE WALRATH: All right.

25 Q. You and people other than counsel

1  
2 did look through these policies, didn't you?

3 MR. NELSON: Same objection, your  
4 Honor. He's previously testified --

5 JUDGE WALRATH: Sustained. He said  
6 he did not do it. Any conclusion  
7 regarding the ownership without  
8 consulting with counsel.

9 MR. SACKS: Okay.

10 JUDGE WALRATH: Sustained.

11 Q. For purposes of settlement,  
12 however, there factually it was determined  
13 that 5 billion was owned by JPMorgan Chase?

14 MR. NELSON: Objection, your Honor,  
15 same objection. The conclusion was  
16 counsel.

17 JUDGE WALRATH: Sustained.

18 Q. Well, let's continue on.

19 You indicate that in certain  
20 instances the debtors and JPMorgan initially  
21 disputed the ownership of certain BOLI/COLI  
22 policies. What policies were those?

23 A. I think at the outset we didn't  
24 have the books and records so we weren't sure  
25 what was owned by whom. So we sent a letter

1  
2 with respect to just telling JPMorgan not to  
3 move on those policies while we took the time  
4 to look at each of those.

5 And then when it came time for  
6 settlement discussions, I believe that WMI  
7 proposed a list that we thought would be the  
8 list that should come to us pursuant to the  
9 settlement agreement, and in that context  
10 that list had the PAC Life list bills and the  
11 PPBI split dollar policies coming to us. The  
12 rest of the split I think is consistent with  
13 what's in the settlement agreement.

14 Q. And ultimately of those two that  
15 you had coming to you, it was ultimately  
16 agreed that one came to WMI and one came to  
17 JPMorgan correct?

18 A. Yes. Those split policies went to  
19 JPMorgan.

20 MR. NELSON: Object, your Honor, to  
21 the extent it's referring not to what  
22 was agreed in the settlement agreement  
23 but what refers to what WMI concluded  
24 based on counsel.

25 JUDGE WALRATH: I think he said

1  
2 it's ultimately what we agreed to.  
3 Overruled.  
4 MR. SACKS: It's what was agreed to  
5 in the settlement agreement.  
6 Q. And with respect to the one that  
7 went to JPMorgan Chase, am I correct that was  
8 on the books and records of the bank?  
9 A. It was.  
10 MR. NELSON: Objection, your Honor.  
11 That's a legal conclusion whether --  
12 JUDGE WALRATH: Overruled. It was  
13 on the records. Whether it was owned by  
14 them or not by them is a different  
15 question. Overruled.  
16 Q. Okay. Now, you did actually  
17 mention books and records and that raises a  
18 question. Are you familiar with something  
19 known as the information access agreement?  
20 A. I am.  
21 Q. Okay, and explain what that is.  
22 A. Well, essentially it set forth the  
23 information sharing as between WMI and  
24 JPMorgan with respect to various records and  
25 the like.

1  
2 Q. Okay. And did it in essence  
3 provide the debtor with the ability to  
4 request whatever historical books and records  
5 it wanted?  
6 MR. NELSON: Objection, your Honor  
7 leading.  
8 JUDGE WALRATH: Overruled.  
9 A. Yes, it did.  
10 Q. And pursuant to that agreement, did  
11 the debtor make requests of JPMorgan for  
12 books and records that it wanted in order to  
13 perform its analysis?  
14 A. We did.  
15 Q. And were those provided?  
16 A. They were.  
17 Q. Let me switch topics, if I could,  
18 very briefly at the moment.  
19 You were asked some questions  
20 about, again, the first item on Mr. Nelson's  
21 demonstrative which has reference to a  
22 \$5 billion NOL. You've been asked that by  
23 several people correct?  
24 A. Correct.  
25 Q. There is nothing in the settlement

1  
2 agreement that you're aware of that gives any  
3 of that value to JPMorgan Chase, is there?  
4 A. No.  
5 Q. Or transferred that away from the  
6 reorganized debtor?  
7 A. No.  
8 Q. Now, you also testified about  
9 liquidation analysis and testified that you  
10 did not do an analysis of the value of  
11 releases of third-party claims, correct?  
12 A. Correct.  
13 Q. All right. Do you have your  
14 opinion liquidation analysis there?  
15 A. Yup.  
16 Q. And look at (c)(2). There's some  
17 notes to that analysis aren't there?  
18 A. There are some notes.  
19 Q. Okay. And one of those notes under  
20 6, settlement agreement, indicates that your  
21 analysis assumes that the value to be  
22 received would be for purposes of the  
23 liquidation analysis equivalent to the value  
24 being received under the settlement  
25 agreement?

1  
2 A. That's right.  
3 Q. And am I correct that you --  
4 JUDGE WALRATH: Well, what note are  
5 you on?  
6 MR. SACKS: 6 on page (c)(2), your  
7 Honor.  
8 THE WITNESS: It's actually the  
9 lead-up notes, not --  
10 MR. SACKS: I'm sorry. I said  
11 footnotes but it's -- footnotes, but  
12 footnotes precede. It's a preceding  
13 note. Do you have it?  
14 JUDGE WALRATH: I have it.  
15 Q. And just again to go back for her  
16 Honor, it assumes that the value to be  
17 received is the value to be received under  
18 the settlement agreement, correct?  
19 A. Correct.  
20 Q. Or equivalent of the value to be  
21 received under the settlement agreement.  
22 A. Right. We made the assumption that  
23 the Chapter 7 trustee would continue with the  
24 settlement agreement in its current form if  
25 they were able to effectuate it.



1  
 2 Q. And that settlement agreement was  
 3 dependent upon the provision of those  
 4 third-party releases, wasn't it, sir?  
 5 A. That's how I understand it.  
 6 Q. So no releases, no settlement  
 7 agreement, no value.  
 8 A. Right.  
 9 Q. Now, there's been a lot of  
 10 back-and-forth over privilege here and you've  
 11 indicated fairly clearly that you are not  
 12 testifying as to the advice that you received  
 13 from WMI's counsel, correct?  
 14 A. Correct.  
 15 Q. But you are putting forward, apart  
 16 from that advice received, the bases on which  
 17 you conclude the settlement is fair and  
 18 reasonable, correct?  
 19 A. Correct.  
 20 MR. NELSON: Objection, your Honor.  
 21 That was -- well, I believe that he  
 22 previously stated his personal analysis  
 23 is due to counsel.  
 24 MR. MASTANDO: Objection, your  
 25 Honor that mischaracterizes --

1  
 2 JUDGE WALRATH: Restate it.  
 3 Restate the question.  
 4 Q. Did you have information other than  
 5 advice of WMI's counsel that caused you to  
 6 believe that the settlement in this case was  
 7 fair and reasonable that you are offering to  
 8 the court?  
 9 A. That's what I'm attempting to do.  
 10 Q. What type of information other than  
 11 the advice of counsel, of WMI's counsel, are  
 12 you offering to the court to support the  
 13 fairness and reasonableness of the settlement  
 14 in this case?  
 15 A. Well, we looked at lots of  
 16 documents, WMI's books and records, WMB's  
 17 books and records, certainly the  
 18 back-and-forth pursuant to a number of  
 19 discussions with JPMorgan with respect to  
 20 ownership, merits of arguments, the whole  
 21 process associated with that settlement  
 22 negotiation.  
 23 MR. NELSON: Move to strike to the  
 24 extent he just said the merits of  
 25 arguments, and to the extent based upon

1  
 2 counsel.  
 3 JUDGE WALRATH: You can recross on  
 4 that point.  
 5 MR. NELSON: All right.  
 6 JUDGE WALRATH: I'll let the answer  
 7 stand.  
 8 Q. You had an assessment of the merits  
 9 of arguments independent of counsel's  
 10 assessment of the merits of the argument; is  
 11 that what you're saying?  
 12 A. No. What I'm saying is in the  
 13 context of the settlement agreement, the  
 14 merits of arguments were discussed between us  
 15 and JPMorgan. So JPMorgan could take a  
 16 stance as to their position and we would take  
 17 one that relates to our position.  
 18 So in context you can get an  
 19 understanding of the various strengths and  
 20 weaknesses of the argument.  
 21 Q. So that factual basis informed your  
 22 opinion?  
 23 A. Right.  
 24 Q. And you mentioned books and records  
 25 and you had access to the books and records,

1  
 2 correct?  
 3 A. Correct.  
 4 Q. Now, you also had access to people  
 5 and witnesses, did you not?  
 6 A. We did have access to many people.  
 7 Q. Okay. And do you know of any  
 8 reason -- let me --  
 9 You met with the Equity Committee,  
 10 didn't you, sir?  
 11 A. We did.  
 12 Q. Okay. And they asked you questions  
 13 and you provided them with information?  
 14 A. Yes.  
 15 Q. And you were aware that the Equity  
 16 Committee had access to books and records and  
 17 information in this case?  
 18 A. Yes.  
 19 Q. And are you aware that the Equity  
 20 Committee had access that we, JPMorgan Chase,  
 21 did not have to the debtors' advice of  
 22 counsel?  
 23 A. Yes. That's my understanding.  
 24 Q. And are you aware of any reason  
 25 that the debtors' counsel could not make

1  
2 their own assessment of whether the  
3 settlement is fair and reasonable, based upon  
4 the same factual information you had  
5 available to you?  
6 A. You said debtors' counsel.  
7 Q. I'm sorry. I meant the Equity  
8 Committee's counsel.  
9 A. I believe that they could make that  
10 assessment.  
11 MR. STOLL: The equity committee  
12 counsel, is that your question?  
13 MR. SACKS: Based upon the factual  
14 information that they could have had  
15 access to, that's correct.  
16 JUDGE WALRATH: Obviously they  
17 disagree with the conclusion or they  
18 wouldn't be here.  
19 (Laughter.)  
20 MR. SACKS: They do disagree with  
21 the conclusion, your Honor, but we seem  
22 to be in a debate over whether the  
23 debtor should be forced to waive its  
24 attorney-client privilege in order to  
25 have a court assess the fairness and

1  
2 debtors.  
3 Before redirect, might I suggest  
4 this might be an appropriate time to  
5 break for lunch? The witness has been  
6 on for a while.  
7 JUDGE WALRATH: How long will you  
8 be on redirect?  
9 MR. MASTANDO: I'm guessing not too  
10 long. I can go through my notes and  
11 streamline it.  
12 MR. NELSON: Your Honor, I think we  
13 should probably (inaudible) --  
14 JUDGE WALRATH: You want to take a  
15 five-minute break and then we'll try to  
16 go to 1:00.  
17 MR. MASTANDO: Sure.  
18 (Recess taken.)  
19 THE DEPUTY: All rise.  
20 You may be seated.  
21 JUDGE WALRATH: I thought we were  
22 all back.  
23 MR. SACKS: I'll go get them, your  
24 Honor.  
25 JUDGE WALRATH: I'm sorry, but

1  
2 reasonableness of the settlement.  
3 JUDGE WALRATH: All right.  
4 MR. SACKS: And so my questions are  
5 simply --  
6 JUDGE WALRATH: Save it for  
7 argument.  
8 MR. SACKS: Okay. My questions are  
9 simply factual-based, your Honor.  
10 Q. To your knowledge, did the Equity  
11 Committee have the ability to take  
12 depositions and speak to people?  
13 A. Yes.  
14 Q. And they had the ability to request  
15 and look at books and records, just as you  
16 did?  
17 A. Yes.  
18 Q. And they had the ability to read  
19 the pleadings and make judgments based upon  
20 those pleadings.  
21 A. Yes.  
22 Q. Okay. All right, that's all I have  
23 for you. Thank you, sir.  
24 MR. MASTANDO: Your Honor, John  
25 Mastando from Weil Gotshal for the

1  
2 somebody said you were ready.  
3 MR. MASTANDO: I apologize, your  
4 Honor. I was really trying to  
5 streamline my argument. My questioning  
6 I should say.  
7 MS. NAGLE: Your Honor, Shannon  
8 Nagle for the settlement note holders.  
9 I have just one question for the  
10 witness.  
11 JUDGE WALRATH: Yes.  
12 EXAMINATION BY  
13 MS. NAGLE:  
14 Q. In Equity 6 --  
15 It's the disclosure statement in  
16 the binders behind you, Exhibit 6.  
17 A. (Perusing binders). Is the exhibit  
18 there?  
19 Q. Yes, the disclosure statement.  
20 In Article 4 in the copy I have  
21 which is on page 43, there's a description of  
22 junior subordinate debentures, the PIERS.  
23 It's on 42 in your copy.  
24 A. Yup.  
25 Q. Got that?

1  
2 And I know that you described the  
3 PIERS earlier in your testimony, but I just  
4 have a little question to sort of dumb it  
5 down. Are the PIERS debt or equity?  
6 A. Debt.  
7 MR. NELSON: Objection, your Honor.  
8 JUDGE WALRATH: Sustained. Isn't  
9 that a legal conclusion?  
10 MS. NAGLE: Not the way he  
11 explained it before.  
12 JUDGE WALRATH: Are they debt or  
13 equity, isn't that a legal conclusion?  
14 If you want to say are they treated as  
15 debt or equity.  
16 (Laughter.)  
17 Q. Are the PIERS treated as debt or  
18 equity?  
19 A. They're on the books of WMI as  
20 debt.  
21 Q. And why is that?  
22 A. Well, the structure -- my  
23 understanding of the structure is that the  
24 trust is a debt holder of WMI and the PIERS  
25 holders own security interest in the trust.

1  
2 And, therefore, there's a debt issuance as  
3 from WMI to the trust and that therefore  
4 means that it's effectively debt.  
5 Q. Okay. All right, thank you very  
6 much.  
7 REDIRECT EXAMINATION  
8 BY MR. MASTANDO:  
9 Q. Good morning, Mr. Goulding. I'm  
10 John Mastando from Weil Gotshal on behalf of  
11 the debtors.  
12 Mr. Goulding, can you explain for  
13 us why you believe the global settlement  
14 agreement is fair and reasonable?  
15 A. Sure.  
16 MR. STOLL: Objection, your Honor.  
17 He put in his testimony on direct  
18 through an affidavit. He shouldn't be  
19 able to go back --  
20 JUDGE WALRATH: Overruled.  
21 I hope it's going to be short.  
22 MR. MASTANDO: Yes.  
23 A. In the context of settlement  
24 negotiation, I believe we got the best result  
25 that we could in terms of that. And in

1  
2 looking at the other outcome of litigating  
3 all of these issues and the post-petition  
4 interest of 30 million plus 8 to 10 million  
5 among the professional fees that continue to  
6 run in this case, the bar would keep getting  
7 higher on a month-by-month basis in order to  
8 get a result that would be in excess of the  
9 settlement agreement that we are putting  
10 forward.  
11 Q. And can you explain why you view  
12 the global settlement agreement as an  
13 integrated whole or in a holistic way?  
14 A. Yeah.  
15 Any number of those issues may have  
16 different outcomes in their own right, but in  
17 the context of the overall agreement it made  
18 sense to agree where we agreed. There may be  
19 some issues that went one way the other but  
20 were balanced out in the context of the  
21 overall agreement.  
22 Q. Now, we had testimony earlier about  
23 the BOLI/COLI policies. Can you tell me and  
24 describe the negotiation with JPMorgan with  
25 respect to the BOLI/COLI policies.

1  
2 A. Sure.  
3 With respect to BOLI/COLI  
4 initially, as I said, we were doing asset  
5 identification, so looking at what was on our  
6 books, what was on WMB's books to see what  
7 assets might be WMI's.  
8 In that context we met with a  
9 number of then JPMorgan but legacy WaMu  
10 people who had overseen that program, and we  
11 got records from them that supported what was  
12 on the books and records from an accounting  
13 perspective.  
14 Q. And what did that show?  
15 A. That showed \$90 million on the  
16 books of WMI and approximately 5 billion on  
17 the books of WMB.  
18 Q. Okay. And do you know when was the  
19 last time WMI's and WMB's books and records  
20 were audited, as far as you know?  
21 A. The last time I guess would have  
22 been in connection -- well, it would have  
23 been done on an annual basis, I guess, so i  
24 connection with their 2007 financials.  
25 Q. Okay. We had some testimony

1 earlier about the Visa shares. Do you recall  
 2 that?  
 3  
 4 A. I do.  
 5 Q. Okay. And can you describe the  
 6 process you went through to analyze the Visa  
 7 shares and your discussions with JPMorgan?  
 8  
 9 A. Sure.  
 10 So in terms of looking at the value  
 11 of the Visa shares, leaving aside the  
 12 ownership issue for a moment, we looked at  
 13 the range of outcomes associated with what  
 14 could happen in the interchange litigation.  
 15 Previously there was one other  
 16 unsettled litigation so we were looking at  
 17 more, but in the context of all we were  
 18 looking at just the interchange litigation  
 19 being the only litigation remaining. So we  
 20 looked at if there is a complete win on the  
 21 interchange and the settlement was zero, the  
 22 maximum value ascribed to the various shares  
 23 assuming the \$75 share price would have been  
 24 \$150 million.  
 25 If the settlement on the  
 interchange litigation went to approximately

1 11 and a half billion, again depending on the  
 2 \$75 share price, the shares would be  
 3 worthless. If it exceeded 11 and a half  
 4 billion, there would be liability for WMI or  
 5 whomever would be determined to be the person  
 6 on the hook for the loss-sharing agreement.  
 7 WMI is the signatory to that agreement.  
 8 There could be further liability associated  
 9 with a decision that was above the 11 and a  
 10 half billion dollars.  
 11 Q. And were there any other potential  
 12 liabilities involved?  
 13  
 14 A. Yeah. The interchange plaintiff  
 15 filed a Proof of Claim against the estate in  
 16 the amount of \$5 billion.  
 17 Q. Okay. And pursuant to the global  
 18 settlement, what did the parties agree to  
 19 with respect to the Visa shares?  
 20  
 21 A. So the Visa shares transferred to  
 22 JPMorgan or are deemed to have transferred to  
 23 JPMorgan and there's 25 million that's paid  
 24 to WMI. And the assumption of any liability  
 25 that WMI has under the loss-sharing agreement  
 as well as any liability associated with the

1 Proof of Claim filed by the plaintiffs in the  
 2 interchange litigation are assumed by  
 3 JPMorgan.  
 4  
 5 Q. And that's the \$5 billion Proof of  
 6 Claim?  
 7  
 8 A. That's right.  
 9 Q. And going back to BOLI/COLI for a  
 10 minute, can you also tell me what the parties  
 11 resolved in the global settlement agreement?  
 12  
 13 A. Sure.  
 14 In the global settlement agreement  
 15 we got the BOLI/COLI that was listed on WMI's  
 16 books plus two the two PAC Life list bills  
 17 that were not on WMI's books and the balance  
 18 of them went to JPMorgan.  
 19 Q. And in the context of the  
 20 settlement discussions, did you and JPMorgan  
 21 agree on the ownership of the policies?  
 22  
 23 A. We agreed on everything but for  
 24 those two PAC Life policies which we ended up  
 25 getting pursuant to the settlement agreement.  
 MR. NELSON: Excuse me, your Honor.  
 We object. To the limited extent again  
 his answer is purely related to what

1 JPMorgan and WMI agreed to, we have no  
 2 objection. To the extent it was the  
 3 conclusion of WMI that they belonged to  
 4 JPMorgan, we disagree and would move to  
 5 strike.  
 6  
 7 JUDGE WALRATH: Sustained.  
 8 Q. Mr. Goulding, can you describe what  
 9 you and JPMorgan agreed to in connection with  
 10 the BOLI/COLI policies?  
 11  
 12 A. Yes. We agreed that we would keep  
 13 the policies that were on WMI's books and  
 14 would get the two PAC Life list bills that  
 15 were not on WMI's books and that JPMorgan  
 16 would get the others.  
 17 Q. Now, I believe it was Mr. Nelson  
 18 who asked you some questions about the  
 19 exercise of subscription rights in the PIERS  
 20 class. Do you recall that?  
 21  
 22 A. I believe he talked a little bit  
 23 about the stock elections and who would own  
 24 it.  
 25 Q. Of the 100 million shares available  
 to the PIERS, how much were subscribed; do  
 you know?

1  
2 A. Oh, in the rights offering I think  
3 there's about 31 million that was subscribed.

4 Q. Okay. And do you know who  
5 exercised the subscription rights in the  
6 PIERS class?

7 A. I don't know, actually.

8 Q. Okay. And Mr. Steinberg was just  
9 asking you about the split of the goodwill  
10 litigation on the settlement. Do you recall  
11 that?

12 A. I do.

13 Q. Okay. In your view, does the split  
14 affect the total settlement of the value?

15 A. Could you repeat that question?

16 Q. Does the split affect the total  
17 value of the settlement to the estate as a  
18 whole?

19 A. Yes, the --

20 MR. NELSON: Objection, vagueness.

21 JUDGE WALRATH: Sustained.

22 Q. Based on the negotiations with  
23 JPMorgan, do you believe that they would have  
24 agreed to have the Anchor litigation go to  
25 WMI without reduction of other value to WMI

1  
2 Q. Thank you.

3 MR. MASTANDO: Nothing further,  
4 your Honor.

5 JUDGE WALRATH: Any recross?

6 MR. NELSON: Justin Nelson, Sussman  
7 Godfrey on behalf of the Equity  
8 Committee.

9 CROSS-EXAMINATION

10 BY MR. NELSON:

11 Q. Mr. Sacks asked you with respect to  
12 whether there was any data that you, being  
13 WMI, requested and that JPMorgan didn't give  
14 you and you said there wasn't. You got  
15 everything you asked for; is that right?

16 A. I think for the most part, for what  
17 we asked for, I -- to the extent JPMorgan had  
18 the documents, I believe that they were given  
19 to us.

20 Q. There is a portfolio of loans that  
21 has the loan data, the historical loan data  
22 pre-seizure. You're aware of that?

23 A. You're talking about for WMB loans  
24 or --

25 Q. WMB loans, correct, that are now in

1  
2 under the settlement?

3 MR. STOLL: Objection.

4 MR. NELSON: Objection, your Honor  
5 calls for speculation.

6 JUDGE WALRATH: Sustained.

7 Q. Can you describe the negotiations  
8 with JPMorgan regarding the Anchor  
9 litigation?

10 A. Yeah. With respect to the goodwill  
11 litigations we both took the initial position  
12 that we were entitled to both of the goodwill  
13 litigations. It the negotiations continued,  
14 our next proposal was that we would split  
15 them with JPMorgan taking the Anchor Savings  
16 litigation and us keeping American. And  
17 JPMorgan's counterproposal to that was that  
18 they would keep both but for 15 million, and  
19 then we ultimately reached the resolution  
20 where we got the settlement agreement.

21 Q. Did JPMorgan ever give you any  
22 indication that they would agree to have the  
23 Anchor litigation go to WMI?

24 A. We didn't ever hear that from them,  
25 no.

1  
2 JPMorgan's books and records in possession.

3 A. I'm not that aware of that issue  
4 but there is likely to be information on the  
5 loans that are on WMB's books.

6 Q. You understand, right, that that  
7 information is necessary to determine the  
8 solvency of WMB and then to WMI, correct?

9 MR. MASTANDO: Objection, your  
10 Honor. It calls for a legal conclusion  
11 and is beyond the scope of the cross and  
12 direct.

13 Q. I'll rephrase.

14 JUDGE WALRATH: All right.

15 Q. Did you ever receive that loan data  
16 from JPMorgan?

17 MR. MASTANDO: Same objections,  
18 beyond the scope.

19 JUDGE WALRATH: Overruled.

20 A. I don't know. I wasn't part of the  
21 group of people that asked for it.

22 Q. So when you testified that JPMorgan  
23 gave you everything you asked for, you don't  
24 know whether that's true with respect to WMI  
25 generally, you just know with respect to your

1  
2 personal knowledge of what you particularly  
3 asked for; is that right?

4 A. Yeah. I guess I was referencing  
5 things that I -- that either I requested or  
6 items I was aware of.

7 Q. Okay. So, for example, you don't  
8 know whether --

9 Assume with me that you did not  
10 get, WMI did not get this loan data. You  
11 don't know whether that's because you didn't  
12 ask or because JPMorgan didn't give it to  
13 you; is that right?

14 MR. MASTANDO: Objection to the  
15 form.

16 JUDGE WALRATH: Overruled.

17 A. Yeah. I don't know if there was --  
18 if it was asked for, I don't know why it  
19 wasn't given or what the issue was.

20 Q. Okay. With respect to this issue  
21 of WMI's books and records, did your analysis  
22 about what was on WMI's books and records  
23 involve consultation with counsel?

24 A. No.

25 Q. You then did consult with counsel

1  
2 about the underlying legal claim as to who  
3 owned which assets as part of the disputed  
4 resolution, correct?

5 A. Sure, we -- we discussed with  
6 counsel on -- on those types of issues.

7 Q. You discussed the NOLs for taxes  
8 and Mr. Sacks asked you whether JPMorgan was  
9 receiving any of that potential 5 billion NOL  
10 that is going to JPMorgan, correct?

11 MR. SACKS: Objection to the form.

12 Q. Excuse me, that is going to  
13 reorganized WMI.

14 A. Right, he asked me about that.

15 MR. SACKS: We'll take it.  
16 (Laughter.)

17 Q. That is not completely true, is it?  
18 (Laughter.)

19 Q. Well, let me rephrase.

20 MR. MASTANDO: Objection.

21 Q. Does that analysis include the fact  
22 that -- isn't it true that JPMorgan is  
23 receiving about \$2.3 billion of tax refund  
24 from the past?

25 MR. MASTANDO: Objection.

1  
2 MR. SACKS: Objection.

3 MR. NELSON: I'm getting there. I  
4 need a foundational question.

5 JUDGE WALRATH: You can answer that  
6 question.

7 A. Sorry. Can you give that again.

8 Q. Sure.

9 Isn't it true that JPMorgan is  
10 receiving as part of the settlement  
11 approximately \$2.3 billion of historical tax  
12 refunds?

13 A. Pursuant to the settlement  
14 agreement there's a split on the refunds. I  
15 think that's about what the number works out  
16 to be.

17 Q. Okay. And that is part of an NOL,  
18 correct?

19 A. I think it's not part of the  
20 \$5 billion NOL that's -- carry-forward that  
21 we were discussing.

22 Q. It's not part of the carry-forward  
23 but it is an NOL, correct, of WMI or --

24 A. (Speaking simultaneously).

25 Carrying back of net operating losses.

1  
2 Q. You are also aware that the reason  
3 why the \$5.5 billion or \$5 billion NOL is  
4 \$5 billion is because you have to deduct the  
5 past tax refunds and NOLs on a historical tax  
6 refund basis, correct?

7 MR. MASTANDO: Objection. Calls  
8 for a legal conclusion, your Honor.

9 JUDGE WALRATH: Overruled.

10 A. For determination of an NOL carry  
11 forward, you would have to know what had been  
12 used up prior.

13 Q. In other words, you're aware,  
14 correct, that from an accounting perspective  
15 WMI actually has about 19 billion of losses  
16 associated with the stock of WMB, correct?

17 A. I think this is probably a better  
18 question for the tax person. I know what an  
19 NOL carry-forward is and I know what the  
20 5 billion relates to on a carry-forward basis  
21 but the specific math on the derivation of  
22 the 5 billion is probably something better  
23 suited for Jim Carreon.

24 Q. Okay. I'm only asking because you  
25 retract your answer about whether you know

1  
2 for sure whether JPMorgan is receiving any  
3 part of the tax carry-forward.

4 MR. SACKS: Objection, your Honor.

5 JUDGE WALRATH: Save that for  
6 argument.

7 MR. NELSON: Okay.

8 Q. Well, let me ask just a few more  
9 questions on this.

10 If it is true that that is a -- you  
11 have to deduct the prior stock -- excuse me,  
12 the prior tax refunds that were given to WMI  
13 or WMB, that would affect the value of the  
14 carry-forward NOL, correct?

15 A. I believe the question that was  
16 asked was the \$5 billion NOL carry-forward,  
17 is JPMorgan getting any of that  
18 carry-forward, and the answer was no. So I  
19 don't -- I'm not sure I understand your  
20 question.

21 Q. You understand that the  
22 carry-forward would be higher but for the tax  
23 refunds that were historic?

24 A. Again, as I said, yes, if you carry  
25 back an NOL, then you would utilize some of

1  
2 analysis but certainly our proposal and the  
3 back-and-forth discussed the various merits  
4 between us and JPMorgan of the BOLI/COLI  
5 policy.

6 Q. Your opinions on the merits of the  
7 arguments are based upon counsel.

8 A. Well, I wasn't making the arguments  
9 on the merits. JPMorgan's counsel or our  
10 counsel would have been making arguments in  
11 connection with the settlement negotiations  
12 about whether we owned them or they owned  
13 them.

14 Q. You testified about the Visa  
15 shares. Do you recall that testimony?

16 A. I do.

17 Q. You said there was a 5 billion  
18 claim. Do you remember that?

19 A. I do.

20 Q. You stated that the -- there -- the  
21 \$5 billion claim, that affected potentially  
22 how you valued the Visa shares; is that  
23 right?

24 A. It was important for us to have it  
25 go away.

1 those attributes.

2 Q. Okay. And changing subjects, just  
3 to be clear, when you did testify to the fact  
4 that there is agreement between you and  
5 JPMorgan, that's agreement that you reached  
6 during the settlement. That was not  
7 agreement that you had internally among the  
8 WMI group, correct?

9 A. I'm not sure what you mean.

10 Q. You said a couple times that there  
11 are places where you, meaning WMI, and  
12 JPMorgan reached agreement on how these  
13 assets would be distributed, correct?

14 A. Right. In my declaration I say we  
15 reached agreement (inaudible) with the  
16 BOLI/COLI agreement on ownership of those.

17 Q. And that agreement, again, it does  
18 not involve the agreement of what is  
19 proper -- who was properly the legal owner of  
20 those assets, correct?

21 MR. MASTANDO: Objection, your  
22 Honor, mischaracterizing the testimony.

23 JUDGE WALRATH: Overruled.

24 A. It doesn't involve legal title  
25

1  
2 Q. You do realize that that claim has  
3 been dismissed, right?

4 A. I believe it was either withdrawn  
5 subsequent to the settlement agreement being  
6 done or perhaps dismissed. I'm not sure.

7 Q. It was withdrawn with prejudice,  
8 correct?

9 MR. MASTANDO: Objection, your  
10 Honor. Calls for a legal conclusion and  
11 asked and answered.

12 JUDGE WALRATH: Overruled.

13 Q. Well, let's go to your  
14 declaration where you state under oath that  
15 it was withdrawn with prejudice.

16 A. Yeah. I believe I said that it was  
17 withdrawn, but I believe withdrawn after the  
18 settlement agreement was reached.

19 Q. Okay. Fair enough.

20 MR. NELSON: Thank you.

21 CROSS-EXAMINATION  
22 BY MR. STEINBERG:

23 Q. I'll be brief, Mr. Goulding.  
24 Arthur Steinberg again.

25 I think you testified when your

1  
2 counsel was asking you questions that  
3 initially in the negotiation on the goodwill  
4 litigations the debtor said, "I want to  
5 retain both litigations" and JPMorgan said,  
6 "I want to retain both litigations." Is that  
7 correct?

8 A. That's correct.

9 Q. So the debtor said, "I'll give up  
10 the Anchor litigation but I want to keep  
11 American Savings litigation"; is that  
12 correct?

13 A. That's my recollection.

14 Q. When the debtor made that proposal  
15 to give you the Anchor litigation, had they  
16 consulted the board as to whether they should  
17 be able to do that?

18 MR. MASTANDO: Objection to the  
19 form and the characterization of the  
20 testimony.

21 JUDGE WALRATH: Overruled.

22 A. I'm not sure. I wasn't involved in  
23 all the consultations with the board but I  
24 certainly don't know what was or wasn't  
25 consulted with the board prior to changing

1  
2 and we'll see the parties back at 2:00.  
3 Again I'm breaking at 4:30, so --

4 MR. ROSEN: Your Honor, before that  
5 I know we laid out a schedule of  
6 witnesses but based upon travel plans,  
7 your Honor, we were hoping that we --  
8 (Discussion off the record.)

9 MR. ROSEN: Your Honor, we will do  
10 Mr. Carreon next, but if there's time we  
11 may go out of order, your Honor, solely  
12 to accommodate Mr. Zelin. We will try  
13 to see that afterwards.

14 JUDGE WALRATH: Fine.

15 MR. ROSEN: Thank you.  
16 (Luncheon recess taken 12:57 p.m.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2 the term sheet.

3 Q. Did anybody suggest that the board  
4 needed to make a good faith judgment as to  
5 whether their giving up the Anchor litigation  
6 would protect the intent and principles of  
7 the amended warrant agreement?

8 MR. MASTANDO: Objection, your  
9 Honor, argumentative.

10 JUDGE WALRATH: Sustained.

11 Q. Do you know what the intent and  
12 principles of the amended warrant agreement  
13 are?

14 A. I don't.

15 MR. MASTANDO: Objection, beyond  
16 the scope of the redirect.

17 MR. STEINBERG: Okay, we'll save it  
18 for argument.

19 JUDGE WALRATH: Thank you.

20 MR. STOLL: No further questions  
21 from us, your Honor.

22 JUDGE WALRATH: All right.

23 MR. MASTANDO: Nothing further,  
24 your Honor. Thank you.

25 JUDGE WALRATH: We stand adjourned

1  
2 A F T E R N O O N S E S S I O N  
3 (Time noted: 2:05 p.m.)

4 THE DEPUTY: All rise.

5 You may be seated.

6 MR. ROSEN: Good afternoon, your  
7 Honor. The next witness, your Honor, is  
8 Mr. James Carreon. My partner Angela  
9 Zambrano will be handling that one.

10 MS. ZAMBRANO: Good afternoon, your  
11 Honor. At this time the debtor would  
12 like to offer the declaration of James  
13 Carreon into evidence as his direct  
14 testimony and I have a copy of his  
15 declaration if your Honor would like.  
16 May I approach?

17 JUDGE WALRATH: You may.

18 MS. ZAMBRANO: We ask that James  
19 Carreon be available for  
20 cross-examination.

21 JUDGE WALRATH: Okay. You should  
22 take the stand. Please remain standing  
23 so you can be sworn.

24 (Whereupon, the witness was duly  
25 sworn.)



1  
 2 THE CLERK: Please state your name  
 3 and spell your last name for the record.  
 4 THE WITNESS: James Edward Carreon,  
 5 C-A-R-R-E-O-N.  
 6 JUDGE WALRATH: And can you confirm  
 7 for the record that your declaration was  
 8 accurate (inaudible) --  
 9 THE WITNESS: Yes.  
 10 JUDGE WALRATH: You may proceed  
 11 with cross.  
 12 MR. NELSON: Thank you, your Honor.  
 13 Justin Nelson, Sussman Godfrey,  
 14 representing the Equity Committee.  
 15 J A M E S C A R R E O N , called  
 16 as a witness, having been duly sworn by  
 17 a Notary Public, was examined and  
 18 testified as follows:  
 19 CROSS-EXAMINATION BY  
 20 MR. NELSON:  
 21 Q. Mr. Carreon, you are a lawyer,  
 22 correct?  
 23 A. I have a law degree, yes.  
 24 Q. In your practice, in your business  
 25 practice, do you perform legal tasks?

1  
 2 calculation that you personally made; is that  
 3 right? You've made a calculation of  
 4 \$352 million?  
 5 A. Yes. We determined that number,  
 6 yes.  
 7 Q. There is a separate issue about the  
 8 ownership of the tax issue and tax refunds  
 9 regardless of historical practice. You're  
 10 aware of that, correct?  
 11 A. I am aware of the issues concerning  
 12 the tax refund, yes.  
 13 Q. You are not here to testify in any  
 14 form about the ownership of the overall tax  
 15 issues as it respects to the legal disputed  
 16 asset; is that right?  
 17 A. I'm not here to testify with  
 18 respect to the ownership of the refund. I am  
 19 aware of the parties' positions, but that's  
 20 just my general knowledge.  
 21 Q. So, for example, with respect to  
 22 the purchase assumption agreement, whether  
 23 that belongs to WMI or the FDIC or to  
 24 JPMorgan, you have no opinion on that  
 25 whatsoever; is that right?

1  
 2 A. No. I am prohibited from  
 3 performing legal tasks. I'm a member of a  
 4 consulting group.  
 5 Q. Anything that you do therefore is  
 6 not legal advice; is that right?  
 7 A. Correct. I do not provide any  
 8 legal advice.  
 9 Q. Do you rely on others to provide  
 10 you with legal advice?  
 11 A. In what context?  
 12 Q. Well, with respect to the tax  
 13 refund issue, you conclude that the debtors  
 14 are owed at least \$352 million. That's your  
 15 testimony, correct?  
 16 A. That is my testimony, correct.  
 17 Q. That analysis is due in part to  
 18 your communications with counsel, correct?  
 19 A. No, it is not correct. We looked  
 20 at the terms of the TSA to determine the  
 21 historical practice and application of the  
 22 TSA.  
 23 Q. Okay. I think -- so we're  
 24 separating out two issues here.  
 25 The first is that there's a

1  
 2 A. I have deferred to our counsel with  
 3 respect to any contract legal interpretation  
 4 along those lines.  
 5 Q. With respect to analysis -- and I  
 6 think you just testified about this. With  
 7 respect to the analysis of the worth of the  
 8 tax refund claim, the legal analysis, counsel  
 9 contributed to that, correct?  
 10 MS. ZAMBRANO: Objection. That  
 11 misstates his testimony.  
 12 JUDGE WALRATH: Overruled. Let's  
 13 test it on cross.  
 14 Is that what you said?  
 15 THE WITNESS: Would you repeat your  
 16 question?  
 17 Q. Yes.  
 18 Counsel engaged in analysis to  
 19 determine the worth of the tax refund claim,  
 20 correct?  
 21 A. I don't know what analysis counsel  
 22 did or did not in (inaudible). If you're  
 23 asking me what the value of a tax refund is,  
 24 then that is a different (inaudible).  
 25 Q. I think if I understand your

1  
2 testimony correctly, what you are saying is,  
3 without any regard to the underlying legal  
4 dispute of who owns the asset, WMI based on  
5 prior historical practice is entitled to  
6 \$352 million based upon certain assumptions  
7 that you've made, correct?

8 A. We performed an analysis that  
9 reflected the \$362 million based on historic  
10 practice and application of the TSA was owed  
11 to WMI from WMB.

12 Q. Did you perform any other analysis  
13 that would reflect a higher or lower amount  
14 that would come in to WMI?

15 A. We only performed the one analysis.

16 Q. And that analysis was solely based  
17 upon essentially saying "Here's what happened  
18 in the past with respect to WMI and WMB" and  
19 applying that on a going-forward basis, WMI  
20 would receive \$350 million?

21 A. Just to be clear, we looked at the  
22 historic application of the TSA, looked at  
23 what the separate company tax liabilities  
24 would be, what the transfer of cash was,  
25 looked at historic documents to understand

1 tracking of NOL changes. And based on that,  
2 up to the date of bankruptcy we determined  
3 under the TSA that WMI was owed the \$352  
4 million from WMB.

5 Q. Okay, at least \$352 million?

6 A. Yes.

7 Q. Because you understand that it  
8 could be substantially higher than that based  
9 upon the result of the dispute between  
10 JPMorgan, the FDIC and WMI regarding the  
11 ownership of the tax asset, correct?

12 A. No. The reason that it could be  
13 greater than \$352 million is because there  
14 was certain information that wasn't readily  
15 available to us at the time of that analysis.

16 Q. What information wasn't available  
17 to you?

18 A. There's just certain internal  
19 accounting records where we made reasonable  
20 assumptions and we didn't have that  
21 information yet. We -- we didn't know if it  
22 would be high enough.

23 Q. Well, what information are you  
24 missing?  
25

1  
2 A. Certain internal accounting  
3 records, things like ledger accounts and  
4 those types of information, towards the first  
5 part of the analysis period.

6 Q. Does that information exist?

7 A. No. I mean not to the best of my  
8 knowledge.

9 Q. Did you ask JPMorgan for it?

10 A. We looked internally, asked several  
11 information requests to JPMorgan as well.

12 Q. Did you ever issue, for example, a  
13 formal request for production for those  
14 documents?

15 A. If you're asking did we formally  
16 ask them for that information, did we ask  
17 them to supply (inaudible) information in  
18 that regard.

19 Q. You understand in litigation there  
20 are requests for production by which a party  
21 is legally obligated to produce those  
22 documents. Did you do that in this case?

23 A. Well, again, I'm not a practicing  
24 lawyer so I did not make any document demands  
25 in a formal legal sense.

1  
2 Q. Well, you just testified that you  
3 were missing information. My question to you  
4 is whether you asked through a formal request  
5 for production on JPMorgan to produce that  
6 information.

7 MS. ZAMBRANO: Objection, asked and  
8 answered.

9 JUDGE WALRATH: Overruled.

10 A. If you're asking me did we ask our  
11 lawyers to make a formal request for  
12 production, no, we did not. We had a fairly  
13 collaborative exchange with them on many  
14 issues, including (inaudible).

15 Q. And with respect to the legal  
16 ownership of the tax refund claim that might  
17 make the worth to WMI substantially higher,  
18 that was based upon counsel's advice,  
19 correct?

20 MS. ZAMBRANO: Objection.

21 JUDGE WALRATH: Overruled.

22 A. Well, I think it's important to  
23 understand what we did.

24 Q. And I'm just looking for a yes or  
25 no answer to that question.

1  
2 A. I don't think a yes or no answer is  
3 appropriate here, because you're asking me  
4 about \$352 million and that was based on the  
5 historic application of the TSA to the group.  
6 When you're asking me about any of  
7 the value associated with the refund on a  
8 going-forward basis, that was an issue of  
9 contract interpretation which we deferred to  
10 counsel on.

11 Q. Okay, I understand that you stated  
12 that with respect to \$352 million you  
13 personally have done that calculation.

14 My question to you is whether your  
15 counsel did analysis to determine the worth  
16 of the tax refund claim for anything from  
17 \$352 million to the amount that you have --  
18 WMI has asserted is in dispute in this  
19 litigation.

20 A. I don't know what analysis counsel  
21 has done.

22 Q. You do understand that they have  
23 done that analysis, correct?

24 A. I would assume an analysis has been  
25 done but, again, I don't know exactly what

1 specific analysis you're referring to.

2 MR. NELSON: Would you mind turning  
3 on the Elmo, please.

4 Q. Mr. Carreon, this is testimony from  
5 yesterday from Mr. Kosturos. I asked him,  
6 without getting into the substance, Weil and  
7 Quinn both undertook analysis about the worth  
8 of the tax refund claim, correct? He stated  
9 all of the analysis was completed by the  
10 financial team and relied upon by the  
11 financial team.

12 That statement is true with respect  
13 to the \$352 million but it is untrue with  
14 respect to the underlying legal dispute about  
15 who owns the tax refund claim, correct?

16 A. Well, I guess I'm a little unclear  
17 as to what analysis Mr. Kosturos may be  
18 referring to. You must understand,  
19 Mr. Kosturos was the chief restructuring  
20 officer and had a much broader view of the  
21 case than I do. My view is for the most part  
22 confined to tax considerations.

23 Q. I'm sorry. Can you answer my  
24 question, please?  
25

1  
2 MR. SACKS: Objection. He's  
3 answered, your Honor.

4 JUDGE WALRATH: Sustained.

5 Q. Do you agree that with respect to  
6 the legal analysis of the claim to determine  
7 the worth of the tax refund claim, debtors'  
8 lawyers did in fact undertake that analysis?

9 MR. SACKS: Objection, your Honor.  
10 Your Honor, he --

11 JUDGE WALRATH: Yeah, I think he's  
12 stated he doesn't know.

13 MR. NELSON: Nothing further.  
14 Thank you.

15 JUDGE WALRATH: Anyone else?

16 MR. STOLL: We have no questions,  
17 for this witness.

18 JUDGE WALRATH: Okay. None by --  
19 anybody? JPMorgan?

20 MR. SACKS: Nothing, your Honor.

21 MS. ZAMBRANO: I'll have redirect.

22 JUDGE WALRATH: Okay.

23 REDIRECT EXAMINATION

24 MS. ZAMBRANO:

25 Q. Does a \$352 million analysis have

1 anything to do with the NOL carry-backs also  
2 in your declaration?

3 A. No. The \$352 million number is  
4 based on historical application of the  
5 tax-sharing agreement and certain  
6 reimbursements to that were not paid.

7 Q. So the \$362 million was past  
8 historic and you did or did not rely on  
9 counsel with respect to that analysis?

10 A. I did not rely on counsel with  
11 respect to that analysis.

12 Q. And the carry-back NOL issue that  
13 also, you testified, you got in your  
14 declaration, did that have anything to do  
15 with analysis of counsel?

16 A. The carry-back claim?

17 Q. Yes.

18 A. The calculation of the carry-back  
19 claim, is that what you're referring to?

20 Q. Let me ask a better question.

21 Did counsel provide any advice with  
22 respect to the NOL carry-back claim?

23 A. No.

24 Q. And you're not relying upon any  
25

1  
2 advice from counsel with respect to -- in  
3 your declaration, in your testimony, with  
4 respect to that claim; is that correct?  
5 A. That's correct.  
6 MS. ZAMBRANO: No other questions,  
7 your Honor.  
8 JUDGE WALRATH: Any recross? No?  
9 All right, thank you. You may step  
10 down.  
11 THE WITNESS: Thank you.  
12 MR. ROSEN: Your Honor, if we could  
13 at this time release Mr. Carreon so that  
14 he doesn't have to stay for the  
15 remainder of the proceedings.  
16 JUDGE WALRATH: Any objection?  
17 MR. NELSON: No objection.  
18 JUDGE WALRATH: You may.  
19 MR. ROSEN: Your Honor, during the  
20 lunch hour we were looking at the  
21 scheduling of witnesses and seeing what  
22 time would permit based upon what we  
23 understand cross-examination might be.  
24 And so we informed the parties to  
25 the other side, your Honor, that we

1  
2 would be altering the schedule slightly,  
3 specifically to move forward  
4 Messrs. Klamser and Sharp. These were  
5 the two representatives from KCC that  
6 were involved in the solicitation and  
7 the tabulation of the votes. So they  
8 move forward and my colleague Kelly  
9 DiBlasi will be handling those.  
10 JUDGE WALRATH: Do you have an  
11 issue on that?  
12 MR. NELSON: Not at all, your  
13 Honor. They did inform us Mr. Smith was  
14 going to be moved to Monday, and I think  
15 actually we can very much, well before  
16 4:30, get Mr. Smith's questioning  
17 underway.  
18 MR. ROSEN: We're not sure it's  
19 going to be Mr. Sims or Mr. Smith going  
20 next after those two.  
21 MS. DiBLASI: Good afternoon, your  
22 Honor, Kelly DiBlasi from Weil Gotshal &  
23 Manges on behalf of the debtor.  
24 Your Honor, I'd like to submit the  
25 declaration of Robert Hugh Klamser with

1  
2 respect to the tabulation of votes on  
3 and elections pursuant to the plan as  
4 his direct. I have a copy with me if  
5 the court would like a copy.  
6 JUDGE WALRATH: You may approach.  
7 MS. DiBLASI: Your Honor, I have no  
8 additional direct for Mr. Klamser.  
9 JUDGE WALRATH: You should take the  
10 stand. Remain standing to be sworn.  
11 (Whereupon, the witness was duly  
12 sworn.)  
13 THE CLERK: Please state your full  
14 name and spell your last name for the  
15 record.  
16 THE WITNESS: Robert Quincy  
17 Klamser.  
18 THE DEPUTY: Spell it, please.  
19 THE WITNESS: Q-U-I-N-C-Y  
20 K-L-A-M-S-E-R.  
21 THE DEPUTY: Thank you.  
22 JUDGE WALRATH: Does anybody have  
23 cross of Mr. Klamser?  
24 MR. NELSON: No questions, your  
25 Honor.

1  
2 MR. BROWN: No questions, your  
3 Honor.  
4 JUDGE WALRATH: Nobody, counsel?  
5 Well, just for the record, your  
6 declaration is what you would testify to  
7 on direct?  
8 THE WITNESS: That's correct.  
9 JUDGE WALRATH: All right, you may  
10 step down.  
11 MR. ROSEN: Same request for  
12 Mr. Klamser so that --  
13 JUDGE WALRATH: Yes.  
14 MR. ROSEN: Thank you.  
15 MS. DiBLASI: THEY'RE just bringing  
16 in the next witness who is waiting  
17 outside the courtroom.  
18 Your Honor, the debtors' next  
19 witness is David Sharp, who also is  
20 employed by KCC. We filed two  
21 declarations from Mr. Sharp, one with  
22 respect to tabulation of votes and  
23 elections pursuant to the plan with  
24 respect to classes of securities, and  
25 the other one with respect to tabulation

1  
 2 of the rights offering elections. We'd  
 3 like to submit these as direct testimony  
 4 and I have copies if you'd like.  
 5 JUDGE WALRATH: You may hand them  
 6 up.  
 7 MS. DiBLASI: (Handing).  
 8 JUDGE WALRATH: Thank you.  
 9 You should take the stand as well.  
 10 Remain standing so you can be sworn.  
 11 (Whereupon, the witness was duly  
 12 sworn.)  
 13 THE DEPUTY: State your full name  
 14 and spell your last name for the record.  
 15 THE WITNESS: My name is David M.  
 16 Sharp, S-H-A-R-P.  
 17 THE CLERK: Thank you.  
 18 MS. DiBLASI: And, your Honor, we  
 19 do have some limited questions for  
 20 Mr. Sharp to supplement his direct  
 21 testimony in response to a handful of  
 22 objections to confirmation that were  
 23 filed by certain shareholders.  
 24 JUDGE WALRATH: All right. You  
 25 may.

1  
 2 D A V I D M. S H A R P , called  
 3 as a witness, having been duly sworn by  
 4 a Notary Public, was examined and  
 5 testified as follows:  
 6 EXAMINATION BY  
 7 MS. DiBLASI:  
 8 Q. Mr. Sharp, just to confirm, where  
 9 are you currently employed?  
 10 A. Kurtzman Carson Consultants.  
 11 Q. And what is your position there?  
 12 A. I'm directly of public securities.  
 13 Q. And Kurtzman Carson Consultants is  
 14 referred to often as KCC?  
 15 A. Correct.  
 16 Q. What is KCC?  
 17 A. KCC is primarily on one hand a  
 18 claims agent and a solicitation agent,  
 19 tabulation agent for debtors in bankruptcies.  
 20 Q. What is KCC's general experience in  
 21 this --  
 22 A. KCC has considerable experience  
 23 working with debtors in Chapter 11  
 24 bankruptcy, providing these services, and I  
 25 am qualified to testify on their behalf.

1  
 2 Q. What is KCC's role in these  
 3 Chapter 11s?  
 4 A. In the Washington Mutual Chapter 11  
 5 cases we were retained as the claims and  
 6 noticing agent as well as the solicitation  
 7 and tabulation agent.  
 8 Q. And how long have you been employed  
 9 at KCC?  
 10 A. I've been there for just over two  
 11 years.  
 12 Q. And prior to that did you -- were  
 13 you employed elsewhere?  
 14 A. I was. Prior to that I worked for  
 15 almost four years at (inaudible) financial  
 16 balloting group as a vice-president  
 17 specializing in Chapter 11 bankruptcy  
 18 solicitations involving public securities,  
 19 international aspects of the Chapter 11  
 20 cases, as well as a specialist in treatment  
 21 elections and subscriptions.  
 22 Q. Have you reviewed the objections to  
 23 confirmation that were filed by shareholders  
 24 raising issues and questions with respect to  
 25 the voting procedures?

1  
 2 A. I have.  
 3 Q. And just in general terms, can you  
 4 describe what some of the allegations were in  
 5 these actions?  
 6 A. There was some concern about voters  
 7 not being able to receive materials,  
 8 solicitation materials, timely. That seemed  
 9 to be the thrust of --  
 10 Q. And were these concerns raised with  
 11 respect to any holders in particular?  
 12 A. The ones that I saw seem to come  
 13 primarily from equity holders.  
 14 Q. Were you involved with the  
 15 distribution of solicitation materials to  
 16 equity holders in these Chapter 11 cases?  
 17 A. I was, yes.  
 18 Q. How did you identify the holders of  
 19 equity securities that were entitled to  
 20 receive solicitation materials?  
 21 A. Once we had identified the equity  
 22 securities that would be involved, we went to  
 23 the transfer agent who was the keeper of the  
 24 records of each of the equity securities and  
 25 asked them for a record date listing of the

1 holders of those securities.  
 2  
 3 Q. And once you received that list,  
 4 what -- I apologize, let me restart.  
 5 What does that list show?  
 6 A. The list would show all of the  
 7 holders of record of that particular  
 8 security.  
 9 Typically with equity securities  
 10 you could have what are known as registered  
 11 holders of the securities who are holders  
 12 that hold the security in their own name,  
 13 they're not holding it through an  
 14 intermediary. So when you get the list, you  
 15 would see the listing of these various  
 16 individuals' names who hold it in their own  
 17 name. You would typically see the name  
 18 (inaudible) the nominee. Same for the  
 19 Depository Trust Company for the United  
 20 States. DTC holds the position on the  
 21 account of nominees or banks and brokers  
 22 holding it (inaudible) of their clients.  
 23 Q. So for those registered holders on  
 24 the list that you received from the transfer  
 25 agent who were the actual beneficial holders

1 of the securities, how did you distribute  
 2 solicitation materials to them?  
 3 A. Anyone who's a registered holder,  
 4 whose name appears directly on the transfer  
 5 agent's list, we would send the materials  
 6 directly to them because we know who they  
 7 are.  
 8 Q. And is that what you did in these  
 9 cases?  
 10 A. We did, yes.  
 11 Q. Okay. And then turning to the  
 12 securities that were registered in the name  
 13 of DTC, how did you distribute solicitation  
 14 materials with respect to those securities?  
 15 A. DTC typically will not act on  
 16 behalf of the banks and brokers, so we go to  
 17 DTC and request a listing of the banks and  
 18 brokers as of the record date that were  
 19 holding at the Depository Trust Company. We  
 20 would then mail materials either to them or  
 21 to an agent that acts on their behalf.  
 22 Many of the banks and brokers use a  
 23 company called Broadbridge to do all the  
 24 mailings to their beneficial holders. Some  
 25

1  
 2 of the other use a company called Medial  
 3 Communications to do that and there are a  
 4 handful of banks and brokers that actually  
 5 mailed to their own beneficial holders.  
 6 So what we could do is send  
 7 sufficient materials for subsequent  
 8 distribution to Broadbridge, Medial and the  
 9 few banks and brokers that actually  
 10 distribute to their own holders. We would  
 11 also send a courtesy copy to every bank and  
 12 broker that appeared on the DTC list so that  
 13 they would be aware that the action was  
 14 happening.  
 15 Also we electronically notify the  
 16 major depositories, which would be the  
 17 Depository Trust Company in the U.S.,  
 18 Canadian depository, (inaudible) in Europe  
 19 and (inaudible) in Switzerland. There's also  
 20 a few banks and brokers that have asked us to  
 21 provide them with electronic materials  
 22 anytime we're working on an action like that  
 23 so they would have provided them with  
 24 electronic materials as well.  
 25 Q. To be clear, are the banks and

1 brokers the ultimate beneficial holders of  
 2 the securities?  
 3 A. No. They're just holding it on  
 4 behalf of other beneficial owners.  
 5 Unfortunately, they don't let us know who  
 6 their clients are or who they're holding for.  
 7 Q. Is there any other way for you to  
 8 determine who the beneficial holders are?  
 9 A. No. The banks and brokers do not  
 10 disclose that information.  
 11 Q. One of the shareholder objections  
 12 alleges that German shareholders specifically  
 13 did not receive copies of the voting  
 14 materials. Did KCC provide solicitation  
 15 materials to foreign equity holders?  
 16 A. We did.  
 17 Q. Can you please describe how you  
 18 distributed materials to those foreign  
 19 shareholders?  
 20 A. Yes. As I was saying, the transfer  
 21 agent holds the full listing of the equity  
 22 issuance on their books and records. DTC  
 23 would be a large part of that. Underneath  
 24 that would be the banks and brokers holding  
 25

1  
2 for DTC. Typically the foreign -- any  
3 foreign holders would be holding through one  
4 of the European depositories, who in turn  
5 hold for one of the U.S. custodians. We  
6 would have provided -- provide to U.S.  
7 custodians and pass it on to one of the  
8 European depositories.

9 Typically then the banks and  
10 brokers in Europe would hold through those  
11 depositories so they would have to handle it  
12 through (inaudible) or (inaudible) and pass  
13 it down to the beneficial owner. We realize  
14 there is a lapse between the U.S. custodian  
15 getting it to the European depository. We  
16 send the materials electronically to the  
17 European depository so they have it on the  
18 way so they can pass it down the chain.

19 Q. Is there any way for KCC to control  
20 or ensure that the materials make their way  
21 through that chain that you just described?

22 A. We cannot, no.

23 Q. Are you generally familiar with the  
24 list of registered holders of Class 22, which  
25 are common equity interests that were

1  
2 the Class 20 equity securities, the only  
3 holder of record was the Depository Trust  
4 Company, DTC.

5 Q. What solicitation materials did you  
6 contribute to registered holders and voting  
7 nominees on behalf of beneficial -- excuse  
8 me, on behalf of equity securities?

9 A. For Class 19 and 20, which were the  
10 voting equity classes, we sent the disclosure  
11 statement order, the confirmation hearing  
12 notice, a CD-ROM that included the disclosure  
13 statement and plan, several letters that were  
14 both in support and in opposition to the plan  
15 as well as a ballot.

16 Q. And Classes 21 and 22?

17 A. Classes 21 and 22 were nonvoting  
18 classes so received the notice of  
19 confirmation hearing as well as a notice of  
20 non-going status (sic).

21 Q. The materials that you sent out  
22 that you just described, were these the  
23 materials that were set forth in the  
24 disclosure statement order as being required  
25 to be sent out to these specific classes?

1  
2 attached to KCC's affidavit of service of  
3 solicitation materials as Exhibit AV?

4 A. I am, yes.

5 Q. Was this intended to be a complete  
6 list of all beneficial holders of common  
7 equity interests?

8 A. It's a list of the registered  
9 holders, which would be the holders I  
10 mentioned that hold the securities in their  
11 own name, as well as the position for the  
12 Depository Trust Company.

13 Q. So to be clear, if a beneficial  
14 holder was not listed on that exhibit, does  
15 that mean that such holder was not sent  
16 solicitation materials?

17 A. No. It means the solicitation  
18 materials would have been sent out to their  
19 voting nominee and it was a voting nominee's  
20 responsibility to send it on to the actual  
21 ultimate beneficial owner.

22 Q. Were any of the preferred equity  
23 interests in Class 20 registered in the name  
24 of the ultimate beneficial holders?

25 A. No. When we requested the list of

1  
2 A. They were, yes.

3 Q. Did these solicitation packages  
4 contain return envelopes addressed to KCC?

5 A. They did not, no.

6 Q. Why?

7 A. The ultimate beneficial owners --  
8 because let me back up a moment.

9 The Class 19 and 20 only had DTC as  
10 the holder of record, so there were no direct  
11 registered holders. Therefore, all of the  
12 solicitation materials needed to go to the  
13 voting nominees to be passed on down to the  
14 beneficial holders. The beneficial holders  
15 must vote the ballots through the voting  
16 nominee to be counted and the voting nominees  
17 turn in their master ballots to us by  
18 overnight mail or by courier.

19 Q. Why is it beneficial holders must  
20 return the ballots through the voting  
21 nominees?

22 A. It's the only way we can verify  
23 they are in fact a holder of the security  
24 because we don't have the list of the names  
25 and positions of those holders, we only know

1  
 2 the names and holders of the nominees.  
 3 Q. Are you aware that certain  
 4 nominees, certain ballots were faxed or  
 5 otherwise electronically submitted to  
 6 nominees by the beneficial holders?  
 7 A. It's not uncommon for the nominees  
 8 to set their own procedures for how they wish  
 9 to receive information, including votes and  
 10 elections, from their clients. The  
 11 requirements for us were that we receive an  
 12 original ballot from the voting nominees, so  
 13 we don't really have any say as to what  
 14 procedures they set up between the nominees  
 15 and their own clients.  
 16 Q. So if a beneficial holder faxed or  
 17 electronically submitted a ballot to their  
 18 voting nominee and the voting nominee then  
 19 submitted an original copy of a master ballot  
 20 to KCC, would that vote have been counted?  
 21 A. Absolutely, yes.  
 22 Q. When were the solicitation packages  
 23 served by KCC on holders of equity  
 24 securities?  
 25 A. They were served on or before

1  
 2 requesting copy of solicitation materials?  
 3 A. They did.  
 4 Q. Did KCC provide them with copies?  
 5 A. We did, with instructions to return  
 6 them to the nominees.  
 7 Q. Did KCC receive calls with  
 8 questions about the solicitation process?  
 9 A. We did, yes.  
 10 Q. And what is KCC policy on  
 11 responding to these calls?  
 12 A. We answer questions related to the  
 13 phone on mechanics and to how it is they need  
 14 to turn in the ballots through their  
 15 nominees. We try to direct them to areas in  
 16 the materials where they can find answers to  
 17 any questions, disclosure statement and plan.  
 18 We do not and cannot give them legal advice  
 19 or offer them any opinions on what they  
 20 should be doing.  
 21 Q. Are you familiar with the opt-out  
 22 and opt-in provisions in the ballots with  
 23 respect to the releases?  
 24 A. I am, yes.  
 25 Q. And can you explain what would

1  
 2 October 25th.  
 3 Q. And what was the voting deadline?  
 4 A. The voting -- the original voting  
 5 deadline was, I believe, December 16th? It  
 6 was -- it was extended to the 18th or 19th.  
 7 Q. Did you mean to say November?  
 8 A. I'm sorry, November. Yes.  
 9 Q. Are you aware that certain nominees  
 10 required beneficial holders to provide them  
 11 with their ballots in advance of the debtors'  
 12 voting deadline?  
 13 A. Yes.  
 14 Q. Is this customary in your  
 15 experience?  
 16 A. It is, yes.  
 17 Q. Do you have any sense for why  
 18 (inaudible) nominees may writer in?  
 19 A. Often nominees like to give  
 20 themselves a few days to assemble the  
 21 instructions they receive from the beneficial  
 22 owners, so they transcribe it onto a master  
 23 ballot and make sure they deliver it by the  
 24 voting deadline.  
 25 Q. Did any equity holders contact KCC

1  
 2 physically happen to an equity holder's  
 3 shares within DTC if they elected to opt out  
 4 of the releases or with respect to Class 19  
 5 if they elected to opt in to the releases?  
 6 A. Yes. If they chose to make one of  
 7 the opt elections in the class, they would  
 8 need to notify their nominee they wished to  
 9 do so. The nominee would then send their  
 10 position in a segregated (inaudible) called a  
 11 contra-CUSIP as a Depository Trust Company.  
 12 That was if it could not be traded. And then  
 13 the nominee would send us information related  
 14 to that opt election and what's called a VOI  
 15 number that is a designator of the fact they  
 16 had tendered it into the contra-CUSIP on the  
 17 master ballot.  
 18 Q. Why is this required?  
 19 A. A few reasons.  
 20 One is anytime a holder makes any  
 21 kind of a treatment election on a security,  
 22 you have to be sure that that particular  
 23 election stays tied to that security. And  
 24 the only way to do a that is to lock it up  
 25 and prevent it from trading. Otherwise,



1  
2 somebody could make an election and trade it  
3 to someone else and you have no way of  
4 tracking that that election was moving on  
5 with the security.

6 The other reason, when you make  
7 distributions through DTC you have to have --  
8 DTC can only accept standard distribution  
9 information for any particular pool of  
10 holders, so anytime someone's making anything  
11 that varies from the standard distribution  
12 you need to move it into a separate pool so  
13 you can make distributions to that.

14 Q. And in your experience, is this  
15 process of forcing security holders to  
16 transfer their shares in a CUSIP when they're  
17 making an election on a ballot customary?

18 A. Very much, yes.

19 Q. In general, based upon your  
20 experience, are the solicitation procedures  
21 in this case customary?

22 A. They are, yes.

23 Q. Have you employed similar  
24 procedures in other bankruptcy cases you've  
25 been involved in with a debtor held publicly,

1  
2 cases that I've had in terms of timing.

3 Q. What do you mean by very similar?

4 A. It's typical we have anywhere from  
5 15 to 30 day period of time.

6 Q. As a normal time?

7 A. Yes.

8 Q. And is there longer times or  
9 shorter terms as well during certain  
10 circumstances?

11 A. There can be, yes. Rarely is it --  
12 rarely have I ever seen it longer than 20 to  
13 25 days.

14 MR. NELSON: Thank you very much.  
15 That's all I have.

16 JUDGE WALRATH: Anybody else?

17 MR. STOLL: No questions.

18 JUDGE WALRATH: Any redirect?

19 MS. DiBLASI: No, your Honor.

20 JUDGE WALRATH: Okay, thank you.  
21 You may step down.

22 MR. ROSEN: Your Honor, may

23 Mr. Sharp be released?

24 JUDGE WALRATH: You may.

25 MR. ROSEN: Thank you.

1  
2 where a debtor had publicly held securities?

3 A. I have, yes.

4 MS. DiBLASI: I have nothing  
5 further at this moment, your Honor.

6 JUDGE WALRATH: Okay. Cross?

7 MR. NELSON: Good afternoon.

8 Justin Nelson, Sussman Godfrey for the  
9 Equity Committee.

10 CROSS-EXAMINATION

11 BY MR. NELSON:

12 Q. I just have a few questions for  
13 you.

14 First, you were aware that there  
15 were multiple, multiple complaints from  
16 shareholders, both deferred and commons, that  
17 they were unable to receive their ballots and  
18 get them back in time, correct?

19 A. Correct.

20 Q. You have experience and just  
21 testified as to customary practices with  
22 respect to the ballot procedures. How does  
23 this case compare to other cases in which  
24 you've been involved in terms of timing?

25 A. It's very similar to many other

1  
2 Your Honor, the next witness is  
3 going to be Mr. Steve Simms.

4 MR. JOHNSON: Good afternoon, your  
5 Honor. Robert Johnson on behalf of the  
6 committee of unsecured creditors. At  
7 this time we would like to offer the  
8 declaration of Steven D. Simms and I  
9 have a copy for your Honor. May I  
10 approach?

11 JUDGE WALRATH: You may hand it  
12 over. Thank you.

13 MR. JOHNSON: I'd like to offer the  
14 declaration in evidence and I have no  
15 questions at this time.

16 JUDGE WALRATH: You should take the  
17 stand. Remain standing so you can be  
18 sworn.

19 (Whereupon, the witness was duly  
20 sworn.)

21 THE DEPUTY: State your full name  
22 and spell your last name please.

23 THE WITNESS: Steven, S-T-E-V-E-N,  
24 David Simms, S-I-M-M-S.

25 THE CLERK: Thank you.

1  
2 JUDGE WALRATH: Can you confirm for  
3 the record that the declaration  
4 submitted on your behalf is your direct  
5 testimony?

6 THE WITNESS: Yes.

7 JUDGE WALRATH: Do you wish to  
8 cross?

9 MR. BROWN: Thank you, your Honor.

10 CROSS-EXAMINATION

11 BY MR. BROWN:

12 Q. Mr. Simms, good to see you again.

13 A. Good to see you.

14 Q. Daniel Brown on behalf of the TPS  
15 consortium.

16 THE WITNESS: Excuse me, I have  
17 someone else's declaration up here.

18 (Discussion off the record.)

19 Q. Mr. Simms, as I said, good to see  
20 you again. We have seen each other before.  
21 Do you recall your deposition a couple of  
22 weeks ago in my office?

23 A. Yes, I do.

24 Q. And during that time you remember  
25 you and I had a dialogue throughout the day

1  
2 hefty because I did the big pages, not a  
3 minuscule. But if you turn to page 91 --

4 A. Okay.

5 Q. -- I'd like to go ahead and review  
6 some of the questions and answers that you  
7 and I went through.

8 At the time, I was asking you about  
9 the analysis that was conducted by the  
10 creditors committee and I believe --

11 Well, here on this page you had  
12 testified that the creditors committee  
13 concluded that the global settlement  
14 agreement was prudent to enter into. Is that  
15 accurate?

16 A. I see from page 9 one of the first  
17 sentences says the committee concluded that  
18 the (inaudible).

19 Q. Okay. And actually at the  
20 conclusion of that paragraph, that answer  
21 actually says the same thing repeated again;  
22 is that right?

23 A. (Reading).

24 Q. You see on lines 12 through 14?

25 A. Um-hm. (Inaudible) yes.

1  
2 at various points regarding privilege issues;  
3 do you recall that?

4 A. Yes, I do.

5 Q. And you know I asked you certain  
6 questions about the analysis that was  
7 conducted by the creditors committee in  
8 connection with the global settlement  
9 agreement during that time; do you recall  
10 that?

11 A. Yes, I do.

12 Q. And during that time you actually  
13 did assert the privilege and refused to  
14 answer several questions. Do you recall  
15 that?

16 A. I remember answering a lot of  
17 questions and I remember asserting privilege  
18 on certain questions, that's correct.

19 MR. BROWN: May I approach the  
20 witness and the bench, your Honor, to  
21 hand out the transcript.

22 JUDGE WALRATH: You may.

23 THE WITNESS: Thank you.

24 Q. Mr. Simms, I did hand you a copy of  
25 the deposition transcript. It's a little bit

1  
2 Q. And is that your position again  
3 today, that the creditors committee concluded  
4 that the global settlement agreement was  
5 prudent to enter into?

6 A. I believe that it was prudent to  
7 enter into.

8 Q. And my follow-up question to you  
9 was exactly what analysis was conducted to  
10 come to that conclusion. Is that accurate?

11 A. (Reading).

12 Q. Lines 15 to 16?

13 A. Yes.

14 Q. And your attorney objected and  
15 instructed you not to answer on behalf --  
16 because of the attorney-client privilege. Do  
17 you recall that?

18 A. That is correct.

19 Q. And you actually did follow that  
20 instruction with respect to some of the  
21 analysis, didn't you?

22 A. (Reading). I followed that  
23 instruction with regard to the conclusions of  
24 the analysis. I think as I sit in here was  
25 from counsel and I believe I go on to say in

1  
2 the answer then carries over to 92 that we  
3 walked through the analysis that was done on  
4 many things, solvency, (inaudible). So we  
5 did a lot of analysis as I indicated that day  
6 and (inaudible) here that was done without  
7 counsel but the conclusions on May were  
8 subject to attorney-client privilege.

9 Q. Understood. Just to clarify, I'll  
10 go ahead and read your answer.

11 The analysis on the major assets,  
12 liabilities and claims was done fully in  
13 conjunction with counsel. I think I believe  
14 earlier today we walked -- talked through  
15 some of the analysis that was done.  
16 Solvency, fraudulent conveyance would be  
17 used, disputes over deposits, disputes over  
18 other items. That was the type of analysis  
19 that was done of the claims against JPM. It  
20 was all done with counsel?

21 Is that accurate still?

22 A. Work was done with counsel. All  
23 that was done with counsel, there was  
24 independent analysis that was part of our  
25 analyses that were done by FDIC. But, yes,

1 they were done at some point with counsel.

2 Q. Okay. And the analysis that was  
3 performed with counsel, was that with respect  
4 to the merits of the legal claims involved in  
5 these Chapter 11 cases?  
6

7 A. Merits of potential legal claims.  
8 But analysis that we did throughout the case  
9 where counsel was involved, there were parts  
10 of it that were fairly done independently by  
11 FTI as an example, to use an example of the  
12 deposit accounts, where we looked at issues  
13 related to the inflows and outflows of  
14 various deposit accounts, where the accounts  
15 were, where the money from -- where the money  
16 came from, what was the back-and-forth  
17 between WMI and WMB in the different deposit  
18 accounts. Analysis at the end that included  
19 counsel with regard to the merits of winning  
20 arguments, but there was extensive analysis  
21 done by FTI independently.

22 Q. I just want to make sure I  
23 understand this correctly. As you just  
24 testified, the merits of the claims, the  
25 analysis regarding the merits of the claims

1  
2 was done by counsel, was it not?

3 MR. JOHNSON: Objection, ambiguous.

4 JUDGE WALRATH: Overruled.

5 A. Would you repeat the question.

6 Q. The analysis that was done with  
7 respect to the claims that we just went  
8 through in your deposition answer was done in  
9 connection with counsel or in conjunction  
10 with connection, was it not?

11 A. I think I just stated that we did  
12 analysis independent of counsel looking at  
13 different components of it. As far as the  
14 likelihood of winning in litigation on many  
15 of those, yes, it was done in conjunction  
16 with counsel.

17 Q. Okay. And, in fact, at the time  
18 during your deposition as we went through the  
19 various claims that were raised between  
20 JPMorgan the FDIC and the debtors, you  
21 asserted the privilege with respect to the  
22 results of that analysis?

23 A. The likelihood of winning on those  
24 claims.

25 Q. That included the analysis or,

1  
2 excuse me, the results of the analysis with  
3 respect to claims on the disputed deposit  
4 accounts of \$4 billion?

5 A. As I just mentioned, we did  
6 intensive work on the claims themselves  
7 looking at the to and fro's from the deposit  
8 account, what the deposit was. We met with  
9 personnel from the company, we received  
10 extensive data from the company but on the  
11 merits of winning legal (inaudible) was  
12 clearly done in conjunction with counsel.

13 Q. And the analysis of whether Debtor  
14 would win any legal litigation with respect  
15 to the disputed tax returns was also done by  
16 counsel; is that right?

17 A. We did extensive work as it related  
18 to taxes looking at the tax -- getting an  
19 understanding of who generated the losses,  
20 where the losses were generated, what major  
21 company transactions were with regard to  
22 taxes, what the merits were. But as far as  
23 winning on a rejection versus repudiation or  
24 things like that, yes, we had advice of  
25 counsel but we got an enormous amount of

1  
2 information from the debtor regarding their  
3 taxes and other information of taxes directly  
4 from the folks at Alvarez.

5 Q. I'm going to focus you back on your  
6 deposition. If you can turn to page 99.

7 A. Um-hm.

8 Q. Because we already discussed during  
9 your deposition certain claims to the  
10 ownership of the Trust Preferred Securities.  
11 Do you remember that?

12 A. Not specifically, but I'm happy to  
13 refresh my memory.

14 Q. You have an understanding that  
15 there was a dispute regarding the ownership  
16 of the Trust Preferred Securities between WMI  
17 and JPMorgan? Do you recall that?

18 A. Yes (inaudible).

19 Q. And you understand that this is one  
20 of the claims that is being settled under the  
21 global settlement agreement?

22 A. Yes, it is.

23 Q. All right. And pursuant to the  
24 global settlement agreement WMI would, if  
25 it's approved, transfer the Trust Preferred

1

2 A. You have me at 99. You want me to  
3 go to 95?

4 Q. I'm sorry. Yeah, I apologize. I  
5 did say 99. I meant 95.

6 A. Okay.

7 Q. Line 8 there.

8 "Question: What was the basis for  
9 concluding that the debtor should  
10 distribute the Trust Preferred  
11 Securities to JPMorgan?"

12 There was an objection,  
13 attorney-client privilege, and then a  
14 follow-up question:

15 "Are you going to follow your  
16 attorney's presumed instruction to not  
17 answer that question based on the  
18 attorney-client privilege?"

19 "Answer: I will follow my  
20 attorney's instruction.

21 "And as you sit here today, are you  
22 continuing to assert the attorney-client  
23 privilege with respect to the basis for  
24 concluding that the debtor should  
25 distribute the (inaudible) preferred

1 Securities to JPMorgan. Do you have that  
2 understanding?

3 MR. JOHNSON: Objection to the  
4 characterization of the plan.

5 MR. SACKS: Objection to the form  
6 of the question.

7 JUDGE WALRATH: Overruled.

8 A. I wouldn't say that they're  
9 transferring. I think there's been claims  
10 made (inaudible) transferred, so if it's  
11 confirmation of certain treatment of that  
12 I'll agree with you. And there's a dispute  
13 over whether or not that's been transferred  
14 or not. JPM would argue it's already been  
15 transferred, the debtors would argue  
16 differently.

17 Q. Under the global settlement  
18 agreement if it's approved who will own the  
19 securities?

20 A. I believe JPMorgan will own the  
21 securities.

22 Q. Okay. And looking back at page 95  
23 I believe --

24 You're there; is that right?  
25

1

2 securities to JPMorgan?"

3 A. With regard to conclusion of  
4 termination, it is subject to attorney-client  
5 privilege. We did obviously extensive work  
6 with regard to Trust Preferred secureds, but  
7 with regard to the conclusion that was  
8 reached it was subject to attorney-client  
9 privilege.

10 Q. And, in fact, here I asked you what  
11 was the basis for concluding -- the basis,  
12 not just the conclusion but the basis. And  
13 you asserted the attorney-client privilege,  
14 did you not?

15 A. Yes, I did.

16 Q. Okay. And the next question:

17 "Question: What was the basis for  
18 determining that Washington Mutual  
19 should agree to split the tax returns in  
20 the amounts set forth in the global  
21 settlement agreement?"

22 "Objection as to attorney-client  
23 privilege and attorney work product on  
24 this specific line item and I will  
25 instruct you not to answer."

1  
2 "Question: You are following your  
3 attorney's instruction?

4 "Answer: Yes."

5 Now are you continuing to assert  
6 the attorney-client privilege with respect to  
7 the basis for determining that Washington  
8 Mutual should agree to split the tax returns?

9 A. For the conclusion aspect, yes.  
10 However, as I said earlier, we did an  
11 extensive amount of work independently in  
12 assessing the tax situation, who owed what to  
13 who, that generated the losses, what would  
14 the outcome be if there were certain  
15 determinations on that. So we did an  
16 extensive amount of that, but for the final  
17 conclusion I do assert the privilege.

18 Q. And during your deposition I asked  
19 you not just the conclusion but the basis for  
20 reaching that conclusion and you asserted the  
21 attorney client privilege, did you not?

22 MR. STROCHAK: Objection, your  
23 Honor. This is their splitting the  
24 basis of the conclusion and the  
25 conclusion.

1 JUDGE WALRATH: Overruled.

2 A. I did answer that question  
3 (inaudible).

4 Q. And on page 96, line 9:

5 "Question: What specific  
6 conclusions were reached with respect to  
7 any cost/benefit analysis of continuing  
8 to litigate the claims related to the  
9 disputed accounts?"

10 You asked me to repeat the question  
11 and it was read back.

12 "Answer: As we have talked about  
13 previously, specific conclusions that  
14 were reached were based on advice of  
15 counsel. On merits of claims as a  
16 result I don't think I can answer that  
17 without revealing attorney-client  
18 privilege."

19 Is that accurate?

20 A. That is correct.

21 Q. Okay. And as you sit here today  
22 you aren't relying on the advice of counsel  
23 with respect to your testimony?

24 MR. JOHNSON: Objection, ambiguous.  
25

1 MR. SACKS: Objection.

2 JUDGE WALRATH: Sustained.

3 Q. In preparing your affidavit today  
4 did you rely on the advice of counsel in  
5 reaching the conclusion that the settlement  
6 is fair and reasonable?  
7

8 A. We believe the settlement is fair  
9 and reasonable. I do not rely on counselors  
10 for that. It's fair and reasonable.

11 Q. In your affidavit you're relying on  
12 what counsel told you with respect to the  
13 claims that are being settled?

14 A. Could you repeat the question?

15 Q. In preparing your affidavit, are  
16 you relying on what counsel told you with  
17 respect to the claims that are being settled?

18 A. The conclusions that we reached  
19 with regard to the individual claims were  
20 dependent on advice from counsel. So, yes,  
21 we were dependent on advice from counsel. As  
22 far as the reasonableness of the global  
23 settlement, that is -- we support that  
24 settlement.  
25

Q. Okay. Did you independently

1 conduct an analysis that did not -- strike  
2 that.

3 Who drafted the your affidavit for  
4 you?

5 MR. JOHNSON: Objection.

6 JUDGE WALRATH: What is the  
7 objection?

8 MR. JOHNSON: Withdrawn.  
9 (Laughter).

10 A. Counsel drafted initially the  
11 affidavit. We provided input to it but  
12 counsel drafted it.

13 Q. And whose counsel drafted it  
14 initially?

15 A. The committee's counsel, Akin Gump.

16 Q. And was that affidavit approved by  
17 debtors' counsel before it was submitted?

18 A. Not that I'm aware of.

19 Q. Do you know if it was approved  
20 by -- any of the words were approved by  
21 debtors' counsel before you signed it?

22 A. Not that I'm aware of.

23 Q. But every word in there was  
24 approved by your attorneys?  
25

1  
2 A. I don't know approved by my  
3 attorneys. I didn't ask them for their  
4 approval on it.

5 Q. Well, they drafted it and reviewed  
6 it and then you signed it, right?

7 A. They drafted it -- I assume they  
8 reviewed it. I don't know. And then I  
9 signed it.

10 Q. I'd like to take a look at your  
11 declaration and go through some of these  
12 paragraphs here.

13 I'm looking specifically at  
14 paragraph 6 on page 3. Look at the first  
15 sentence there where it says, Through it's  
16 professionals the creditors committee  
17 promptly and thoroughly investigated the  
18 debtors' assets and liabilities including  
19 potential causes of action that could be  
20 asserted by or on behalf of the debtors'  
21 estates." So that analysis was conducted by  
22 counsel, was it not?

23 A. It was -- there was analysis  
24 conducted by FTI and analysis conducted by  
25 counsel.

1  
2 Q. Okay. And your analysis with  
3 respect to the potential causes of action was  
4 conducted with the assistance of counsel, was  
5 it not?

6 A. Sometimes yes and sometimes no.

7 Q. Okay. And the work actually  
8 entailed thousands of hours of financial and  
9 legal analysis; is that correct?

10 A. That is correct.

11 Q. Okay. And the analysis, some of  
12 the analysis anyway -- I'm not going to go  
13 through all the bullet points -- included the  
14 \$4 billion disputed deposits?

15 A. Some of the analysis included  
16 (inaudible) deposits, yes.

17 Q. And also some of the analysis  
18 included potential claims to the Trust  
19 Preferred securities with a value of  
20 \$4 billion?

21 A. That is correct.

22 Q. And some of the analysis also  
23 included whether or not WMI was entitled to  
24 and the associated value of the tax refunds  
25 in net operating losses as set forth in

1  
2 subparagraph (f), did it not?

3 A. That is correct.

4 Q. And that analysis was done in  
5 conjunction with counsel, wasn't it?

6 MR. JOHNSON: Objection, asked and  
7 answered.

8 JUDGE WALRATH: Overruled.

9 A. As I stated earlier, there was  
10 independent analysis done by FTI and counsel  
11 on the assets we were talking about  
12 (inaudible).

13 Q. And I want to go ahead and flip to  
14 paragraph 8 --

15 A. Okay.

16 Q. -- which deals with the potential  
17 challenge of the OTS seizure of WMB.

18 A. Yes.

19 Q. And the last sentence -- I'm sorry,  
20 the second-to-last sentence on the page says,  
21 "The creditors committee also considered  
22 litigation risk appellate risk and the time  
23 and expense of litigation." Did I read that  
24 accurately?

25 A. That is correct.

1  
2 Q. And the litigation risk and  
3 appellate risk, the analysis related to those  
4 was done by counsel, was it not?

5 A. Counsel certainly looked at that  
6 but we considered it as well. Obviously,  
7 this is a major takeover. To challenge the  
8 federal government or the OTS I knew would be  
9 expensive, time-consuming and it would be a  
10 lot of litigation surrounding this. So we  
11 were aware of that. We had heard it from the  
12 FDIC previously. We heard other people state  
13 it. We were aware of it but counsel was  
14 clearly involved in looking at those  
15 components.

16 Q. And whether or not it would be  
17 successful, that determination was determined  
18 or was -- strike that. Let me ask a  
19 different question or slightly better  
20 question.

21 When you're determining whether or  
22 not there would be worthwhile to do that, did  
23 you consider whether or not it would succeed?

24 A. There was a consideration of  
25 whether or not it would succeed. We factored

1 in many things in looking at that. Okay,  
2 there was extensive review of items such as  
3 the history, the capital contributions that  
4 had been made, what had been going on in the  
5 industry, the financial crisis that was going  
6 on at that time, the risks inherent with  
7 challenging it, the threats on Section 9 of  
8 the asset purchase agreement of offsetting  
9 against deposits, the reaction that we would  
10 get from the FDIC.

11 Those were all things that were  
12 considered as part of that and the merits of  
13 success, yes, those were part of it, but  
14 there were a whole host of issues that were  
15 looked at, okay.

16 Q. Okay. And were any of those issues  
17 looked at by counsel?

18 A. Some of the issues were looked at  
19 by counsel.

20 Q. And that went into the overall  
21 determination of whether or not it would be  
22 successful is what your counsel told you,  
23 isn't it?

24 A. Counsel's input on whether or not  
25

1 counsel, didn't you?

2 A. As I stated a couple of times, we  
3 conferred with counsel on numerous aspects.  
4 We looked at things independently, the FTI  
5 independently on numerous things. From the  
6 start, the deposits as I said earlier. We  
7 looked at extensive historic records from the  
8 company on the taxes. We looked at an  
9 extensive amount of information, historical  
10 records. We looked at information on where  
11 losses were generated. We had a good  
12 understanding from the company, each company,  
13 transactions where we were.

14 We did an extensive amount of work  
15 on those items and we can go through others  
16 here as well, but we did talk with counsel on  
17 them and they were important in the  
18 conclusion. But we did plenty of independent  
19 work.

20 Q. And the conclusion, you say, is  
21 privileged?

22 MR. JOHNSON: Objection, ambiguous.

23 JUDGE WALRATH: Well, overruled.

24 A. Can you restate the question?  
25

1 we would succeed in that litigation was a  
2 part of it. But as I said, the other things  
3 I had factored in were also independent of  
4 counsel.

5 Q. Let's go ahead and look at  
6 paragraph 11.

7 A. Okay.

8 Q. Paragraph 11 deals with the  
9 disputes related to deposits, the Trust  
10 Preferred Securities, goodwill litigation  
11 proceeds and some of the other disputed  
12 assets; is that fair?

13 A. I'd like to read it, please.

14 Q. Sure, go ahead.

15 A. (Reading). That is correct.

16 Q. And you state in this paragraph  
17 that the creditors committee carefully and  
18 thoroughly examined and analyzed JPM's claims  
19 and consulted extensively with the debtors  
20 regarding (inaudible) counterclaims. Do you  
21 see that near the end of the paragraph?

22 A. Yes, I do.

23 Q. Okay. And in analyzing and  
24 examining JPMC's claims you conferred with  
25

1 Q. Sure.

2 Is the conclusion that you said you  
3 reached with respect to at least the merits  
4 of these claims, that is privileged, is it  
5 not?  
6

7 MR. JOHNSON: Objection, ambiguous.

8 JUDGE WALRATH: Overruled.

9 A. The conclusion of our likelihood of  
10 success on these claims is something that we  
11 have asserted privilege on, yes. I do think  
12 the merits of the claims and the items that I  
13 talked about earlier and some of the  
14 important analysis that went into it, the  
15 analysis underlying that we talked about, I  
16 think it talks about work we had done  
17 previously (inaudible).

18 Q. Paragraph 17 begins -- I'll give  
19 you a second to get it.

20 A. Okay.

21 Q. -- begins the creditors committee  
22 conducted an independent legal and financial  
23 analysis of, one, the merits of the potential  
24 claims against JPMorgan Chase. Now, the  
25 independent legal analysis with regards to

1  
2 the potential claims against JPMC was done by  
3 counsel wasn't it?

4 A. It says independent legal. Legal  
5 and financial, I think they were mine, so  
6 there was legal work and financial work done  
7 on all of these claims. (Inaudible).

8 Q. And the creditors committee, the  
9 creditors committees, excuse me, independent  
10 legal and financial analysis with respect to  
11 number two, possible defenses available to  
12 JPMC was done by counsel; is that correct?

13 A. Again I'll go back to the legal  
14 sentence. Legal and financial work. Though  
15 it was both legal and finance.

16 Q. But specifically the legal work was  
17 done by your counsel not the financial work?

18 A. There was legal work done by  
19 counsel that is correct.

20 Q. And just go ahead and finish up in  
21 this paragraph.

22 Number 3, there was independent  
23 legal analysis conducted with respect to the  
24 debtors' solvency and WMB's solvency at times  
25 prior to the seizure of WMB. That was done

1  
2 JUDGE WALRATH: Overruled.

3 You can answer.

4 A. Can you repeat the question?

5 Q. All right. Let me ask it a little  
6 bit differently.

7 We have three points here?

8 A. Um-hm.

9 Q. The merits of the potential claims  
10 against JPMC is point 1. Do you see that?

11 A. Yes, I do.

12 Q. And the possible defenses available  
13 to JPMorgan is point 2. Do you see that?

14 A. Yes.

15 Q. Point number 3 deals with financial  
16 issues relating to the claims against  
17 JPMorgan including, among other things, the  
18 debtors' solvency and WMB's solvency. Do you  
19 see that?

20 A. Yes.

21 Q. Okay. And I'm asking you, is it  
22 your testimony that with respect to those  
23 three issues, legal analysis was encompassed  
24 in the entire analysis?

25 MR. JOHNSON: Objection.

1  
2 by legal counsel, wasn't it?

3 MR. JOHNSON: Objection.

4 Misquoting the document.

5 A. Yeah, I don't see the words  
6 "independent" -- it's again independent legal  
7 and financial analysis. There was work done  
8 by counsel, there was work done by financial  
9 advisors on these points.

10 Q. Okay. And your analysis with  
11 respect to financial issues encompassed both  
12 of them; is that your testimony?

13 A. I'm sorry, could you repeat that?

14 Q. All right.

15 Well, the analysis that was  
16 conducted, the independent analysis --

17 A. Um-hm.

18 Q. -- with respect to all three of  
19 these issues in this paragraph encompassed  
20 both legal and financial analysis; is that  
21 your testimony?

22 MR. SACKS: Objection, vague.

23 Analysis of who? He's testified both  
24 legal analysis and financial analysis by  
25 different people.

1  
2 JUDGE WALRATH: Overruled.

3 A. Legal analysis was encompassed in  
4 reaching conclusions by many of -- most  
5 analyses on these outcomes, but there was  
6 independent financial analysis done in each  
7 of these areas.

8 Q. Okay. And just one last question.  
9 In reaching your business judgment as is set  
10 forth in paragraph 23 --

11 I'll wait for you to get there.

12 A. Yes.

13 Q. -- the creditors committee  
14 supposedly carefully considered the relative  
15 merits of each of the claims. Do you see  
16 that in the middle of the paragraph?

17 A. Yes.

18 Q. And analysis with respect to the  
19 merits of the claims was done by your  
20 counsel, wasn't it?

21 A. No. As I stated earlier, there was  
22 work done by -- financial work and legal  
23 work, and it's a combination of the two. The  
24 conclusion reached encompassed counsel's  
25 advice, so that was included. But the



1  
2 different work that was done, there was work  
3 done on the financial side and on the legal  
4 side.  
5 Q. All right.  
6 A. (Inaudible).  
7 Q. I'm sorry, I didn't mean to  
8 interrupt you. I just want to turn you just  
9 to page 96 again of your deposition.  
10 A. Okay.  
11 Q. I just want to remind you of your  
12 testimony there, line 18.  
13 A. Uh-huh.  
14 Q. "As we have talked about  
15 previously, specific conclusions that were  
16 reached were based on advice of counsel on  
17 merits of claims."  
18 Was that an accurate statement in  
19 your deposition two weeks ago?  
20 MR. SACKS: Objection to the form,  
21 your Honor.  
22 JUDGE WALRATH: Overruled.  
23 A. Yes, it was.  
24 MR. BROWN: Thank you. I have no  
25 further questions.

1  
2 MR. SARGENT: Good afternoon, your  
3 Honor. I'm Edgar Sargent also with  
4 Sussman Godfrey representing the Equity  
5 Committee. May I go ahead?  
6 JUDGE WALRATH: Go ahead.  
7 CROSS-EXAMINATION  
8 BY MR. SARGENT:  
9 Q. Good afternoon, Mr. Simms.  
10 A. Good afternoon.  
11 Q. There's four seats on the creditors  
12 committee; is that correct?  
13 A. That is correct.  
14 Q. The seats are held by the  
15 indentured trustees for four different series  
16 of securities that were issued by the debtor?  
17 A. That is corrects.  
18 Q. And those securities issuances are  
19 the senior notes, the senior subordinated  
20 notes, the PIERS and the CCV I and II; is  
21 that accurate?  
22 A. That's correct.  
23 Q. So the indentured trustee for each  
24 of these four series holds a seat on the  
25 creditors committee?

1  
2 A. There are four members on the  
3 creditors committee, one representing  
4 (inaudible). There are four members on the  
5 creditors committee and they represent the  
6 (inaudible).  
7 Q. And, Mr. Simms, you weren't here  
8 yesterday but there was some testimony about  
9 what percentage of various classes of  
10 securities are held by the settlement note  
11 holders.  
12 First, are you aware that the  
13 settlement note holders are the four hedge  
14 funds, each of whom has significant  
15 investments in (inaudible)?  
16 A. I am aware some of the note holders  
17 are for funds. I don't know if they're  
18 technically considered hedge funds, but there  
19 are four holders (inaudible) settlement  
20 agreement.  
21 Q. I appreciate the clarification.  
22 Thank you. And those four are Appaloosa,  
23 Centerbridge, Owl Creek and Aurelius,  
24 correct?  
25 A. That is correct. Maybe through

1  
2 some of their sub funds, but you're using the  
3 general (inaudible).  
4 MR. SARGENT: May I approach the  
5 bench?  
6 JUDGE WALRATH: You may.  
7 This is an Equity Committee  
8 exhibit?  
9 MR. SARGENT: It is.  
10 JUDGE WALRATH: A new one?  
11 MR. SARGENT: A new one I think we  
12 are going to move for.  
13 MR. JOHNSON: I have an objection  
14 to foundation but he can begin his  
15 questioning.  
16 JUDGE WALRATH: Just tell me what  
17 number we're up to for the Equity  
18 Committee.  
19 MR. NELSON: I believe it's 54.  
20 JUDGE WALRATH: All right. I'll  
21 mark it 54, but ask questions and we'll  
22 see if it can be admitted.  
23 Q. This is a table we created  
24 summarizing information in exhibits to the  
25 settlement agreement and plan.

1  
2 You see that the four categories of  
3 securities -- here, put it on the Elmo like  
4 everybody else -- four categories of  
5 securities that sit on the creditors  
6 committee that we just went over are listed  
7 on the column across the top?  
8 A. Yes. I apologize (inaudible), yes.  
9 JUDGE WALRATH: You have to speak  
10 up.  
11 THE WITNESS: Yes. I apologize.  
12 The screen itself is distracting me.  
13 Yes, I do see them.  
14 Q. The left-hand side are the four  
15 funds we just mentioned?  
16 A. That is correct.  
17 Q. Could you please get the third  
18 binder of Equity Committee exhibits and go to  
19 53.  
20 A. There are only two binders up here.  
21 Q. Sorry. We'll get them.  
22 MR. SARGENT: May I approach the  
23 witness, your Honor?  
24 JUDGE WALRATH: You may.  
25 A. You said 53?

1  
2 Q. 53.  
3 A. Okay.  
4 Q. Are you familiar with this  
5 document?  
6 A. (Perusing document). As a  
7 stand-alone document, I believe it was  
8 attached to -- actually attached to the  
9 global settlement agreement or another part  
10 but I'm not sure in the exhibit.  
11 Q. It's Exhibit C to the general  
12 settlement agreement.  
13 A. Yeah, I believe so, but --  
14 Q. You've seen at least something like  
15 this before?  
16 A. Yes.  
17 MR. JOHNSON: Objection.  
18 JUDGE WALRATH: Overruled.  
19 Q. This shows the claims held by the  
20 four settling note holders; is that correct?  
21 A. This is what this is intended to  
22 show, that is correct.  
23 Q. Could you please turn to page C-1.  
24 A. Yes.  
25 Q. And do you see there, if you look

1  
2 at the table I've handed you, Exhibit 54, and  
3 compare the entries under senior notes,  
4 senior subordinated notes and PIERS for  
5 Appaloosa, we have just copied the numbers  
6 over with some rounding.  
7 A. That is correct.  
8 Q. I'm not going to run through the  
9 other three --  
10 We've added up those columns. The  
11 total of the senior notes held by the four  
12 settling note holders is 371, the total of  
13 senior subordinated notes is 1,341,000 and  
14 819 million for the PIERS. Do you see that  
15 on the table?  
16 A. Yes, I do.  
17 Q. And then if you could grab binder  
18 2. Do you see that? 37?  
19 A. Okay.  
20 JUDGE WALRATH: Which one, 47?  
21 MR. SARGENT: 37. I'm sorry, your  
22 Honor.  
23 JUDGE WALRATH: Thank you.  
24 Q. Okay?  
25 That's the liquidation analysis

1  
2 which is attached as an exhibit to the plan,  
3 I believe. Are you familiar with that  
4 document?  
5 A. Yes, I am.  
6 Q. And if you look back at our table,  
7 you see the outstanding principal at the  
8 bottom. We've copied the number over from  
9 the face amount of the -- not counting  
10 post-petition interest, of the debt in each  
11 of these three categories.  
12 A. Okay.  
13 Q. And I guess my question for you  
14 would be: Were you aware that the settlement  
15 note holders held 9 percent of the  
16 outstanding principal in senior notes?  
17 A. We were aware of the numbers. I  
18 don't recall a specific percentage but we  
19 were aware.  
20 Q. Were you aware that the settlement  
21 note holders held approximately 80 percent of  
22 the outstanding principal on the senior  
23 subordinated notes?  
24 A. We were aware of the numbers. I  
25 don't remember the exact percent of those

1  
 2 numbers, but...  
 3 Q. On this chart it looks like over  
 4 100 percent have the PIERS. I believe that's  
 5 because the outstanding principal on the  
 6 liquidation analysis has been reduced to  
 7 reflect the reduction that the court ordered.  
 8 But, again, the settlement note holding in  
 9 PIERS is over 75 percent?  
 10 MR. JOHNSON: Objection to the  
 11 characterization with respect to the  
 12 PIERS-based value.  
 13 A. I think you may be looking at, and  
 14 I'm not sure, an OID issue, the face value  
 15 versus the allowed claim amount. So I don't  
 16 know how, sitting here right now, to equate  
 17 the exact number, but that's I think.  
 18 Q. Would you agree the holders are  
 19 greater than 75 percent?  
 20 A. I can't agree with it without doing  
 21 the math.  
 22 MR. SARGENT: We move the admission  
 23 of the exhibit.  
 24 MR. SACKS: Objection, your Honor.  
 25 There is no foundation from this

1  
 2 conducted in conjunction with creditors  
 3 committee counsel, correct?  
 4 MR. SACKS: Objection. This is  
 5 repetitive.  
 6 JUDGE WALRATH: You're repeating.  
 7 MR. SARGENT: I'll skip ahead.  
 8 Q. Are you aware the Equity Committee  
 9 retained financial consultant?  
 10 A. I am.  
 11 Q. Peter J. Solomon?  
 12 A. Correct.  
 13 Q. And representatives of Peter J.  
 14 Solomon contacted FTI and asked that you  
 15 prepare an analysis of the settlement; are  
 16 you aware of that?  
 17 A. I'm not aware they asked for that  
 18 specifically.  
 19 Q. You're not aware that FTI refused  
 20 to provide it?  
 21 A. I'm aware (inaudible). I am not  
 22 aware of a request for specific documents  
 23 regarding that.  
 24 Q. Do you know someone at FTI named  
 25 Andrew Scrutin (ph.)?

1  
 2 witness --  
 3 JUDGE WALRATH: Well, can we agree  
 4 it's demonstrative from another exhibit?  
 5 MR. SACKS: I'm not sure all the  
 6 other exhibits have been moved in at  
 7 this point but we can agree it's a  
 8 demonstrative where he's taken numbers  
 9 from other documents, yes.  
 10 Q. Mr. Simms, your declaration  
 11 describes the investigation that the  
 12 creditors committee and its professionals  
 13 conducted into the litigation claims?  
 14 A. Can I ask you a question. Are we  
 15 done with these? Can I move these?  
 16 Q. Sure. Take your time.  
 17 A. Can you repeat the question.  
 18 Q. I'm not going to rehash everything  
 19 that Mr. Brown covered but your declaration  
 20 describes the investigation that the  
 21 creditors committee and its professionals  
 22 conducted into the cases and the litigations  
 23 claims held by the debtors, correct?  
 24 A. Correct.  
 25 Q. And that investigation was

1  
 2 A. Certainly.  
 3 Q. Did he ever ask you about requests  
 4 from Peter J. Solomon with this case?  
 5 A. Andy spoke to him, I'm aware of  
 6 that. If they had a specific request like  
 7 that, I'm sure he would have spoken with  
 8 counsel about it. But I'm not aware  
 9 specifically.  
 10 Q. Are you aware of any analysis of  
 11 the claims that was privileged or not  
 12 provided to any other party in the bankruptcy  
 13 from FTI?  
 14 MR. JOHNSON: Objection, vague.  
 15 JUDGE WALRATH: Overruled.  
 16 (Long pause.)  
 17 A. I don't recall specifically if  
 18 there was an analysis -- objections that we  
 19 helped review but I don't recall specifically  
 20 (inaudible).  
 21 Q. The evaluation the creditors  
 22 committee conducted included evaluations of  
 23 claims against JPMorgan Chase, correct?  
 24 A. Correct.  
 25 Q. When did the debtors file their

1  
2 litigation against JPMC; do you recall that?  
3 A. There was the DC action against the  
4 FDIC, debtors (inaudible) filed one shortly  
5 after. There was a counterclaim filed in  
6 2009, I think.  
7 Q. Do you know what month?  
8 A. May, I believe.  
9 Q. Your declaration is in your binder,  
10 the third binder. I think it's number 44.  
11 A. Okay. I have it separately.  
12 Q. Okay. Go to paragraph 10. I think  
13 it was March.  
14 A. That was the DC action.  
15 Q. The adversary proceeding was filed  
16 in May?  
17 MR. JOHNSON: Objection.  
18 Mischaracterizes testimony. He said the  
19 complaint was filed in March.  
20 MR. SARGENT: Maybe I  
21 misunderstood. I'm sorry. I thought he  
22 said May.  
23 MR. JOHNSON: (Inaudible).  
24 A. Could you repeat the question?  
25 Q. My question is: When did the

1  
2 A. Okay.  
3 Q. It's an e-mail, you see from Bill  
4 Kosturos to --  
5 JUDGE WALRATH: What's the number  
6 of this?  
7 MR. SARGENT: I'm sorry, the  
8 number?  
9 JUDGE WALRATH: What's the number?  
10 MR. SARGENT: Number 43, your  
11 Honor.  
12 I'm sorry. This e-mail has an  
13 unusual format so I read the addressee  
14 backwards. It's from John Goulding to  
15 Bill Kosturos, cc to (inaudible).  
16 A. Okay.  
17 Q. Do you see the second sentence?  
18 I'll just read it into the record. "FTI Akin  
19 wanted to be prepared to put a global  
20 settlement on the table on that date."  
21 Do you see that?  
22 A. Yes, I do.  
23 Q. And the date he's referring to is  
24 the 23rd in the first sentence?  
25 A. Correct.

1  
2 debtors file the litigation against JPMC,  
3 which month in 2009?  
4 MR. JOHNSON: Objection, vague.  
5 Which litigation?  
6 Q. Start with the DC litigation.  
7 A. The debtor filed the DC complaint  
8 in March 2009.  
9 Q. And the adversary proceedings filed  
10 in what month? March, correct?  
11 MR. SACKS: Object, your Honor.  
12 Which adversary proceedings?  
13 JUDGE WALRATH: The JPMC.  
14 MR. SACKS: The one we brought or  
15 the debtors?  
16 JUDGE WALRATH: You want to  
17 clarify?  
18 Q. The one filed by the debtors.  
19 MR. JOHNSON: Objection, vague.  
20 (Laughter).  
21 Q. Let's move on.  
22 MR. JOHNSON: There's still more  
23 than one.  
24 Q. Let's move on. Please turn to  
25 Exhibit 43 in that binder.

1  
2 Q. And the date of this e-mail is  
3 2/6/2009, correct?  
4 A. That is correct.  
5 Q. So he's talking about FTI Akin  
6 wants to be prepared to gut a global  
7 settlement on the table on the 23rd of  
8 February, correct?  
9 A. Correct.  
10 Q. And FTI Akin, that's you, the  
11 creditors committee?  
12 A. FTI Akin is counsel for  
13 (inaudible), correct.  
14 Q. And is it accurate you were wanting  
15 to put -- the creditors committee was wanting  
16 to put a global settlement on the table with  
17 the FDIC and JPMC as far back as February  
18 2009?  
19 A. I didn't write this e-mail. I'm  
20 not even a party to what I see. So I don't  
21 recall specifically, but I do recall that we  
22 thought it was important to be in a position  
23 to understand what potential settlement we're  
24 looking for and a global settlement in case  
25 it came up at a meeting on the 23rd.

1  
2 Q. Do you recall being involved in  
3 preparing the global settlement proposal for  
4 the meeting on the 23rd?  
5 A. I don't believe there was a  
6 proposal for the 23rd as I recall.  
7 MR. SARGENT: Those are all the  
8 questions I have, your Honor.  
9 CROSS-EXAMINATION  
10 BY MR. STEINBERG:  
11 Q. Good afternoon, Mr. Simms. I'm  
12 Arthur Steinberg from King & Spalding on  
13 behalf of the Dime warrant holders. I think  
14 you were asked a series of questions about  
15 the membership of the creditors committee.  
16 Who is the chairperson of the committee?  
17 A. I don't -- I'm not sure we have a  
18 chairperson.  
19 Q. Okay. But the four members of the  
20 committee are all indentured trustees?  
21 A. Yes, they are.  
22 Q. And you've been practicing in the  
23 restructuring area for 21 years, according to  
24 your declaration, correct?  
25 A. My declaration says I've been in

1 restructuring and other things for several  
2 years. My restructuring is 21 plus years.  
3 Q. Are you familiar with the fiduciary  
4 duty that an indentured trustee has to its  
5 constituencies and what the fiduciary duty  
6 that creditors committee has to its  
7 constituents? Have you ever participated in  
8 discussions or had a thought process about  
9 that?  
10  
11 MR. SACKS: Objection to form.  
12 MR. JOHNSON: Objection.  
13 JUDGE WALRATH: Yes, sustained.  
14 Q. Would it be fair to say that the  
15 creditors committee has a fiduciary duty only  
16 to the unsecured creditors and no other  
17 constituencies in a bankruptcy estate?  
18 A. The creditors committee has a  
19 fiduciary duty to creditors, unsecured  
20 creditors.  
21 Q. Only the unsecured creditors, not a  
22 full bankruptcy estate; isn't that correct?  
23 A. Duty only to the unsecured  
24 creditors but obviously making sure that the  
25 bankruptcy -- maximizing value which

1 maximized (inaudible).  
2  
3 Q. Well, let's take the last statement  
4 that you made, they need to make sure that  
5 you maximize value. If the proposal was to  
6 pay unsecured creditors a hundred cents on  
7 the dollar, you'd still hold out to try to  
8 get more value for the estate if your  
9 representatives think that's where you think  
10 your (inaudible) is?  
11 MR. STROCHAK: Objection, your  
12 Honor.  
13 MR. JOHNSON: Objection.  
14 JUDGE WALRATH: Sustained.  
15 Q. Now, you're here today testifying  
16 but I'm not exactly sure on behalf of who.  
17 Are you testifying on behalf of the creditors  
18 committee itself?  
19 A. I'm a (inaudible).  
20 Q. You're not on the creditors  
21 committee, right?  
22 A. I am the financial advisor to the  
23 creditors committee.  
24 Q. You're a consultant to the  
25 creditors committee but you're not on the

1 creditors committee itself?  
2  
3 A. I'm a financial advisor to the  
4 creditor committee.  
5 Q. And is there a reason why there's  
6 not a member of the creditors committee  
7 testifying as to what their thought process  
8 was in evaluating the settlement and you  
9 instead, a consultant to the committee?  
10 MR. JOHNSON: Objection.  
11 JUDGE WALRATH: Sustained.  
12 Q. In your declaration when you talk  
13 about the creditors committee thought this or  
14 did this, are you speaking from your own  
15 personal knowledge?  
16 A. Yes.  
17 Q. And so when you testify that or  
18 when you put in your declaration that you're  
19 going to discuss the creditors committee --  
20 which is in paragraph 3 on page 2.  
21 "In this declaration I will discuss  
22 the creditors committee's financial and legal  
23 investigation and analysis of the assets and  
24 liabilities of the debtors, the litigations  
25 involving the debtors and the claims made

1  
2 against the debtors." You're discussing that  
3 on behalf of the creditors committee or what  
4 FTI participation in that is?

5 A. I'm discussing on behalf of the  
6 creditors committee.

7 Q. Okay, so -- but if anybody asks you  
8 a question about the legal advice or the  
9 legal investigation that the creditors  
10 committee had, you're refusing to answer  
11 those questions; isn't that correct?

12 A. Could you repeat the question,  
13 please?

14 Q. If anybody asks you today whether  
15 you are going to testify about the actual  
16 legal investigation done for the creditors  
17 committee, you're going to refuse to answer  
18 that question on the grounds of  
19 attorney-client privilege?

20 MR. JOHNSON: Objection.

21 Mischaracterizes his testimony.

22 A. As far as legal conclusions, I said  
23 I can't give legal conclusions as they are  
24 based on counsel advice, that's correct.

25 Q. Well, are you going to be able to

1  
2 say what the strengths or weaknesses of any  
3 particular legal issue is?

4 A. Now do you define "legal issue"?

5 Q. Let's talk about the Anchor  
6 litigation. What investigation did the  
7 creditors committee do?

8 A. The creditors committee looked at  
9 the historic ownership of the entities that  
10 were subject to it, the Anchor American  
11 Savings bank. There was some legal analysis  
12 that was done. The creditors committee  
13 looked at --

14 Q. Let me pause for a second. Who did  
15 the legal analysis?

16 A. (Inaudible) Akin Gump.

17 Q. And what did they conclude?

18 MR. JOHNSON: Objection,  
19 attorney-client privilege.

20 Q. So you're not prepared to talk  
21 about the legal investigation, are you?

22 MR. JOHNSON: Objection.

23 Mischaracterizes testimony. He can talk  
24 about --

25 JUDGE WALRATH: Let's not argue.

1  
2 Sustained.

3 Q. So go on, what did Akin Gump do?

4 MR. JOHNSON: Objection,  
5 privileged. I'm sorry.

6 JUDGE WALRATH: Overruled.

7 MR. JOHNSON: Withdrawn.

8 A. As I said, they looked at the  
9 historical transaction ownership of the  
10 institutions, who owned them, where the banks  
11 were acquired, where they sat on the initial  
12 ownership chain, what historic litigation had  
13 been out there for these different types of  
14 litigation, Anchor and American Savings,  
15 goodwill litigation in general and getting an  
16 understanding of that in conjunction -- they  
17 were involved heavily in that.

18 Q. How many hours did they spend doing  
19 that work?

20 A. I don't know.

21 Q. What did they look at?

22 A. I believe they looked at other  
23 goodwill litigation. I believe they looked  
24 at information from the company on some of  
25 the acquisitions, but I don't know

1  
2 specifically.

3 Q. What other typical litigations did  
4 they look at?

5 A. I don't know.

6 Q. Did they look at the Glen Fed  
7 litigation tracking warrant and the  
8 litigation involving that Glen Fed bank?

9 A. I just stated earlier I don't know  
10 which one they looked at.

11 Q. Okay. And did the creditors  
12 committee participate in the JPMorgan  
13 adversary -- the litigation that the debtors  
14 commenced against JPMorgan?

15 A. I think we tried to go (inaudible).

16 Q. And did they review the answer and  
17 counterclaims prepared by the company in the  
18 JPMorgan adversary proceedings?

19 A. The creditors committee reviewed  
20 it.

21 Q. And did they support the debtors'  
22 conclusion and pleading in that case?

23 MR. JOHNSON: Objection, vague.

24 JUDGE WALRATH: Overruled.

25 A. The creditors committee had

1 reviewed the information, intervened on the  
2 action, I believe that's (inaudible).

3 Q. Right. And what did the -- what  
4 was the debtors' view as to who owned the  
5 Anchor litigation, Washington Mutual, Inc. or  
6 Washington Mutual Bank?

7 A. I don't recall.

8 Q. So if -- let me give you -- try to  
9 help you along.

10 If the debtors' position was that  
11 Washington Mutual, Inc. owned the Anchor  
12 litigation and the creditors committee had  
13 reviewed that pleading in support of the  
14 position, would it be your view that the  
15 creditors committee also believed that  
16 Washington Mutual, Inc. owned the Anchor  
17 litigation?

18 MR. STROCHAK: Objection, your  
19 Honor.

20 JUDGE WALRATH: Sustained. You're  
21 not going to get this out of this fact  
22 witness, are you?

23 MR. STEINBERG: Well, I don't know.  
24 (Laughter.)  
25

1 Q. And did they look at Article 4 of  
2 the amended agreement?

3 A. I do not know if they looked at  
4 Article 4 of the amended agreement.

5 Q. Do you know anything specifically  
6 of what they looked at with regard to the  
7 agreement? Do you know any -- do you  
8 remember any discussion with any of the  
9 specific provisions of the agreement?

10 A. I remember discussions on -- with  
11 counsel on the merits of arguments on  
12 ownership of the different goodwill  
13 litigations. I don't remember specifically  
14 the Article 4 that you're referencing.  
15

16 Q. Okay. You were involved in the  
17 global settlement discussions?

18 A. Yes, I was.

19 Q. And you were involved with the  
20 allocation of the disputed assets as to which  
21 ones JPMorgan would take and which one would  
22 be left with the debtor, right?

23 A. I wouldn't characterize it this  
24 way. I was involved in the global settlement  
25 agreement which had assets going to different

1 MR. STEINBERG: If I ask it a  
2 couple more times, I may actually get an  
3 answer.

4 Q. Let's continue on. So there was  
5 this investigation but I don't recall what  
6 the conclusion was, you couldn't recall  
7 whether Washington Mutual, Inc. or the bank  
8 owns it?

9 MR. JOHNSON: Objection.  
10 Mischaracterizes.

11 MR. STEINBERG: Please don't tell  
12 him what he --

13 JUDGE WALRATH: Sustained.

14 A. I did not say that. I said that I  
15 didn't recall that they looked at certain  
16 goodwill investigations that they referenced.  
17 I said I cannot state what the conclusion was  
18 that counsel came to. That is, I cannot  
19 state a conclusion.

20 Q. Okay. Do you know whether counsel  
21 looked at anything related to the litigation  
22 tracking warrants and the amended agreement?

23 A. I believe counsel looked at the  
24 litigation tracking warrants.  
25

1 parties. Yes, I was involved.

2 Q. Okay. So were you also involved in  
3 the structure of the global settlement as to  
4 why there's a sale of the assets from the  
5 debtor to JPMorgan which is going to be  
6 deemed retroactive to 2008? You are familiar  
7 with this thing is retroactive for two years?

8 A. I don't recall the specifics on  
9 that, no.

10 Q. Were you involved with which assets  
11 were going to -- which liabilities were going  
12 to be assumed by JPMorgan and which  
13 liabilities were not going to be assumed by  
14 JPMorgan?

15 A. That was a component of the global  
16 settlement agreement, which liabilities would  
17 be assumed and others, so yes.

18 Q. Were you involved in the  
19 negotiations in trying to decide which  
20 liabilities of Washington Mutual, Inc. that  
21 JPMorgan was going to assume and which ones  
22 they weren't? Were you part of that  
23 back-and-forth negotiation?

24 A. I was in meetings where that was  
25

1  
2 discussed, yes.  
3 Q. And at any of these meetings was  
4 there a discussion as to whether JPMorgan  
5 should assume the litigation tracking warrant  
6 obligation?

7 A. Not that I recall in the meeting  
8 that I was at.

9 Q. You didn't suggest that as a  
10 committee representative, did you?

11 A. That they assume litigation  
12 tracking warrants?

13 Q. Yes.

14 A. I don't recall suggesting that.

15 Q. Okay. You recall at some point in  
16 time in the litigation that the debtor made a  
17 concession that the Anchor litigation should  
18 go onto the JPMorgan ledger while they would  
19 continue to hold the American Savings  
20 goodwill litigation, correct?

21 A. You said during the litigation?

22 Q. During the negotiation. Do you  
23 remember that happening?

24 A. I don't think you can piece it that  
25 way, sir. I think that there were a number

1  
2 of items. There were all the different  
3 aspects and different liabilities that are on  
4 there. Some assets were going to be retained  
5 by the debtor, some retained by JPM, and  
6 those assets were split up the way they were  
7 in the global settlement agreement.

8 Q. So do you remember the opening  
9 salvo from the company side, the debtors'  
10 side, to JPMorgan vis-a-vis who should take  
11 control of the litigation? Did the debtor  
12 say, "Both of them belong to me"?

13 A. If I recall, the initial  
14 discussions were the (inaudible).

15 Q. And the creditors committee agreed  
16 with that. They said those belong to the  
17 estate, correct?

18 A. The creditors committee said, "The  
19 more money we can get the better."

20 Q. Did the creditors committee try to  
21 argue this in terms of money or in terms of  
22 the merits of the particular claims? When  
23 they were sitting at the negotiating table,  
24 didn't they say that Anchor litigation  
25 belongs to the Washington Mutual estate or it

1  
2 wasn't negotiated like that?

3 A. We negotiated that. We wanted to  
4 maintain as many assets as we could. The  
5 negotiation was we should maintain items like  
6 the deposits, goodwill litigation, taxes,  
7 negotiating. So, yes, we should maintain the  
8 goodwill litigation.

9 Q. Okay. So at some point in time the  
10 Anchor litigation fell off the side of the  
11 debtor and was pushed towards the JPMorgan by  
12 side, correct?

13 MR. JOHNSON: Objection.

14 A. I would not characterize it that  
15 way.

16 Q. How would you say it? How would  
17 you say it?

18 They ended up with the litigation,  
19 right? Under the global settlement they got  
20 to keep the Anchor litigation, right?

21 A. Under the global settlement  
22 agreement they get the Anchor litigation.  
23 However, I won't say fell off the side. So  
24 it was a global settlement agreement which  
25 encompassed a lot of assets and a lot of

1  
2 value and that value is going to JPM and lot  
3 of value is going to the estate of (Speaking  
4 simultaneously).

5 Q. How did that particular asset, how  
6 did that shift columns to go to the JPMorgan  
7 side? Tell me the back-and-forth. Who did  
8 what to who?

9 A. The back-and-forth was part of a  
10 global settlement. There was negotiations  
11 actively going on on various assets. That  
12 was one of the assets that was in play, but  
13 it was part of an entirety. There was no  
14 discussion, "Hey, let's just talk about the  
15 goodwill. You take this and I'll take that  
16 and we'll just leave that as a one-off  
17 settlement." It was part of the global  
18 settlement.

19 Q. They looked at it in a holistic  
20 way, looking at the entire way, that was the  
21 way it was negotiated?

22 A. That's how we negotiated the global  
23 settlement.

24 Q. Okay. Did you look at the -- when  
25 this Anchor litigation was being negotiated



1  
2 did you have a sense as to what you thought  
3 the asset was worth?  
4 A. Yes, there was discussion about  
5 that.  
6 Q. What did you think the asset was  
7 worth at the time?  
8 A. If I recall, there was estimated  
9 value of -- there was a judgment issue, I  
10 think it was being challenged, about 350 to  
11 390 I think was the number.  
12 Q. So that was the asset -- that was  
13 the value you put on -- the creditors  
14 committee put on of the Anchor litigation as  
15 we were trying to drive towards a holistic  
16 settlement?  
17 A. That is a value that people thought  
18 of with regard to the Anchor litigation.  
19 There was actually some incremental  
20 opportunity for it, if I recall, but that was  
21 the number that people were using, was the  
22 350 to 400. And the term "holistic," I know  
23 you used that term in raising our your hands  
24 and characterizing it some other way. We did  
25 a global settlement. I don't want to make

1  
2 light of it.  
3 Q. No. I read it in the declaration.  
4 I had to look it up in the dictionary.  
5 But you said there was some  
6 adjustment, it was 350 to 400. What was the  
7 upper range of what you thought this Anchor  
8 litigation was worth?  
9 A. I don't recall. I think we were  
10 using 380 to 390.  
11 Q. Did you also forget about the  
12 \$144 million gross-up number, which brings it  
13 up to --  
14 A. I don't think we forget about it.  
15 I believe that there's been something filed  
16 by JPM that talks about a tax gross-up, but I  
17 was not aware of that at that time.  
18 Q. Okay.  
19 A. Nor am I sure that is the right  
20 number, nor am I sure that would be the  
21 benefit (inaudible).  
22 Q. Okay. Are you aware they had to  
23 file an estimation motion to put a cap on the  
24 LTW claim?  
25 A. Yes.

1  
2 Q. Are you aware they changed their  
3 number in the disclosure claim from  
4 \$184 million and now say it's \$250 million?  
5 Are you aware of that?  
6 A. I know it's been changed. I don't  
7 know the specific numbers.  
8 Q. Do you know how they got to the  
9 \$250 million number?  
10 A. Other than that my firm did. I was  
11 not involved.  
12 Q. But you don't have personal  
13 knowledge?  
14 A. I am not aware of that.  
15 Q. Okay, just a couple more questions.  
16 MR. STEINBERG: Your Honor, I don't  
17 have any more questions.  
18 JUDGE WALRATH: Thank you. Anybody  
19 else? Any redirect by the committee?  
20 MR. JOHNSON: Your Honor, can we  
21 take a very fast break before we resume?  
22 JUDGE WALRATH: Yes.  
23 MR. JOHNSON: Thank you.  
24 (Recess taken.)  
25 THE DEPUTY: All rise.

1  
2 You may be seated.  
3 MR. SARGENT: May I ask before we  
4 start, we noticed several times during  
5 the last witness's testimony signals  
6 going from the counsel table including a  
7 "slow down" at the very end of the last  
8 testimony and we overheard actual  
9 communication, "Please slow down" during  
10 the break. We ask the court instruct  
11 the counsel not to coach the witness.  
12 JUDGE WALRATH: Well, it's not a  
13 jury and I think maybe the court  
14 reporter would appreciate that.  
15 (Laughter.)  
16 MR. SARGENT: Duly noted.  
17 MR. JOHNSON: Your Honor, Robert  
18 Johnson for the creditor's committee.  
19 DIRECT EXAMINATION  
20 BY MR. JOHNSON:  
21 Q. Mr. Simms, you were asked some  
22 questions about your affidavit. Could you  
23 get a copy of that in front of you?  
24 A. I have it. My declaration?  
25 Q. Your declaration, yes. Thank you.

1  
2 Paragraph 6.

3 In paragraph 6 you were asked  
4 questions about some parts of the work that  
5 was done by the creditors committee. Could  
6 you please tell us what work it was that FTI  
7 did with respect to the books and records of  
8 the company?

9 A. Yes.

10 We received excessive amounts of  
11 information, as I mentioned earlier, on  
12 historic deposit transactions and flow of  
13 funds from WMI to WMB, account information on  
14 varying bank accounts.

15 We received a tremendous amount of  
16 papers on taxes, various tax flows, various  
17 tax payments, intercompany accounting,  
18 BOLI/COLI assets, pension plan information.  
19 We reviewed a significant amount of  
20 information from the company on their  
21 consolidating balance sheets, historic  
22 information on the company's 10-Ks and 10-Qs,  
23 cash flow forecasts, information of that  
24 nature. We received information on their  
25 venture funds, their insurance entity, WMRIC

1  
2 and Marion. We received information on  
3 venture capital, capital calls going on.  
4 Historical information of that type.

5 Q. Can you describe for me how FTI  
6 staffed this particular project?

7 A. Sure. Myself and Andy Scrutin  
8 (ph.) were the lead day-to-day partners  
9 handling the transaction. We had numerous  
10 people from different areas involved.

11 Initially there was a lot of  
12 information that was needed as far as  
13 information access with JPM. We had people  
14 from our forensic consulting group involved  
15 for that, to get involved and make sure that  
16 we got the right information, went about  
17 preserving the right information.

18 We had professionals from our  
19 forensic litigation group that were involved  
20 looking at different areas, whether it be  
21 solvency, whether it be data gathering. We  
22 had myself, as I mentioned. We had a number  
23 of other professionals in a restructuring  
24 group involved. We had possibly at any given  
25 time at least 10 to 12 different

1  
2 professionals involved throughout the case.  
3 We also had one of our tax professionals  
4 involved looking at tax information.

5 Q. Could you look at page 4 of your  
6 declaration, and I'll direct your attention  
7 to subparagraph G regarding fraudulent  
8 transfers or preferences. Can you describe  
9 what work FTI did actually with that topic?

10 A. Yes.

11 We looked at historical transfers  
12 that had been made from WMI to WMB, what  
13 transfers were made from WMB to WMI. We also  
14 looked at the company's historical  
15 performance, we looked at market performance.  
16 We looked at balance sheets of different  
17 dates, we looked at marketing -- at different  
18 dates. We looked at the information on the  
19 general market conditions of those dates.  
20 Information of that nature.

21 We also got involved in  
22 understanding calculate the third-party  
23 preferences and transfers as well,  
24 understanding payments made to third parties.

25 Q. Did you do any work regarding

1  
2 solvency?

3 A. Yes, we did work with regard to  
4 solvency on those matters where we looked at  
5 the payments that were made, as I mentioned,  
6 transfers to and from, checking determination  
7 of solvency on different dates to analyze  
8 what -- how the company was performing, what  
9 the changes were, how their market  
10 performance, what the assets were, looking at  
11 their loan book and information of that  
12 nature.

13 MR. STOLL: Your Honor, I'm going  
14 to ask to move to strike that answer.  
15 This information was in the declaration.  
16 He's now been crossed so we're going  
17 through what looks to be additional  
18 direct testimony having nothing to do  
19 with the cross-examination. If they  
20 wanted this information, then they  
21 should have put in the declaration at  
22 the beginning. They chose to submit  
23 witnesses by declaration. They  
24 shouldn't be allowed to introduce new  
25 direct testimony that is not part of the

1 cross-examination.

2 JUDGE WALRATH: I'm going to  
3 overrule but I don't know how much I'll  
4 let you go into the details of this.

5 MR. JOHNSON: I'll keep it brief,  
6 your Honor.

7 Q. Could you please take a look at  
8 subparagraph H. There's a reference there to  
9 WMRIC?

10 A. Um-hm.

11 Q. Could you tell me what work FTI did  
12 as opposed to lawyers with respect to WMRIC?

13 A. Sure.

14 With WMRIC throughout, there were  
15 multiple trusts, I think seven or eight  
16 different trusts part of the WMRIC entity.  
17 There were determinations that needed to be  
18 made throughout the case on whether or not to  
19 contribute additional capital into those  
20 trusts that were required in order to make  
21 payments so the trust could stay viable, stay  
22 alive, or otherwise it would be commuted  
23 effectively. So we looked at different  
24 trusts throughout the case.  
25

1 Early on in the case there were  
2 potential capital calls. I believe one triad  
3 was actually commuted because it was  
4 determined it wasn't prudent to make capital  
5 contribution to it. We looked at the  
6 different needs of those entities. We looked  
7 at Milman (ph.) reports that were provided  
8 which were showing the loss reserves.

9 We looked at information as it  
10 related to potential value of WMRIC, so we  
11 could do an analysis on that. And throughout  
12 the entire case WMRIC was a continuing item  
13 just because they had the potential capital  
14 needs. The value changed at various points.  
15 There was also a potential marketing of that  
16 entity at one point as well so we became  
17 familiar with it for those reasons.

18 Q. Moving on to a new topic, you were  
19 asked many questions about settlement  
20 negotiations. Could you describe generally  
21 what was the course of settlement  
22 negotiations in this case.

23 A. Sure. I'll define settlement  
24 negotiations as having started almost  
25

1 immediately from the point of individual  
2 settlements. We met with JPM and FDIC very  
3 early on in the case and said, "We want our  
4 deposits." If you want to call that a  
5 settlement negotiation. I would say it was a  
6 demand for our deposits. We tried extremely  
7 hard to get those deposits immediately.  
8 There were turnover actions that were  
9 threatened regularly and we tried to get  
10 those assets.

11 That was unsuccessful on our part.  
12 We then had a number of meetings, I would say  
13 starting in February, late February, I  
14 February 23rd I think was the date that was  
15 referenced earlier -- in DC with the FDIC and  
16 various other parties, JPM, and we started  
17 laying out the foundation of different  
18 people's positions on assets and liabilities.

19 There were then discussions of  
20 potential settlement starting in March of  
21 '09, I believe. That probably continued for  
22 a couple of months, some back-and-forth on  
23 that. And then there was a period of  
24 somewhat of a hiatus where litigation  
25

1 starting ensuing. There couldn't be a  
2 meeting of minds to get to a reasonable  
3 settlement.

4 And then activities began to pick  
5 up again I would say in late 2009 through  
6 March 2010, and then the continuation of  
7 where it became with multiple plans being  
8 filed. But the settlement negotiations were  
9 active, contentious, and we were heavily  
10 involved in the negotiations.

11 Q. You made reference to a meeting  
12 February 23rd of 2009 at the FDIC. Who  
13 called for that meeting?

14 A. I believe it was the FDIC.

15 Q. Did you attend the meeting?

16 A. Yes, I did.

17 Q. Who else attended?

18 A. From the creditors committee it was  
19 counsel for the creditors committee, myself.  
20 There were members of the creditors committee  
21 there, I believe two maybe three of the  
22 members of the creditors committee. There  
23 was the debtors. There were principals of --  
24 there were employees of theirs. I believe  
25

1  
 2 Robert Williams and Chad Smith may have been  
 3 there. Debtors' counsel and Alvarez & Marsal  
 4 was there. The FDIC was there. They had  
 5 counsel, DLA Piper. JPM was there, they had  
 6 business people there as well as their  
 7 counsel, Sullivan & Cromwell. There were  
 8 lawyers White & Case who were representing  
 9 the ad hoc senior note holder group and  
 10 lawyers from Fried, Frank representing an  
 11 ad hoc (inaudible).

12 Q. At that meeting did FDOIC say  
 13 anything about the merits of its claims  
 14 against the estates?

15 A. The FDIC was fairly strong in  
 16 threatening certain activities. They said  
 17 they felt that many of their claims were --  
 18 they felt they had a lot of strength in their  
 19 claims. They felt that items such as the  
 20 (inaudible) Trust Preferred were precedential  
 21 in nature; they would take any challenges to  
 22 the Supreme Court. They had pushed heavily  
 23 on their rights under Section 9.5.

24 So they were laying out the  
 25 difficult challenges that we may find faced

1  
 2 with challenging them.

3 Q. Do you know the amount of the  
 4 claims that the FDIC filed against the  
 5 estates?

6 A. Within the billions. I think  
 7 theirs was the \$12 billion range. 12 or 20  
 8 (inaudible).

9 Q. And at that meeting who was present  
 10 from the FDIC?

11 A. I believe it was Tom Reeves (ph.)  
 12 of the FDIC. It was definitely an FDIC  
 13 individual and it was DLA Piper as well.

14 Q. As the JPM, who was present for  
 15 JPM?

16 A. They had a few business people. I  
 17 think maybe Don McCree, someone from their  
 18 general counsel's office, and there were  
 19 three business people at JPM. I don't recall  
 20 specifically their names.

21 MR. SARGENT: This is Mr. Sargent  
 22 from Sussman Godfrey. I object to that  
 23 line of questions. I asked a question  
 24 about preparation of this meeting. I  
 25 didn't ask a question going into great

1  
 2 detail.

3 JUDGE WALRATH: How much longer are  
 4 we going to go?

5 MR. JOHNSON: I can wrap up in a  
 6 couple minutes.

7 JUDGE WALRATH: Do so.

8 Q. You were asked some questions about  
 9 a document which I believe was misidentified  
 10 for the record, but it was an e-mail that  
 11 discussed FTI Akin wants to be prepared for  
 12 the global settlement on the table on that  
 13 date. Do you recall that testimony?

14 A. Yes, I do.

15 Q. Why was it that you wanted to be  
 16 prepared for a global settlement at that  
 17 meeting?

18 A. We were getting in the room with  
 19 different parties and being called by FDIC to  
 20 try and get people to agree. There seemed  
 21 like there could be some motivation. We were  
 22 aware of the significant claims that various  
 23 parties had against the estate. We had  
 24 analyzed a number of the merits by that  
 25 point. We felt it was important to get as

1  
 2 much information as possible before that.

3 I believe the genesis of that  
 4 e-mail, if you recall, it was on a Friday.  
 5 We had weekly calls with the debtor  
 6 throughout this case every Friday. We  
 7 regularly tried to get information and push  
 8 information. At that point it was very  
 9 important that we get as much information  
 10 from the company, be as prepared as possible  
 11 to react to whatever was proposed.

12 I think it was including for the  
 13 estate, for the creditors as well, to be  
 14 prepared and understand, when there is a  
 15 meeting with four, five six significant  
 16 parties, to at least be prepared to react for  
 17 a global settlement.

18 Q. What were the factors that you  
 19 considered in pushing for the global  
 20 settlement?

21 A. Items as I mentioned, but there  
 22 were significant claims.

23 (Cough interruption.)

24 A. There was risk every day of this,  
 25 you know, "We're going to offset against the

1  
 2 accounts, use Section 9.5 of the APA." There  
 3 was substantial threats of prolonged  
 4 litigation, extremely prolonged litigation,  
 5 where people kept saying precedential, going  
 6 to go to the Supreme Court. So we saw the  
 7 time delay here being extensive.  
 8 We also were aware of the merits of  
 9 some of the different positions by that  
 10 point. We had looked into many of the  
 11 positions, many key assets, and had a sense  
 12 of where they were and we thought it was  
 13 important to try and push forward.  
 14 Q. Was exclusivity a concern?  
 15 A. Exclusivity was on the table.  
 16 Exclusivity was going to be coming up. It  
 17 was early on, relatively speaking. You know,  
 18 it was six months into it. There was  
 19 obviously more time, but this was going to be  
 20 a complex case, a complex situation, so we  
 21 knew it would take some time, which it  
 22 obviously did.  
 23 And we thought something that  
 24 needed to be factored in as well, also  
 25 incremental costs. The estate was incurring

1  
 2 JUDGE WALRATH: Looks like a good  
 3 time to break.  
 4 MR. ROSEN: Your Honor, again Brian  
 5 Rosen, Weil Gotshal.  
 6 I definitely agree with that and I  
 7 just wanted to try to understand the  
 8 schedule as we go forward for Monday.  
 9 Your Honor, the debtors have as  
 10 part of their presentation two  
 11 additional witnesses, Mr. Chad Smith and  
 12 Mr. Steve Zelin. Based upon depositions  
 13 that have taken place and the way things  
 14 have been conducted the first two days  
 15 of this, I anticipate while Mr. Zelin  
 16 might be a relatively quick witness,  
 17 that people may want to take additional  
 18 time with Mr. Smith and that would take  
 19 most of the day. And I was trying to  
 20 deal with people's expectations and also  
 21 as to when you might want to open the  
 22 floor, as you said you would, for other  
 23 people to say they wanted to say,  
 24 shareholders included.  
 25 And so, to permit people to gather

1  
 2 substantial amounts of costs every month,  
 3 whether it be professional fees, whether it  
 4 be the incremental cost of post-petition  
 5 interest. It was extremely expensive to run  
 6 this estate and it would have continued to be  
 7 had we gone on for years and years.  
 8 Q. Moving on to the time of the  
 9 execution of the global settlement agreement,  
 10 was exclusivity a concern at that time?  
 11 A. Yes. Execution of the global  
 12 settlement agreement clearly was a concern.  
 13 Exclusivity was expiring. I think the debtor  
 14 filed a plan right before the end of March  
 15 2010 when their exclusivity finally expired,  
 16 or getting close to 18 months.  
 17 MR. JOHNSON: I have nothing  
 18 further.  
 19 JUDGE WALRATH: Thank you.  
 20 Anybody else for cross?  
 21 MR. BROWN: No, your Honor.  
 22 MR. NELSON: No, your Honor.  
 23 JUDGE WALRATH: Thank you. You may  
 24 step down.  
 25 THE WITNESS: Thank you.

1  
 2 all of their thoughts and review the  
 3 transcripts for purposes of closing  
 4 arguments, if we could arrange, your  
 5 Honor, to go through those witnesses on  
 6 Monday and perhaps deal with remaining  
 7 objections and closings on Tuesday, if  
 8 the court's calendar permits that.  
 9 JUDGE WALRATH: Does that work for  
 10 everybody?  
 11 MR. STARK: Your Honor, from the  
 12 Trust Preferred (inaudible), that would  
 13 be fine for us. But we're happy to do  
 14 whatever the court recommends.  
 15 MR. NELSON: Likewise, your Honor,  
 16 we're at the court's pleasure on this.  
 17 The only thing I would add, I think  
 18 we're going to be done with testimony  
 19 certainly by the morning would be my  
 20 guess with the rest of the two witnesses  
 21 on Monday, so we're at the court's  
 22 pleasure how to proceed.  
 23 MS. FRIEDMAN: Your Honor, same for  
 24 JPMorgan Chase, and we would be happy to  
 25 finish up on Monday if it works out that

1  
2 way we will continue to Tuesday.

3 JUDGE WALRATH: Let's see how it  
4 goes on Monday. I don't know about any  
5 of you, but taking a break might help us  
6 all organize our thoughts and be  
7 shorter. But I'll leave it up to  
8 parties.

9 MR. ROSEN: Thank you, your Honor.  
10 I understand that we will now be moving  
11 back to your courtroom?

12 JUDGE WALRATH: Yes, and IT will be  
13 coming up at 4:30. It will be wired.

14 MR. ROSEN: What time will we  
15 starting on Monday?

16 JUDGE WALRATH: 9:30. If you want  
17 to move your stuff to my courtroom and  
18 leave it for the weekend, you can. Or  
19 you can take it with you.

20 MR. STEINBERG: Your Honor, Arthur  
21 Steinberg.

22 I think you ended off and confused  
23 me at least. Will closing be on Tuesday  
24 or is there a possibility it might be  
25 Monday afternoon?

1 JUDGE WALRATH: I prefer Tuesday.

2 MR. STEINBERG: If everybody's  
3 agreeable to do it on Tuesday.

4 MR. NELSON: No objection, your  
5 Honor.

6 JUDGE WALRATH: So we'll do it  
7 Tuesday morning at 9:30.

8 MR. STOLL: One last housekeeping  
9 matter, your Honor.

10 We've been sending back and forth  
11 an order, trying to have an agreed order  
12 on the examiner motion. Seems like  
13 we're having a raging disagreement. It  
14 looks unlikely that we will reach  
15 agreement on it. Can we submit our  
16 respective orders and have you decide  
17 which one to sign, your Honor?

18 Thank you.

19 JUDGE WALRATH: Good idea.

20 MR. ROSEN: Thank you, your Honor.

21 JUDGE WALRATH: All right. We'll  
22 stand adjourned.

23 (Time noted: 4:23 p.m.)  
24  
25

<b>A</b>				
<b>ability</b> 764:3 772:11,14,18	887:3	<b>admitted</b> 866:22	822:22	796:7,12 801:22
<b>able</b> 654:20 659:3 663:23 721:2 725:22 735:22 736:23 754:14 766:25 776:19 795:17 818:7 883:25	<b>actions</b> 663:5 818:5 905:9	<b>Adv</b> 614:10	<b>agent's</b> 820:6	810:6 836:9
<b>Absolutely</b> 827:21	<b>active</b> 684:9 906:10	<b>advance</b> 828:11	<b>aggressive</b> 654:15 654:21	837:14 838:4 843:21,24 844:19
<b>accept</b> 831:8	<b>actively</b> 683:21 894:11	<b>adversary</b> 620:18 625:17 745:22 875:15 876:9,12 886:13,18	<b>ago</b> 835:22 863:19	846:21 855:9 865:20 866:25 868:9,12 888:23 889:3,5,8,10,25 890:17 892:7 893:22,24 912:9 912:12 916:16
<b>access</b> 641:8 737:13 763:19 769:25 770:4,6,16 770:20 771:15 900:13	<b>activities</b> 906:5 907:16	<b>advice</b> 641:23 644:10 650:8,11 697:12 708:2 710:12 767:12,16 768:5,11 770:21 800:6,8,10 806:18 810:22 811:2 829:18 842:24 848:15,23 849:5 849:20,21 862:25 863:16 883:8,24	<b>agree</b> 639:22 647:25 660:8 675:23 676:9 759:23 777:18 780:18 781:19 784:22 809:5 844:13 846:19 847:8 871:18,20 872:3,7 909:20 913:6	853:13 856:6,15 859:20 864:5,6 873:7
<b>accommodate</b> 797:12	<b>act</b> 907:9,11	<b>advised</b> 624:13	<b>agreeable</b> 916:4	<b>Ah</b> 707:11
<b>account</b> 672:10 676:24 688:22 691:23,24 692:7 750:6 819:21 842:8 899:13	<b>Adam</b> 615:8 616:24 625:4	<b>advisor</b> 881:22 882:3	<b>agreed</b> 622:5,14 624:2 759:21,25 760:5,16 762:16 762:22 763:2,4 777:18 781:20 782:2,9,11 783:24 892:15 916:12	<b>ahead</b> 702:7 722:6 722:24 734:17 837:5 839:10 853:13 856:6,15 859:20 864:5,6 873:7
<b>accounting</b> 662:25 778:12 790:14 804:20 805:2 899:17	<b>add</b> 753:9 914:17	<b>advisors</b> 860:9	<b>agreement</b> 627:13 638:22 649:3 665:22 666:3 667:12 671:5,7,12 671:24 697:9 709:4,8 728:18 730:13 731:17,23 732:7,9 733:2 739:13,20 740:15 744:18 745:3,8 746:7 747:2,19 748:9 756:7,8,23 757:8,20 762:9,13 762:22 763:5,19 764:10 765:2,20 765:25 766:18,21 766:24 767:2,7 769:13 776:14 777:9,12,17,21 780:7,8,24 781:10 781:12,22 784:20 789:14 792:5,6,8 792:13,16,17,18 792:19 794:5,18	<b>akin</b> 617:4 754:6 850:16 877:18 878:5,10,12 884:16 885:3 909:11
<b>accounts</b> 805:3 840:12,14,14,18 842:4 848:10 899:14 911:2	<b>added</b> 641:16 667:6 736:21 737:2,5 869:10	<b>advisory</b> 694:23 695:3,19 696:16 696:23 697:3	<b>alike</b> 686:4	<b>al</b> 614:4,8,12 617:3
<b>accurate</b> 799:8 837:15 838:10 839:21 848:20 863:18 864:21 878:14	<b>additional</b> 642:13 733:23 737:2 751:7 753:16 754:21 813:8 902:17 903:20 913:11,17	<b>advocate</b> 729:11	<b>alive</b> 903:23	<b>Alexander</b> 615:10 621:10
<b>accurately</b> 853:24	<b>Addressed</b> 826:4	<b>advocated</b> 729:5	<b>allegations</b> 818:4	<b>alleges</b> 822:13
<b>acknowledged</b> 722:24	<b>addressee</b> 877:13	<b>affect</b> 740:21 783:14,16 791:13	<b>allegation</b> 818:4	<b>allocation</b> 641:5 748:10 889:20
<b>acquire</b> 753:16	<b>addressing</b> 627:8	<b>affidavit</b> 627:18 628:17 776:18 824:2 849:4,11,15 850:4,12,17 898:22	<b>alleges</b> 822:13	<b>allow</b> 620:21 675:13 760:19
<b>acquired</b> 885:11	<b>adjourned</b> 796:25 916:23	<b>affidavits</b> 627:9	<b>allegation</b> 818:4	<b>allowed</b> 627:6 871:15 902:24
<b>acquisitions</b> 885:25	<b>adjust</b> 702:4	<b>Affiliated</b> 715:25	<b>allegation</b> 818:4	<b>allows</b> 686:7
<b>act</b> 820:16	<b>adjustment</b> 757:7 896:6	<b>affiliates</b> 622:13	<b>allegation</b> 818:4	<b>altering</b> 812:2
<b>action</b> 621:12 821:13,22 851:19 852:3 875:3,14	<b>Administrated</b> 614:6	<b>afternoon</b> 758:12 758:13 798:6,10 812:21 832:7 834:4 864:2,9,10 879:11 915:25	<b>allegation</b> 818:4	<b>Alvarez</b> 717:8 843:4 907:3
	<b>Administration</b> 665:4	<b>afternoon's</b> 624:5	<b>allegation</b> 818:4	<b>ambiguous</b> 841:3 848:25 857:23 858:7
	<b>admission</b> 871:22	<b>agendas</b> 624:16	<b>allegation</b> 818:4	<b>ambushed</b> 626:13
	<b>admit</b> 679:8,11,12	<b>agent</b> 816:18,18,19 817:6,7 818:23 819:25 820:22	<b>allegation</b> 818:4	<b>amended</b> 622:3 715:25 716:6 721:9 722:11

723:5 731:16 739:13,20 740:14 744:18 745:3,8 746:7 756:7,23 757:7,19 796:7,12 888:23 889:3,5 <b>American</b> 623:6 732:12,17,21 748:6,11 784:16 795:11 884:10 885:14 891:19 <b>Americas</b> 617:15 <b>amount</b> 638:4 676:23 690:6,6,12 691:7,8 692:9 693:12 733:22 734:5,6,18,20 735:5,7,21 736:2 738:8,25 740:6,6 742:7 751:9,15 780:16 803:13 807:17 842:25 847:11,16 857:10 857:15 870:9 871:15 899:15,19 908:3 <b>amounts</b> 693:24 846:20 899:10 912:2 <b>analyses</b> 708:2 839:25 862:5 <b>analysis</b> 635:19,20 635:22,23 636:16 636:16,22 638:4,5 640:19 641:18 642:3 644:14 649:4 650:13 661:10,17 664:9 664:12,18 666:11 667:8 668:16,17 669:5 670:4,5,15 673:13,14 677:23 678:21 679:2 682:5 699:5,8,15 699:17,18,21 700:25,25 702:13 703:5 705:24	707:23,24 714:19 715:16 717:3,7,15 717:22 718:10 719:4 720:2 724:2 724:9,11,23 725:6 748:18 758:25 760:11 764:13 765:9,10,14,17,21 765:23 767:22 787:21 788:21 793:2 800:17 802:5,7,8,18,21 803:8,12,15,16 804:16 805:5 807:15,20,23,24 808:2,8,10,18 809:6,8,25 810:10 810:12,16 836:6 837:9 838:9,21,24 839:3,5,11,15,18 839:24 840:3,8,18 840:20,25 841:6 841:12,22,25 842:2,13 848:8 850:2 851:21,23 851:24 852:2,9,11 852:12,15,17,22 853:4,10 854:3 858:14,15,23,25 859:10,23 860:7 860:10,15,16,20 860:23,24,24 861:23,24 862:3,6 862:18 869:25 871:6 873:15 874:10,18 882:23 884:11,15 904:12 <b>analyze</b> 779:6 902:7 <b>analyzed</b> 856:19 909:24 <b>analyzing</b> 670:16 856:24 <b>Anchor</b> 731:6,14 731:23 732:13,18 732:20 733:9,24 734:2,3 737:25	741:18 744:2,4,24 745:24 748:7,12 756:11 783:24 784:8,15,23 795:10,15 796:5 884:5,10 885:14 887:6,12,17 891:17 892:24 893:10,20,22 894:25 895:14,18 896:7 <b>Andrew</b> 873:25 <b>ANDREWS</b> 617:20 <b>Andy</b> 874:5 900:7 <b>and/or</b> 639:11 <b>ane</b> 790:18 <b>Angela</b> 798:8 <b>announce</b> 624:10 624:25 <b>announcing</b> 620:10 <b>annual</b> 661:13,23 778:23 <b>annuatizing</b> 660:24 <b>annuities</b> 664:4 <b>answer</b> 629:4 641:22 643:3 645:2 648:25 649:11 650:16 651:16,22,25 652:11 656:11 661:8 664:17 666:23 667:8 668:11,14,19 669:12 670:7,13 670:14 710:17 725:23,23 728:2,2 738:19 755:15 769:6 781:25 789:5 790:25 791:18 806:25 807:2 808:24 829:12 836:14 837:20 838:15 839:2,10 841:8 845:17,19 846:25 847:4 848:3,13,17 861:3 883:10,17	886:16 888:4 902:14 <b>answered</b> 643:15 643:20 644:22 649:10 667:25 669:9 698:24 708:6 720:20 794:11 806:8 809:3 853:7 <b>answering</b> 836:16 <b>answers</b> 829:16 837:6 <b>anticipate</b> 913:15 <b>anticipated</b> 703:10 734:23 <b>anticipation</b> 703:11 <b>anybody</b> 711:23,23 713:3 796:3 809:19 813:22 833:16 883:7,14 897:18 912:20 <b>anytime</b> 821:22 830:20 831:10 <b>anyway</b> 852:12 <b>APA</b> 911:2 <b>apart</b> 767:15 <b>apologies</b> 633:6 <b>apologize</b> 774:3 819:4 845:4 867:8 867:11 <b>Appaloosa</b> 865:22 869:5 <b>appeal</b> 631:9,10,14 <b>appear</b> 716:13 <b>Appearances</b> 616:2 <b>appeared</b> 821:12 <b>appears</b> 629:19 680:8 820:5 <b>appellate</b> 853:22 854:3 <b>application</b> 800:21 803:10,22 807:5 810:5 <b>applying</b> 803:19 <b>appointment</b> 680:3 <b>appreciate</b> 865:21 898:14	<b>approach</b> 632:22 634:7 636:10 637:16,21 649:17 658:15 676:17 686:20,22 687:10 687:14 715:6 716:20 734:13 747:25 798:16 813:6 834:10 836:19 866:4 867:22 <b>approached</b> 649:21 658:18 <b>appropriate</b> 621:2 629:17 739:3 773:4 807:3 <b>approval</b> 851:4 <b>approve</b> 697:4,8,17 698:20 <b>approved</b> 687:17 698:3 726:12 843:25 844:19 850:17,20,21,25 851:2 <b>approximately</b> 636:2,6 637:13,14 640:17 641:13 659:22 674:18 675:8 676:9 677:13,14 703:16 733:22 734:5 741:9 752:20 759:22,25 778:16 779:25 789:11 870:21 <b>ARD</b> 618:8 <b>area</b> 654:3 879:23 <b>areas</b> 829:15 862:7 900:10,20 <b>argue</b> 844:15,16 884:25 892:21 <b>argument</b> 667:18 746:12 755:21 756:15 769:10,20 772:7 774:5 791:6 796:18 <b>argumentative</b>
--	--	---	---	---



713:15 758:2 796:9 <b>arguments</b> 648:22 655:9 656:25 657:10,19 712:16 733:2 744:10 768:20,25 769:9 769:14 793:7,8,10 840:20 889:12 914:4 <b>arrange</b> 914:4 <b>Arthur</b> 725:16 794:24 879:12 915:20 <b>article</b> 757:8,11,19 774:20 889:2,5,15 <b>articulated</b> 709:2 <b>ascertain</b> 645:22 <b>ascribe</b> 649:2 <b>ascribed</b> 779:21 <b>ASHBY</b> 618:12 <b>aside</b> 779:10 <b>asked</b> 643:15 644:22 649:9,14 650:12 651:11 667:24 669:8 708:6 720:20 725:21 727:16,21 758:21 764:19,22 770:12 782:17 785:11,15,17 786:21,23 787:3 787:18 788:8,14 791:16 794:11 805:10 806:4,7 808:6 818:25 821:20 836:5 846:10 847:18 848:11 853:6 873:14,17 879:14 898:21 899:3 904:20 908:23 909:8 <b>asking</b> 650:17 661:24 664:10 675:5,14,18 711:16 731:12	755:25 783:9 790:24 795:2 802:23 805:15 806:10 807:3,6 837:8 861:21 <b>asks</b> 883:7,14 <b>aspect</b> 847:9 <b>aspects</b> 726:2 817:19 857:4 892:3 <b>assemble</b> 828:20 <b>assert</b> 666:16 836:13 845:22 847:5,17 <b>asserted</b> 655:5 712:16 807:18 841:21 846:13 847:20 851:20 858:11 <b>asserting</b> 653:19 836:17 <b>assertion</b> 657:4 <b>assertions</b> 628:25 656:24 657:12,13 <b>assess</b> 667:23 668:11 771:25 <b>assessing</b> 847:12 <b>assessment</b> 746:20 769:8,10 771:2,10 <b>asset</b> 641:4 659:11 661:21 662:21 663:25 682:14 707:12 728:19 730:4,6,9,22 744:11 745:9 746:4 756:16 778:4 801:16 803:4 804:12 855:9 894:5 895:3 895:6,12 <b>assets</b> 635:14 639:3 639:11 640:15 641:23 642:11,20 644:17,19 645:14 647:4,11,12 648:14 653:9 655:11,13,17,18	655:24 659:19,25 660:4,16 661:4,24 662:18 664:24 665:21 667:7 669:15 670:10 671:21 672:4,10 687:18,19,23 693:10 694:5 698:6,8,9,22 701:11 702:11,19 702:23 703:10,16 707:25 726:5,10 726:20 730:14,19 730:20 742:20 753:17 756:19 778:7 788:3 792:14,21 839:11 851:18 853:11 856:13 882:23 889:20,25 890:5 890:11 892:4,6 893:4,25 894:11 894:12 899:18 902:10 905:11,19 911:11 <b>assistance</b> 852:4 <b>associated</b> 623:5 667:11 673:21 678:13 680:10 691:2 693:20 730:5,10,21 731:6 731:13 734:10 736:24 768:21 779:12 780:9,25 790:16 807:7 852:24 <b>assume</b> 698:4 699:12 729:7 742:13 753:24 787:9 807:24 851:7 890:22 891:5,11 <b>assumed</b> 727:23 728:10 729:13 781:3 890:13,14 890:18 <b>assumes</b> 671:6,7	765:21 766:16 <b>assuming</b> 672:15 685:15 693:5,7 703:8 779:22 <b>assumption</b> 625:18 678:25 682:10 683:2,4,7,18 684:7,13 752:21 766:22 780:23 801:22 <b>assumptions</b> 681:18 682:20 683:5 803:6 804:21 <b>assure</b> 746:16 <b>attach</b> 631:7 <b>attached</b> 632:19,20 691:3 824:2 868:8 868:8 870:2 <b>attempt</b> 663:3 754:21,22 755:2 <b>attempted</b> 647:9 757:17 <b>attempting</b> 654:3 768:9 <b>attend</b> 906:16 <b>attended</b> 906:18 <b>attention</b> 901:6 <b>attorney</b> 838:14 846:23 847:21 <b>attorneys</b> 713:25 714:3 850:25 851:3 <b>attorney's</b> 845:16 845:20 847:3 <b>attorney-client</b> 771:24 838:16 839:8 845:13,18 845:22 846:4,8,13 846:22 847:6 848:18 883:19 884:19 <b>attributes</b> 792:2 <b>Atty</b> 618:18 <b>audited</b> 778:20 <b>Aurelius</b> 865:23 <b>authorities</b> 694:2	<b>automatic</b> 620:21 <b>AV</b> 824:3 <b>available</b> 633:8 636:3,7 688:12 703:8 771:5 782:23 798:19 804:16,17 859:11 861:12 <b>Ave</b> 618:4,13 <b>Avenue</b> 615:21 617:15,21 <b>award</b> 735:20 739:4,10 <b>awarded</b> 739:25 <b>awards</b> 672:21 731:9 <b>aware</b> 678:8,10 680:20 717:21 765:2 770:15,19 770:24 785:22 786:3 787:6 790:2 790:13 801:10,11 801:19 821:13 827:3 828:9 832:14 850:19,23 854:11,13 865:12 865:16 870:14,17 870:19,20,24 873:8,16,17,19,21 873:22 874:5,8,10 896:17,22 897:2,5 897:14 909:22 911:8 <b>AXICON</b> 617:14 <b>A&amp;M</b> 717:14 <b>A's</b> 676:4,8 <hr/> <b>B</b> <hr/> <b>B</b> 616:9,25 632:16 674:2,9,16,24 676:15 <b>back</b> 626:17 627:11 628:5 669:25 681:10 688:11 690:21 692:11 700:24 702:4 706:19 708:19
--	--	--	--	--

737:17 752:13	<b>banks</b> 819:21	<b>begins</b> 858:18,21	<b>bench</b> 649:21	700:12 704:19,22
766:15 773:22	820:17,18,23	<b>behalf</b> 620:8 626:7	658:18 686:22	867:18 869:17
776:19 781:8	821:4,9,20,25	627:3 632:4	687:14 716:21	875:9,10 876:25
789:25 791:25	822:10,25 823:9	776:10 785:7	836:20 866:5	<b>binders</b> 626:16
797:2 826:8	885:10	812:23 816:25	<b>beneficial</b> 819:25	638:11 774:16,17
832:18 843:5	<b>bank's</b> 760:4	820:17,22 822:5	820:25 821:5	867:20
844:23 848:12	<b>bar</b> 777:6	825:7,8 834:5	822:2,5,9 823:13	<b>biographies</b> 680:7
859:13 870:6	<b>bars</b> 758:19	835:4,14 838:15	824:6,13,21,24	<b>bit</b> 642:19 685:6
878:17 915:11	<b>based</b> 624:24 637:3	851:20 879:13	825:7 826:7,14,14	692:4 707:22
916:11	656:12 659:18	881:16,17 883:3,5	826:19 827:6,16	714:18 782:20
<b>backwards</b> 877:14	673:7 676:13	<b>believe</b> 620:23	828:10,21	836:25 861:6
<b>back-and-forth</b>	677:7,19,23	622:4,15 628:19	<b>benefit</b> 896:21	<b>Black</b> 614:8 625:17
732:18 760:18	681:17 682:17	630:19 637:10	<b>benefits</b> 748:13	<b>Blackstone</b> 681:12
767:10 768:18	683:17 684:6	645:3,7 654:4	<b>best</b> 646:10 717:23	682:9,12 683:10
793:3 840:16	686:17 707:7	657:4 686:17	776:24 805:7	684:2,6,15
890:24 894:7,9	736:22 739:15,19	694:13 695:25	<b>better</b> 718:5,8	<b>Bldg</b> 618:21
905:23	762:24 768:25	700:10 702:24	719:19,20 737:16	<b>blowup</b> 636:15
<b>balance</b> 704:13	771:3,13 772:19	704:4,21 705:3	790:17,22 810:21	<b>board</b> 678:11
705:10,13 706:12	783:22 793:7	715:17,22 716:9	854:19 892:19	680:10 694:23
756:14 781:15	797:6 803:4,6,9	716:10 721:24	<b>beyond</b> 672:22	695:3,19 696:16
899:21 901:16	803:16 804:2,9	737:22 744:11	786:11,18 796:15	696:23 697:3,4,8
<b>balanced</b> 777:20	806:18 807:4	746:24 747:5	<b>big</b> 837:2	697:16,22 698:3
<b>ballot</b> 686:6 825:15	810:5 811:22	748:8 762:6	<b>bigger</b> 742:8,14	698:19,21 715:20
827:12,17,19	831:19 845:17	767:21 768:6	<b>Bill</b> 877:3,15	795:16,23,25
828:23 830:17	848:15 863:16	771:9 776:13,24	<b>billion</b> 636:3,7,23	796:3
831:17 832:22	883:24 913:12	782:16,20 783:23	638:23 639:24	<b>Boggs</b> 618:21
<b>balloting</b> 817:16	<b>bases</b> 623:10	785:18 791:15	640:2,4,8,17	<b>BOLI/COLI</b>
<b>ballots</b> 716:8,10,11	767:16	794:4,16,17 828:5	641:15 654:8,14	640:15,25 641:5,9
826:15,17,20	<b>basically</b> 628:12	837:10 838:6,25	654:21 690:6,12	641:24,25 642:8
827:4 828:11	663:4	839:13 844:21,24	690:14,16,23	642:10,12,17,22
829:14,22 832:17	<b>basis</b> 624:4 650:2	849:8 866:19	700:22 727:18	643:2,8 693:15
<b>bank</b> 614:11	662:12 675:6	868:7,13 870:3	753:9,10,18,23	701:10 703:11
621:14 732:17	728:24 736:15	871:4 875:8 879:5	759:11,18,23	758:20,22 759:3
734:3 744:6,13	738:15 746:9	885:22,23 887:3	760:2 761:13	759:22 761:21
745:11 756:11	760:12,20 769:21	888:24 896:15	764:22 778:16	777:23,25 778:3
759:4,24 763:8	777:7 778:23	904:3 905:22	780:2,5,11,16	781:8,13 782:10
821:11 884:11	790:6,20 803:19	906:15,22,25	781:5 788:9,23	792:17 793:4
886:8 887:7 888:8	807:8 845:8,23	908:11 909:9	789:11,20 790:3,3	899:18
899:14	846:11,11,12,17	910:3	790:4,15,20,22	<b>BOLLER</b> 617:8
<b>bankruptcies</b>	847:7,19,24	<b>believed</b> 887:16	791:16 793:17,21	<b>bonus</b> 693:18
816:19	<b>Bates</b> 700:14	<b>belong</b> 687:18	842:4 852:14,20	<b>book</b> 902:11
<b>bankruptcy</b> 614:2	<b>bearing</b> 716:24	892:12,16	908:7	<b>books</b> 641:6,8,12
621:9 717:13,24	<b>becoming</b> 750:25	<b>belonged</b> 744:12	<b>billions</b> 658:6,7,24	641:14,15,20
726:13 804:3	751:2	782:4	658:24 908:6	643:6 659:18
816:24 817:17	<b>began</b> 635:3 906:5	<b>belongs</b> 647:19	<b>bills</b> 762:10 781:14	759:7,9 761:24
831:24 874:12	<b>beginning</b> 624:5	801:23 892:25	782:13	763:8,17 764:4,12
880:17,22,25	708:19 902:22	<b>BEN</b> 615:24	<b>binder</b> 699:19	768:16,17 769:24

769:25 770:16 772:15 775:19 778:6,6,12,16,17 778:19 781:14,15 782:12,14 786:2,5 787:21,22 822:23 899:7 <b>Bos</b> 616:22 <b>Boston</b> 616:6 <b>bottom</b> 660:9 666:19 670:2 689:14 700:14 701:24 756:3,5 870:8 <b>bottomed</b> 660:12 <b>Box</b> 618:14 <b>break</b> 686:25 736:18 773:5,15 897:21 898:10 913:3 915:5 <b>breakdown</b> 741:11 <b>breaking</b> 797:3 <b>breaks</b> 703:14 <b>BRENT</b> 616:18 <b>Brian</b> 615:7 616:17 620:7 913:4 <b>brief</b> 629:11 631:2 758:8 794:23 903:6 <b>briefly</b> 764:18 <b>bring</b> 627:14 <b>bringing</b> 629:20 759:14 814:15 <b>brings</b> 896:12 <b>Broad</b> 616:13 <b>BROADBILL</b> 617:19 <b>Broadbridge</b> 820:24 821:8 <b>broader</b> 808:21 <b>broken</b> 702:13 <b>broker</b> 821:12 <b>brokers</b> 819:21 820:17,19,23 821:4,9,20 822:2 822:10,25 823:10 <b>brought</b> 692:23,24	876:14 <b>Brown</b> 616:4,10 626:7 627:2 814:2 835:9,11,14 836:19 863:24 872:19 912:21 <b>Bryant</b> 617:5 <b>buildup</b> 703:14 <b>bull</b> 721:19 <b>bullet</b> 852:13 <b>bunch</b> 725:22 <b>business</b> 682:11,19 682:22,24 683:8 684:21 753:21 754:7,9,10 755:18 755:20 799:24 862:9 907:6 908:16,19 <b>buying</b> 670:25 <b>B's</b> 676:4,8 <hr/> <b>C</b> <hr/> <b>c</b> 615:2 636:17 765:16 766:6 799:15 868:11 <b>calculate</b> 701:15 740:5 901:22 <b>calculates</b> 739:8 <b>calculation</b> 735:7 735:22 736:15,22 737:2,12 739:2,11 739:14 741:15 745:4 751:17,25 801:2,3 807:13 810:19 <b>calculations</b> 661:19 <b>Caleb</b> 618:21 <b>calendar</b> 914:8 <b>California</b> 622:10 <b>call</b> 633:9 640:7 698:2 905:5 <b>called</b> 634:16 799:15 816:2 820:24 821:2 830:10,14 906:14 909:19 <b>calls</b> 648:16 654:2	654:10 658:9 664:15 712:4 718:24 719:22 720:20 723:16 732:23 757:3,25 784:5 786:10 790:7 794:10 829:7,11 900:3 904:3 910:5 <b>Canadian</b> 821:18 <b>cap</b> 896:23 <b>capacity</b> 738:17 <b>capital</b> 614:8 627:22 750:22 751:4,4,6 753:16 754:5 755:9 855:4 900:3,3 903:20 904:3,5,14 <b>captive</b> 682:15,17 754:3 <b>carefully</b> 856:18 862:14 <b>Carreon</b> 709:23 710:4 790:23 797:10 798:8,13 798:19 799:4,21 808:5 811:13 <b>carried</b> 640:5 <b>carries</b> 839:2 <b>carry</b> 663:9 709:10 790:10 791:24 <b>Carrying</b> 789:25 <b>carry-back</b> 810:13 810:17,19,23 <b>carry-backs</b> 810:2 <b>carry-forward</b> 789:20,22 790:19 790:20 791:3,14 791:16,18,22 <b>Carson</b> 816:10,13 <b>CARTY</b> 617:9 <b>case</b> 614:5 621:10 631:8 645:23 666:15 679:25 708:22 710:10 713:10,23 716:9 750:6 754:25	756:23 768:6,14 770:17 777:6 805:22 808:22 831:21 832:23 840:8 874:4 878:24 886:22 901:2 903:19,25 904:2,13,23 905:4 907:8 910:6 911:20 <b>cases</b> 817:5,20 818:16 820:10 831:24 832:23 833:2 840:6 872:22 <b>case-by-case</b> 728:23 <b>cash</b> 642:25 693:13 700:7,7,21,21 701:2,4,5,6,7,13 701:13,14,15 702:11,20 703:2,4 703:6,8,15,17,21 703:22,22 704:8,8 705:4,5,7,8,9 707:3,4 735:3 757:2 803:24 899:23 <b>categories</b> 638:14 702:10 867:2,4 870:11 <b>category</b> 701:2,4 702:19 705:25 <b>cause</b> 663:6 <b>caused</b> 768:5 <b>causes</b> 851:19 852:3 <b>cc</b> 877:15 <b>CCV</b> 864:20 <b>CD-ROM</b> 825:12 <b>Center</b> 616:5 <b>Centerbridge</b> 865:23 <b>cents</b> 881:6 <b>certain</b> 620:11 621:23 635:14 639:15,17 661:19	693:15 702:22 703:10 711:16 720:12,24 729:9 729:12 734:8 745:2 751:9 752:7 761:19,21 803:6 804:15,19 805:2 810:6 815:23 827:3,4 828:9 833:9 836:5,18 843:9 844:12 847:14 888:16 907:16 <b>certainly</b> 641:18 643:5,9 644:13 683:4 712:9,13 713:23 729:8 768:17 793:2 795:24 854:5 874:2 914:19 <b>cetera</b> 627:23 <b>Chad</b> 907:2 913:11 <b>chain</b> 688:13 823:18,21 885:12 <b>chairperson</b> 879:16 879:18 <b>challenge</b> 853:17 854:7 <b>challenged</b> 895:10 <b>challenges</b> 907:21 907:25 <b>challenging</b> 855:8 908:2 <b>change</b> 661:8 <b>changed</b> 735:15 736:5 897:2,6 904:15 <b>changes</b> 660:20 742:11 804:2 902:9 <b>changing</b> 697:6 707:22 792:3 795:25 <b>channeling</b> 628:17 <b>Chapter</b> 614:4 703:7 719:10,11 748:20,20 749:5,5
---	--	---	--	--

749:25 766:23 816:23 817:3,4,17 817:19 818:16 840:6 <b>characterization</b> 627:21 714:12 795:19 844:5 871:11 <b>characterize</b> 671:3 711:11 889:23 893:14 <b>characterizing</b> 895:24 <b>chart</b> 699:8 758:18 871:3 <b>Chase</b> 614:11 761:13 763:7 765:3 770:20 858:24 874:23 914:24 <b>check</b> 640:12 <b>checking</b> 902:6 <b>chief</b> 678:12,16 808:20 <b>chose</b> 830:6 902:22 <b>CHRISTOPHER</b> 617:9 <b>CHUN</b> 615:16 <b>Circuit</b> 631:10 <b>circumstances</b> 653:7 730:8 753:7 756:19 833:10 <b>citation</b> 628:4,7,15 628:19 629:7,18 <b>citations</b> 629:22,25 630:2 <b>cited</b> 628:11 744:18 <b>cites</b> 627:24 628:23 630:4 <b>city</b> 739:17 <b>claim</b> 621:9,17 622:2,4 627:22 684:22 690:21 691:7,16 692:7,23 709:17,18,21 719:15,17 749:3 756:16 780:15	781:2,6 788:2 793:18,21 794:2 802:8,19 806:16 807:16 808:9,16 809:6,7 810:17,20 810:23 811:4 871:15 896:24 897:3 <b>claims</b> 627:23 646:7 647:8,17,18 671:9 685:8,17 692:15,17,18,19 693:5 694:11,14 696:3 709:3,6,11 709:16 711:16 718:11 719:3 720:3,8,17 721:15 723:13,14,21,23 724:16,19 725:2 733:20 747:3 748:24 765:11 816:18 817:5 839:12,19 840:5,7 840:24,25 841:7 841:19,24 842:3,6 843:9,20 844:10 848:9,16 849:13 849:17,19 852:18 856:19,25 858:5 858:10,12,24 859:2,7 861:9,16 862:15,19 863:17 868:19 872:13,23 874:11,23 882:25 892:22 907:13,17 907:19 908:4 909:22 910:22 <b>clarification</b> 625:21 626:2 865:21 <b>clarified</b> 688:18 <b>clarify</b> 675:19 760:23 839:9 876:17 <b>clarity</b> 715:11 <b>class</b> 621:11 646:19 674:2,9,16,24,25	676:15,15 782:19 783:6 823:24 824:23 825:2,9 826:9 830:4,7 <b>classes</b> 685:13 691:12,22 751:16 814:24 825:10,16 825:17,18,25 865:9 <b>clear</b> 631:18,22 643:18 649:13 651:3 658:20 707:21 731:25 792:4 803:21 821:25 824:13 <b>clearly</b> 652:5 767:11 842:12 854:14 912:12 <b>clerk</b> 624:13 633:15 799:2 813:13 815:17 834:25 <b>client</b> 847:21 <b>clients</b> 819:22 822:7 827:10,15 <b>close</b> 664:7 912:16 <b>closing</b> 914:3 915:23 <b>closings</b> 914:7 <b>CLR</b> 614:23 <b>coach</b> 898:11 <b>COBB</b> 616:20 <b>Code</b> 717:24 <b>COFFEY</b> 616:9 <b>collaborative</b> 806:13 <b>colleague</b> 812:8 <b>COLLINS</b> 615:15 <b>column</b> 638:3 867:7 <b>columns</b> 869:10 894:6 <b>combination</b> 756:24 862:23 <b>combined</b> 704:10 <b>come</b> 624:16 626:17 628:21	664:20 711:19 712:11 730:17,18 762:8 803:14 818:12 838:10 <b>comes</b> 674:17 703:23 <b>comfort</b> 744:22 745:9 <b>comfortable</b> 631:20 <b>coming</b> 692:3 719:4 762:11,15 911:16 915:13 <b>commenced</b> 886:14 <b>comment</b> 733:18 <b>comments</b> 627:11 631:4 <b>COMMITTE</b> 618:2 <b>committee</b> 617:2 634:15 665:3,4 678:14 695:23 696:11 746:2 770:9,16,20 771:11 772:11 785:8 799:14 832:9 834:6 836:7 837:10,12,17 838:3 851:16 853:21 856:18 858:21 859:8 862:13 864:5,12 864:25 865:3,5 866:7,18 867:6,18 872:12,21 873:3,8 874:22 878:11,15 879:15,16,20 880:7,15,18 881:18,21,23,25 882:2,4,6,9,13,19 883:3,6,10,17 884:7,8,12 886:12 886:19,25 887:13 887:16 891:10 892:15,18,20 895:14 897:19 898:18 899:5	906:19,20,21,23 <b>committees</b> 859:9 <b>committee's</b> 771:8 850:16 882:22 <b>common</b> 674:11 675:7,24 676:10 688:23 689:17 692:7,20 696:13 823:25 824:6 <b>commons</b> 832:16 <b>communication</b> 898:9 <b>communications</b> 800:18 821:3 <b>commuted</b> 903:23 904:4 <b>company</b> 622:18 622:22 678:9,12 678:17,22,24 681:12 682:16,18 683:14 693:21 752:15,25 754:3 755:10 759:4 803:23 819:19 820:20,24 821:2 821:17 824:12 825:4 830:11 842:9,10,21 857:9 857:13,13 885:24 886:17 892:9 899:8,20 902:8 910:10 <b>company's</b> 899:22 901:14 <b>compare</b> 628:8 832:23 869:3 <b>compared</b> 663:8 <b>comparison</b> 639:19 <b>compel</b> 720:16,17 <b>compelled</b> 661:7 719:15 720:4,7 721:15 723:12,13 723:22,24 724:20 725:3 <b>compensation</b> 665:25 728:16,20 <b>competent</b> 712:10
--	---	--	--	--

<b>compile</b> 714:24	786:10 790:8	714:2 739:9	<b>contemplation</b>	<b>control</b> 823:19
<b>complaint</b> 875:19	794:10 837:20	758:24 759:6	752:15	892:11
876:7	838:10 846:3,7,12	760:16 778:22,24	<b>contentious</b> 906:10	<b>Cont'd</b> 616:2
<b>complaints</b> 832:15	847:9,17,19,20,24	782:9 793:11	<b>context</b> 645:25	<b>conversation</b>
<b>complete</b> 627:12	847:25 849:6	836:8 841:9,10	648:5 654:19	697:18,20,22
631:8,14 779:19	857:19,21 858:3,9	<b>consider</b> 630:12	655:3 662:10	698:5 713:7
824:5	862:24 886:22	666:21 681:10	663:20 665:20	<b>conversations</b>
<b>completed</b> 808:10	888:7,18,20	682:21 684:21	671:11,24 673:2	669:21 737:22
<b>completely</b> 651:7	<b>conclusions</b> 711:6	724:19 725:2	703:4 709:7	<b>conversion</b> 674:7
788:17	838:23 839:7	854:23	713:22 728:17	676:12,15,19
<b>completeness</b> 652:3	848:7,14 849:18	<b>considerable</b>	732:25 747:19,25	677:24
<b>complex</b> 689:20	862:4 863:15	816:22	748:8 754:2	<b>convert</b> 674:24
911:20,20	883:22,23	<b>considerably</b>	757:14 760:6	676:4
<b>component</b> 683:13	<b>conditions</b> 901:19	660:25	762:9 769:13,18	<b>converted</b> 646:18
704:2 747:21,23	<b>conduct</b> 649:4	<b>consideration</b>	776:23 777:17,20	756:21 757:2
890:16	850:2	854:24	778:8 779:16	<b>convertible</b> 756:9
<b>components</b> 702:22	<b>conducted</b> 836:7	<b>considerations</b>	781:17 800:11	<b>converting</b> 676:7
702:25 741:6	837:9 838:9	808:23	<b>contexts</b> 663:19	<b>conveyance</b> 839:16
841:13 854:15	851:21,24,24	<b>considered</b> 684:3	<b>contingent</b> 673:20	<b>copied</b> 869:5 870:8
<b>composed</b> 678:11	852:4 858:22	853:21 854:6	<b>continuation</b> 906:7	<b>copies</b> 633:7 634:7
687:21	859:23 860:16	855:13 862:14	<b>continue</b> 643:10	815:4 822:14
<b>comprised</b> 701:5	872:13,22 873:2	865:18 910:19	668:5 692:11	829:4
<b>compromised</b>	874:22 913:14	<b>consistent</b> 762:12	755:17 761:18	<b>copy</b> 631:7 632:11
718:21	<b>conferred</b> 856:25	<b>consolidating</b>	766:23 777:5	637:21 715:15,18
<b>concern</b> 818:6	857:4	899:21	888:5 891:19	733:10 734:13
911:14 912:10,12	<b>confess</b> 746:21	<b>consortium</b> 835:15	915:2	774:20,23 798:14
<b>concerning</b> 621:5	<b>confined</b> 808:23	<b>constituencies</b>	<b>continued</b> 784:13	813:4,5 821:11
801:11	<b>confirm</b> 633:24	880:6,17	905:22 912:6	827:19 829:2
<b>concerns</b> 622:11,23	799:6 816:8 835:2	<b>constituents</b> 880:8	<b>continues</b> 751:11	834:9 836:24
818:10	<b>confirmation</b>	<b>constitutes</b> 708:21	<b>continuing</b> 682:18	898:23
<b>concession</b> 891:17	625:13,20,24	<b>consult</b> 787:25	845:22 847:5	<b>Corp</b> 687:22 701:7
<b>conclude</b> 644:4	629:11 687:17	<b>consultant</b> 873:9	848:8 904:13	<b>correct</b> 633:25
701:24 767:17	815:22 817:23	881:24 882:9	<b>continuity</b> 755:21	635:11,21 636:5
800:13 884:17	825:11,19 844:12	<b>Consultants</b> 816:10	<b>contract</b> 802:3	636:20 637:9
<b>concluded</b> 701:17	<b>confirmed</b> 689:2	816:13	807:9	638:7,12 639:4,13
762:23 837:13,17	<b>confused</b> 708:18	<b>consultation</b>	<b>contractual</b> 751:20	639:25 640:4,8,17
838:3	915:22	787:23	<b>contrasted</b> 744:5	640:18,22 642:23
<b>concluding</b> 845:9	<b>conjunction</b> 839:13	<b>consultations</b>	<b>contra-CUSIP</b>	645:5,6,9,10,14
845:24 846:11	841:9,15 842:12	795:23	830:11,16	647:9,19 648:14
<b>conclusion</b> 648:16	853:5 873:2	<b>consulted</b> 795:16	<b>contribute</b> 825:6	650:4,16 651:5
664:21 711:19	885:16	795:25 856:20	903:20	652:24 653:10,11
712:12,17 718:24	<b>connection</b> 623:7	<b>consulting</b> 761:8	<b>contributed</b> 802:9	653:15,21,22,24
719:22 720:21	661:22 662:2,6	800:4 900:14	<b>contribution</b>	654:8 656:7,14,15
723:17 757:4	667:9 668:19	<b>contact</b> 828:25	627:22 702:12	656:18 657:5,6
758:2 761:6,15	669:6 670:16	<b>contacted</b> 873:14	904:6	658:2,3,4,25
763:11 771:17,21	679:4 683:22,23	<b>contain</b> 826:4	<b>contributions</b>	660:3,10 662:24
775:9,13 782:4	697:19 713:25	<b>contemplate</b> 671:5	855:4	663:13 665:18

666:12 667:23	838:18 848:21	767:13,23 768:5	<b>couple</b> 733:5	880:7,15,16,18,19
669:7 671:18,22	852:9,10,21 853:3	768:11,11 769:2	792:11 835:21	880:20,21,24
671:25 672:11	853:25 856:16	770:22,25 771:6,8	857:3 888:3	881:6,17,20,23,25
673:19,22 674:6	859:12,19 864:12	771:12 787:23,25	897:15 905:23	882:2,6,13,19,22
674:19 675:8,25	864:13,22 865:24	788:6 793:7,9,10	909:6	883:3,6,9,16
676:11,20,25	865:25 867:16	795:2 800:18	<b>courier</b> 826:18	884:7,8,12 886:11
677:2,5,6,10,11	868:20,22 869:7	802:2,8,18,21	<b>course</b> 904:22	886:19,25 887:13
677:15,20 678:22	872:23,24 873:3	807:10,15,20	<b>court</b> 614:2 620:16	887:16 892:15,18
679:2,22 680:4,22	873:12 874:23,24	810:10,11,16,22	621:2,13,24 622:2	892:20 895:13
681:13,14,18,19	876:10 877:25	811:2 814:4	631:6,10,10 635:2	899:5 906:19,20
681:24 682:11,22	878:3,4,8,9,13	838:25 839:7,13	637:21,22 700:4	906:21,23 910:13
683:2,8 684:10,11	879:24 880:22	839:20,22,23	714:4,5 717:13	<b>creditor's</b> 898:18
684:15,24 685:21	883:11,24 891:20	840:2,4,9,19	726:12 733:20	<b>Creek</b> 680:12,14
686:3,13,16 688:9	892:17 893:12	841:2,9,12,16	768:8,12 771:25	865:23
689:24 690:7	<b>correctly</b> 803:2	842:12,16,25	813:5 871:7	<b>crisis</b> 855:6
694:8,13,15	840:23	848:16,23 849:5	898:10,13 907:22	<b>criteria</b> 651:23
695:16,20 699:11	<b>corrects</b> 864:17	849:12,16,20,21	911:6 914:14	677:19
699:12,13,15	<b>corresponding</b>	850:11,13,14,16	<b>courtesy</b> 821:11	<b>criterion</b> 730:3
700:4 702:8,9	726:9 728:20	850:18,22 851:22	<b>courtroom</b> 614:16	<b>Cromwell</b> 616:12
704:12 705:17	<b>corresponds</b>	851:25 852:4	814:17 915:11,17	737:21,23 907:7
708:3 721:4,5	707:19	853:5,10 854:4,5	<b>court's</b> 914:8,16,21	<b>cross</b> 687:2 710:9
723:15 729:16	<b>cost</b> 621:16 912:4	854:13 855:18,20	<b>covered</b> 638:8	750:22 751:11
735:12,13 736:2,3	<b>costs</b> 911:25 912:2	855:23 856:5	872:19	786:11 799:11
736:17 742:9,11	<b>cost/benefit</b> 848:8	857:2,4,17 859:3	<b>create</b> 715:11	802:13 813:23
742:13,18 745:24	<b>Cough</b> 910:23	859:12,17,19	<b>created</b> 649:3	832:6 835:8
745:25 748:15,16	<b>counsel</b> 631:5	860:2,8 862:20	866:23	912:20
750:6 751:21	638:17 640:22	863:16 873:3	<b>creditor</b> 718:4,18	<b>crossed</b> 902:16
754:19 758:22,23	641:17 642:23	874:8 878:12	718:20 719:14,18	<b>cross-examination</b>
758:24 759:10	643:3,10,12 644:8	883:24 888:19,21	723:13 882:4	633:21 634:20
762:17 763:7	644:19 649:6	888:24 889:12	<b>creditors</b> 617:2	725:13 785:9
764:23,24 765:11	650:8,11,15,18	898:6,11 906:20	678:13 691:12	794:21 798:20
765:12 766:3,18	651:5,16,22	907:3,5,7	695:22 696:10	799:19 811:23
766:19 767:13,14	652:16 656:6,17	<b>counselors</b> 849:9	717:23 718:12	832:10 835:10
767:18,19 770:2,3	656:22 657:6,8,16	<b>counsel's</b> 641:22	720:3,7,17 721:16	864:7 879:9
771:15 785:25	657:20 661:9,16	644:10 647:21	723:21,23 724:20	902:19 903:2
786:8 788:4,10	664:8,11,18,20	673:14 747:16	746:2 748:21	<b>cross-examined</b>
789:18,23 790:6	665:6 667:9	769:9 806:18	749:8,10,10,25	632:10
790:14,16 791:14	668:20,23 669:2,7	855:25 862:24	750:11,11 751:19	<b>CSR</b> 614:24
792:9,14,21 794:8	669:17 670:17,21	908:18	834:6 836:7	<b>current</b> 676:22
795:7,8,12 799:22	687:4 697:12,14	<b>counted</b> 826:16	837:10,12 838:3	677:9 681:18
800:7,15,16,18,19	697:19 698:4	827:20	851:16 853:21	726:24 727:13
801:10 802:9,20	708:3 710:12,24	<b>counterclaim</b> 875:5	856:18 858:21	766:24
803:7 804:12	711:7,17,20 713:6	<b>counterclaims</b>	859:8,9 862:13	<b>currently</b> 646:17
806:19 807:23	713:9 714:7	856:21 886:17	864:11,25 865:3,5	676:13,21 816:9
808:9,16 811:4,5	737:17,24 759:6	<b>counterproposal</b>	867:5 872:12,21	<b>CUSIP</b> 831:16
814:8 816:15	760:12,25 761:8	784:17	873:2 874:21	<b>custodian</b> 823:14
832:18,19 836:18	761:16 762:24	<b>counting</b> 870:9	878:11,15 879:15	<b>custodians</b> 823:5,7

**customary** 828:14  
831:17,21 832:21  
**C-A-R-R-E-O-N**  
799:5  
**C-1** 868:23

**D**

**D** 615:15 616:17  
634:16 816:2,2  
834:8  
**DAILY** 614:18  
**damages** 734:5  
**Daniel** 616:10  
680:12 835:14  
**data** 785:12,21,21  
786:15 787:10  
842:10 900:21  
**date** 685:9 693:17  
703:9,12,19  
726:14,24 727:13  
753:4 804:3  
818:25 820:19  
877:20,23 878:2  
905:15 909:13  
**dates** 901:17,18,19  
902:7  
**David** 615:23  
617:10,11 814:19  
815:15 834:24  
**day** 700:2 737:24  
833:5 835:25  
839:5 910:24  
913:19  
**days** 754:4 828:20  
833:13 913:14  
**day-to-day** 900:8  
**DC** 615:6 875:3,14  
876:6,7 905:16  
**DE** 614:17 615:14  
616:23 618:15,23  
**deadline** 828:3,5,12  
828:24  
**deal** 627:16 747:25  
913:20 914:6  
**deals** 853:16 856:9  
861:15  
**debate** 771:22

**debentures** 774:22  
**debt** 689:23 690:9  
690:11 692:24  
775:5,6,12,15,17  
775:20,24 776:2,4  
870:10  
**debtor** 632:4  
726:11 729:5  
735:2,14 738:25  
739:7 764:3,11  
765:6 771:23  
795:4,9,14 798:11  
812:23 831:25  
832:2 842:13  
843:2 845:9,24  
864:16 876:7  
889:22 890:6  
891:16 892:5,11  
893:11 910:5  
912:13  
**debtors** 614:5  
615:3 620:8,24  
622:12 625:5  
628:3 632:5,16  
636:4 652:14  
680:4 695:22  
696:10 714:23  
715:17,23 716:2,4  
716:14 722:5,10  
736:15 745:21  
748:8 759:20  
761:20 770:21,25  
771:6 773:2  
776:11 800:13  
809:7 814:18  
816:19,23 828:11  
841:20 844:16  
850:18,22 851:18  
851:20 856:20  
859:24 861:18  
872:23 874:25  
875:4 876:2,15,18  
882:24,25 883:2  
886:13,21 887:5  
887:11 892:9  
906:24 907:3  
913:9

**debtor's** 717:4  
721:7 722:4  
748:13  
**deceased** 620:16  
621:4  
**December** 614:19  
659:19 660:2,9,15  
661:17 662:5  
663:11,16,21  
828:5  
**decide** 645:12  
890:20 916:17  
**decided** 727:22  
728:10  
**decision** 734:3,7  
780:10  
**declaration** 630:21  
632:8,11,17,21  
633:25 635:25  
636:17 678:20  
683:15 708:20,21  
709:10,13 710:6  
710:10,19,23  
711:5 714:6,15  
725:19 733:5,11  
734:14 741:16  
742:23 743:8,20  
744:9,19 756:2  
757:15,24 759:19  
792:15 794:14  
798:12,15 799:7  
810:3,15 811:3  
812:25 814:6  
834:8,14 835:3,17  
851:11 872:10,19  
875:9 879:24,25  
882:12,18,21  
896:3 898:24,25  
901:6 902:15,21  
902:23  
**declarations**  
630:17 814:21  
**declined** 660:23  
664:3  
**decreased** 736:20  
**decreasing** 736:13  
**deduct** 790:4

791:11  
**deduction** 739:12  
**deductions** 736:25  
**deemed** 780:21  
890:7  
**Defendants** 614:14  
616:11  
**defenses** 655:6  
747:3 859:11  
861:12  
**deferred** 665:25  
802:2 807:9  
832:16  
**deferring** 624:23  
**deficiency** 686:8  
**define** 646:4  
708:20 733:25  
884:4 904:24  
**definitely** 908:12  
913:6  
**definitively** 644:15  
**degree** 799:23  
**Delaware** 614:2  
618:13  
**delay** 748:23  
749:17 751:6  
911:7  
**deleting** 630:21  
723:6  
**deliver** 828:23  
**demand** 905:7  
**demands** 805:24  
**demonstrative**  
636:11,14 637:17  
637:25 764:21  
872:4,8  
**department** 641:10  
**depend** 685:7  
728:12,24  
**dependent** 767:3  
849:20,21  
**depending** 753:3  
780:2  
**depends** 647:15  
662:9 692:21,22  
739:25  
**deposit** 840:12,14

840:17 842:3,7,8  
899:12  
**depository** 819:19  
820:20 821:17,18  
823:17 825:3  
**deposition** 627:17  
634:7 640:7,10,11  
644:2 649:24,25  
650:13 651:10  
652:4 665:12  
666:18 667:14  
668:2 669:25  
835:21 836:25  
841:8,18 843:6,9  
847:18 863:9,19  
**depositions** 772:12  
913:12  
**depositories** 821:16  
823:4,8,11  
**depository** 823:15  
824:12 830:11  
**deposits** 839:17  
852:14,16 855:10  
856:10 857:7  
893:6 905:5,7,8  
**Dept** 618:19  
**DEPUTY** 620:3  
687:7 773:19  
798:4 813:18,21  
815:13 834:21  
897:25  
**derivation** 790:21  
**derive** 740:18  
**derived** 740:17  
**describe** 741:18  
777:24 779:5  
782:8 784:7 818:4  
822:18 900:5  
901:8 904:21  
**described** 709:3  
775:2 823:21  
825:22  
**describes** 659:16  
872:11,20  
**describing** 746:19  
**description** 774:21  
**designated** 635:13

635:17 722:19 <b>designator</b> 830:15 <b>despite</b> 710:8 <b>detail</b> 909:2 <b>details</b> 903:5 <b>determination</b> 643:11 644:13 650:2,20 652:13 652:18 656:16 672:8,9 693:14 790:10 854:17 855:22 902:6 <b>determinations</b> 645:12 847:15 903:18 <b>determine</b> 640:20 641:23 643:4 644:14 646:13 648:6,9 650:9,10 656:6 659:10 669:2,22 670:22 685:7 711:25 712:21 723:21 730:14 759:3 786:7 800:20 802:19 807:15 809:6 822:9 <b>determined</b> 672:21 734:20 761:12 780:6 801:5 804:3 854:17 904:5 <b>determining</b> 642:21 675:24 681:24,25 682:3 719:18 735:19 846:18 847:7 854:21 <b>dialogue</b> 835:25 <b>DiBlasi</b> 812:9,21,22 813:7 814:15 815:7,18 816:7 832:4 833:19 <b>dictate</b> 696:12 <b>dictionary</b> 746:21 896:4 <b>difference</b> 638:3 735:24 741:4	742:5 751:22 752:6 <b>differences</b> 719:10 <b>different</b> 660:18 662:15,18 667:10 668:7,9 669:16 670:9,10 676:17 699:16 705:24 728:16 729:21,22 742:7 755:22 763:14 777:16 802:24 840:17 841:13 854:19 860:25 863:2 864:15 885:13 889:13,25 892:2,3 900:10,20,25 901:16,17 902:7 903:17,24 904:7 905:18 909:19 911:9 <b>differently</b> 664:9 664:12 844:17 861:6 <b>difficult</b> 645:21 647:2 685:6 730:11 737:7 741:15 754:13 907:25 <b>difficulty</b> 662:11 735:18 <b>Dime</b> 617:13 725:17 730:25 736:25 737:19 879:13 <b>direct</b> 632:6,9 634:2 708:22,25 776:17 786:12 798:13 813:4,8 814:7 815:3,20 826:10 829:15 835:4 898:19 901:6 902:18,25 <b>direction</b> 730:15 <b>directly</b> 816:12 820:5,7 843:3 <b>directors</b> 680:3,10	<b>disagree</b> 771:17,20 782:5 <b>disagreement</b> 916:14 <b>discharge</b> 721:2 <b>discharged</b> 718:13 <b>disclose</b> 668:15 822:11 <b>disclosure</b> 700:3 735:10 774:15,19 825:10,12,24 829:17 897:3 <b>discount</b> 662:13 663:8 691:2 <b>discuss</b> 635:13,18 646:9 687:3 698:8 698:20 709:12 882:19,21 <b>discussed</b> 634:25 639:7 650:7 651:16,22 652:16 656:22 657:8,16 669:17 670:21 672:14 686:16 695:2 697:15 698:18,19 709:15 709:17 724:6 769:14 788:5,7 793:3 843:8 891:2 909:11 <b>discusses</b> 636:21 <b>discussing</b> 709:11 709:24 728:14,17 789:21 883:2,5 <b>discussion</b> 649:22 658:19 686:23 687:15 727:14 731:8,19 732:5 752:9 797:8 835:18 889:9 891:4 894:14 895:4 <b>discussions</b> 729:21 729:24 731:3 760:7 762:6 768:19 779:7 781:18 880:9	889:11,17 892:14 905:20 <b>dismissed</b> 794:3,6 <b>disposed</b> 662:22 <b>dispute</b> 646:14 803:4 804:10 807:18 808:15 843:15 844:13 <b>disputed</b> 644:18 645:13 646:2,7 647:17 685:17 744:11 761:21 788:3 801:15 842:3,15 848:10 852:14 856:12 889:20 <b>disputes</b> 648:13 665:23 669:15 839:17,17 856:10 <b>distracting</b> 867:12 <b>distribute</b> 820:2,14 821:10 845:10,25 <b>distributed</b> 687:23 689:7 694:7 707:13,13 792:14 822:19 <b>distribution</b> 636:4 636:23 686:11 688:12,19,20,21 688:22 692:6 703:20 710:2 818:15 821:8 831:8,11 <b>distributions</b> 687:25 831:7,13 <b>District</b> 614:2 620:19 631:9 <b>divided</b> 703:18 <b>DLA</b> 907:5 908:13 <b>docket</b> 679:5,9,18 <b>document</b> 631:18 695:4 699:16,18 700:7,11 704:4 705:4 721:12 732:3 744:22 745:19 805:24 860:4 868:5,6,7	870:4 909:9 <b>documentation</b> 621:19 623:15 641:11 643:9 <b>documents</b> 625:23 635:6 641:17 681:6 768:16 785:18 803:25 805:14,22 872:9 873:22 <b>doing</b> 717:12 718:18,19 719:19 726:16 754:9 778:4 829:20 871:20 885:18 <b>dollar</b> 653:24 654:7 738:5 762:11 881:7 <b>dollars</b> 654:8,21 658:7,24 674:19 678:3 689:4 702:7 727:18 737:11 749:11,24 780:11 <b>Don</b> 908:17 <b>draft</b> 705:23 737:19 <b>drafted</b> 754:16 850:4,11,13,14 851:5,7 <b>drafting</b> 732:9 <b>drive</b> 895:15 <b>DTC</b> 819:20 820:14 820:16,18 821:12 822:23 823:2 825:4 826:9 830:3 831:7,8 <b>due</b> 767:23 800:17 <b>duly</b> 633:13 634:17 798:24 799:16 813:11 815:11 816:3 834:19 898:16 <b>dumb</b> 775:4 <b>duty</b> 880:5,6,15,19 880:23
--	---	---	---	---

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**E**


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<p><b>E</b> 615:2,2 798:2,2 799:15,15 <b>earlier</b> 699:14 775:3 777:22 779:2 839:14 847:10 853:9 857:7 858:13 862:21 886:9 899:11 905:16 <b>early</b> 644:3 904:2 905:4 911:17 <b>easel</b> 636:11 <b>Eastern</b> 620:19 <b>Edgar</b> 618:6 864:3 <b>Edward</b> 799:4 <b>effective</b> 685:9 693:17 703:9,12 703:19 739:9 740:13 743:3 753:3 <b>effectively</b> 754:2 776:4 903:24 <b>effectuate</b> 766:25 <b>efforts</b> 622:11 <b>eight</b> 717:10 903:16 <b>either</b> 620:12 640:16 680:11 787:5 794:4 820:21 <b>elected</b> 685:12 830:3,5 <b>election</b> 830:14,21 830:23 831:2,4,17 <b>elections</b> 782:21 813:3 814:23 815:2 817:21 827:10 830:7 <b>electronic</b> 821:21 821:24 <b>electronically</b> 821:15 823:16 827:5,17 <b>elements</b> 645:23 <b>Elmo</b> 808:4 867:3 <b>ELSBURG</b> 615:23 <b>else's</b> 835:17</p>	<p><b>EMANUEL</b> 615:19 <b>emerge</b> 678:8 <b>employed</b> 814:20 816:9 817:8,13 831:23 <b>employees</b> 906:25 <b>encompassed</b> 860:11,19 861:23 862:3,24 893:25 <b>ended</b> 781:21 893:18 915:22 <b>engaged</b> 653:16 802:18 <b>enormous</b> 842:25 <b>ensuing</b> 906:2 <b>ensure</b> 823:20 <b>entailed</b> 852:8 <b>enter</b> 837:14 838:5 838:7 <b>entered</b> 626:16 733:20 <b>entire</b> 757:19 861:24 894:20 904:13 <b>entirely</b> 655:2 <b>entirety</b> 723:6 745:5 894:13 <b>entities</b> 623:4,13 884:9 904:7 <b>entitled</b> 685:11 734:4 751:7 784:12 803:5 818:19 852:23 <b>entity</b> 623:5 752:10 755:3,4 899:25 903:17 904:17 <b>entries</b> 869:3 <b>envelopes</b> 826:4 <b>environment</b> 660:22 663:8 <b>equate</b> 871:16 <b>equitable</b> 748:13 <b>equity</b> 618:2 634:14 638:6 692:14,16 693:8 696:13,24 770:9 770:15,19 771:7</p>	<p>771:11 772:10 774:14 775:5,13 775:15,18 785:7 799:14 818:13,16 818:19,21,24 819:9 822:16,22 823:25 824:7,22 825:2,8,10 827:23 828:25 830:2 832:9 864:4 866:7 866:17 867:18 873:8 <b>equivalent</b> 765:23 766:20 <b>equivalents</b> 700:7 700:22 701:14 703:22 704:9 707:4 <b>escrow</b> 676:14,23 677:9 693:25 <b>ESQ</b> 615:7,8,15,16 615:17,23,24 616:7,8,9,10,15 616:16,17,18,24 616:25 617:7,8,9 617:10,11,17,23 <b>essence</b> 764:2 <b>essentially</b> 637:8 691:15 695:17 701:22 763:22 803:17 <b>establish</b> 718:3 <b>established</b> 676:20 677:25 <b>establishing</b> 735:3 <b>estate</b> 621:17,18 636:2 645:9 652:23 653:13,18 665:9 671:10 672:4 674:14 688:2 744:13 747:10 748:13 780:15 783:17 880:17,22 881:8 892:17,25 894:3 909:23 910:13 911:25 912:6</p>	<p><b>estates</b> 851:21 907:14 908:5 <b>estimate</b> 655:22 659:20 661:4 664:2 677:4 736:23 <b>estimated</b> 662:8 701:18 895:8 <b>estimation</b> 735:3 896:23 <b>et</b> 614:4,8,12 617:3 627:23 <b>Europe</b> 821:18 823:10 <b>European</b> 823:4,8 823:15,17 <b>evaluate</b> 651:17,20 <b>evaluating</b> 645:25 657:17 668:23 882:8 <b>evaluation</b> 653:17 874:21 <b>evaluations</b> 874:22 <b>event</b> 756:25 <b>everybody</b> 647:25 867:4 914:10 <b>everybody's</b> 916:3 <b>evidence</b> 631:19 632:8 643:19 798:13 834:14 <b>exact</b> 640:9 646:13 870:25 871:17 <b>exactly</b> 663:24 678:15 684:17 685:2 688:14 693:2 696:14,25 737:8 738:20 741:6 807:25 838:9 881:16 <b>examination</b> 634:3 708:10 758:9 774:12 776:7 809:23 816:6 898:19 <b>examined</b> 634:18 799:17 816:4 856:19</p>	<p><b>examiner</b> 627:24 628:14 629:21 632:12 916:13 <b>examiner's</b> 627:10 628:5,6,15,18 629:2,9,15,16,18 630:4,23 631:7,12 <b>examining</b> 856:25 <b>example</b> 646:10 647:15,17 652:22 665:24 672:2 703:9 728:15 787:7 801:21 805:12 840:11,11 <b>exceeded</b> 780:4 <b>excess</b> 777:8 <b>excessive</b> 899:10 <b>exchange</b> 677:9 806:13 <b>excluded</b> 631:19 <b>excluding</b> 703:25 705:8 707:4 <b>exclusivity</b> 911:14 911:15,16 912:10 912:13,15 <b>excuse</b> 624:20 627:18 637:4 673:5 688:25 698:14,18 721:25 722:3 723:23 760:21 781:23 788:12 791:11 825:7 835:16 842:2 859:9 <b>executed</b> 745:12 756:7 <b>execution</b> 912:9,11 <b>executive</b> 678:12 678:16 <b>exercisable</b> 756:10 <b>exercise</b> 782:18 <b>exercised</b> 783:5 <b>exhibit</b> 636:17 637:20,25 638:10 638:11 639:6 680:6 699:20 700:13 704:19,21</p>
--	--	---	--	---

715:17,18,23,23 716:5,5,14 717:4 721:7,23,24 722:4 722:5,10 723:3,7 723:10,19 724:11 774:16,17 824:3 824:14 866:8 868:10,11 869:2 870:2 871:23 872:4 876:25 <b>exhibits</b> 625:12,23 632:16,19 633:2 635:5 695:10 714:22,23 715:14 716:18,19 866:24 867:18 872:6 <b>exist</b> 805:6 <b>exists</b> 731:16 <b>expectations</b> 913:20 <b>expected</b> 751:5 <b>expense</b> 752:22 853:23 <b>expenses</b> 736:24 737:5,20 738:7 <b>expensive</b> 660:25 854:9 912:5 <b>experience</b> 726:25 816:20,22 828:15 831:14,20 832:20 <b>expert</b> 653:2 <b>expired</b> 912:15 <b>expiring</b> 912:13 <b>explain</b> 763:21 776:12 777:11 829:25 <b>explained</b> 775:11 <b>exposure</b> 672:23 676:24 <b>expressed</b> 709:5,8 <b>extended</b> 828:6 <b>extensive</b> 625:15 840:20 842:10,17 846:5 847:11,16 855:3 857:8,10,15 911:7 <b>extensively</b> 856:20	<b>extent</b> 686:7 696:2 716:12 728:19 731:16 762:21 768:24,25 781:24 782:3 785:17 <b>extra</b> 632:25 753:6 754:19 <b>extremely</b> 905:7 911:4 912:5 <b>Eye</b> 615:5 <b>e-mail</b> 877:3,12 878:2,19 909:10 910:4 <hr/> <b>F</b> <hr/> <b>f</b> 614:20 798:2 853:2 <b>face</b> 690:6 870:9 871:14 <b>faced</b> 907:25 <b>fact</b> 682:25 788:21 792:4 809:8 826:23 830:15 841:17 846:10 887:22 <b>factored</b> 735:25 854:25 856:4 911:24 <b>factors</b> 643:4 644:16 656:15 665:5 736:5,7,11 736:13,19 910:18 <b>facts</b> 747:2 756:19 <b>factual</b> 650:2 769:21 771:4,13 <b>factually</b> 761:12 <b>factual-based</b> 772:9 <b>fair</b> 638:25 639:19 640:14 645:4,24 647:5 650:3,10 651:24 652:15,19 657:11 661:5 671:13 697:23 708:23 709:6,14 710:6,13 711:7,20 712:2,22 713:18	718:22 723:8 728:18 747:5,12 748:12 767:17 768:7 771:3 776:14 794:19 849:7,8,10 856:13 880:14 <b>fairly</b> 659:15 767:11 806:12 840:10 907:15 <b>fairness</b> 649:5 650:14,20,24 652:6 657:17 709:5 713:23 768:13 771:25 <b>faith</b> 796:4 <b>familiar</b> 679:24 695:5 720:10 731:22 757:6 763:18 823:23 829:21 868:4 870:3 880:4 890:7 904:18 <b>far</b> 676:14 778:20 841:13 842:22 849:22 878:17 883:22 900:12 <b>Fargo</b> 695:14 <b>fashion</b> 635:2 <b>fast</b> 897:21 <b>faulty</b> 684:14 <b>fax</b> 707:6 <b>faxed</b> 827:4,16 <b>FDIC</b> 621:13 627:22 801:23 804:11 839:25 841:20 854:12 855:11 875:4 878:17 905:3,16 906:13,15 907:4 907:15 908:4,10 908:12,12 909:19 <b>FDOIC</b> 907:12 <b>feasibility</b> 683:24 <b>February</b> 878:8,17 905:14,14,15 906:13	<b>Fed</b> 886:6,8 <b>federal</b> 618:21 733:20 739:15,16 740:4 751:23 854:8 <b>fees</b> 736:24 777:5 912:3 <b>FEL</b> 617:4 <b>fell</b> 733:3 759:9 893:10,23 <b>felt</b> 661:7 728:18 907:17,18,19 909:25 <b>fiduciary</b> 880:4,6 880:15,19 <b>fight</b> 627:16 <b>figure</b> 676:3 706:10 713:18 <b>file</b> 622:3 632:16 724:8 740:2 874:25 876:2 896:23 <b>filed</b> 621:9,23 622:19,22 623:9 629:22 630:19 661:12 666:15 671:10 679:21,23 682:7 705:22 721:9 724:8,11 734:24 735:2 743:2,4,5,8 744:3 780:15 781:2 814:20 815:23 817:23 875:4,5,15 875:19 876:7,9,18 896:15 906:9 908:4 912:14 <b>filing</b> 621:2 623:21 679:25 726:13 <b>final</b> 644:12 847:16 <b>finally</b> 912:15 <b>finance</b> 859:15 <b>financial</b> 616:5 679:3 682:13 683:25 684:4 712:10 752:19 808:11,12 817:15	852:8 855:6 858:22 859:5,6,10 859:14,17 860:7,8 860:11,20,24 861:15 862:6,22 863:3 873:9 881:22 882:3,22 <b>financials</b> 778:24 <b>find</b> 629:14 695:6 829:16 907:25 <b>fine</b> 715:3 797:14 914:13 <b>FINESTONE</b> 615:24 <b>fine-tune</b> 736:23 <b>FINGER</b> 615:12 <b>finish</b> 621:20 706:8 755:25 859:20 914:25 <b>finishing</b> 623:16 <b>firm</b> 653:17 897:10 <b>first</b> 634:24 671:16 675:23 679:5 707:15,18 715:15 717:15 725:19 726:3 737:11 758:18 764:20 800:25 805:4 832:14 837:16 851:14 865:12 877:24 913:14 <b>fit</b> 747:11 <b>five</b> 714:22 717:19 910:15 <b>five-minute</b> 686:25 773:15 <b>fixed-income</b> 660:17 <b>flip</b> 853:13 <b>flow</b> 913:22 <b>flow</b> 688:10 692:11 899:12,23 <b>flows</b> 899:16 <b>fluctuates</b> 739:22 <b>focus</b> 843:5 <b>folks</b> 641:7 737:18 737:23 843:4
--	---	--	--	--

<b>follow</b> 700:17 708:15 718:15 739:5 838:19 845:15,19	<b>format</b> 877:13 <b>former</b> 622:21 <b>forth</b> 661:14 676:13 739:14,18 744:15 757:23 763:22 825:23 846:20 852:25 862:10 916:11	851:24 853:10 857:5 873:14,19 873:24 874:13 877:18 878:5,10 878:12 883:4 899:6 900:5 901:9 903:12 909:11	908:18 <b>generally</b> 786:25 823:23 904:21 <b>generate</b> 754:14 <b>generated</b> 842:19 842:20 847:13 857:12	838:4 843:21,24 844:18 846:20 849:22 868:9 877:19 878:6,16 878:24 879:3 889:17,24 890:4 890:16 892:7 893:19,21,24 894:10,17,22 895:25 909:12,16 910:17,19 912:9 912:11
<b>followed</b> 838:22 <b>following</b> 715:13 847:2	<b>fortunately</b> 747:15 <b>forward</b> 640:5 660:21 663:10 696:12 755:3 757:15 767:15 777:10 790:11 812:3,8 911:13 913:8	<b>fulcrum</b> 749:4 <b>full</b> 633:15 691:8 715:18 722:11 745:20 752:16 813:13 815:13 822:22 834:21 880:22	<b>genesis</b> 910:3 <b>German</b> 822:13 <b>getting</b> 626:9 643:7 657:24 672:5 675:4 688:2 689:4 703:18 747:10 749:12 751:9 777:6 781:22 789:3 791:17 808:7 823:15 842:18 885:15 909:18 912:16	<b>globally</b> 730:7 <b>GLUEKSTEIN</b> 616:17 <b>go</b> 628:5 638:10 643:25 665:11 666:18 668:2 669:24 679:5 680:11 681:4 683:15,16 685:18 686:2 687:19,24 688:6 689:10,20 690:19,20 695:10 701:4 704:3,18 705:3 706:19 722:6,24 728:21 730:11 734:17 735:23 737:17 739:24 755:3 766:15 773:10,16 773:23 776:19 783:24 784:23 793:25 794:13 797:11 820:17 826:12 837:5 838:25 839:10 845:3 851:11 852:12 853:13 856:6,15 857:16 859:13,20 864:5,6 867:18 875:12 885:3 886:15 891:18 894:6 903:5 909:4 911:6 913:8 914:5
<b>follows</b> 634:19 799:18 816:5 <b>follow-up</b> 838:8 845:14	<b>forward</b> 640:5 660:21 663:10 696:12 755:3 757:15 767:15 777:10 790:11 812:3,8 911:13 913:8	<b>fund</b> 621:22 676:24 <b>funded</b> 676:13 <b>funding</b> 661:13,14 661:23 <b>funds</b> 636:3 680:22 686:16 865:14,17 865:18 866:2 867:15 899:13,25	<b>give</b> 653:5 672:18 678:20 703:3 714:24 719:15 720:4,8,16,17 723:22,24 725:3 732:21 734:13 744:22 745:9 784:21 785:13 787:12 789:7 795:9,15 828:19 829:18 858:18 883:23 887:9	<b>Godfrey</b> 618:3
<b>footnote</b> 628:11,23 628:23 743:21,22 <b>footnotes</b> 766:11 766:11,12	<b>foundation</b> 639:6 656:20 658:10 699:2 722:20 866:14 871:25 905:18	<b>fully</b> 839:12 <b>fund</b> 621:22 676:24 <b>funded</b> 676:13 <b>funding</b> 661:13,14 661:23 <b>funds</b> 636:3 680:22 686:16 865:14,17 865:18 866:2 867:15 899:13,25	<b>given</b> 653:7 660:22 663:7 746:9 785:18 787:19 791:12 900:24 <b>gives</b> 765:2 <b>giving</b> 652:23 747:11 796:5 <b>Glen</b> 886:6,8 <b>global</b> 697:8 709:4 725:20,25 726:3 727:21 728:10 729:15 731:22 746:20,25 748:9 776:13 777:12 780:17 781:10,12 836:8 837:13	
<b>Force</b> 622:10 <b>forced</b> 771:23 <b>forcing</b> 831:15 <b>forecasts</b> 899:23 <b>foreign</b> 822:16,19 823:2,3	<b>foundational</b> 789:4 <b>four</b> 680:21 686:15 817:15 864:11,15 864:24 865:2,4,13 865:19,22 867:2,4 867:14 868:20 869:11 879:19 910:15	<b>future</b> 640:4 733:23		
<b>forensic</b> 900:14,19 <b>forget</b> 634:11 742:21 896:11,14 <b>forgot</b> 735:16 <b>form</b> 622:20 635:2 639:6 640:23 642:5 645:19 647:21 649:8 651:7 658:9 659:2 661:14 664:13 670:15 675:10 678:5 698:11 711:8 714:8 718:24 719:22 720:20 724:4 728:4 729:18 732:23 738:16 740:8 742:16 755:13 766:24 787:15 788:11 795:19 801:14 844:6 863:20 880:11	<b>Franchise</b> 622:10 <b>Frank</b> 619:3 907:10 <b>frankly</b> 654:11 658:3 708:17 <b>fraudulent</b> 839:16 901:7 <b>free</b> 731:24 <b>Friday</b> 614:19 910:4,6 <b>Fried</b> 619:3 907:10 <b>FRIEDMAN</b> 616:15 914:23 <b>front</b> 733:11 741:7 898:23 <b>fro's</b> 842:7 <b>FSB</b> 621:13 <b>FTI</b> 840:11,21	<b>future</b> 640:4 733:23		
<b>formal</b> 805:13,25 806:4,11 <b>formally</b> 805:15				
		<b>G</b>		
		<b>G</b> 616:24 618:6 634:16,16 901:7 <b>gain</b> 641:7 <b>gap</b> 701:24 <b>gather</b> 913:25 <b>gathering</b> 900:21 <b>gears</b> 714:17 <b>GEDDES</b> 618:12 <b>general</b> 685:8 801:20 816:20 818:3 831:19 866:3 868:11 885:15 901:19		

634:14 785:7	798:10 812:21	671:9 786:21	830:2	810:9 857:8 884:9
799:13 832:8	832:7 834:4	792:9 800:4 807:5	<b>happened</b> 695:25	885:12 899:12,21
864:4 908:22	835:12,13,19	817:16 900:14,19	803:17	<b>historical</b> 764:4
<b>goes</b> 686:11 693:3	857:12 864:2,9,10	900:24 907:9	<b>happening</b> 821:14	785:21 789:11
696:24 747:4	879:11 913:2	<b>grouped</b> 642:3	891:23	790:5 800:21
756:4,6 915:4	916:20	<b>guess</b> 629:24	<b>happens</b> 662:19	801:9 803:5 810:5
<b>going</b> 625:11	<b>goodwill</b> 731:10	652:11 697:25	696:2,6	857:10 885:9
629:24 630:11	732:11 783:9	703:3 709:10	<b>happy</b> 721:20	900:4 901:11,14
640:16 646:4	784:10,12 795:3	711:11 716:16	843:12 914:13,24	<b>history</b> 855:4
648:24,25 659:12	856:11 885:15,23	717:19 719:5,9,24	<b>hard</b> 646:12 905:8	<b>hit</b> 684:17
667:13 669:25	888:17 889:13	741:25 758:13	<b>HARRIS</b> 619:3	<b>hoc</b> 907:9,11
685:5 686:25	891:20 893:6,8	778:21,23 787:4	<b>HAUER</b> 617:4	<b>hold</b> 686:18 693:17
688:15 691:22	894:15	808:17 870:13	<b>Hawaii</b> 754:3	750:21 751:14
692:4 696:12	<b>Gotshal</b> 615:4	914:20	<b>head</b> 691:18 741:14	819:12,16 823:5
700:24 711:15	620:7 625:4 632:3	<b>guessing</b> 773:9	<b>hear</b> 784:24	823:10 824:10
714:17 715:12,21	772:25 776:10	<b>Gump</b> 617:4	<b>heard</b> 710:9 711:14	881:7 891:19
716:3,18 717:2	812:22 913:5	850:16 884:16	854:11,12	<b>holder</b> 692:24
721:13 725:24	<b>Goulding</b> 632:7,9	885:3	<b>hearing</b> 625:24	775:24 820:4
730:15,15 731:24	633:9,18,21 634:8	<b>gut</b> 878:6	626:14 825:11,19	824:14,15 825:3
740:3 749:5	634:24 638:2	<b>guys</b> 749:14 751:14	<b>hearings</b> 625:14	826:10,23 827:16
753:20 754:20	652:5 708:12	<b>G-O-U-L-D-I-N-G</b>	<b>heavily</b> 885:17	830:20 907:9
757:23 758:15	725:15 758:11	633:19	906:10 907:22	<b>holders</b> 623:22
776:21 781:8	776:9,12 782:8		<b>hedge</b> 680:21	624:21,21 695:23
788:10,12 812:14	794:23 877:14	<b>H</b>	686:15 865:13,18	696:11 708:14
812:19,19 834:3	<b>Goulding's</b> 632:17	<b>H</b> 634:16 816:2	<b>HEDGES</b> 615:20	725:17 750:13,17
843:5 845:15	<b>government</b> 854:8	903:9	<b>hefty</b> 837:2	750:18 751:12,13
852:12 855:5,6	<b>go-forward</b> 662:12	<b>half</b> 636:7 637:8,11	<b>held</b> 642:12,14	774:8 775:25
866:12 869:8	<b>grab</b> 869:17	638:23 702:7	734:3 831:25	818:11,13,16,18
872:18 882:19	<b>granted</b> 720:13	727:18 739:21	832:2 864:14	819:2,7,11,11,23
883:15,17,25	<b>great</b> 908:25	780:2,4,11	865:10 868:19	819:25 820:25
887:22 889:25	<b>greater</b> 752:25	<b>hand</b> 714:21,25	869:11 870:15,21	821:5,10 822:2,9
890:6,12,12,14,22	804:14 871:19	715:21 815:5	872:23	822:16 823:3,24
892:4 894:2,3,11	<b>greatly</b> 728:24	816:17 834:11	<b>help</b> 887:10 915:5	824:6,9,9,24
898:6 900:3	<b>GREGORY</b>	836:21,24	<b>helped</b> 874:19	825:6 826:11,14
902:13,16 903:3	618:16	<b>handed</b> 869:2	<b>helpful</b> 745:15	826:14,19,25
908:25 909:4	<b>gross</b> 692:8	<b>handful</b> 815:21	<b>Hey</b> 894:14	827:2,6,23 828:10
910:25 911:5,16	<b>grossed</b> 734:9	821:4	<b>hiatus</b> 905:25	828:25 831:10,15
911:19 914:18	<b>gross-up</b> 734:7,11	<b>handing</b> 632:24	<b>high</b> 658:6 804:23	865:11,13,16,19
<b>going-forward</b>	734:18,21,23,24	634:10 637:24	<b>higher</b> 777:7	868:20 869:12
803:19 807:8	735:17,20 736:2,8	715:13 716:3,23	791:22 803:13	870:15,21 871:18
<b>good</b> 620:6 625:3	736:10,22 738:9	734:16 815:7	804:9 806:17	879:13
626:25 632:2	738:14 740:21	<b>handle</b> 823:11	<b>highest</b> 739:15,16	<b>holder's</b> 830:2
634:22,23 685:4	741:5,23 742:2,21	<b>handling</b> 798:9	740:4	<b>holding</b> 759:4
708:12 718:8	742:25 743:9,14	812:9 900:9	<b>highly</b> 658:12	819:13,22 820:20
725:15 738:22	896:12,16	<b>hands</b> 895:23	<b>hired</b> 678:23	822:4,7,25 823:3
758:11,12,13	<b>grounds</b> 883:18	<b>happen</b> 655:25	<b>historic</b> 791:23	871:8
776:9 796:4 798:6	<b>group</b> 622:6 623:22	691:13 779:13	803:9,22,25 807:5	<b>holdings</b> 686:17

750:22 751:11,14	781:23 784:4	<b>idea</b> 663:15 685:4	874:20 875:4,23	<b>independent</b> 677:8
<b>holds</b> 819:20	785:4 786:10	741:3 752:2	877:15 878:13	681:12 769:9
822:22 864:24	790:8 791:4	916:20	881:2,10,19	839:24 841:12
<b>hole</b> 702:2	792:23 794:10	<b>ideas</b> 653:6	884:16 886:15	853:10 856:4
<b>holistic</b> 746:25	796:9,21,24 797:4	<b>identification</b>	887:3 892:14	857:19 858:22,25
747:7 748:2,14	797:7,9,11 798:7	778:5	896:21 907:11,20	859:4,9,22 860:6
750:24 757:16	798:7,11,15	<b>identified</b> 716:17	908:8 914:12	860:6,16 862:6
777:13 894:19	799:12 809:3,9,10	721:24 818:21	<b>include</b> 705:10	<b>independently</b>
895:15,22	809:20 811:7,12	<b>identify</b> 634:12	788:21	840:10,21 847:11
<b>Hon</b> 614:20	811:19,25 812:13	818:18	<b>included</b> 625:19,23	849:25 857:5,6
<b>honest</b> 626:11	812:22,24 813:7	<b>ignore</b> 630:11	638:21,23 665:22	<b>indicate</b> 744:9
678:19	813:25 814:3,18	<b>II</b> 864:20	702:20,23 703:20	759:19 761:19
<b>Honor</b> 620:7,9,14	815:18 832:5	<b>III</b> 615:9	706:13 707:16,17	<b>indicated</b> 691:14
620:23 621:8,15	833:19,22 834:2,5	<b>immediately</b> 905:2	734:22 743:3,18	767:11 839:5
621:21 622:5	834:9 835:9	905:8	825:12 840:18	<b>indicates</b> 765:20
623:4,16,20	836:20 847:23	<b>immunize</b> 663:4	841:25 852:13,15	<b>indicating</b> 702:14
624:18 625:4	863:21 864:3	<b>impact</b> 743:24	852:18,23 862:25	<b>indication</b> 784:22
626:6 627:2,14	867:23 869:22	748:20 749:4	874:22 913:24	<b>individual</b> 712:9
629:5 630:16	871:24 876:11	<b>important</b> 676:2	<b>includes</b> 705:12,20	751:15 849:19
631:13,20,24	877:11 879:8	729:8 793:24	707:8	905:2 908:13
632:3,14 633:22	881:12 887:20	806:22 857:18	<b>including</b> 701:6	<b>individuals</b> 819:16
634:6 636:11	897:16,20 898:17	858:14 878:22	747:3 806:14	<b>industry</b> 855:6
637:17,19 638:17	902:13 903:7	909:25 910:9	827:9 851:18	<b>inflows</b> 840:13
643:15,17,23	912:21,22 913:4,9	911:13	861:17 898:6	<b>inform</b> 812:13
644:22 648:16	914:5,11,15,23	<b>inaccurate</b> 684:19	910:12	<b>information</b> 641:19
649:18 652:2	915:9,20 916:6,10	<b>inaudible</b> 638:7	<b>income</b> 693:23	662:2 664:15
654:2,9 658:9,14	916:18,21	654:11 685:25	739:16 752:20,23	669:19 670:20,22
664:14 667:14	<b>Honor's</b> 632:13	694:15 700:11	754:14	710:20 714:15
674:20 675:11	<b>hook</b> 780:7	701:10 720:24	<b>income-generating</b>	737:14,15 763:19
679:7,16 680:24	<b>hope</b> 776:21	734:2 738:7	753:17	763:23 768:4,10
681:4 686:20	<b>hoping</b> 621:20	744:16 748:24	<b>inconsistent</b> 667:15	770:13,17 771:4
687:5,11 704:22	713:10 797:7	753:8 773:13	<b>incorporated</b> 626:5	771:14 786:4,7
708:5 711:9	<b>Horse</b> 614:8 625:17	792:16 799:8	<b>increase</b> 637:7	804:15,17,22,24
713:13 714:9,20	<b>host</b> 855:15	802:22,24 805:17	663:6 702:6 736:8	805:4,6,11,16,17
715:2,7,10 716:21	<b>hour</b> 811:20	806:14 817:15	740:24	806:3,6 822:11
719:7 722:7,17,25	<b>hours</b> 635:6 852:8	819:18,22 821:18	<b>increased</b> 663:25	827:9 830:13
725:10 734:12	885:18	821:19 823:12,12	664:6 736:19	831:9 843:2,3
740:8 742:16	<b>housekeeping</b>	828:18 830:10	<b>increasing</b> 736:9	857:10,11 866:24
747:14 757:4	625:6,11 631:3	837:18,25 839:4,6	736:12 741:8	885:24 887:2
758:3,8 759:12	916:9	842:11 843:18	<b>incremental</b> 895:19	899:11,13,18,20
760:9 761:4,14	<b>Hugh</b> 812:25	844:11 845:25	911:25 912:4	899:22,23,24
762:20 763:10	<b>hundred</b> 654:8,14	848:4 852:16	<b>incurring</b> 911:25	900:2,4,12,13,16
764:6 766:7,16	654:21 881:6	853:12 856:21	<b>indemnification</b>	900:17 901:4,18
767:20,25 771:21	<b>hypothetical</b>	858:17 859:7	622:24	901:20 902:11,15
772:9,24 773:12	654:10 675:6	863:6 865:4,6,15	<b>indentured</b> 864:15	902:20 904:10
773:24 774:4,7		865:19 866:3	864:23 879:20	910:2,7,8,9
775:7 776:16		867:8 873:21	880:5	<b>informed</b> 769:21
	<b>I</b>			

811:24	673:10 779:13,17	<b>involve</b> 713:6	855:15,17,19	897:20,23 898:17
<b>infringement</b>	779:20,25 780:14	787:23 792:19,25	860:11,19 861:16	898:18,20 903:6
655:15,16	781:3	<b>involved</b> 668:23	861:23	909:5 912:17
<b>inherent</b> 855:7	<b>intercompany</b>	727:14 729:23,25	<b>item</b> 671:4,11,18	<b>joined</b> 746:3
<b>initial</b> 641:4 688:20	701:9 899:17	730:2 731:3,8,12	732:19 764:20	<b>Joint</b> 715:25
703:19 784:11	<b>interest</b> 660:22	732:8,11 735:6	846:24 904:13	<b>jointly</b> 614:6
885:11 892:13	663:7 664:3 742:5	737:18 780:13	<b>items</b> 638:20 646:2	695:22 696:10
<b>initially</b> 644:16	744:4,23 749:12	795:22 812:6	665:21 694:4	<b>Jonathan</b> 632:7
735:19 761:20	749:15,18 750:4,5	818:14,22 831:25	729:22 730:12	634:8
778:4 795:3	751:10,18 775:25	832:24 840:5,9	734:22 787:6	<b>Jones</b> 737:24
850:11,15 900:11	777:4 870:10	854:14 879:2	839:18 855:3	<b>JP</b> 614:11
<b>input</b> 649:6 650:15	912:5	885:17 889:16,19	857:16 858:12	<b>JPM</b> 839:19 844:15
669:2 850:12	<b>interests</b> 717:23	889:24 890:2,3,11	892:2 893:5	892:5 894:2
855:25	823:25 824:7,23	890:19 897:11	907:19 910:21	896:16 900:13
<b>inserted</b> 732:6	<b>intermediary</b>	900:10,14,15,19		905:3,17 907:5
<b>insertions</b> 711:3	819:14	900:24 901:2,4,21	<b>J</b>	908:14,15,19
<b>instances</b> 759:20	<b>intermingled</b>	906:11	<b>J</b> 616:7,10,18	<b>JPMC</b> 630:13
761:20	642:17	<b>involving</b> 817:18	618:21 634:16	701:8 759:20
<b>institutions</b> 885:10	<b>internal</b> 804:19	882:25 886:8	799:15 873:11,13	859:2,12 861:10
<b>instruct</b> 846:25	805:2	<b>IP</b> 655:15 656:2	874:4	875:2 876:2,13
898:10	<b>internally</b> 792:8	658:13 659:4	<b>JACOBSON</b> 619:3	878:17
<b>instructed</b> 627:7	805:10	<b>issuance</b> 776:2	<b>James</b> 616:8 798:8	<b>JPMC's</b> 856:25
838:15	<b>international</b>	822:23	798:12,18 799:4	<b>JPMorgan</b> 616:11
<b>instruction</b> 632:13	817:19	<b>issuances</b> 864:18	<b>JANE</b> 618:18	629:10,12,14,23
838:20,23 845:16	<b>interposed</b> 620:15	<b>issue</b> 643:12 644:9	<b>JANG</b> 615:16	630:6,6 640:16,20
845:20 847:3	<b>interpretation</b>	644:20 646:10	<b>JENNIFER</b> 615:17	647:19 652:24
<b>instructions</b> 828:21	648:2 802:3 807:9	656:23 657:7	<b>JEREMY</b> 616:9	655:6 656:2
829:5	<b>interrupt</b> 690:20	667:5 669:13	<b>Jim</b> 627:2 708:13	657:13 662:23
<b>insufficient</b> 628:20	863:8	670:6,7,8 678:19	790:23	665:17,25 670:25
<b>insurance</b> 682:15	<b>interrupted</b> 660:6	724:25 727:15	<b>JOB</b> 614:25	671:6 726:5
693:19,21 755:6	<b>interruption</b>	779:11 786:3	<b>John</b> 615:9 632:3	727:20,23 729:7
755:10 899:25	910:23	787:19,20 800:13	633:18 772:24	729:13 730:5,9,20
<b>integrated</b> 748:10	<b>intervened</b> 887:2	801:7,8 805:12	776:10 877:14	731:4,7,13,20
777:13	<b>introduce</b> 902:24	807:8 810:13	<b>Johnson</b> 617:7	734:24 738:11,14
<b>intellectual</b> 652:22	<b>invest</b> 755:17	812:11 871:14	834:4,5,13 841:3	740:2,11,20
652:25 653:4,12	<b>investigated</b> 851:17	884:3,4 895:9	844:4 848:25	742:20 743:2
653:14,16 655:8	<b>investigation</b> 644:4	<b>issued</b> 689:23	850:6,9 853:6	745:22 756:15
655:10,14 657:23	872:11,20,25	690:2,8,11,15	857:23 858:7	761:13,20 762:2
658:22	882:23 883:9,16	691:2 739:4	860:3 861:25	762:17,19 763:7
<b>intended</b> 743:12	884:6,21 888:6	864:16	866:13 868:17	763:24 764:11
747:20 824:5	<b>investigations</b>	<b>issues</b> 621:5 650:9	871:10 874:14	765:3 768:19
868:21	888:17	656:4,5 709:24	875:17,23 876:4	769:15,15 770:20
<b>intensive</b> 842:6	<b>investing</b> 754:10	710:3 713:8 747:2	876:19,22 880:12	777:24 778:9
<b>intent</b> 796:6,11	<b>Investment</b> 665:3	777:3,15,19 788:6	881:13 882:10	779:7 780:21,22
<b>intention</b> 696:9	687:22 701:7	800:24 801:11,15	883:20 884:18,22	781:4,16,18 782:2
<b>interchange</b> 646:21	<b>investments</b> 617:19	806:14 817:24	885:4,7 886:23	782:5,9,14 783:23
671:9 672:17,20	865:15	836:2 840:12	888:10 893:13	784:8,15,21

785:13,17 786:16 786:22 787:12 788:8,10,22 789:9 791:2,17 792:6,13 793:4 795:5 801:24 804:11 805:9,11 806:5 809:19 841:20 843:17 844:2,21 845:11 846:2 858:24 861:13,17 874:23 886:12,14 886:18 889:21 890:6,13,15,22 891:4,18 892:10 893:11 894:6 914:24	708:7 709:20 710:16 711:10 712:6 713:14 714:10,13 715:3,8 716:15,22 718:25 719:8,23 720:22 722:3,6,8,23 723:18 724:5 725:12 727:5,11 728:6 729:19 732:24 733:14 734:15 738:18 740:10 742:17 746:11 747:17 755:14 757:5 758:4,6 759:16 760:19,24 761:5 761:10,17 762:25 763:12 764:8 766:4,14 768:2 769:3,6 771:16 772:3,6 773:7,14 773:21,25 774:11 775:8,12 776:20 782:7 783:21 784:6 785:5 786:14,19 787:16 789:5 790:9 791:5 792:24 794:12 795:21 796:10,19 796:22,25 797:14 798:17,21 799:6 799:10 802:12 806:9,21 809:4,11 809:15,18,22 811:8,16,18 812:10 813:6,9,22 814:4,9,13 815:5 815:8,24 832:6 833:16,18,20,24 834:11,16 835:2,7 836:22 841:4 844:8 848:2 849:3 850:7 853:8 857:24 858:8 861:2 862:2 863:22 864:6	866:6,10,16,20 867:9,24 868:18 869:20,23 872:3 873:6 874:15 876:13,16 877:5,9 880:13 881:14 882:11 884:25 885:6 886:24 887:21 888:14 897:18,22 898:12 903:3 909:3,7 912:19,23 913:2 914:9 915:3,12,16 916:2,7,20,22 <b>judgment</b> 625:16 677:8 733:21 739:25 751:23 796:4 862:9 895:9 <b>judgments</b> 772:19 <b>June</b> 704:14,24 <b>junior</b> 774:22 <b>jury</b> 898:13 <b>Justice</b> 618:19 <b>justified</b> 697:23 <b>Justin</b> 618:7 634:13 785:6 799:13 832:8	<b>key</b> 911:11 <b>Keystone</b> 623:4,13 <b>kind</b> 830:21 <b>King</b> 615:13 618:22 725:16 879:12 <b>Klamser</b> 812:4,25 813:8,17,23 814:12 <b>knew</b> 672:22 742:24 743:9 854:8 911:21 <b>know</b> 625:7 626:11 626:14,20 638:8 639:15 640:9 643:5 644:13 646:16,22 648:11 648:19,23 654:15 664:11 665:10 666:8 669:18,20 674:3,5 676:2 678:15 683:3 684:22 685:2,16 685:19,23 686:14 691:17 696:14,21 696:25 698:4,5 712:8 719:11 720:25 722:20 726:15 727:25 728:2,9 731:21 732:4 740:17,18 741:10,10,14 745:6,20 752:4 754:8,13 770:7 775:2 778:18,20 782:25 783:4,7 786:20,24,25 787:8,11,17,18 790:11,18,19,25 795:24 796:11 797:5 802:21 804:22 807:20,25 809:12 820:7 822:6 826:25 836:5 850:20 851:2,8 865:17 871:16 873:24	875:7 885:20,25 886:5,9 887:24 888:21 889:4,6,8 895:22 897:6,7,8 903:4 908:3 910:25 911:17 915:4 <b>knowing</b> 654:6 <b>knowledge</b> 712:8 722:21,21 772:10 787:2 801:20 805:8 882:15 897:13 <b>known</b> 763:19 819:10 <b>Korsman</b> 695:11 <b>Kosturos</b> 627:17 628:12 629:7 645:3 694:20 709:11,12,17 725:21 727:17 743:23 760:13 808:6,18,20 877:4 877:15 <b>Kosturos's</b> 627:21 <b>Krueger</b> 680:12 <b>KURTH</b> 617:20 <b>Kurtzman</b> 816:10 816:13 <b>K-L-A-M-S-E-R</b> 813:20
624:19 625:2 626:4,19 627:6 628:22 630:5,10 630:25 631:15,21 632:23 633:3,7,11 633:23 634:5,9,11 636:12 637:18,23 638:18 639:8 642:6 643:16,20 644:23 645:16,20 647:22 648:18 649:9,14,19,23 651:9 652:8 654:12,22 656:10 656:21 658:11,16 658:19 664:16 667:17 668:3 669:11 674:22 675:12 678:6 679:10,14,17,20 680:18 681:2,6 686:23,24 687:9 687:12,15,16 698:12,15 699:3 704:20,23 705:2	792:24 794:12 795:21 796:10,19 796:22,25 797:14 798:17,21 799:6 799:10 802:12 806:9,21 809:4,11 809:15,18,22 811:8,16,18 812:10 813:6,9,22 814:4,9,13 815:5 815:8,24 832:6 833:16,18,20,24 834:11,16 835:2,7 836:22 841:4 844:8 848:2 849:3 850:7 853:8 857:24 858:8 861:2 862:2 863:22 864:6	<hr/> <b>K</b> <hr/> <b>KCC</b> 812:5 814:20 816:14,16,17,22 817:9 822:15 823:19 826:4 827:20,23 828:25 829:4,7,10 <b>KCC's</b> 816:20 817:2 824:2 <b>keep</b> 631:8 732:20 777:6 782:11 784:18 795:10 893:20 903:6 <b>keeper</b> 818:23 <b>keeping</b> 678:18 784:16 <b>Kelly</b> 812:8,22 <b>kept</b> 659:17 662:23 911:5	691:17 696:14,21 696:25 698:4,5 712:8 719:11 720:25 722:20 726:15 727:25 728:2,9 731:21 732:4 740:17,18 741:10,10,14 745:6,20 752:4 754:8,13 770:7 775:2 778:18,20 782:25 783:4,7 786:20,24,25 787:8,11,17,18 790:11,18,19,25 795:24 796:11 797:5 802:21 804:22 807:20,25 809:12 820:7 822:6 826:25 836:5 850:20 851:2,8 865:17 871:16 873:24	<hr/> <b>L</b> <hr/> <b>L</b> 615:17,23 634:16 <b>lack</b> 699:2 715:11 <b>laid</b> 696:18 712:24 797:5 <b>landed</b> 736:20 <b>LANDIS</b> 616:20,24 <b>language</b> 621:24 622:6,14 631:24 721:14 722:13 723:11,20 731:22 732:4,6 <b>lapse</b> 823:14 <b>large</b> 822:24 <b>lasting</b> 750:7

<b>lastly</b> 623:20	800:3,6,8,10	890:12,14,17,21	723:25 724:9,10	876:2,5,6 884:6
<b>late</b> 905:14 906:6	801:15 802:3,8	892:3 905:19	724:22 725:5	885:12,14,15,23
<b>Laughter</b> 625:9	803:3 805:25	<b>liability</b> 659:20	748:18 765:9,14	886:7,8,13 887:6
654:16 675:16	806:15 808:15	661:3,19 663:9	765:23 869:25	887:13,18 888:22
738:24 746:15	809:6 829:18	664:2,5 666:5,5,6	871:6	888:25 891:5,11
771:19 775:16	840:5,7 842:11,14	666:22 671:6,8	<b>liquidity</b> 702:12	891:16,17,20,21
788:16,18 850:10	852:9 858:22,25	672:23 673:20	<b>list</b> 672:22 695:2	892:11,24 893:6,8
876:20 887:25	859:4,4,6,10,13	731:5,13,15,25	715:23 716:5	893:10,18,20,22
898:15	859:14,15,16,18	780:5,9,23,25	762:7,8,10,10	894:25 895:14,18
<b>law</b> 799:23	859:23 860:2,6,20	<b>Life</b> 762:10 781:14	781:14 782:13	896:8 900:19
<b>lawyer</b> 712:14,18	860:24 861:23	781:21 782:13	819:3,5,6,14,24	905:25 911:4,4
712:20 743:25	862:3,22 863:3	<b>lifted</b> 646:20	820:6 821:12	<b>litigations</b> 731:10
799:21 805:24	882:22 883:8,9,16	<b>light</b> 896:2	823:24 824:6,8,25	732:11 784:11,13
<b>lawyers</b> 713:20	883:22,23 884:3,4	<b>likelihood</b> 645:13	826:24	795:4,5,6 872:22
806:11 809:8	884:11,15,21	646:6 647:16	<b>listed</b> 638:20 702:6	882:24 886:3
903:13 907:8,10	<b>legally</b> 805:21	648:2,12,20	705:7 781:13	889:14
<b>laying</b> 905:18	<b>length</b> 646:12	841:14,23 858:9	824:14 867:6	<b>little</b> 642:19 654:14
907:24	<b>letter</b> 761:25	<b>Likewise</b> 623:20	<b>listening</b> 746:14	677:20 685:6
<b>LAYTON</b> 615:12	<b>letters</b> 825:13	914:15	<b>listing</b> 818:25	692:3 707:22
<b>lead</b> 900:8	<b>let's</b> 643:25 665:11	<b>limine</b> 627:5 631:4	819:15 820:18	708:17 714:18
<b>leading</b> 759:13	666:18 669:24	<b>limited</b> 758:16	822:22	721:17 747:22
764:7	674:10 679:5	781:24 815:19	<b>lists</b> 680:6	750:25 751:2
<b>lead-up</b> 766:9	680:11 683:15,16	<b>line</b> 651:12 666:19	<b>litigate</b> 848:9	775:4 782:20
<b>LEAMY</b> 618:18	691:18 700:6	668:19 670:2	<b>litigating</b> 777:2	808:17 836:25
<b>learned</b> 625:8	728:6 743:19	671:4,11,17 704:4	<b>litigation</b> 617:13	861:5
<b>leave</b> 741:23	746:18 748:17	745:17 845:7	620:18,25 623:6,9	<b>LLC</b> 617:14
894:16 915:7,18	761:18 794:13	846:24 848:5	623:12 646:21	<b>LLP</b> 615:4,20
<b>leaving</b> 779:10	802:12 856:6	863:12 908:23	655:3,14 671:9	616:12,20 617:4
<b>ledger</b> 805:3	876:21,24 881:3	<b>lines</b> 715:5 802:4	672:20 673:8,10	617:20 618:3
891:18	884:5,25 888:5	837:24 838:12	673:18,21 701:10	619:3
<b>left</b> 690:17 691:21	894:14 915:3	<b>liquidate</b> 693:22	731:2,4,6,14,24	<b>loan</b> 785:21,21
737:10 742:2	<b>level</b> 624:9 685:16	<b>liquidated</b> 682:5	732:2,13,13 733:9	786:15 787:10
743:16 750:25	692:20 749:18	<b>liquidating</b> 687:19	733:25 735:4	902:11
752:25 889:22	<b>Lexington</b> 617:21	687:24 688:11,15	737:25 738:2	<b>loans</b> 701:9 785:20
<b>left-hand</b> 638:3	<b>liabilities</b> 660:24	689:2,8 691:24	741:19 744:2,4,24	785:23,25 786:5
867:14	661:25 662:13,14	692:5 693:11	745:24 748:7,11	<b>local</b> 740:5,16
<b>legacy</b> 643:7 778:9	662:16 663:7	694:10,17,22	748:12 756:12	<b>lock</b> 830:24
<b>legal</b> 644:14 648:16	664:5,24 665:8,14	696:4,6,16 697:2	779:13,15,17,18	<b>long</b> 631:17 659:15
656:25 657:7	665:16,18,20	755:6	779:25 781:3	717:7 773:7,10
669:14 713:8	672:11 676:25	<b>liquidation</b> 635:18	783:10,24 784:9	817:8 874:16
718:24 719:22	727:19,22 728:9	635:20 636:15	784:16,23 795:10	<b>longer</b> 632:19
720:21 723:17	728:13,16,21,25	688:25 699:8,18	795:11,15 796:5	749:13 750:7
757:4 758:2	729:4,9,13,22	700:24 703:5	805:19 807:19	833:8,12 909:3
763:11 775:9,13	730:5,10,15,21	714:19 715:16	841:14 842:14	<b>look</b> 626:10,21
786:10 788:2	734:7 780:13	717:3,7,22 718:6	853:22,23 854:2	629:12 630:5
790:8 792:20,25	803:23 839:12	718:19 719:4,20	854:10 856:2,11	641:19 646:3
794:10 799:25	851:18 882:24	720:2 721:3	872:13 875:2	647:2,23 648:3



651:19 655:24,25 656:23 659:13 661:15,21 663:18 665:2,4,19 666:6 666:17 671:11,12 671:17,20,23 710:22 712:15,21 712:24 718:20 721:6 723:2,19 724:25 732:14 735:23 743:21 744:17 751:8,22 753:25 754:11 761:2 762:4 765:16 772:15 851:10,14 856:6 868:25 870:6 885:21 886:4,6 889:2 894:24 896:4 901:5 903:8	721:23 733:2 747:18 751:4 754:7 759:2,7 777:2 778:5 779:9 779:15,17 806:24 811:20 841:12 842:7,18 844:23 851:13 854:14 855:2 871:13 878:24 894:20 900:20 901:4 902:10	<b>MA</b> 616:6 <b>macro</b> 747:9 <b>Madison</b> 615:21 <b>magnitude</b> 742:4 <b>mail</b> 820:21 826:18 <b>mailed</b> 821:5 <b>mailings</b> 820:25 <b>main</b> 683:5 <b>maintain</b> 893:4,5,7 <b>major</b> 749:4 821:16 839:11 842:20 854:7 <b>majority</b> 686:18 <b>making</b> 652:17 703:19 726:17 793:8,10 831:10 831:17 880:24 <b>managed</b> 643:8 <b>Manges</b> 615:4 812:23 <b>March</b> 660:12 733:19 875:13,19 876:8,10 905:21 906:7 912:14 <b>Marion</b> 693:20 900:2 <b>mark</b> 615:15 680:14 716:18 866:21 <b>marked</b> 700:10 715:22 716:4,10 721:7 <b>market</b> 614:16 616:21 660:10,12 660:15,18 663:5 673:23 901:15,19 902:9 <b>marketing</b> 901:17 904:16 <b>Marsal</b> 907:3 <b>Mary</b> 614:20 <b>Mastando</b> 615:9 632:2,3,24 633:9 633:20 638:16 639:5 640:23 642:4 643:14 644:21 645:15,18	647:20 648:15 649:8,20 651:6 652:2 653:25 654:9 656:8,19 658:8,17 659:2 664:13 667:13,24 669:8 675:9 678:4 679:15 680:16 686:21 687:10,13 698:10,23 706:7 708:4 709:19 710:14 711:8 712:4 713:12 714:8,11 718:23 719:6,21 720:19 722:17 723:16 724:3 727:3,10 729:17 732:22 734:12,16 738:16 742:15 746:10,16 747:14 755:12 757:25 760:14 767:24 772:24,25 773:9,17 774:3 776:8,10,22 785:3 786:9,17 787:14 788:20,25 790:7 792:22 794:9 795:18 796:8,15 796:23 <b>master</b> 621:22 826:17 827:19 828:22 830:17 <b>MASTRANDO</b> 728:3 740:7 757:3 <b>materials</b> 818:7,8 818:15,20 820:3,6 820:15,21 821:7 821:21,24 822:15 822:16,19 823:16 823:20 824:3,16 824:18 825:5,21 825:23 826:12 829:2,16 <b>math</b> 674:17 675:5 675:15,17 741:13 790:21 871:21	<b>matter</b> 621:15 622:25 625:6 729:14 916:10 <b>matters</b> 712:10 902:4 <b>MATTHEW</b> 616:25 <b>maximize</b> 881:5 <b>maximized</b> 881:2 <b>maximizes</b> 645:8 <b>maximizing</b> 880:25 <b>maximum</b> 672:18 675:2 779:21 <b>McCree</b> 908:17 <b>McGUIRE</b> 616:25 <b>McINTOSH</b> 616:18 <b>mean</b> 628:23 638:19 640:3 641:3 650:7 654:13,17 665:10 668:6,9 684:18 690:19 692:9 709:21 711:23 712:7 713:9 718:7 720:14,25 747:8 748:25 750:14 751:6 792:10 805:7 824:15 828:7 833:3 863:7 <b>meaning</b> 679:22 792:12 <b>means</b> 776:4 824:17 <b>meant</b> 709:25 771:7 845:5 <b>measured</b> 651:14 <b>measurement</b> 651:3 <b>mechanics</b> 696:17 829:13 <b>mechanism</b> 696:15 726:20,23 <b>Medial</b> 821:2,8 <b>meeting</b> 878:25 879:4 891:7 906:3 906:12,14,16
<b>looked</b> 643:4 647:10,11 666:25 667:2,10 672:14 672:19,25 713:23 724:23 747:8 768:15 779:11,19 800:19 803:21,22 803:25 805:10 840:12 854:5 855:16,18,19 857:5,8,9,11 884:8,13 885:8,22 885:23 886:10 888:16,22,24 889:4,7 894:19 901:11,14,15,16 901:17,18 902:4 903:24 904:6,7,10 911:10 <b>looking</b> 642:25 643:3,6 644:17 645:2,23 648:5 651:11 655:4,8,11 657:17 660:24 661:3 663:19 670:8 671:14 676:8 707:2 711:5	<b>looks</b> 660:19 666:9 871:3 902:17 913:2 916:15 <b>loss</b> 640:5 752:23 752:25 753:5 904:9 <b>losses</b> 753:6 789:25 790:15 842:19,20 847:13 852:25 857:12 <b>loss-sharing</b> 671:7 780:7,24 <b>lost</b> 734:4 <b>lot</b> 638:19 641:6 660:16 662:17,17 662:18 666:15 750:21 758:19 767:9 836:16 839:5 854:10 893:25,25 894:2 900:11 907:18 <b>lots</b> 729:20 768:15 <b>low</b> 677:14 749:19 <b>lower</b> 803:13 <b>LOWRY</b> 619:6 <b>LP</b> 614:8 <b>LTW</b> 896:24 <b>LTWs</b> 756:9,10,21 757:12,21 <b>lunch</b> 773:5 811:20 <b>Luncheon</b> 797:16	<hr/> <b>M</b> <hr/> <b>M</b> 618:18 799:15 815:15 816:2		

907:12 908:9,24 909:17 910:15 <b>meetings</b> 890:25 891:3 905:13 <b>member</b> 800:3 882:6 <b>members</b> 680:21 695:2,21 696:9 865:2,4 879:19 906:21,23 <b>membership</b> 879:15 <b>memory</b> 843:13 <b>mention</b> 763:17 <b>mentioned</b> 769:24 824:10 842:5 867:15 899:11 900:22 902:5 910:21 <b>merits</b> 651:17 655:9 697:15 768:20,24 769:8 769:10,14 793:3,6 793:9 840:5,7,19 840:24,25 842:11 842:22 848:16 855:13 858:4,12 858:23 861:9 862:15,19 863:17 889:12 892:22 907:13 909:24 911:8 <b>Messrs</b> 649:20 658:17 686:21 687:13 812:4 <b>met</b> 770:9 778:8 842:8 905:3 <b>method</b> 629:19 <b>metric</b> 651:13 <b>mic</b> 633:5 <b>middle</b> 862:16 <b>midpoint</b> 681:20 681:23,25 682:8 <b>million</b> 637:4,9 638:2 641:13 659:7,22 661:6 663:12 666:22	671:2,6,17 672:3 674:15,18 675:7,8 676:10 677:18,20 678:3 681:16 685:20 689:3,15 689:16,25 690:17 691:19 701:22,25 702:6,7,20 703:16 705:6,15 706:17 706:22,25 707:6 707:20 713:10 733:22 734:6,25 735:6,11,15,15 736:21 737:9,10 738:5,10,15 739:2 741:20,20,24 742:8,22 743:16 752:5,17,21 753:13,14 754:18 777:4,4 778:15 779:23 780:22 782:23 783:3 784:18 800:14 801:4 803:6,9,20 804:5,6,14 807:4 807:12,17 808:14 809:25 810:4,8 869:14 896:12 897:4,4,9 <b>Milman</b> 904:8 <b>mind</b> 730:17,18 808:3 <b>minds</b> 906:3 <b>mine</b> 859:5 <b>minuscrypt</b> 837:3 <b>minute</b> 781:9 <b>minutes</b> 909:6 <b>mischaracterizat...</b> 728:4 740:8 <b>mischaracterizes</b> 708:5 767:25 875:18 883:21 884:23 888:11 <b>mischaracterizing</b> 651:7 656:9 669:9 710:15 792:23 <b>misidentified</b> 909:9	<b>misleading</b> 639:16 <b>Misquoting</b> 860:4 <b>missing</b> 754:25 804:25 806:3 <b>misstates</b> 802:11 <b>mistake</b> 741:22 742:3 <b>misunderstood</b> 875:21 <b>modification</b> 715:24 721:8 724:7 <b>modifications</b> 724:24 <b>moment</b> 714:24 730:24 764:18 779:11 826:8 832:5 <b>Monday</b> 624:14 812:14 913:8 914:6,21,25 915:4 915:15,25 <b>monetize</b> 655:12 693:16 <b>monetizing</b> 703:10 <b>money</b> 676:23 691:20,22,23 692:4,10 751:7,9 754:6,21,24 755:2 755:5,16,20 840:15,15 892:19 892:21 <b>month</b> 704:20,23 875:7 876:3,10 912:2 <b>monthly</b> 659:13 703:23 704:18,25 705:11 <b>months</b> 905:23 911:18 912:16 <b>month-by-month</b> 777:7 <b>MORGAN</b> 614:11 <b>morning</b> 620:6 625:3 626:13,25 627:12 632:2 634:22,23 708:12	725:15 758:11 776:9 914:19 916:8 <b>morning's</b> 620:10 <b>motion</b> 627:5 631:4 632:15,18 734:23 735:3 742:25 896:23 916:13 <b>motivation</b> 909:21 <b>move</b> 644:24 652:20 660:21 678:7 679:8,12 760:10 762:3 768:23 782:5 812:3,8 831:12 866:12 871:22 872:15 876:21,24 902:14 915:17 <b>moved</b> 812:14 872:6 <b>moving</b> 831:4 904:19 912:8 915:10 <b>multiple</b> 832:15,15 903:16 906:8 <b>multiply</b> 675:2 677:12,17 <b>mute</b> 715:4 <b>Mutual</b> 614:4 617:3 641:11 659:17 687:22 727:19,25 729:5 744:5,6,12,13,24 745:10,11,13 746:3 817:4 846:18 847:8 887:6,7,12,17 888:8 890:21 892:25	<b>name</b> 633:16,16,19 705:19 708:13 799:2,3 813:14,14 815:13,14,15 819:12,17,17 820:5,13 824:11 824:23 834:21,22 <b>named</b> 873:24 <b>names</b> 819:16 826:24 827:2 908:20 <b>nature</b> 668:16 899:24 901:20 902:12 907:21 <b>near</b> 856:22 <b>nearly</b> 699:11 <b>necessary</b> 631:16 652:17 714:2 786:7 <b>need</b> 626:17 645:12 650:19,23 655:13 669:18,20 670:22 679:10 680:18 693:14 712:13,20 733:14 789:4 829:13 830:8 831:12 881:4 <b>needed</b> 796:4 826:12 900:12 903:18 911:24 <b>needs</b> 669:2 904:7 904:15 <b>negative</b> 701:25 <b>negotiated</b> 742:19 893:2,3 894:21,22 894:25 <b>negotiating</b> 729:15 729:22 892:23 893:7 <b>negotiation</b> 768:22 776:24 777:24 795:3 890:24 891:22 893:5 905:6 <b>negotiations</b> 673:3 760:17 783:22 784:7,13 793:11
<hr/> <b>N</b> <hr/>				
<b>N</b> 614:16 615:2 634:16,16 798:2,2 798:2 799:15 <b>Nagle</b> 619:6 623:24 680:24 774:7,8,13 775:10				

890:20 894:10 904:21,23,25 906:9,11 <b>neither</b> 746:7 <b>Nelson</b> 618:7 634:6 634:10,13,13,21 636:10,13 637:16 637:19,24 643:17 643:22 644:24 649:11,17,20 658:14,17 678:7 679:7,12,19 681:4 681:8 686:19,21 687:5,13 698:14 698:16 704:21,24 706:9 708:8 711:15 759:12 760:9 761:3,14 762:20 763:10 764:6 767:20 768:23 769:5 773:12 775:7 781:23 782:16 783:20 784:4 785:6,6,10 789:3 791:7 794:20 799:12,13,20 808:3 809:13 811:17 812:12 813:24 832:7,8,11 833:14 866:19 912:22 914:15 916:5 <b>Nelson's</b> 708:15 710:9 764:20 <b>net</b> 636:25 637:2 640:5 659:21,25 664:6 701:18 752:20,22,23,24 753:6 789:25 852:25 <b>never</b> 633:2 664:20 711:7 714:6 746:22 <b>new</b> 615:22 616:14 617:6,16,22 619:4 619:5 620:19	635:5,8 637:10,12 682:11,22,23 683:8 684:21 739:18 754:9 866:10,11 902:24 904:19 <b>NG</b> 615:10 <b>night</b> 625:12 627:11 <b>NOL</b> 639:24 640:2 640:3 752:17 753:18,23 754:19 754:22 755:11 764:22 788:9 789:17,20,23 790:3,10,19 791:14,16,25 804:2 810:2,13,23 <b>NOLs</b> 788:7 790:5 <b>nominee</b> 819:18 824:19 826:16 827:18,18 830:8,9 830:13 <b>nominees</b> 819:21 825:7 826:13,16 826:21 827:2,4,6 827:7,12,14 828:9 828:18,19 829:6 829:15 <b>nominee's</b> 824:19 <b>nonvoting</b> 825:17 <b>non-debtor</b> 719:16 723:14,24 <b>non-debtors</b> 725:5 <b>non-going</b> 825:20 <b>normal</b> 726:25 833:6 <b>North</b> 615:13 <b>Nos</b> 614:13 <b>Notary</b> 634:18 799:17 816:4 <b>note</b> 623:21 624:3,3 624:20,21 625:11 631:3 659:14 695:23 696:11 701:5 722:18 747:16 750:13,17	750:18 751:12,13 766:4,13 774:8 865:10,13,16 868:20 869:12 870:15,21 871:8 907:9 <b>noted</b> 798:3 898:16 916:24 <b>NOTEHOLDERS</b> 619:2 <b>notes</b> 685:10,20,24 686:4,5,9,10 765:17,18,19 766:9 773:10 864:19,20 869:3,4 869:11,13 870:16 870:23 <b>notice</b> 622:19 661:13,23 679:21 694:25 695:5 825:12,18,19 <b>noticed</b> 898:4 <b>notices</b> 662:3 <b>noticing</b> 817:6 <b>notify</b> 821:15 830:8 <b>November</b> 622:4 721:9 724:12 828:7,8 <b>number</b> 620:11 637:10,12 643:4 644:15 646:4,8,24 646:25 650:8 653:5 655:23 664:6 665:23 666:8 679:6,18 684:17 689:16 691:17 700:14 701:15,16 703:4,6 703:15,21 704:10 705:12 706:5,22 706:24 707:8 721:25 733:15 735:11 736:5,8,9 736:12,13,14,19 737:16 738:2,4,5 738:7,9,10,15 740:18,19,21,22	741:24 742:2,14 743:10,16 759:10 759:17 768:18 777:15 778:9 789:15 801:5 810:4 830:15 859:11,22 861:15 866:17 870:8 871:17 875:10 877:5,8,9,10 891:25 895:11,21 896:12,20 897:3,9 900:22 905:13 909:24 <b>numbers</b> 659:21 700:16 735:25 737:3 741:11 743:15 869:5 870:17,24 871:2 872:8 897:7 <b>number's</b> 742:8 <b>numerical</b> 670:4,5 <b>numerous</b> 857:4,6 900:9 <b>NY</b> 615:22 616:14 617:6,16,22 619:5 <b>N.A</b> 614:11 <b>N.W</b> 615:5 <hr/> <b>O</b> <hr/> <b>O</b> 634:16,16 798:2 798:2,2 799:15 <b>oath</b> 794:14 <b>object</b> 626:5,10 640:23 645:18 649:8 652:2 659:2 664:13 667:13 711:8 714:8,11 722:18 728:3 738:16 747:15 762:20 781:24 876:11 908:22 <b>objected</b> 838:14 <b>objection</b> 620:15 621:6,23 622:2,8 622:16,20,22 623:2,10,19	624:23,24 638:16 639:5 642:4 643:14 644:6,21 645:15,17 647:20 648:15 651:6 653:25 656:8,19 658:8 667:24 669:8 670:12 674:20 675:9,10 678:4 679:14,15 680:16,24 698:10 698:23 708:4 709:19 710:14 712:4 713:12 718:23 719:6,21 720:19 723:16 724:3 727:3,10 728:3 729:17 732:22 740:7 742:15 746:10 755:12 757:3,25 759:12 760:9 761:3,14,15 763:10 764:6 767:20,24 775:7 776:16 782:3 783:20 784:3,4 786:9 787:14 788:11,20,25 789:2 790:7 791:4 792:22 794:9 795:18 796:8,15 802:10 806:7,20 809:2,9 811:16,17 841:3 844:4,6 845:12 846:22 847:22 848:25 849:2 850:6,8 853:6 857:23 858:7 860:3,22 861:25 863:20 866:13 868:17 871:10,24 873:4 874:14 875:17 876:4,19 880:11 880:12 881:11,13 882:10 883:20
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884:18,22 885:4 886:23 887:19 888:10 893:13 916:5 <b>objections</b> 620:12 623:14 786:17 815:22 817:22 822:12 874:18 914:7 <b>obligated</b> 805:21 <b>obligation</b> 677:4 699:10 729:6,7 891:6 <b>obligations</b> 622:24 <b>obviously</b> 625:22 650:7 771:16 846:5 854:6 880:24 911:19,22 <b>occurred</b> 697:22 <b>occurs</b> 753:4 <b>October</b> 660:14 699:22 828:2 <b>odd</b> 674:18 <b>offer</b> 632:6,8 633:20 798:12 829:19 834:7,13 <b>offering</b> 753:13,20 754:24 755:5 768:7,12 783:2 815:2 <b>office</b> 616:22 618:20 835:22 908:18 <b>officer</b> 622:21 808:21 <b>official</b> 619:9 <b>offset</b> 672:5 910:25 <b>offsetting</b> 855:9 <b>off-the</b> 658:18 686:22 687:14 <b>off-the-record</b> 649:22 <b>Oh</b> 700:18 757:10 783:2 <b>OID</b> 871:14 <b>okay</b> 620:5 624:11 625:2 626:14	633:10 634:5 636:9 637:15 640:12,15 642:16 642:20 643:17,22 644:24 649:12,17 650:22 652:20 659:23 660:7 666:18 667:22 669:24 670:24 671:19 673:10,16 677:17,22 678:7 679:12,17 680:2 681:8 684:4,12,20 686:14,19 687:9 689:12,18 690:4 690:13,24 691:5,9 693:5,10 694:3,6 695:8,9,17,21 697:4 700:21 701:13,13,17,21 702:10,16,25 704:3,13 705:18 706:4,16 707:2,11 707:21 708:8 709:9 710:8 711:22 714:16 716:24 718:10 719:13,25 721:6 721:21 722:6,16 723:10 725:2,12 730:2,8 732:10 733:4 735:2,24 741:21 743:19 744:17 745:14,21 746:13,18 748:4 748:17 749:8 752:8 753:10 755:25 760:8 761:9 763:16,21 764:2 765:19 770:7,12 772:8,22 776:5 778:18,25 779:5 780:17 783:4,8,13 787:7 787:20 789:17 790:24 791:7 792:3 794:19	796:17 798:21 800:23 804:6 807:11 809:18,22 820:12 832:6 833:20 837:4,19 840:3 841:17 844:23 845:6 846:16 848:22 849:25 852:2,7,11 853:15 855:2,16 855:17 856:8,24 858:20 860:10 861:21 862:8 863:10 868:3 869:19,24 870:12 875:11,12 877:2 877:16 879:19 883:7 886:11 888:21 889:16 890:3 891:15 893:9 894:24 896:18,22 897:15 <b>OLIVER</b> 615:19 <b>once</b> 714:22 818:21 819:3 <b>ones</b> 727:24 730:14 818:12 889:21 890:22 <b>one-off</b> 894:16 <b>one-to-one</b> 676:14 <b>ongoing</b> 623:11 673:18,21 <b>Oops</b> 704:6 <b>open</b> 673:23 722:10 913:21 <b>opening</b> 892:8 <b>operating</b> 640:5 659:14 682:14 683:14,19,21 684:7,9 703:24 704:18,25 705:11 752:23,24 753:4,6 754:8 789:25 852:25 <b>operation</b> 683:20 <b>operations</b> 684:8 <b>opine</b> 653:3	<b>opinion</b> 765:14 769:22 801:24 <b>opinions</b> 793:6 829:19 <b>opportunity</b> 895:20 <b>opposed</b> 744:13 903:13 <b>opposing</b> 657:4 <b>opposition</b> 825:14 <b>opt</b> 830:3,5,7,14 <b>opted</b> 685:20,24 <b>optimal</b> 753:7 <b>option</b> 755:18 <b>opt-in</b> 829:22 <b>opt-out</b> 829:21 <b>order</b> 627:6,7 631:24 645:11 648:9 669:21 693:22 697:17 718:17 721:2 730:13 764:12 771:24 777:7 797:11 825:11,24 903:21 916:12,12 <b>ordered</b> 871:7 <b>orders</b> 916:17 <b>organize</b> 915:6 <b>organized</b> 716:25 <b>original</b> 691:2 737:18 827:12,19 828:4 <b>originally</b> 735:10 <b>osmosis</b> 626:17 <b>OTS</b> 853:17 854:8 <b>outcome</b> 666:14 673:5 777:2 847:14 <b>outcomes</b> 646:2 647:12,24 648:4,6 655:21,23 662:19 665:24 666:7,10 667:2,10 668:7,10 669:16 670:9,10 673:8 681:17 777:16 779:12 862:5 <b>outflows</b> 840:13	<b>outset</b> 761:23 <b>outside</b> 621:12 814:17 <b>outstanding</b> 870:7 870:16,22 871:5 <b>overall</b> 671:24 709:7 746:19 747:19,24 777:17 777:21 801:14 855:21 <b>overfunded</b> 659:6 664:22 <b>overfunding</b> 663:12,16 <b>overhead</b> 643:24 <b>overheard</b> 898:8 <b>overlap</b> 750:10,16 <b>overnight</b> 826:18 <b>overrule</b> 903:4 <b>overruled</b> 638:18 639:8 645:20 647:22 648:18 654:12 656:21 658:11 668:4 669:11 675:12 709:20 710:18 711:10 712:6 714:10,13 719:8 719:23 720:22 724:5 727:11 729:19 732:24 738:18 740:10 742:17 747:17 755:14 759:16 763:3,12,15 764:8 776:20 786:19 787:16 790:9 792:24 794:12 795:21 802:12 806:9,21 841:4 844:8 848:2 853:8 857:24 858:8 861:2 862:2 863:22 868:18 874:15 885:6 886:24 <b>oversaw</b> 641:9
---	---	---	--	--

699:4 <b>overseen</b> 778:10 <b>oversight</b> 630:20 <b>owed</b> 800:14 803:10 804:4 847:12 <b>Owl</b> 680:12,14 865:23 <b>owned</b> 640:20,21 674:24 686:15 745:10 759:4,24 761:13,25 763:13 788:3 793:12,12 885:10 887:5,12 887:17 <b>owner</b> 745:23 746:4 792:20 823:13 824:21 <b>owners</b> 684:23 685:2 822:5 826:7 828:22 <b>ownership</b> 641:23 642:21 643:5,12 644:8 646:15 648:13 655:5,10 656:13,17 657:2 657:21 669:15 688:8,19 759:21 761:7,21 768:20 779:11 781:19 792:17 801:8,14 801:18 804:12 806:16 843:10,15 884:9 885:9,12 889:13 <b>owns</b> 655:7 657:24 803:4 808:16 888:9	630:12 639:18 643:25 649:24 650:6 651:11 652:4 666:19 668:8 670:2 675:20 695:7 700:6,9,10,16 701:17 704:3,11 705:4,24 706:12 706:19 715:19 717:5 721:23 722:12 723:3 733:7,16 741:16 741:17 743:21 746:23 748:5,19 752:9 756:4,5,6 766:6 774:21 837:3,11,16 843:6 844:23 848:5 851:14 853:20 863:9 868:23 882:20 901:5 <b>pages</b> 629:10 700:17 706:23 837:2 <b>paid</b> 713:9 751:18 757:13 780:22 810:7 <b>pair</b> 626:15 <b>paper</b> 652:10 666:15 <b>papers</b> 621:3 899:16 <b>paragraph</b> 627:16 627:19,20 628:9 628:10 629:5,13 630:6,8,9,14,22 683:16 733:7,15 733:16 741:17,17 741:18 744:19 746:23 748:5,21 756:2 759:19 837:20 851:14 853:14 856:7,9,17 856:22 858:18 859:21 860:19 862:10,16 875:12	882:20 899:2,3 <b>paragraphs</b> 627:8 630:18 722:13 851:12 <b>paraphrased</b> 628:13 <b>Park</b> 617:5 <b>parse</b> 749:9 <b>part</b> 621:3 625:19 625:25 633:4 641:22 642:2,10 642:23 679:2 683:11 689:7 701:14,16 702:11 716:16 717:22 718:10 719:16 725:5 727:21 752:17 785:16 786:20 788:3 789:10,17,19,22 791:3 800:17 805:5 808:22 822:24 839:24 855:13,14 856:3 868:9 890:23 894:9,13,17 902:25 903:17 905:12 913:10 <b>participate</b> 699:24 886:12 <b>participated</b> 880:8 <b>participation</b> 883:4 <b>particular</b> 653:13 657:23 716:8 726:2 759:21 818:11 819:7 830:22 831:9 884:3 892:22 894:5 900:6 <b>particularly</b> 787:2 <b>parties</b> 624:2,19 626:4 637:20 656:24 694:11 715:4 720:5,8,16 720:18 723:15,25 724:17,21 726:21 780:18 781:9	797:2 801:19 811:24 890:2 901:24 905:17 909:19,23 910:16 915:8 <b>partner</b> 798:8 <b>partners</b> 617:13,14 900:8 <b>parts</b> 840:9 899:4 <b>party</b> 623:7 657:5 719:16 723:12 728:20 744:3,23 805:20 874:12 878:20 <b>pass</b> 823:7,12,18 <b>passed</b> 826:13 <b>PAUL</b> 617:23 <b>pause</b> 874:16 884:14 <b>pay</b> 685:15 691:14 691:15,16 692:11 734:9 740:16 757:21 881:6 <b>payable</b> 757:2 <b>paying</b> 691:11 703:12 <b>payments</b> 701:8 899:17 901:24 902:5 903:22 <b>pays</b> 671:6 <b>pending</b> 621:12 <b>pension</b> 659:5,11 659:16,18 660:2 660:16,21 661:10 661:20 662:7,11 662:20 664:19,21 664:22,23 665:14 899:18 <b>people</b> 621:10 653:5 666:16 678:13 731:19 746:14 750:23 759:2 760:25 764:23 770:4,6 772:12 778:10 786:21 854:12 860:25 895:17,21	900:10,13 907:6 908:16,19 909:20 911:5 913:17,23 913:25 <b>people's</b> 905:19 913:20 <b>percent</b> 683:18 684:7 706:24 707:19 738:22 739:8,21 740:6,19 740:20 741:9 750:3 870:15,21 870:25 871:4,9,19 <b>percentage</b> 742:5 865:9 870:18 <b>perform</b> 661:18 670:3,5 724:10 751:25 764:13 799:25 803:12 <b>performance</b> 901:15,15 902:10 <b>performed</b> 640:19 664:8 668:18 669:6 803:8,15 840:4 <b>performing</b> 664:2 745:4 800:3 902:8 <b>period</b> 659:15 682:19 693:22 749:13 805:5 833:5 905:24 <b>permit</b> 811:22 913:25 <b>permits</b> 914:8 <b>Perrera</b> 709:22 <b>Perrin</b> 659:21 <b>persistence</b> 693:18 <b>person</b> 712:10 717:14 780:6 790:18 <b>personal</b> 767:22 787:2 882:15 897:12 <b>personally</b> 729:23 801:2 807:13 <b>personnel</b> 643:8 842:9
<b>P</b>				
<b>P</b> 615:2,2,9 816:2 <b>PAC</b> 762:10 781:14 781:21 782:13 <b>packages</b> 826:3 827:22 <b>page</b> 628:7,11 629:9,16 630:7,9				

<b>perspective</b> 624:12 778:13 790:14	662:7,12,20 663:3 663:4 664:19,22 664:22,23,25 665:3,3,5,14 688:3,25 696:18 696:18 697:17 698:3 703:7 715:25 716:6 718:5,13,18,21 719:16,19 720:11 720:15 721:4,9 722:11,12 723:5 726:17 749:2 753:12 754:16 813:3 814:23 825:13,14 829:17 844:5 866:25 870:2 899:18 912:14	<b>plenty</b> 857:19 <b>plus</b> 701:8 734:6 741:20 742:22 743:16 750:3 777:4 781:14 880:3 <b>PO</b> 618:14 <b>pocket</b> 750:25 751:2 <b>podium</b> 625:8 <b>point</b> 628:7 648:24 655:22 660:8 661:22 733:17 769:4 840:2 861:10,13,15 872:7 891:15 893:9 904:17 905:2 909:25 910:8 911:10 <b>points</b> 627:13 836:2 852:13 860:9 861:7 904:15 <b>policies</b> 643:2 693:16 703:11 759:3,8,22 761:2 761:22,22 762:3 762:11,18 777:23 777:25 781:19,21 782:10,12 <b>policy</b> 793:5 829:10 <b>pool</b> 685:9 831:9,12 <b>portfolio</b> 755:6 785:20 <b>portion</b> 691:17 <b>portions</b> 734:8 <b>position</b> 655:4 745:22 769:16,17 784:11 816:11 819:20 824:11 830:10 838:2 878:22 887:11,15 <b>positions</b> 666:16 801:19 826:25 905:19 911:9,11 <b>possess</b> 718:12 <b>possession</b> 786:2	<b>possibilities</b> 647:3 <b>possibility</b> 673:18 915:24 <b>possible</b> 647:12,24 648:4,5 655:22 662:18 665:24 666:25 672:7,18 677:5 699:11 859:11 861:12 910:2,10 <b>possibly</b> 624:15 900:24 <b>Post</b> 616:22 <b>post-petition</b> 703:25 705:9,10 705:12,15,20,25 706:3,13,21 707:4 707:5,8 749:12,15 749:18 750:4,5 751:10,18 777:3 870:10 912:4 <b>post-settlement</b> 743:4 <b>potential</b> 627:23 638:14 639:2 656:12 657:25 673:8 676:25 684:21 742:25 754:17 780:12 788:9 840:7 851:19 852:3,18 853:16 858:23 859:2 861:9 878:23 904:3,11 904:14,16 905:21 <b>potentially</b> 756:15 793:21 <b>PPBI</b> 762:11 <b>practically</b> 677:4 <b>practice</b> 799:24,25 800:21 801:9 803:5,10 <b>practices</b> 832:21 <b>practicing</b> 805:23 879:22 <b>preamble</b> 723:4 <b>precede</b> 766:12	<b>precedential</b> 907:20 911:5 <b>preceding</b> 766:12 <b>prefer</b> 916:2 <b>preferences</b> 901:8 901:23 <b>preferred</b> 625:16 627:3 638:6 692:14,16 693:8 708:14 824:22 843:10,16,25 845:10,25 846:6 852:19 856:11 907:20 914:12 <b>preferreds</b> 693:6,8 696:5,13 <b>prejudice</b> 794:7,15 <b>premise</b> 710:11 <b>preparation</b> 699:4 713:21 908:24 <b>prepare</b> 662:2 664:18 721:3 873:15 <b>prepared</b> 626:12 635:22 655:3 659:20 679:3 752:20 755:24 877:19 878:6 884:20 886:17 909:11,16 910:10 910:14,16 <b>preparing</b> 849:4,15 879:3 <b>prescribed</b> 739:19 740:14 <b>present</b> 619:8 698:25 908:9,14 <b>presentation</b> 913:10 <b>Presenting</b> 636:13 <b>preserving</b> 900:17 <b>pressed</b> 646:13 <b>presumably</b> 753:21 <b>presumed</b> 845:16 <b>pretend</b> 714:5 <b>pretty</b> 685:4 740:24
--	---	---	---	---

<b>prevail</b> 656:13	670:20 697:20	<b>proffered</b> 631:12	678:25 720:2	789:13 813:3
<b>prevailing</b> 647:16	710:20 714:15	631:18	764:15 770:13	814:23 843:23
648:12	857:22 858:5	<b>profits</b> 640:4 734:4	821:23 823:6	<b>push</b> 910:7 911:13
<b>prevent</b> 830:25	874:11 885:5	753:2	850:12 874:12	<b>pushed</b> 893:11
<b>previous</b> 656:11	<b>privileges</b> 722:22	<b>program</b> 641:9	904:8	907:22
<b>previously</b> 760:10	<b>pro</b> 685:14 691:11	778:10	<b>provides</b> 726:4	<b>pushing</b> 910:19
761:4 767:22	<b>probably</b> 639:16	<b>programs</b> 665:25	756:8,24	<b>put</b> 628:14 631:23
779:14 848:14	654:14 661:5	<b>prohibited</b> 800:2	<b>providing</b> 631:3	646:24 652:10
854:12 858:17	664:7 684:17	<b>project</b> 682:23	816:24	657:10 677:8
863:15	712:11 773:13	900:6	<b>provision</b> 686:6	681:15 690:14
<b>pre-petition</b> 689:15	790:17,22 905:22	<b>projected</b> 682:13	696:22 721:22	721:18 744:8
691:16	<b>problems</b> 626:23	749:2 753:5	767:3	749:21 754:5
<b>pre-seizure</b> 785:22	<b>Proc</b> 614:10	<b>projection</b> 682:16	<b>provisions</b> 697:2	755:9,16 756:14
<b>price</b> 676:3 779:22	<b>procedures</b> 817:25	<b>projections</b> 679:3	720:15,24 723:6	756:17,18 759:11
780:3	827:8,14 831:20	682:13,20 683:6	829:22 889:10	776:17 867:3
<b>primarily</b> 686:15	831:24 832:22	683:12,17,25	<b>prudent</b> 669:17	877:19 878:15,16
816:17 818:13	<b>proceed</b> 799:10	684:5,16 752:19	713:6 837:14	882:18 895:13,14
<b>primary</b> 682:25	914:22	755:23	838:5,6 904:5	896:23 902:21
683:4,7,11,18	<b>proceeding</b> 620:10	<b>prolonged</b> 911:3,4	<b>public</b> 634:18	<b>putting</b> 689:25
684:6	620:18,21,22	<b>promptly</b> 851:17	799:17 816:4,12	714:14 757:15
<b>principal</b> 694:5	745:23 875:15	<b>pronouncing</b>	817:18	767:15 777:9
870:7,16,22 871:5	<b>proceedings</b> 620:2	695:12	<b>publicly</b> 831:25	<b>P&amp;A</b> 726:9,10
<b>Principally</b> 703:2	624:6 635:2	<b>Proof</b> 622:3 780:15	832:2	<b>P.A</b> 615:12
<b>principals</b> 906:24	811:15 876:9,12	781:2,5	<b>purchase</b> 801:22	<b>p.m</b> 797:16 798:3
<b>principles</b> 796:6,12	886:18	<b>proper</b> 792:20	855:9	916:24
<b>prior</b> 703:18	<b>proceeds</b> 623:9,12	<b>properly</b> 759:24	<b>purchasing</b> 664:4	
743:12 790:12	636:25 637:2	792:20	<b>purely</b> 760:17	<b>Q</b>
791:11,12 795:25	638:22 701:9	<b>property</b> 652:23	781:25	<b>qualified</b> 816:25
803:5 817:12,14	733:23 734:2	653:2,4,13,15,16	<b>purported</b> 621:11	<b>quantifying</b> 667:5
859:25	741:19 748:11,12	655:8,11,14	<b>purpose</b> 717:21	<b>question</b> 629:4
<b>priority</b> 693:4	755:17 756:11	657:23 658:22	718:2 724:9	639:9 644:3
<b>private</b> 724:16	856:12	<b>proposal</b> 784:14	726:16 753:15	651:13 664:14
<b>privilege</b> 644:6	<b>process</b> 622:2	793:2 795:14	<b>purposes</b> 631:14	666:20 668:6,8,13
653:19 668:15	624:8 768:21	879:3,6 881:5	642:24 652:13	668:17 670:3,8
767:10 771:24	779:6 829:8	<b>propose</b> 628:2	661:20 666:20	675:5,19 688:14
836:2,13,17	831:15 880:9	<b>proposed</b> 635:15	672:24 682:4	717:6 725:24
838:16 839:8	882:7	639:12 688:3	691:6 703:7	728:8 739:6
841:21 845:13,18	<b>produce</b> 805:21	697:5 762:7	719:18 724:22	763:15,18 768:3
845:23 846:5,9,13	806:5	910:11	741:25 745:4	771:12 774:9
846:23 847:6,17	<b>product</b> 846:23	<b>protect</b> 796:6	761:11 765:22	775:4 783:15
847:21 848:19	<b>production</b> 805:13	<b>provide</b> 754:17	914:3	789:4,6 790:18
858:11 883:19	805:20 806:5,12	756:21 764:3	<b>pursuant</b> 636:8	791:15,20 802:16
884:19	<b>professional</b> 777:5	800:7,9 810:22	666:2 671:4	806:3,25 807:14
<b>privileged</b> 650:4	912:3	821:21 822:15	690:25 726:17	808:25 810:21
651:4 654:3,24	<b>professionals</b>	823:6 828:10	739:12 762:8	838:8 841:5 844:7
657:9 664:15	851:16 872:12,21	829:4 873:20	764:10 768:18	845:8,14,17
666:11 667:23	900:18,23 901:2,3	<b>provided</b> 620:20	780:17 781:22	846:16,17 847:2

848:3,6,11 849:14	642:10,13,15,18	849:6 862:4,9	849:22	623:23 624:4,25
854:19,20 857:25	642:22 701:10	<b>react</b> 910:11,16	<b>reasons</b> 681:9	625:13,16,20,25
861:4 862:8	<b>raging</b> 916:14	<b>reaction</b> 855:10	684:20 830:19	630:2 631:14
870:13 872:14,17	<b>raise</b> 652:8 754:20	<b>read</b> 623:22 624:4	904:18	633:4,17,24
875:24,25 883:8	755:5	652:5 711:18,25	<b>recall</b> 621:25	634:12 643:19
883:12,18 908:23	<b>raised</b> 733:3	733:12,17 772:18	730:23 731:18	649:12 658:19,20
908:25	818:10 841:19	839:10 848:12	732:5 737:7	686:22 687:14
<b>questioning</b> 774:5	<b>raises</b> 763:17	853:23 856:14	738:20 745:7,18	715:12 716:17
812:16 866:15	<b>raising</b> 753:15	877:13,18 896:3	779:2 782:19	797:8 799:3,7
<b>questions</b> 666:3	754:17,23 755:2	<b>readily</b> 804:15	783:10 793:15	813:15 814:5
708:9,15,16	817:24 895:23	<b>reading</b> 628:24	835:21 836:3,9,14	815:14 818:25
711:15 717:3	<b>ran</b> 731:17	630:10 683:23	838:17 843:17	819:7 820:19
725:18,22 733:6	<b>range</b> 647:3,11	711:5 837:23	870:18 874:17,19	825:3 826:10
734:10 758:5,16	648:4,5 653:7	838:11,22 856:16	875:2 878:21,21	835:3,18 877:18
758:21 764:19	654:7,18 655:20	<b>reads</b> 714:5	879:2,6 887:8	909:10
770:12 772:4,8	655:22 656:6,12	<b>ready</b> 774:2	888:6,7,16 890:9	<b>records</b> 641:7,8,12
782:17 791:9	657:25 658:6	<b>real</b> 744:3,23	891:7,14,15	641:14,20 643:6
795:2 796:20	661:5 663:24	<b>realistically</b> 691:10	892:13 895:8,20	716:12 759:8,9
809:16 811:6	665:23 666:6,10	<b>realize</b> 794:2	896:9 908:19	761:24 763:8,13
813:24 814:2	666:25 667:22	823:13	909:13 910:4	763:17,24 764:4
815:19 817:24	668:11 672:13,25	<b>really</b> 745:10	<b>receivable</b> 693:24	764:12 768:16,17
829:8,12,17	673:2,4,7 681:15	749:23 754:8	<b>receive</b> 636:2	769:24,25 770:16
832:12 833:17	682:8 747:12	774:4 827:13	685:11 786:15	772:15 778:11,12
834:15 836:6,14	779:12 896:7	<b>reason</b> 722:21	803:20 818:7,20	778:19 786:2
836:17,18 837:6	908:7	756:13 770:8,24	822:14 827:9,11	787:21,22 804:20
863:25 866:21	<b>rarely</b> 833:11,12	790:2 804:13	828:21 829:7	805:3 818:24
879:8,14 883:11	<b>rata</b> 685:14 691:11	831:6 882:5	832:17	822:23 857:8,11
897:15,17 898:22	<b>rate</b> 660:22 662:13	<b>reasonable</b> 645:4	<b>received</b> 641:11	899:7
899:4 904:20	663:7,8 674:8	645:25 650:3,11	693:25 694:2	<b>recover</b> 734:4
908:23 909:8	738:13 739:3,8,16	651:24 652:15,19	705:21 765:22,24	<b>recovered</b> 748:22
<b>quick</b> 913:16	739:17,17,18,22	669:23 670:23	766:17,17,21	<b>recoveries</b> 718:3
<b>Quincy</b> 813:16	740:4,13 742:7,12	671:13 681:16	767:12,16 819:3	733:24
<b>Quinn</b> 615:19	743:3 751:5,20,24	682:8 697:23	819:24 825:18	<b>recovering</b> 696:5
808:8	<b>rates</b> 664:3 739:19	712:2,22 713:18	842:9 899:10,15	<b>recovery</b> 635:18,23
<b>quite</b> 627:12	742:6,6	728:19 747:6,13	899:24 900:2	636:16,21 638:4,5
753:19	<b>RATH</b> 616:20	767:18 768:7	<b>receiver</b> 627:23	638:15 682:5
<b>quotation</b> 630:11	<b>ratio</b> 676:12,19	771:3 776:14	<b>receivership</b> 754:4	691:14 696:12
<b>quotes</b> 630:3	677:24	804:20 849:7,9,10	<b>receives</b> 756:11	699:5,14,17,21
<b>quoting</b> 629:14,15	<b>raw</b> 736:14	906:3	<b>receiving</b> 788:9,23	700:25 701:18
<b>Q-U-I-N-C-Y</b>	<b>reach</b> 916:15	<b>reasonableness</b>	789:10 791:2	702:12 705:23
813:19	<b>reached</b> 620:11,24	648:8,11 649:5	<b>recess</b> 687:6 773:18	734:8 748:25
<hr/>	784:19 792:6,13	650:14,21,24	797:16 897:24	750:2
<b>R</b>	792:16 794:18	651:14,20 652:7	<b>recollect</b> 746:8	<b>recross</b> 769:3 785:5
<b>R</b> 615:2 616:15	846:8 848:7,15	657:18 661:6	<b>recollection</b> 795:13	811:8
798:2 799:15,15	849:18 858:4	668:24 669:4	<b>recommends</b>	<b>red</b> 721:19
816:2	862:24 863:16	709:6 713:24	914:14	<b>redirect</b> 652:9
<b>rabbi</b> 641:25	<b>reaching</b> 847:20	768:13 772:2	<b>record</b> 620:17	773:3,8 776:7



796:16 809:21,23 833:18 897:19 <b>redistributed</b> 686:9 <b>redistribution</b> 685:13 686:7 <b>reduced</b> 690:25 871:6 <b>reduction</b> 737:4 783:25 871:7 <b>Reed</b> 621:10 <b>Reeves</b> 908:11 <b>Ref</b> 614:13 <b>refer</b> 699:7 <b>reference</b> 627:9 629:2 630:22,23 659:9 743:11,13 764:21 903:9 906:12 <b>referenced</b> 888:17 905:16 <b>references</b> 630:19 632:12 <b>referencing</b> 787:4 889:15 <b>referred</b> 681:11 699:17 816:14 <b>referring</b> 699:9 739:12 762:21 808:2,19 810:20 877:23 <b>refers</b> 762:23 <b>refinement</b> 737:6 <b>reflect</b> 803:13 871:7 <b>reflected</b> 631:11 742:23 803:9 <b>refresh</b> 843:13 <b>refund</b> 703:25 706:14,22 788:23 790:6 800:13 801:12,18 802:8 802:19,23 806:16 807:7,16 808:9,16 809:7 <b>refunds</b> 701:6 705:9,11,12,14,15 705:20,21,25	706:3 707:5,6,9 707:15,18 789:12 789:14 790:5 791:12,23 801:8 852:24 <b>refuse</b> 883:17 <b>refused</b> 836:13 873:19 <b>refusing</b> 883:10 <b>regard</b> 710:24 725:18,25 731:14 757:11 803:3 805:18 838:23 840:19 842:21 846:3,6,7 849:19 889:7 895:18 902:3 <b>regarding</b> 622:23 698:21 717:3 761:7 784:8 804:11 836:2 840:25 843:2,15 856:21 873:23 901:7,25 <b>regardless</b> 674:23 728:21 801:9 <b>regards</b> 858:25 <b>registered</b> 819:10 819:23 820:4,13 823:24 824:8,23 825:6 826:11 <b>regularly</b> 662:6 905:10 910:7 <b>rehash</b> 872:18 <b>reimbursements</b> 810:7 <b>reinsurance</b> 682:18 754:3 <b>rejection</b> 842:23 <b>relate</b> 734:10 <b>related</b> 701:9 758:20 781:25 829:12 830:13 840:13 842:17 848:9 854:3 856:10 888:22 904:11	<b>relates</b> 621:11 690:21 692:8 732:16 769:17 790:20 <b>relating</b> 621:23 623:11 731:25 861:16 <b>relative</b> 862:14 <b>relatively</b> 653:6 663:22 664:7 689:20 758:7 911:17 913:16 <b>release</b> 621:24 720:11,24 721:14 722:13 723:11,12 723:14 811:13 <b>released</b> 639:12 694:12,15 721:16 724:16,21 833:23 <b>releases</b> 621:5 622:7,13 720:12 720:14 724:8 765:11 767:4,6 829:23 830:4,5 <b>relevant</b> 691:10 757:22 <b>reliance</b> 640:21 <b>relied</b> 641:22 642:22 656:6,17 657:5 808:11 <b>relief</b> 620:20 <b>relieved</b> 729:6 <b>Relizon</b> 622:18 <b>rely</b> 661:18 684:14 697:12 800:9 810:9,11 849:5,9 <b>relying</b> 644:9 654:23,25 657:12 659:24 666:12 710:12 810:25 848:23 849:11,16 <b>remain</b> 633:11 798:22 813:10 815:10 834:17 <b>remainder</b> 811:15 <b>remaining</b> 683:20 684:9 686:2,11	693:24 779:18 914:6 <b>remember</b> 640:11 735:9 743:22 793:18 835:24 836:16,17 843:11 870:25 889:9,11 889:14 891:23 892:8 <b>remind</b> 863:11 <b>removed</b> 632:13 <b>removing</b> 628:19 <b>Reorg</b> 687:21 <b>reorganized</b> 637:3 639:24 678:9,12 678:17,22,24 680:4,10 681:17 682:4,10,14 683:13,19 684:5 684:23 685:3 687:18 688:4 691:22 702:5 752:10,15 754:2 755:3,4 765:6 788:13 <b>repayment</b> 751:4 <b>repeat</b> 639:9 783:15 802:15 841:5 848:11 849:14 860:13 861:4 872:17 875:24 883:12 <b>repeated</b> 837:21 <b>repeating</b> 873:6 <b>repetitive</b> 873:5 <b>rephrase</b> 642:7,9 654:5 673:6 698:17 786:13 788:19 <b>replaced</b> 696:24 <b>replacing</b> 696:15 697:2 723:7 <b>report</b> 627:10,25 628:5,6,18 629:2 629:9,15,16,18 630:4,24 631:7,12 632:12 653:14,20	653:23 654:19,22 655:2 659:14 663:21 684:15 703:24 704:19,25 705:11 715:16 <b>Reported</b> 614:22 <b>reporter</b> 898:14 <b>reports</b> 904:8 <b>represent</b> 667:3,3 708:13 725:17 865:5 <b>representation</b> 634:2 639:19 <b>representative</b> 695:18 891:10 <b>representatives</b> 812:5 873:13 881:9 <b>represented</b> 698:4 <b>representing</b> 634:14 799:14 864:4 865:3 907:8 907:10 <b>represents</b> 666:8 689:17 706:5 <b>repudiation</b> 842:23 <b>request</b> 631:6 726:11,15 764:4 772:14 805:13 806:4,11 814:11 820:18 873:22 874:6 <b>requested</b> 785:13 787:5 824:25 <b>requesting</b> 829:2 <b>requests</b> 764:11 805:11,20 874:3 <b>required</b> 825:24 828:10 830:18 903:21 <b>requirement</b> 683:24 <b>requirements</b> 661:12 827:11 <b>reservation</b> 623:25 <b>reserve</b> 685:17 735:4
---	---	---	--	---

<b>reserves</b> 904:9	820:15 829:23	<b>retain</b> 795:5,6	695:12,12,13,15	889:22 893:19,20
<b>residual</b> 623:8	830:4 832:22	<b>retained</b> 664:25	695:24 699:19,22	896:19 900:16,17
701:25	838:20 840:4	817:5 873:9 892:4	699:23 700:5,8,22	912:14 916:22
<b>resolution</b> 620:11	841:7,21 842:3,14	892:5	700:23 701:2,3,11	<b>rightfully</b> 644:5
620:25 621:20	845:23 847:6	<b>retract</b> 790:25	701:12,15,19,20	<b>rights</b> 623:8,11
624:8 646:22	848:7,24 849:12	<b>retroactive</b> 726:5,7	702:2,3,14,15,17	718:20 753:13,20
710:2 784:19	849:17 852:3	726:13,18 890:7,8	702:18 704:12,16	754:24 755:5
788:4	858:4 859:10,23	<b>return</b> 751:5 826:4	704:17 705:6,7,16	782:18 783:2,5
<b>resolved</b> 621:16	860:11,18 861:22	826:20 829:5	705:25 706:2,14	815:2 907:23
622:25 623:14	862:18 871:11	<b>returns</b> 842:15	706:15 707:3,10	<b>right-hand</b> 638:20
635:14 644:19	899:7 903:13	846:19 847:8	707:17 709:13,15	<b>rise</b> 620:3 687:7
781:10	<b>respective</b> 726:21	<b>revealing</b> 848:18	710:21 711:2,21	773:19 798:4
<b>respect</b> 620:14	916:17	<b>review</b> 643:10	712:3,14,18,23	897:25
622:6,12 640:24	<b>respects</b> 750:24	699:5 837:5 855:3	713:20 714:4,7,25	<b>risk</b> 673:12,17
641:5 642:20	801:15	874:19 886:16	715:9 716:15	853:22,22 854:2,3
643:11 644:7,10	<b>responded</b> 660:15	914:2	717:10 718:14	910:24
644:18 646:6,11	<b>responding</b> 829:11	<b>reviewed</b> 635:5,7	720:18 722:23	<b>risks</b> 747:3 855:7
646:15 648:13	<b>response</b> 725:23	641:16 745:2,5,19	727:7,16 731:11	<b>Robert</b> 616:7,16
653:9,12 655:5,7	744:20 815:21	817:22 851:5,8	732:13 733:12	617:7,8,17 626:6
655:10 657:2,3,20	<b>responsibility</b>	886:19 887:2,14	735:9 736:16	812:25 813:16
657:22 658:21	721:3 824:20	899:19	738:11,12 739:23	834:5 898:17
659:5 662:19	<b>rest</b> 762:12 914:20	<b>reviewing</b> 759:7	740:25 741:20	907:2
664:21 665:13,15	<b>restart</b> 755:18	760:6	742:4 743:6,7,10	<b>role</b> 817:2
669:15 670:15,24	819:4	<b>revise</b> 738:6	743:17,19 744:7	<b>Rondel</b> 680:14
671:8 674:8	<b>restarting</b> 754:7	<b>revised</b> 630:18,21	744:14,15 746:4,8	<b>room</b> 711:24
678:24 688:7,19	<b>restate</b> 768:2,3	723:20	747:21,23 748:2,3	713:17 909:18
693:15 696:15	857:25	<b>revision</b> 682:6	749:6,7,11,14	<b>Rosen</b> 615:7 620:6
698:6 707:23	<b>restated</b> 731:17	<b>RICHARDS</b>	750:5,8,12 751:2	620:7 623:25
710:9 711:4	739:13,20 740:14	615:12	751:20 755:7	624:18,20 797:4,9
727:15 728:13,15	745:3	<b>right</b> 626:19 629:3	756:23 757:2	797:15 798:6
729:3 731:9	<b>restricted</b> 646:18	630:15 631:16	760:5,24 765:13	811:12,19 812:18
732:16 734:20	674:2 701:7	633:7 635:19	766:2,22 767:8	814:11,14 833:22
735:20 743:2	<b>restriction</b> 646:19	636:18,24 637:5,6	769:5,23 772:3,22	833:25 913:4,5
750:23 755:23	<b>restrictions</b> 674:8	638:13,15 650:17	776:5 777:16	915:9,14 916:21
762:2 763:6,24	<b>restructuring</b>	657:14,25 658:7	781:7 785:15	<b>Rotella</b> 622:21
768:19 777:25	717:12,14 808:20	659:7 663:14	786:6,14 787:3,13	<b>roughly</b> 674:12,13
778:3 780:19	879:23 880:2,3	665:11 668:3	788:14 792:15	736:5
784:10 785:11	900:23	670:19 671:2	793:23 794:3	<b>rounding</b> 869:6
786:24,25 787:20	<b>result</b> 653:20,23	673:9,15 676:5,6	796:22 800:6	<b>RPR</b> 614:23
800:12 801:18,21	654:7 718:13	677:14,16,21	801:3,16,25 811:9	<b>Rudnick</b> 616:4
802:3,5,7 803:18	748:22 776:24	678:9,14 680:7	814:9 815:24	626:7 627:2
806:15 807:12	777:8 804:10	681:21,22 682:6	837:22 842:16	<b>ruled</b> 622:3 631:13
808:13,15 809:5	848:17	683:22 684:25	843:23 844:25	734:8
810:10,12,23	<b>results</b> 654:6	685:5 686:24	851:6 860:14	<b>rules</b> 662:25
811:2,4 813:2	683:19 684:8,14	687:16 688:16	861:5 863:5	<b>run</b> 682:18 751:11
814:22,24,25	841:22 842:2	692:14,20 693:6,7	866:20 871:16	777:6 869:8 912:5
817:24 818:11	<b>resume</b> 897:21	694:9,23,24	881:21 887:4	<b>runoff</b> 682:16,19

754:4 755:7,8,10	884:11 885:14 891:19	726:4 732:15 743:12 757:7,14 855:8 907:23 911:2	<b>segregated</b> 830:10 <b>seizure</b> 853:17 859:25 <b>selected</b> 695:22 696:10 <b>selecting</b> 729:12 <b>sell</b> 655:18,18 <b>send</b> 631:9 820:6 821:6,11 823:16 824:20 830:9,13 <b>sending</b> 916:11 <b>senior</b> 624:3,21 685:10,19,23 686:4,9 749:10,25 750:11,18 751:12 864:19,19 869:3,4 869:11,13 870:16 870:22 907:9 <b>seniors</b> 750:21 <b>sense</b> 729:12 777:18 805:25 828:17 895:2 911:11 <b>sent</b> 761:25 824:15 824:18 825:10,21 825:25 <b>sentence</b> 627:19 628:8,9,10,20 683:16 748:7 756:3 851:15 853:19,20 859:14 877:17,24 <b>sentences</b> 837:17 <b>separate</b> 703:13 801:7 803:23 831:12 <b>separately</b> 626:12 875:11 <b>separating</b> 800:24 <b>September</b> 744:2 <b>series</b> 709:3 717:2 864:15,24 879:14 <b>served</b> 827:23,25 <b>service</b> 824:2 <b>services</b> 816:24 <b>set</b> 653:7 676:13,23 682:12 685:16	707:18 744:15 757:23 763:22 825:23 827:8,14 846:20 852:25 862:9 <b>SETH</b> 618:8 <b>sets</b> 657:20 661:14 739:14,18 <b>setting</b> 691:6 <b>settle</b> 662:16 <b>settled</b> 698:9,22 843:20 849:13,17 <b>settlement</b> 619:2 621:3 635:15 636:8 638:21 639:12 645:4,8 646:20 647:14 648:7,10 649:3,6 650:3,10,15,21,25 651:15,18,21,24 652:15,19 657:18 659:20 661:3 664:2 665:22 666:2,21 667:11 668:25 669:3,22 670:11,23 671:5 671:12 672:17,20 672:24 673:2 688:3 689:5 695:23 696:11 697:5,9,24 698:20 709:4,16 712:2,22 712:25 713:19,24 725:20 726:3 727:21 728:11,17 729:15 730:13 731:23 732:9,25 746:20,25 747:5 748:9 760:6 761:11 762:6,9,13 762:22 763:5 764:25 765:20,24 766:18,21,24 767:2,6,17 768:6 768:13,21 769:13 771:3 772:2 774:8 776:13,23 777:9
<b>S</b>	<b>saw</b> 746:22 818:12 911:6 <b>saying</b> 626:9 647:7 652:12 654:13 692:2,3 744:3 746:9 747:4 760:20 769:11,12 803:2,17 822:21 911:5 <b>says</b> 650:5 680:5,13 700:14,21 705:8 705:14,20 707:5 723:4,9 756:6 837:17,21 851:15 853:20 859:4 879:25 <b>schedule</b> 703:14 705:8 797:5 812:2 913:8 <b>scheduling</b> 811:21 <b>scope</b> 786:11,18 796:16 <b>SCOTT</b> 617:17 <b>screen</b> 867:12 <b>Scrutin</b> 873:25 900:7 <b>seal</b> 632:17 <b>sealed</b> 632:20 <b>seat</b> 864:24 <b>seated</b> 620:4 687:8 773:20 798:5 898:2 <b>seats</b> 864:11,14 <b>Seattle</b> 618:5 <b>second</b> 628:9,10 629:4 630:9 639:21 695:7 704:22 715:24 721:8,11 858:19 877:17 884:14 <b>second-to-last</b> 853:20 <b>section</b> 636:19 720:11 721:25 723:3,4,5,10	<b>sections</b> 745:2 <b>secureds</b> 846:6 <b>securities</b> 627:4 642:14 660:17 688:23 689:17 692:7 814:24 816:12 817:18 818:19,22,24 819:2,9,11 820:2 820:13,15 822:3 824:10 825:2,8 827:24 832:2 843:10,16 844:2 844:20,22 845:11 846:2 852:19 856:11 864:16,18 865:10 867:3,5 <b>security</b> 708:14 749:4 775:25 819:8,12 826:23 830:21,23 831:5 831:15 <b>see</b> 619:9 624:17 628:12 657:18 659:23 666:14,16 671:12 689:14 700:13 704:5 706:21,23 707:5,7 715:20 778:6 797:2,13 819:15 819:17 835:12,13 835:19 837:16,24 856:22 860:5 861:10,13,19 862:15 866:22 867:2,13 868:25 869:14,18 870:7 877:3,17,21 878:20 915:3 <b>seeing</b> 811:21 <b>seen</b> 633:2 746:6 833:12 835:20 868:14		

777:12 779:20,24	646:15,16,17,19	<b>signals</b> 898:5	911:20	709:25 727:9
780:18 781:10,12	670:25 672:3,11	<b>signatory</b> 780:8	<b>six</b> 678:13 714:22	736:4 749:16
781:18,22 783:10	672:15,21 673:17	<b>signature</b> 745:17	717:19 910:15	756:5 758:13
783:14,17 784:2	673:24 674:2,2,6	<b>signed</b> 850:22	911:18	766:10 771:7
784:20 789:10,13	674:9,11,15,16,21	851:6,9	<b>Sixth</b> 715:25 716:6	773:25 789:7
792:7 793:11	674:23,25,25	<b>significant</b> 660:19	721:8 722:11	808:24 828:8
794:5,18 836:8	675:3,7,22,25	667:4 748:23	<b>size</b> 685:8	845:4 853:19
837:13 838:4	676:15,16 677:18	865:14 899:19	<b>skip</b> 873:7	860:13 863:7
843:21,24 844:18	756:9,22 779:2,7	909:22 910:15,22	<b>sleep</b> 721:18	867:21 869:21
846:21 849:6,8,23	779:10,21 780:3	<b>significantly</b>	<b>slightly</b> 701:21	875:21 877:7,12
849:24 865:10,13	780:19,20 782:23	660:14 685:7	812:2 854:19	885:5
865:19 866:25	793:15,22 830:3	<b>sign-in</b> 619:9	<b>slow</b> 898:7,9	<b>sort</b> 642:16 654:17
868:9,12 870:14	831:16	<b>SILVERSTEIN</b>	<b>small</b> 735:11	654:18 666:24
870:20 871:8	<b>sharing</b> 763:23	617:23	<b>smaller</b> 694:4	715:11 728:23
873:15 877:20	<b>Sharp</b> 812:4	<b>similar</b> 647:10	748:25	775:4
878:7,16,23,24	814:19,21 815:16	662:17 663:23	<b>Smith</b> 812:13,19	<b>sounds</b> 664:14
879:3 882:8	815:20 816:8	665:21 672:13	907:2 913:11,18	677:16,21
889:17,24 890:4	833:23	754:10 831:23	<b>Smith's</b> 812:16	<b>source</b> 629:8
890:17 892:7	<b>SHAUNA</b> 614:23	832:25 833:3	<b>solely</b> 682:17	<b>sources</b> 628:24
893:19,21,24	<b>sheet</b> 619:9 704:14	<b>Simms</b> 834:3,8,24	797:11 803:16	638:13
894:10,17,18,23	705:10,13 706:12	835:12,19 836:24	<b>solicitation</b> 812:6	<b>Spalding</b> 725:16
895:16,25 904:20	796:2	864:9 865:7	816:18 817:6	879:12
904:22,24 905:6	<b>sheets</b> 732:15	872:10 879:11	818:8,15,20 820:3	<b>speak</b> 681:7 772:12
905:21 906:4,9	899:21 901:16	898:21	820:14 822:15	867:9
909:12,16 910:17	<b>shelter</b> 640:3,8	<b>SIMONDS</b> 617:11	824:3,16,17 825:5	<b>speaking</b> 660:5
910:20 912:9,12	752:23	<b>simple</b> 675:5	826:3,12 827:22	706:6 727:4
<b>settlements</b> 676:24	<b>shift</b> 714:17 894:6	<b>simply</b> 772:5,9	829:2,8 831:20	741:12 749:20
707:15 725:25	<b>short</b> 692:4 776:21	<b>Sims</b> 812:19	<b>solicitations</b> 817:18	789:24 882:14
905:3	<b>shorter</b> 833:9	<b>simultaneously</b>	<b>solicited</b> 650:8	894:3 911:17
<b>settling</b> 868:20	915:7	660:5 706:6 727:4	<b>Solomon</b> 873:11,14	<b>specialist</b> 817:20
869:12	<b>shortly</b> 875:4	741:12 749:21	874:4	<b>specializing</b> 817:17
<b>seven</b> 636:6 638:23	<b>show</b> 689:13	789:24 894:4	<b>solvency</b> 786:8	<b>specific</b> 645:22
680:20 903:16	756:14 778:14	<b>single</b> 680:9	839:4,16 859:24	648:20 672:12
<b>Shannon</b> 619:6	819:5,6 868:22	<b>sir</b> 700:14 708:23	859:24 861:18,18	790:21 808:2
774:7	<b>showed</b> 778:15	713:4,20 714:7,16	900:21 902:2,4,7	825:25 846:24
<b>share</b> 625:8 670:19	<b>showing</b> 904:9	714:17 716:24	<b>somebody</b> 668:25	848:6,14 863:15
674:13 676:3	<b>shown</b> 703:6	717:4,7 721:10,18	711:18,22 712:7	870:18 873:22
677:13,15 701:6	758:18	722:2,9,15 723:2	774:2 831:2	874:6 889:10
706:2,24 707:14	<b>shows</b> 868:19	767:4 770:10	<b>someone's</b> 831:10	897:7
713:7 779:22	<b>SHRIVER</b> 619:3	772:23 891:25	<b>someplace</b> 749:22	<b>specifically</b> 711:16
780:3	<b>shy</b> 747:22	<b>sit</b> 696:21 711:24	<b>somewhat</b> 905:25	723:20 728:12,25
<b>shareholder</b> 822:12	<b>sic</b> 825:20	713:21 745:7	<b>SONTERRA</b>	733:6 812:3
<b>shareholders</b> 725:3	<b>side</b> 638:21 811:25	838:24 845:21	617:13	822:13 843:12
815:23 817:23	863:3,4 867:14	848:22 867:5	<b>sorry</b> 660:6 665:15	851:13 859:16
822:13,20 832:16	892:9,10 893:10	<b>sitting</b> 871:16	669:24 689:9	873:18 874:9,17
913:24	893:12,23 894:7	892:23	690:10,19 695:4	874:19 878:21
<b>shares</b> 646:11,14	<b>sign</b> 916:18	<b>situation</b> 847:12	700:16,18 709:23	886:2 889:6,14

908:20	<b>start</b> 620:9 638:6	811:14 903:22,22	<b>stricken</b> 628:2	<b>subparagraph</b>
<b>specifics</b> 890:9	689:2 696:5	<b>stayed</b> 730:21	<b>strike</b> 628:4,25	853:2 901:7 903:9
<b>speculate</b> 654:18	708:19 857:7	<b>stays</b> 830:23	629:24 760:10	<b>subs</b> 701:8
742:10	876:6 898:4	<b>Steinberg</b> 725:14	768:23 782:6	<b>subscribed</b> 782:24
<b>speculating</b> 698:2	<b>started</b> 904:25	725:16 727:7	850:2 854:18	783:3
<b>speculation</b> 654:2	905:17	746:13 758:5	902:14	<b>subscription</b>
654:10 658:10	<b>starting</b> 905:14,21	783:8 794:22,24	<b>STROCHACK</b>	782:18 783:5
712:5 732:23	906:2 915:15	796:17 879:10,12	631:23	<b>subscriptions</b>
784:5	<b>starts</b> 693:11,13	887:24 888:2,12	<b>Strochak</b> 615:8	817:21
<b>speculative</b> 658:12	756:3	897:16 915:20,21	625:3,4,10 626:21	<b>subsection</b> 754:12
<b>spell</b> 633:16 799:3	<b>startup</b> 754:6,12	916:3	631:2,17 847:22	<b>subsequent</b> 724:7
813:14,18 815:14	<b>state</b> 633:15 635:25	<b>stem</b> 683:20 684:8	881:11 887:19	794:5 821:7
834:22	659:6 739:15,16	<b>step</b> 675:23 692:13	<b>strong</b> 907:15	<b>subsequently</b>
<b>spend</b> 885:18	739:17,17 740:4	811:9 814:10	<b>struck</b> 747:6	735:22
<b>spent</b> 758:25 759:2	794:14 799:2	833:21 912:24	<b>structure</b> 689:10	<b>subsidiaries</b> 703:3
<b>split</b> 732:12,17	813:13 815:13	<b>Stephen</b> 622:21	689:19,22 750:22	703:17
742:20 748:6	834:21 854:12	<b>Steve</b> 834:3 913:12	775:22,23 890:4	<b>subsidiary</b> 621:14
762:11,12,18	856:17 888:18,20	<b>Steven</b> 834:8,23	<b>stuck</b> 643:21	683:21 684:9
783:9,13,16	<b>stated</b> 644:25 645:3	<b>stock</b> 676:10	<b>stuff</b> 915:17	<b>substance</b> 808:7
784:14 789:14	649:25 650:23	684:23 685:3,11	<b>sub</b> 686:5 866:2	<b>substantial</b> 647:15
846:19 847:8	656:11 663:11	685:13,17 755:22	<b>subject</b> 620:17	673:12,17 750:10
892:6	699:6 767:22	757:22 782:21	621:19,25 623:15	911:3 912:2
<b>splits</b> 731:9	793:20 807:11	790:16 791:11	709:3 710:5	<b>substantially</b>
<b>splitting</b> 847:23	808:9 809:12	<b>Stoll</b> 616:8 625:7	729:14 759:15	660:23 662:9,15
<b>spoke</b> 711:7 874:5	841:11 853:9	626:24,25 627:2	760:17 839:8	664:6 740:25
<b>spoken</b> 874:7	857:3 862:21	629:3 630:7,15	846:4,8 884:10	804:9 806:17
<b>sponsor</b> 728:22	886:9	708:11,13 714:20	<b>subjects</b> 707:22	<b>subsumed</b> 752:17
<b>STACEY</b> 616:15	<b>statement</b> 629:6	715:10 716:20,23	758:16 792:3	<b>subtract</b> 706:17
<b>staffed</b> 900:6	640:14 700:3	722:5,7,25 725:10	<b>submission</b> 629:10	<b>succeed</b> 854:23,25
<b>stakeholders</b> 636:4	735:10 743:25	771:11 776:16	629:13 630:13	856:2
636:8	744:16,23 756:20	784:3 796:20	<b>submit</b> 627:7	<b>success</b> 645:13
<b>stance</b> 769:16	757:10,23 774:15	809:16 833:17	812:24 815:3	646:6 647:16
<b>stand</b> 651:25	774:19 808:13	902:13 916:9	902:22 916:16	648:2,12 855:14
667:20 670:18	825:11,13,24	<b>STOLTZ-LAUR...</b>	<b>submitted</b> 641:17	858:10
769:7 796:25	829:17 863:18	614:23	643:9 700:3	<b>successful</b> 854:17
798:22 813:10	881:3	<b>STRATTON</b>	708:21 710:11	855:23
815:9 834:17	<b>statements</b> 629:8	617:10	827:5,17,19 835:4	<b>sufficient</b> 679:9
916:23	629:21 710:23	<b>STRAUSS</b> 617:4	850:18	821:7
<b>standard</b> 831:8,11	711:6	<b>streamline</b> 773:11	<b>submitting</b> 710:19	<b>suggest</b> 773:3
<b>standing</b> 633:12	<b>states</b> 614:2 618:19	774:5	<b>subordinate</b> 624:3	796:3 891:9
671:18 798:22	618:20 636:22	<b>Street</b> 614:16 615:5	<b>subordinated</b>	<b>suggesting</b> 891:14
813:10 815:10	701:5 704:5	615:13 616:13,21	692:25 774:22	<b>suggests</b> 664:9,12
834:17	733:20,21 819:20	618:22	686:10 692:15,17	<b>suited</b> 790:23
<b>standpoint</b> 691:11	<b>status</b> 661:15	<b>strength</b> 712:25	692:18,19 750:13	<b>Sullivan</b> 616:12
<b>stand-alone</b> 868:7	825:20	907:18	750:17 751:12	737:21,23 907:7
<b>Stark</b> 616:7 626:6	<b>stay</b> 620:21 691:24	<b>strengths</b> 648:21	864:19 869:4,13	<b>sum</b> 645:24
626:7 914:11	727:24 743:19	769:19 884:2	870:23	<b>summarize</b> 647:7

<b>summarized</b> 628:13	830:22 840:22 856:15 858:2	866:23 869:2,15 870:6 877:20	743:23 748:5 785:23 853:11	781:9 866:16 888:12 894:7
<b>summarizing</b> 866:24	868:10 871:14 872:5,16 874:7	878:7,16 892:23 898:6 909:12	878:5 <b>talks</b> 683:24 757:20	<b>telling</b> 762:2
<b>summary</b> 625:15 627:20 743:13,15	879:17 880:24 881:4,16 896:19	911:15 <b>tabulation</b> 812:7	858:16 896:16 <b>tasks</b> 799:25 800:3	<b>tells</b> 723:11
<b>summer</b> 743:5	896:20 900:7,15 903:14 904:24	813:2 814:22,25 816:19 817:7	<b>tax</b> 622:10 640:3,8 693:24,25 701:6	<b>tendered</b> 830:16
<b>supplement</b> 696:18 815:20	<b>surrender</b> 642:25	<b>take</b> 625:7 626:10 674:10 682:11,21	705:14 706:3,14 706:22 707:8,15	<b>term</b> 732:15 796:2 895:22,23
<b>supply</b> 805:17	<b>surrounding</b> 854:10	686:25 688:22 711:23 717:12	707:18 709:18,21 709:24 710:2	<b>terminate</b> 663:3
<b>support</b> 629:25 641:12,19 652:13	<b>SUSMAN</b> 618:3 <b>Sussman</b> 634:14	731:4,13 735:23 752:13 755:22	734:7 736:22 738:13 739:3,16	<b>termination</b> 644:7 846:4
768:12 825:14 849:23 886:21	785:6 799:13 832:8 864:4	769:15,16 772:11 773:14 788:15	739:16,17 740:13 742:6,7,12 743:3	<b>terms</b> 658:22 659:24 671:20
887:14	908:22	798:22 813:9 815:9 834:16	752:21 788:23 789:11 790:5,5,18	675:6 712:25 776:25 779:9
<b>supported</b> 778:11	<b>sustained</b> 642:6 643:16 644:23	851:10 872:16 881:3 889:21	791:3,12,22 800:12 801:8,8,12	800:20 818:3 832:24 833:2,9
<b>supportive</b> 630:13	649:16 651:9 656:10 674:22	892:10 894:15,15 897:21 903:8	801:14 802:8,19 802:23 803:23	892:21,21
<b>supposed</b> 719:3	678:6 681:3 699:3 708:7 713:14	907:21 911:21 913:17,18 915:19	804:12 806:16 807:16 808:9,16	<b>test</b> 717:24 718:2 802:13
<b>supposedly</b> 862:14	718:25 723:18 727:5 757:5 758:4	<b>taken</b> 651:4 687:6 773:18 797:16	808:23 809:7 842:15,18 846:19	<b>testified</b> 634:19 652:6 667:19
<b>Supreme</b> 907:22 911:6	761:5,10,17 775:8 782:7 783:21	872:8 897:24 913:13	847:8,12 852:24 896:16 899:16,17	760:11 761:4 765:8,9 786:22
<b>sure</b> 626:22 627:15 631:11 636:25	784:6 796:10 809:4 849:3	<b>takeover</b> 854:7 <b>talk</b> 646:12 711:17	901:3,4 <b>taxed</b> 740:3	765:8,9 786:22 793:14 794:25
637:14 639:16 640:6 643:18	880:13 881:14 882:11 885:2	711:19 714:18 722:14 728:7	<b>taxes</b> 734:9 739:9 740:16 788:7	799:18 802:6 806:2 810:14
646:9 653:4 672:8 679:23 689:11	887:21 888:14 <b>switch</b> 764:17	737:21 746:18 748:19 857:17	842:18,22 843:3,3 857:9 893:6	816:5 832:21 837:12 840:24
695:5 696:14 697:14 699:25	634:17 677:7 798:23,25 799:16	882:12 884:5,20 884:23 894:14	899:16 <b>taxing</b> 694:2	860:23
704:7 706:20 709:9 711:13	813:10,12 815:10 815:12 816:3	<b>talked</b> 711:2 714:6 752:11 782:20	<b>tax-sharing</b> 810:6 <b>TAYLOR</b> 618:16	<b>testify</b> 659:3 675:14 792:4
712:7,13 713:9 718:7,15,16	834:18,20 <b>S-H-A-R-P</b> 815:16	839:14 848:13 858:13,15 863:14	857:9 893:6 899:16	801:13,17 814:6 816:25 882:17
720:14 721:14 729:10,20 730:23	<b>S-I-M-M-S</b> 834:24 <b>S-T-E-V-E-N</b> 834:23	<b>talking</b> 638:24 640:24 660:20	<b>team</b> 641:9 808:11 808:12	883:15
732:4,14 733:10 738:3 739:5,24		665:13 677:18 683:25 688:7	<b>taxing</b> 694:2 <b>tax-sharing</b> 810:6	<b>testifying</b> 638:17 647:21 653:8
740:23 741:2 742:10 746:14		689:11 698:11 701:23 713:19	<b>TAYLOR</b> 618:16 <b>team</b> 641:9 808:11	698:7 707:25 727:6 747:16
750:20 753:19 761:24 773:17		728:25 733:8	808:12 <b>technically</b> 865:18	760:15 767:12 881:15,17 882:7
776:15 778:2 779:8 781:11			<b>tedious</b> 721:17 <b>tell</b> 646:5 652:21	760:15 767:12 881:15,17 882:7
788:5 789:8 791:2 791:19 792:10			657:25 658:6,21 663:23 697:16,21	<b>testimony</b> 628:16 629:20 632:6,9
794:6 795:22 812:18 828:23			722:14 728:7 743:24 777:23	634:25 644:11 651:8 656:9
	<b>T</b> <b>T</b> 617:17 798:2			667:16,20 669:10 670:18 672:6
	<b>table</b> 729:15			

697:24 708:5,18 708:22,25 710:8 710:15 714:12 728:5 750:9 775:3 776:17 777:22 778:25 792:23 793:15 795:20 798:14 800:15,16 802:11 803:2 808:5 811:3 815:3 815:21 835:5 848:24 860:12,21 861:22 863:12 865:8 875:18 883:21 884:23 898:5,8 902:18,25 909:13 914:18 <b>text</b> 722:11 <b>thank</b> 624:18 630:15,25 631:25 635:9 636:9 643:22 650:22 677:22 679:20 684:12 687:5 705:2 714:16 716:24 722:7,25 758:6 772:23 776:5 785:2 794:20 796:19,24 797:15 799:12 809:14 811:9,11 813:21 814:14 815:8,17 833:14 833:20,25 834:12 834:25 835:9 836:23 863:24 865:22 869:23 897:18,23 898:25 912:19,23,25 915:9 916:19,21 <b>theirs</b> 656:3 906:25 908:7 <b>thereabouts</b> 738:21 <b>therewith</b> 734:10 <b>They'd</b> 749:21 <b>thing</b> 625:14 631:5 662:22 671:16	837:21 890:8 914:17 <b>things</b> 677:8 699:10 726:25 755:19 787:5 805:3 839:4 842:24 855:2,12 856:3 857:5,6 861:17 880:2 913:13 <b>think</b> 624:13 626:17 630:17 631:15 639:18 641:3,21 643:21 644:12 645:2,21 646:3 647:2,6,21 647:23,24 648:3 648:19,20,22 650:6,9,19 652:17 654:25 656:20 657:8 659:8 660:14 665:19 666:13 668:14,22 668:25 669:18,19 669:20 670:13,19 670:21 674:13 676:2 679:10 680:16 683:9 684:16 688:17 689:9 693:2 696:17 697:19 698:23 699:5 705:19 709:14 710:14 712:15,16 712:24 714:2,14 714:21 718:8 726:19 731:15,18 732:10,14 734:19 738:4,6 742:24 743:11 748:4 749:14,17,20 750:9,16 751:3,8 752:8,11 753:25 754:11,13 755:16 757:18 761:23 762:12,25 773:12 783:2 785:16	789:15,19 790:17 794:25 800:23 802:6,25 806:22 807:2 809:11 812:14 838:24 839:13 841:11 844:10 848:17 858:11,16 859:5 866:11 871:13,17 875:6,10,12 879:13 881:9,9 886:15 891:24,25 895:6,10,11 896:9 896:14 898:13 903:16 905:15 908:6,17 910:12 912:13 914:17 915:22 <b>thinking</b> 625:12 <b>third</b> 618:4 694:11 717:5 719:16 720:4,8,16,18 723:15,24 724:15 724:17,21 867:17 875:10 901:24 <b>third-party</b> 696:3 723:21 725:4,4 765:11 767:4 901:22 <b>Thomas</b> 695:11 <b>thoroughly</b> 851:17 856:19 <b>thought</b> 625:14,20 672:25 706:11 711:14 713:5 747:12 762:7 773:21 875:21 878:22 880:9 882:7,13 895:2,17 896:7 911:12,23 <b>thoughts</b> 914:2 915:6 <b>thousands</b> 852:8 <b>threatened</b> 905:10 <b>threatening</b> 907:16 <b>threats</b> 855:8 911:3 <b>three</b> 649:15	695:21 696:9 860:18 861:7,23 869:9 870:11 906:22 908:19 <b>thrust</b> 818:9 <b>tied</b> 830:23 <b>time</b> 632:5 659:15 661:22 674:10 693:22 722:2,9 726:9 737:11,14 749:13 758:25 759:2 762:3,5 773:4 778:19,21 797:10 798:3,11 804:16 811:13,22 832:18 833:5,6 834:7,15 835:24 836:9,12 837:8 841:17 853:22 855:7 872:16 891:16 893:9 895:7 896:17 900:25 911:7,19 911:21 912:8,10 913:3,18 915:14 916:24 <b>timely</b> 818:8 <b>times</b> 649:15 675:2 675:7 792:11 833:8 857:3 859:24 888:3 898:4 <b>time-consuming</b> 854:9 <b>timing</b> 624:12 832:24 833:2 <b>title</b> 644:14 792:25 <b>today</b> 623:17 624:14 661:11 662:16 663:3,6 673:24 674:6,12 675:22 696:21 745:7 838:3 839:14 845:21 848:22 849:4 881:15 883:14 <b>told</b> 706:11 710:25	724:14,15 727:17 849:12,16 855:23 <b>Tom</b> 908:11 <b>top</b> 668:8 691:18 700:8 703:23 704:4 733:16 741:14 867:7 <b>topic</b> 722:19 725:20 731:19 901:9 904:19 <b>topics</b> 697:6 764:17 <b>total</b> 636:3 670:9 671:21 702:17,21 783:14,16 869:11 869:12 <b>totality</b> 747:10 <b>Towers</b> 659:21 <b>TPS</b> 715:9 716:19 835:14 <b>tracking</b> 731:2,5 732:2 735:4 804:2 831:4 886:7 888:23,25 891:5 891:12 <b>trade</b> 674:3,6,12 831:2 <b>traded</b> 830:12 <b>trading</b> 830:25 <b>Tranquility</b> 621:22 622:5 <b>transaction</b> 885:9 900:9 <b>transactions</b> 842:21 857:14 899:12 <b>transcribe</b> 828:22 <b>transcript</b> 614:18 836:21,25 <b>transcripts</b> 914:3 <b>transfer</b> 726:4,10 726:20,24 803:24 818:23 819:24 820:5 822:21 831:16 843:25 <b>transferred</b> 639:4 639:11 653:10 659:12 662:23
--	---	---	--	--

671:22 688:4 727:20,23 729:4,9 730:4,6,9 731:7 731:24 765:5 780:20,21 844:11 844:14,16 <b>transferring</b> 665:8 665:17 729:21 844:10 <b>transfers</b> 901:8,11 901:13,23 902:6 <b>travel</b> 797:6 <b>treasurer</b> 635:10 <b>treasury</b> 641:10 <b>treated</b> 775:14,17 <b>treatment</b> 671:13 817:20 830:21 844:12 <b>tremendous</b> 899:15 <b>triad</b> 904:3 <b>trial</b> 618:18 635:3 713:17 <b>trickle</b> 691:21 <b>tried</b> 756:18 886:15 905:7,10 910:7 <b>trigger</b> 756:25 <b>true</b> 633:25 635:15 635:16 649:7 651:10 665:9 666:4 668:21 755:8 786:24 788:17,22 789:9 791:10 808:13 <b>trust</b> 625:16 627:3 641:25 642:15,18 687:20,24 688:11 688:15 689:2,8,23 690:2,2,8,11,15 690:15,22 691:7 691:24 692:5,8,11 693:11,19 694:10 694:17,22,23 695:2,18 696:4,7 696:16,23 697:3 701:11 708:13 775:24,25 776:3 819:19 820:20	821:17 824:12 825:3 830:11 843:10,16,25 845:10 846:6 852:18 856:10 903:22 907:20 914:12 <b>trustee</b> 618:20 694:18 695:14 766:23 864:23 880:5 <b>trustees</b> 696:23 864:15 879:20 <b>trusts</b> 642:10,13,22 644:5 903:16,17 903:21,25 <b>try</b> 653:3 658:13 704:6 721:13 737:25 749:9 753:22,24 773:15 797:12 829:15 881:7 887:9 892:20 909:20 911:13 913:7 <b>trying</b> 643:18 655:21 675:19,20 676:6 706:9 744:15 774:4 890:20 895:15 913:19 916:12 <b>TSA</b> 800:20,22 803:10,22 804:4 807:5 <b>Tuesday</b> 624:15,17 914:7 915:2,23 916:2,4,8 <b>turn</b> 626:23 630:3 699:19 700:6 717:5 725:19 733:4 748:17 752:8 756:2 823:4 826:17 829:14 837:3 843:6 863:8 868:23 876:24 <b>turning</b> 808:3 820:12 <b>turnover</b> 905:9	<b>turns</b> 684:13 <b>two</b> 627:13 659:21 663:5 716:7 722:12 724:23 726:5,7,13,18 734:22 741:5,7,11 754:9 755:7 762:14 781:14,14 781:21 782:13 800:24 812:5,20 814:20 817:10 859:11 862:23 863:19 867:20 890:8 906:22 913:10,14 914:20 <b>type</b> 642:2 768:10 839:18 900:4 <b>types</b> 656:3,5 719:2 788:6 805:4 885:13 <b>typical</b> 833:4 886:3 <b>typically</b> 819:9,17 820:16 823:2,9	<b>underneath</b> 707:3 822:24 <b>understand</b> 642:2 644:16 648:21 656:25 677:3 680:2 692:2 702:4 709:2 718:17 719:2,9,12,14,24 720:11,18,23 721:15 726:22 737:19 756:13 767:5 786:6 791:19,21 802:25 803:25 804:8 805:19 806:23 807:11,22 808:19 811:23 840:23 843:19 878:23 910:14 913:7 915:10 <b>understanding</b> 643:7 673:25 692:22 694:16 726:8 734:21 740:12 769:19 770:23 775:23 842:19 843:14 844:3 857:13 885:16 901:22,24 <b>understood</b> 713:7 839:9 <b>undertake</b> 809:8 <b>undertook</b> 808:8 <b>underway</b> 812:17 <b>undetermined</b> 734:6 <b>Unfortunately</b> 822:6 <b>unimpaired</b> 718:7 <b>United</b> 614:2 618:19,20 733:20 733:21 819:19 <b>units</b> 690:3,5,15 691:4 <b>unnecessary</b> 627:15 <b>UNOFFICIAL</b>	614:18 <b>unpack</b> 671:15 <b>unrestricted</b> 674:5 <b>unsecured</b> 617:2 685:8 751:19 834:6 880:16,19 880:21,23 881:6 <b>unsettled</b> 779:15 <b>unsuccessful</b> 905:12 <b>untrue</b> 808:14 <b>unusual</b> 877:13 <b>updated</b> 737:25 <b>upper</b> 896:7 <b>URQUHART</b> 615:19 <b>use</b> 624:17 633:4 691:8 739:7 742:6 753:20,22 820:23 821:2 840:11 911:2 <b>utilization</b> 752:16 <b>utilize</b> 753:17 754:15,18,21,22 791:25 <b>utilized</b> 753:2 <b>U.S</b> 821:17 823:5,6 823:14
<hr/> <b>U</b> <hr/>			<hr/> <b>V</b> <hr/>	
			<b>V</b> 816:2 <b>vague</b> 732:3 860:22 874:14 876:4,19 886:23 <b>vagueness</b> 783:20 <b>valuation</b> 642:21 653:2,20 672:13 678:23 679:4 681:11,13,24 682:2 683:11 684:2,3,18 720:3 752:12,14,18 <b>valuations</b> 665:6 <b>value</b> 637:4 641:14 642:21,24,25 645:8,22 646:13 646:16 647:8,18	



648:25 649:2	<b>venture</b> 899:25	<b>W</b>	733:14 734:15	903:3 909:3,7
652:22 653:3,6,14	900:3	<b>W</b> 616:8	738:18 740:10	912:19,23 913:2
657:22 658:2,5,13	<b>ventures</b> 754:12	<b>WA</b> 618:5	742:17 746:11	914:9 915:3,12,16
658:23 659:4,11	<b>verify</b> 826:22	<b>wait</b> 693:21 862:11	747:17 755:14	916:2,7,20,22
659:25 660:18,21	<b>version</b> 682:7	<b>waiting</b> 624:16	757:5 758:4,6	<b>WaMu</b> 778:9
661:22,24,25	<b>versus</b> 624:3	814:16	759:16 760:19,24	<b>want</b> 623:22 624:10
662:8,10,14	657:13 661:4	<b>waive</b> 688:18	761:5,10,17	625:22 626:2,10
664:19,23,24	748:20 842:23	771:23	762:25 763:12	626:13 631:5
665:7,18 666:24	871:15	<b>wake</b> 721:20	764:8 766:4,14	633:3 640:13
667:4,7,23 670:9	<b>viable</b> 903:22	<b>walk</b> 721:13	768:2 769:3,6	643:18 649:12
671:21 672:8,10	<b>vice-president</b>	<b>walked</b> 839:3,14	771:16 772:3,6	653:2 658:13
672:15,16,18,19	817:16	<b>walking</b> 678:2	773:7,14,21,25	663:20 675:17
675:3,21,24 677:8	<b>view</b> 660:18 661:2	<b>Walrath</b> 614:20	774:11 775:8,12	683:9 708:18
677:19 678:2,21	709:5,8 746:25	620:5 624:11,19	776:20 782:7	714:4 721:6 733:5
683:7 686:2	747:9 748:2,14	625:2 626:4,19	783:21 784:6	733:17 742:10
718:11 719:3,17	750:24 755:22	628:22 630:5,10	785:5 786:14,19	746:13 749:15,17
724:15,15 742:22	757:16 777:11	630:25 631:15,21	787:16 789:5	752:8 755:21
748:22 749:24	783:13 808:21,22	632:23 633:3,7,11	790:9 791:5	773:14 775:14
752:10 765:3,10	887:5,15	633:23 634:5,9,11	792:24 794:12	795:4,6,10 840:22
765:21,23 766:16	<b>viewed</b> 683:10	636:12 637:18,23	795:21 796:10,19	845:2 853:13
766:17,20 767:7	<b>Visa</b> 646:11,14,15	638:18 639:8	796:22,25 797:14	863:8,11 876:16
779:9,21 783:14	646:16,18 647:8	642:6 643:16,20	798:17,21 799:6	895:25 905:4,5
783:17,25 791:13	647:18 670:24	644:23 645:16,20	799:10 802:12	913:17,21 915:16
802:23 807:7	671:4 672:2,11,15	647:22 648:18	806:9,21 809:4,11	<b>wanted</b> 627:14
852:19,24 871:12	673:8,17,24 674:6	649:9,14,19 651:9	809:15,18,22	764:5,12 877:19
871:14 880:25	674:11 675:21	652:8 654:12	811:8,16,18	893:3 902:20
881:5,8 894:2,2,3	676:19 677:3,24	656:10,21 658:11	812:10 813:6,9,22	909:15 913:7,23
895:9,13,17	677:24 701:8	658:16 664:16	814:4,9,13 815:5	<b>wanting</b> 878:14,15
904:11,15	779:2,6,10 780:19	667:17 668:3	815:8,24 832:6	<b>wants</b> 625:7 878:6
<b>valued</b> 659:17,18	780:20 793:14,22	669:11 674:22	833:16,18,20,24	909:11
721:17 793:22	<b>vis-a-vis</b> 892:10	675:12 678:6	834:11,16 835:2,7	<b>warrant</b> 725:17
<b>values</b> 639:3,10,14	<b>VOI</b> 830:14	679:10,14,17,20	836:22 841:4	730:25 731:5,17
639:15,17,17	<b>VOICE</b> 632:25	680:18 681:2,6	844:8 848:2 849:3	739:13,20 740:15
656:12 663:25	633:6 715:6	686:24 687:9,12	850:7 853:8	744:18 745:3,8
668:12 741:7,9	<b>voluntarily</b> 735:14	687:16 698:12,15	857:24 858:8	746:7 756:7,8,23
<b>varies</b> 831:11	<b>vote</b> 826:15 827:20	699:3 704:20,23	861:2 862:2	757:19 796:7,12
<b>various</b> 656:23,24	<b>voted</b> 716:13	705:2 708:7	863:22 864:6	879:13 886:7
685:13 691:12	<b>voters</b> 818:6	709:20 710:16	866:6,10,16,20	891:5
709:24 747:2	<b>votes</b> 812:7 813:2	711:10 712:6	867:9,24 868:18	<b>warrants</b> 691:3
763:24 769:19	814:22 827:9	713:14 714:10,13	869:20,23 872:3	731:2 732:2 735:4
779:21 793:3	<b>voting</b> 817:25	715:3,8 716:15,22	873:6 874:15	736:25 737:19
819:15 836:2	822:14 824:19,19	718:25 719:8,23	876:13,16 877:5,9	756:21 757:7
840:14 841:19	825:6,10 826:13	720:22 722:3,6,8	880:13 881:14	888:23,25 891:12
865:9 894:11	826:15,16,20	722:23 723:18	882:11 884:25	<b>wary</b> 626:9
899:16,16 904:15	827:12,18,18	724:5 725:12	885:6 886:24	<b>Washington</b> 614:4
905:17 909:22	828:3,4,4,12,24	727:5,11 728:6	887:21 888:14	615:6 617:3
<b>varying</b> 899:14	<b>vs</b> 614:9	729:19 732:24	897:18,22 898:12	641:10 659:17

687:21 727:19,25 729:5 744:5,6,12 744:13,24 745:10 745:11,12 746:3 817:4 846:18 847:7 887:6,7,12 887:17 888:8 890:21 892:25	<b>weekly</b> 910:5 <b>weeks</b> 835:22 863:19 <b>Weil</b> 615:4 620:7 625:4 632:3 772:25 776:10 808:7 812:22 913:5 <b>Wells</b> 695:14 <b>went</b> 680:17 728:19 730:20 736:14 746:21 762:18 763:7 777:19 779:6,25 781:16 818:22 837:7 841:7,18 855:21 858:14 867:6 900:16	<b>White</b> 907:8 <b>WIC</b> 704:9 705:4 <b>wide</b> 653:7 <b>Williams</b> 907:2 <b>Wilmington</b> 618:15 <b>Wilmington</b> 614:17 615:14 616:23 618:23 <b>win</b> 655:13 656:2,3 779:19 842:14 <b>WINE</b> 615:17 <b>winning</b> 840:19 841:14,23 842:11 842:23 <b>wired</b> 915:13 <b>wish</b> 662:10 827:8 835:7 <b>wished</b> 830:8 <b>withdraw</b> 632:18 <b>Withdrawal</b> 622:19 <b>withdrawing</b> 621:6 622:8,15 623:2,18 624:22 <b>withdrawn</b> 620:13 621:18 622:16 623:3 794:4,7,15 794:17,17 850:9 885:7 <b>witness</b> 633:13,18 634:4,17 698:24 706:7 715:13,22 716:4 722:18 725:11 734:13 738:17 760:15 766:8 773:5 774:10 798:7,24 799:4,9,16 802:15 809:17 811:11 813:11,16,19 814:8,16,19 815:11,15 816:3 834:2,19,23 835:6 835:16 836:20,23 867:11,23 872:2 887:23 898:11	912:25 913:16 <b>witnesses</b> 770:5 797:6 811:21 902:23 913:11 914:5,20 <b>witness's</b> 667:15 898:5 <b>WMB</b> 641:15 655:7 778:17 785:23,25 786:8 790:16 791:13 803:11,18 804:5 840:17 853:17 859:25 899:13 901:12,13 <b>WMB's</b> 768:16 778:6,19 786:5 859:24 861:18 <b>WMI</b> 623:21 635:10,14 637:4 639:24 640:16,21 641:14 647:19 655:9 669:6 678:8 678:21 679:22 681:17 682:4,10 682:14 683:13,19 684:5,23 685:3 687:18,21,22 688:4,18 689:4,23 690:11,22 691:7 691:23 697:16 698:8,20 701:6,7 702:5,5 704:9 705:5 707:18 731:18 754:2 756:7,10,22 762:6 762:16,23 763:23 775:19,24 776:3 778:16 780:5,8,23 780:24 782:2,4 783:25,25 784:23 785:13 786:8,24 787:10 788:13 789:23 790:15 791:12 792:9,12 801:23 803:4,11 803:14,18,19	804:4,11 806:17 807:18 840:17 843:16,24 852:23 899:13 901:12,13 <b>WMI's</b> 644:5 706:24 760:4 767:13 768:5,11 768:16 778:7,19 781:13,15 782:12 782:14 787:21,22 <b>WMRIC</b> 621:13 639:23 678:22 682:15,18,21 683:12,21 687:22 899:25 903:10,13 903:15,17 904:11 904:13 <b>won</b> 655:15 <b>word</b> 640:11 746:19 747:6 850:24 <b>words</b> 628:16 640:10 647:6 662:21 688:24 707:12 749:9 790:13 850:21 860:5 <b>work</b> 641:4 653:17 663:2 693:3 696:17,20 717:13 839:22 842:6,17 846:5,23 847:11 852:7 857:15,20 858:16 859:6,6,14 859:16,17,18 860:7,8 862:22,22 862:23 863:2,2 885:19 899:4,6 901:9,25 902:3 903:12 914:9 <b>worked</b> 641:7,8 817:14 <b>working</b> 623:13 625:18 816:23 821:22 <b>works</b> 689:23 789:15 914:25
<b>wasn't</b> 643:13 698:2,24 727:14 732:8 754:23 767:4 785:14 786:20 787:19 793:8 795:22,24 804:15,17 853:5 859:3 860:2 862:20 893:2 904:5 <b>waterfall</b> 692:12,13 694:8 696:5,24 <b>way</b> 654:22 655:24 662:25 665:2 666:24 667:5 671:4 673:13 676:18 688:17 689:22 691:15 710:12 711:12 719:14 726:25 746:22 747:7 775:10 777:13,19 822:8 823:18,19 823:20 826:22 830:24 831:3 889:24 891:25 892:6 893:15 894:20,20,21 895:24 913:13 915:2 <b>ways</b> 667:22 668:11 <b>weaknesses</b> 648:21 713:2 769:20 884:2 <b>Wednesday</b> 679:22 679:24 <b>weekend</b> 621:21 623:17 626:22 915:18	<b>weren't</b> 674:21 761:24 865:7 890:23 <b>we'll</b> 620:25 624:13 631:23 639:20,22 668:5 773:15 788:15 796:17 797:2 866:21 867:21 894:16 916:7,22 <b>we're</b> 621:19 625:18 627:12 629:24 631:3,19 654:25 655:4,8,11 655:12 669:25 675:4 686:24 689:11 692:6 701:23,25 710:19 714:14 715:9 754:9 800:23 812:18 821:22 866:17 878:23 902:16 910:25 914:13,16,18,21 916:14 <b>we've</b> 620:10 625:8 631:11 869:10 870:8 916:11 <b>whatsoever</b> 801:25	<b>White</b> 907:8 <b>WIC</b> 704:9 705:4 <b>wide</b> 653:7 <b>Williams</b> 907:2 <b>Wilmington</b> 618:15 <b>Wilmington</b> 614:17 615:14 616:23 618:23 <b>win</b> 655:13 656:2,3 779:19 842:14 <b>WINE</b> 615:17 <b>winning</b> 840:19 841:14,23 842:11 842:23 <b>wired</b> 915:13 <b>wish</b> 662:10 827:8 835:7 <b>wished</b> 830:8 <b>withdraw</b> 632:18 <b>Withdrawal</b> 622:19 <b>withdrawing</b> 621:6 622:8,15 623:2,18 624:22 <b>withdrawn</b> 620:13 621:18 622:16 623:3 794:4,7,15 794:17,17 850:9 885:7 <b>witness</b> 633:13,18 634:4,17 698:24 706:7 715:13,22 716:4 722:18 725:11 734:13 738:17 760:15 766:8 773:5 774:10 798:7,24 799:4,9,16 802:15 809:17 811:11 813:11,16,19 814:8,16,19 815:11,15 816:3 834:2,19,23 835:6 835:16 836:20,23 867:11,23 872:2 887:23 898:11	912:25 913:16 <b>witnesses</b> 770:5 797:6 811:21 902:23 913:11 914:5,20 <b>witness's</b> 667:15 898:5 <b>WMB</b> 641:15 655:7 778:17 785:23,25 786:8 790:16 791:13 803:11,18 804:5 840:17 853:17 859:25 899:13 901:12,13 <b>WMB's</b> 768:16 778:6,19 786:5 859:24 861:18 <b>WMI</b> 623:21 635:10,14 637:4 639:24 640:16,21 641:14 647:19 655:9 669:6 678:8 678:21 679:22 681:17 682:4,10 682:14 683:13,19 684:5,23 685:3 687:18,21,22 688:4,18 689:4,23 690:11,22 691:7 691:23 697:16 698:8,20 701:6,7 702:5,5 704:9 705:5 707:18 731:18 754:2 756:7,10,22 762:6 762:16,23 763:23 775:19,24 776:3 778:16 780:5,8,23 780:24 782:2,4 783:25,25 784:23 785:13 786:8,24 787:10 788:13 789:23 790:15 791:12 792:9,12 801:23 803:4,11 803:14,18,19	804:4,11 806:17 807:18 840:17 843:16,24 852:23 899:13 901:12,13 <b>WMI's</b> 644:5 706:24 760:4 767:13 768:5,11 768:16 778:7,19 781:13,15 782:12 782:14 787:21,22 <b>WMRIC</b> 621:13 639:23 678:22 682:15,18,21 683:12,21 687:22 899:25 903:10,13 903:15,17 904:11 904:13 <b>won</b> 655:15 <b>word</b> 640:11 746:19 747:6 850:24 <b>words</b> 628:16 640:10 647:6 662:21 688:24 707:12 749:9 790:13 850:21 860:5 <b>work</b> 641:4 653:17 663:2 693:3 696:17,20 717:13 839:22 842:6,17 846:5,23 847:11 852:7 857:15,20 858:16 859:6,6,14 859:16,17,18 860:7,8 862:22,22 862:23 863:2,2 885:19 899:4,6 901:9,25 902:3 903:12 914:9 <b>worked</b> 641:7,8 817:14 <b>working</b> 623:13 625:18 816:23 821:22 <b>works</b> 689:23 789:15 914:25

<b>worse</b> 660:15	726:7,13,18 754:9	<b>\$250</b> 675:8 676:10	<b>10</b> 737:8,10 738:4	<b>135</b> 681:15
<b>worth</b> 647:13	755:7 817:11,15	705:6 735:6 897:4	777:4 875:12	<b>137</b> 683:16
654:13 658:23	879:23 880:3,3	897:9	900:25	<b>139</b> 614:13
661:11 662:22,24	890:8 912:7,7	<b>\$275</b> 666:22	<b>10-Ks</b> 899:22	<b>14</b> 733:19 837:24
672:3 673:24	<b>yesterday</b> 627:6	<b>\$30</b> 713:10	<b>10-Qs</b> 899:22	<b>140</b> 678:2
674:4 675:22,25	632:14 635:3	<b>\$31</b> 685:20	<b>10-5138(MFW)</b>	<b>142</b> 649:25
682:3 685:20	639:7 680:17	<b>\$35</b> 690:17	614:10	<b>144</b> 734:25 736:21
690:16 698:9,21	725:21 808:6	<b>\$350</b> 659:7 803:20	<b>100</b> 683:18 684:7	742:22
802:7,19 806:17	865:8	<b>\$352</b> 800:14 801:4	741:17,18 748:5	<b>145</b> 702:6
807:15 808:8	<b>York</b> 615:22	803:6 804:4,6,14	750:3 752:21	<b>148</b> 716:14
809:7 895:3,7	616:14 617:6,16	807:4,12,17	753:14 782:23	<b>149</b> 614:13
896:8	617:22 619:4,5	808:14 809:25	871:4	<b>15</b> 668:19 784:18
<b>worthless</b> 780:4	620:19 739:18	810:4	<b>10004</b> 619:5	833:5 838:12
<b>worthwhile</b> 854:22	<b>yup</b> 701:16 717:11	<b>\$361</b> 638:2	<b>10004-2498</b> 616:14	<b>150</b> 678:3 691:19
<b>wouldn't</b> 643:3	721:12 765:15	<b>\$362</b> 803:9 810:8	<b>10006</b> 617:6	<b>157</b> 637:10
653:2 658:13	774:24	<b>\$39</b> 663:12	<b>10010</b> 615:22	<b>157.5</b> 681:20 682:6
659:3 663:23		<b>\$4</b> 842:4 852:14,20	<b>10017</b> 617:22	<b>16</b> 838:12
671:3 674:3	<b>Z</b>	<b>\$4.58</b> 700:22	<b>10019</b> 617:16	<b>16th</b> 828:5
688:22 692:9	<b>Zambrano</b> 798:9	<b>\$42</b> 677:14	<b>105</b> 614:13	<b>160</b> 691:17
745:6,20 749:23	798:10,18 802:10	<b>\$43</b> 677:15	<b>106</b> 614:13	<b>17</b> 629:10,13 630:7
771:18 844:9	806:7,20 809:21	<b>\$5</b> 639:24 640:2,4,8	<b>108</b> 614:13	630:14 858:18
889:23	809:24 811:6	640:17 753:18	<b>109</b> 614:13	<b>18</b> 629:11,13,16
<b>wrap</b> 909:5	<b>Zelin</b> 630:20	764:22 780:16	<b>11</b> 614:4 703:7	630:7,9,12 863:12
<b>wrap-up</b> 693:20	797:12 913:12,15	781:5 789:20	719:10 724:24	912:16
<b>write</b> 878:19	<b>Zelin's</b> 630:23	790:3,4 791:16	748:20 749:5	<b>18th</b> 828:6
<b>writer</b> 828:18	<b>zero</b> 672:17 693:7	793:21	780:2,4,10 816:23	<b>180</b> 681:16
<b>wrote</b> 757:10,14	779:20	<b>\$5.5</b> 790:3	817:4,17,19	<b>184</b> 735:15 736:6
<b>W.F</b> 615:10	<b>zone</b> 648:7,10	<b>\$62</b> 702:20	818:16 840:6	736:15
	669:4	<b>\$7.446</b> 636:23	856:7,9	<b>19</b> 790:15 825:9
<b>Y</b>	<b>zoom</b> 704:6	<b>\$75</b> 674:13 677:13	<b>11s</b> 817:3	826:9 830:4
<b>yeah</b> 644:12 650:6		779:22 780:3	<b>110</b> 614:13	<b>19th</b> 828:6
666:13 667:21	<b>\$</b>	<b>\$90</b> 778:15	<b>1150</b> 618:14	<b>197</b> 629:9
680:18 688:10	<b>\$1.15</b> 690:6		<b>118</b> 614:13	<b>19801</b> 615:14
698:16 700:18	<b>\$100</b> 752:5,17	<b>0</b>	<b>12</b> 637:8 651:12	618:23
705:19 708:24	753:13 754:18	<b>00004</b> 700:15	702:7 837:24	<b>19899</b> 616:23
709:7 720:23	<b>\$12</b> 701:22 908:7	<b>004</b> 700:10	900:25 908:7	618:15
723:9 728:6	<b>\$140</b> 738:15	<b>02111</b> 616:6	<b>12:57</b> 797:16	<b>199</b> 628:7,11
743:11,18 747:18	<b>\$144</b> 738:10 741:24	<b>08-12229(MFW)</b>	<b>1201</b> 618:4	
749:20 750:15	742:8 743:16	614:5	<b>124</b> 666:19	<b>2</b>
756:17 777:14	896:12	<b>09</b> 905:22	<b>125</b> 616:13	<b>2</b> 629:18 716:5
780:14 784:10	<b>\$145</b> 637:4		<b>127</b> 746:23	722:4,10 765:16
787:4,17 794:16	<b>\$150</b> 677:20 779:23	<b>1</b>	<b>128</b> 652:4 668:9	766:6 861:13
809:11 845:4	<b>\$184</b> 735:11 739:2	<b>1</b> 861:10	<b>129</b> 651:12	869:18 882:20
860:5 868:13	897:4	<b>1,341,000</b> 869:13	<b>1300</b> 615:5	<b>2nd</b> 659:19 660:2,9
<b>year</b> 620:22 739:22	<b>\$2.3</b> 788:23 789:11	<b>1.15</b> 690:16	<b>131</b> 652:4	661:17 662:5
743:6	<b>\$23</b> 706:17	<b>1.185</b> 690:23	<b>1325</b> 617:15	663:11,21
<b>years</b> 717:10 726:6	<b>\$25</b> 671:2,6,17	<b>1.85</b> 690:12	<b>134</b> 748:21	<b>2/6/2009</b> 878:3
	672:3	<b>1:00</b> 773:16		

**2:00** 797:2  
**2:05** 798:3  
**20** 706:24 707:19  
 737:9,10 738:5  
 824:23 825:2,9  
 826:9 833:12  
 908:7  
**20005-3314** 615:6  
**2002** 717:9  
**2003** 756:8,20  
**2007** 778:24  
**2008** 659:19 660:2  
 660:4,9,22 661:17  
 662:5 663:12,21  
 726:6 733:19  
 744:2 890:7  
**2009** 660:13 875:6  
 876:3,8 878:18  
 906:6,13  
**2010** 614:19 663:17  
 699:22 704:14  
 721:9 724:12  
 906:7 912:15  
**2087** 616:22  
**21** 825:16,17  
 879:23 880:3  
**22** 744:2 823:24  
 825:16,17  
**228** 701:25,25  
**23** 705:15 862:10  
**23rd** 877:24 878:7  
 878:25 879:4,6  
 905:15 906:13  
**24** 635:6 670:2  
 721:9 724:12  
**25** 666:19 780:22  
 833:13  
**25th** 828:2  
**250** 674:18 706:22  
 707:6,17 735:15  
 736:6,16,20  
**275** 704:9  
**29** 689:3

---

**3**

**3** 614:19 705:4  
 721:23 723:3

851:14 859:22  
 861:15 882:20  
**3.147** 674:16 675:2  
**3.15** 674:14 675:7  
 677:18  
**30** 689:3,25 777:4  
 833:5  
**30th** 622:4 704:14  
 704:24  
**31** 783:3  
**31st** 663:16  
**35** 689:16 690:14  
**350** 895:10,22  
 896:6  
**356** 741:20  
**363** 726:4  
**37** 638:10 869:18  
 869:21  
**371** 869:12  
**38** 743:21  
**38.7** 738:21,22  
 740:6,18  
**380** 896:10  
**382** 733:22 734:6  
**39** 659:22 661:6  
 699:20 700:12,13  
**390** 895:11 896:10

---

**4**

**4** 700:6 701:17  
 704:11 705:24  
 715:9,23 721:7,23  
 722:5 723:3,7,10  
 723:19 724:11  
 757:8,11 774:20  
 889:2,5,15 901:5  
**4.3** 704:9  
**4.306** 707:3  
**4.308** 706:13  
**4.34** 701:18  
**4.58** 704:12  
**4.81** 704:10  
**4:23** 916:24  
**4:30** 624:14 797:3  
 812:16 915:13  
**40** 677:14 703:16  
 704:19,21 741:17

**40's** 677:14  
**400** 895:22 896:6  
**41** 756:4  
**42** 733:7,16 743:21  
 756:5 774:23  
**43** 741:17 748:5  
 756:6 774:21  
 876:25 877:10  
**43.6** 723:5,10,20  
**44** 875:10  
**45** 739:21  
**45.5** 739:7 740:18  
 740:20  
**450** 617:21  
**46** 759:19  
**4689** 614:25  
**47** 869:20

---

**5**

**5** 614:16 641:15  
 700:9 753:9,10,23  
 759:11,18,18,22  
 759:23 760:2  
 761:13 778:16  
 788:9 790:20,22  
 793:17  
**5C** 715:17 717:4  
**5th** 699:22  
**50** 706:25 707:20  
**500** 618:13  
**51** 615:21  
**510(b)** 692:18,19  
 692:25 693:5  
**53** 867:19,25 868:2  
**54** 746:23 866:19  
 866:21 869:2  
**5500** 661:14  
**56** 676:20 677:9,12  
**57** 748:19

---

**6**

**6** 704:3 706:12,19  
 765:20 766:6  
 774:14,16 851:14  
 899:2,3  
**6188** 679:6,19  
**63** 741:20  
**64** 752:9

---

**7**

**7** 637:4 719:11  
 721:25 723:3  
 724:24 741:9  
 748:20 749:5,25  
 766:23  
**7.458** 637:13  
**7.5** 636:3  
**75** 675:2,7 871:9,19  
**76** 643:25  
**765** 691:15  
**77** 627:16 629:5  
**789** 689:15,15  
 690:25 691:8  
**79** 627:17,19

---

**8**

**8** 777:4 845:7  
 853:14  
**80** 870:21  
**810490** 614:24  
**819** 869:14  
**844** 618:22  
**86** 722:12

---

**9**

**9** 837:16 848:5  
 855:8 870:15  
**9.5** 907:23 911:2  
**9:30** 915:16 916:8  
**90** 641:13  
**91** 837:3  
**919** 616:21  
**92** 839:2  
**920** 615:13  
**924** 614:16  
**95** 844:23 845:3,5  
**96** 848:5 863:9  
**97** 733:7,16 756:2  
**98101-3000** 618:5  
**99** 744:19 843:6  
 845:2,5

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
WASHINGTON MUTUAL, INC., <i>et al.</i> ,	)	Case No. 08-12229 (MFW)
	)	Jointly Administered
Debtors	)	Related Doc. No.
	)	

**ORDER APPROVING PLAINTIFF'S SUPPLEMENTAL  
MOTION IN LIMINE TO STRIKE AND PRECLUDE ALL  
TRIAL EVIDENCE OF ANALYSIS THAT WAS WITHHELD FROM  
DISCOVERY ON THE BASIS OF THE ATTORNEY-CLIENT PRIVILEGE**

Upon consideration of the Supplemental *Motion in Limine* to Strike and Preclude All Trial Evidence of Analysis that was Withheld from Discovery on the Basis of the Attorney-Client Privilege (the "Motion") filed by the Consortium of Trust Preferred Security Holders (the "TPS Consortium") and any objections thereto, it is hereby ORDERED that the Motion is Approved and that the testimony of witnesses, as detailed in Exhibit A of the Motion, is stricken.

Dated: December \_\_, 2010  
Wilmington, Delaware

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The Honorable Mary F. Walrath  
UNITED STATES BANKRUPTCY JUDGE