

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

-----X	:	Chapter 11
In re	:	
WASHINGTON MUTUAL, INC., <u>et al.</u> , ¹	:	Case No. 08-12229 (MFW)
Debtors.	:	Jointly Administered
-----X	:	Hearing date: February 8, 2011 at 10:30 a.m.
-----X	:	Related D.I. 6575, 6653, 6656, 6658, 6661, 6662

OMNIBUS REPLY IN SUPPORT OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS' PETITION, PURSUANT TO 11 U.S.C. § 105(a), 28 U.S.C. § 158(d)(2), AND FED. R. BANKR. P. 8001(f), FOR CERTIFICATION OF DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF THE OPINION AND ORDER DENYING PLAN CONFIRMATION

The Official Committee of Equity Security Holders (the “Equity Committee”) hereby submits this omnibus reply in support of its motion (the “Certification Request”), pursuant to section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, et seq. (the “Bankruptcy Code”), 28 U.S.C. § 158(d)(2), and Rule 8001(f) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for the entry of an order certifying the portion of this Court’s *Order Denying Plan Confirmation* and related *Opinion* that held that the global settlement was fair and reasonable, entered on January 7, 2010 [D.I. 6528 and 6529] (the “Opinion and Order”), for direct appeal to the United States Court of Appeals for the Third Circuit (the “Third Circuit”), and respectfully states as follows:

PRELIMINARY STATEMENT

The Equity Committee seeks certification for direct appeal to the Third Circuit of this

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s tax identification number, are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 925 Fourth Avenue, Suite 2500, Seattle, Washington 98104.



Court's Order finding that the terms of the Global Settlement Agreement (the "GSA") are fair and reasonable. The Court made this finding in conjunction with its Order denying confirmation of the Debtors Sixth Amended Plan (the "Plan"). Approval of the terms of the GSA resolved the most significant and hotly contested issue in this case and did so with finality. Any doubt on this score has been settled by the proponents of the plan who have subsequently confirmed that they intend to rely on the Court's finding concerning the GSA as "law of the case" and make modifications only to the release provisions. (Jan. 20, 2011 Trans. at 72).² As a final order determining the core issue in this bankruptcy, the approval of the GSA can and should be certified for appeal now to expedite the ultimate resolution of this case and to insure that meaningful appellate review can be obtained before the issue becomes moot.

ARGUMENT

1. THE EQUITY COMMITTEE HAS STANDING TO MAINTAIN THIS APPEAL.

1. The Equity Committee opposed approval of the GSA and WMI's equity holders are aggrieved by the Order because consummation of the settlement on the terms proposed in the GSA would extinguish claims and liquidate other assets of the estate that could contribute to a recovery for equity holders, either directly or derivatively. *See In re PWS Holding Corp.*, 228 F.3d 224, 249 (3d Cir 2000) (find that aggrieved persons are those "whose rights or interests are directly and adversely affected pecuniarily" (quoting *In re Dykes*, 10 F.3d 184, 187 (3d Cir. 1993)). This impairment of rights unquestionably satisfies the standing requirements necessary for an appeal of the Order. *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299 (4th Cir. 1987) (finding equity committee had standing to appeal order establishing a fund for distribution to creditors outside of a plan); *In re Western Pacific Airlines*,

² A copy of the transcript from the January 20, 2011 hearing is attached hereto as **Exhibit A**.

Inc., 219 B.R. 575 (D. Colo. 1998) (declining to dismiss creditors committee's appeal of settlement order on standing)

2. The Debtors argue that the Equity Committee lacks standing because the Court's finding on the GSA was contained in the Order denying confirmation, a result sought by the Equity Committee. The Debtors do not contest that the approval of the GSA aggrieves the Equity Committee's constituency; instead it makes the hyper-technical argument that the inclusion of the GSA Order in the same document as the Order denying confirmation strips appellate jurisdiction over the former as an independent ruling. (Debtors Br. at 5-6.) But courts, both in and out of bankruptcy, have repeatedly rejected this effort to elevate form over substance and held that the absence of a stand-alone document representing the order being appealed does not deprive the appellate court of jurisdiction (or the appellant of standing to bring the appeal.) *In re Marvel Entertainment Group, Inc.*, 209 B.R. 832, 836-37 (D. Del. 1997) (citing *Schrob v. Catterson*, 948 F.2d 1402, 1407 (3rd Cir. 1991) and *Burlington Northern R.R. Co. v. Huddleston*, 94 F.3d 1413, 1416 n.3 (10th Cir. 1996)). This result is particularly appropriate in an appeal such as this which involves approval of a settlement under Bankruptcy Rule 9019, which, as the Court is well aware, can be, and frequently is, sought in an independent motion.

3. The Debtors' rely on case law that is utterly off point. In *Drelles v. Metropolitan Life Ins. Co.*, 357 F.3d 344 (3rd Cir. 2003), the Third Circuit rejected an attempt to have it assert appellate jurisdiction over a motion to strike dicta comments made by a magistrate judge during a hearing. *Id.* at 347-48. The ruling that the Equity Committee seeks to appeal is not dicta, but, as the Debtors themselves emphasize, "law of the case" on the central issue in this bankruptcy. The Debtors other standing case holds only that the appellant must be a "person aggrieved" by an order to have standing. *GMAC v. Dykes*, 10 F.3d 184, 188 (3rd Cir. 1993). It says nothing

whatsoever about appeal of one of two orders contained in the same written opinion.

4. By the same token, cases cited by the Debtors for the proposition that appellate standing is interpreted narrowly in bankruptcy cases hold only that the appellant must be a “person aggrieved.” See *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 558 (D.Del. 2005); *Enterprise Bank v. Young*, 2007 WL 1667198 at **2 (3rd. Cir. 1997); *In re PWS*, 228 F.3d at 249 (all cited in Debtors’ Br. at pp. 5-6.) Neither the Debtors nor any of the other plan supporters make any effort to argue that the Equity Committee is not “aggrieved” by the Order approving the GSA under the standard established in these cases, nor could they. Instead the Debtors base their standing argument strictly on the misguided effort to limit appeal to the plan confirmation issue, a theory for which the Debtors are unable to cite any supporting case law whatsoever.

2. THE COURT’S APPROVAL OF THE GSA IS APPEALABLE AS A FINAL ORDER UNDER THE COLLATERAL ORDER DOCTRINE.

5. The Third Circuit has held that finality for purposes of bankruptcy appeals must be given a flexible interpretation in order to promote efficiency and fairness. See, e.g., *Buncher Co. v. Official Comm. Of Unsecured Creditors of Genfarm Ltd. P’ship*, 229 F.3d 245, 250 (3rd Cir. 2000) (pragmatic considerations favor a “relaxed standard of finality in bankruptcy cases.”); *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 511 (3rd Cir. 2005) (“In bankruptcy cases, finality is construed more broadly than in other types of civil cases.”); *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3rd Cir. 1985) (holding that, in bankruptcy cases, “courts have permitted appellate review of orders that in other contexts might be considered interlocutory.”) Contrary to this mandate, the Debtors repeatedly insist that the possibility that equitable mootness will bar any subsequent appeal does not justify appeal from this Order. The Debtors are flat wrong. The unavailability of review on appeal from a final order on the merits of the case is one of the well-

established factors courts consider when determining whether an order should be considered final for purposes of appeal under the “collateral order doctrine.”

6. The rationale for the collateral order doctrine has been stated as follows:

[When a final judgment on the merits is issued] it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. . . . This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred. . . . We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion . . . appealability would present a different question.

Under Seal v. Under Seal, 326 F.3d 479, 487 (4th Cir. 2003) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949)).

7. Appellate review under the collateral order doctrine is appropriate where the order in question: (i) conclusively determines the disputed question; (ii) resolves an important issue completely separate from the merits of the action; and (iii) is effectively unreviewable on appeal from a final judgment. *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398, 401 (3d Cir. 2010); *Cohen*, 337 U.S. at 546; *In re Edison Bros. Stores, Inc.*, 1996 WL 363806, at *3 (D. Del. June 27, 1996); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 357 (3d Cir. 2007). This test is met here.

8. The conclusion that the GSA is fair and reasonable determines *the* key disputed issue in the Debtors’ cases and determines the assets that will comprise the Debtors’ estates and be available for distribution to claimants. The Debtors have acknowledged that they will not modify the terms of the GSA that have been approved by the Court in the next iteration of the Plan. (Jan. 20, 2011 Trans. at 48, 72). The Debtors argument in response to this motion that the

GSA remains “in flux” and an appeal would be inefficient because it could be rendered moot runs completely contrary to their representations to the Court about the finality of this issue and their careful insistence in this brief that the fairness determination for the existing GSA is “law of the case.” (Debtors Br. at p. 9 (“in flux”) and p. 3 (“law of the case”)). Accordingly, the Bankruptcy Court’s Order finding that the GSA is fair and reasonable satisfies elements (i) and (ii) of the collateral order doctrine.

9. Most importantly, as the Equity Committee explained in its moving brief, the finding that the Global Settlement is fair and reasonable is very likely to be effectively unreviewable on appeal from any subsequently entered order confirming a plan on grounds of equitable mootness. *See In re Cont’l Airlines*, 91 F.3d 553, 560 (3d Cir. 1993) (identifying the factors a court will consider in determining whether an appeal is equitably moot: (a) whether the plan of reorganization has been substantially consummated; (b) whether a stay of the confirmation order has been obtained; (c) whether the relief requested would affect the rights of parties not before the court; (d) whether the relief requested would affect the success of the plan; and (e) the public policy affording finality to bankruptcy court judgments). Indeed, given that the most important of these considerations is whether the plan has been substantially consummated, an equitable mootness argument seems inevitable. *In re Zenith Elecs. Corp.*, 329 F.3d 338, 343 (3d Cir. 2003).³ The third element of the collateral order doctrine, that the issue be unreviewable on subsequent appeal, is plainly met here.

10. Although the Debtors and other plan supporters acknowledge the Equity Committee’s position that appeal of the GSA after plan confirmation may be equitably moot,

³ Substantial consummation is defined in section 1101(2) of the Bankruptcy Code as: (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debt under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2).

they do so only to say, in effect, “tough luck.” (Debtors Br. at 10-11, 17) Notably, not one of the plan supporters indicate that it will agree to waive that argument. The Debtors’ insistence that potential mootness is irrelevant to the timing of this appeal is contrary to well-established precedent and should be rejected.

3. THIS APPEAL SATISFIES THE REQUIREMENTS FOR INTERLOCUTORY REVIEW

11. Even if the Court’s Order approving the GSA as fair and reasonable is determined not to be final (under the collateral order doctrine or otherwise), the Order is subject to discretionary review. Under 28 U.S.C. §§ 158(a) and (d)(2), interlocutory orders by a bankruptcy court may be appealed with leave from the appellate court. The Debtors insist that such leave can only be granted by the district court, but that that argument ignores Bankruptcy Rule 8003(d) which expressly authorizes the circuit court to grant interlocutory review by accepting certification of a direct appeal from the bankruptcy court, precisely the procedure that the Equity Committee seeks to invoke here.

12. Review of an interlocutory order requires a showing that (i) the appeal involves a controlling question of law; (ii) the issue is one where there is substantial grounds for difference of opinion; (iii) an immediate appeal may materially advance the ultimate termination of the litigation. *In re Delaware & Hudson Ry. Co.*, 96 B.R. 469, 472 (D. Del. 1989); *In re SemCrude, L.P.*, 407 B.R. 553, 556 (D. Del. 2009.) All three prongs are met here. The legal issue on appeal is the necessity for some record evidence concerning the legal analysis of litigation claims being reviewed for reasonableness under the *TMT Trailer* factors. As explained more fully in the Equity Committee’s moving brief, this is a controlling question of law for the approval of this settlement because the plan proponents failed to submit any such evidence. It is also an issue on which there are substantial grounds for difference of opinion, as demonstrated by Judge Cary’s

opinion in the *Spanston* case refusing to approve a settlement of legal claims for which the proponent failed to proffer any evidence of legal analysis. Immediate appellate review of this issue would unquestionably be more efficient than waiting until after one or more additional rounds of plan confirmation hearings, all of which would be based on the potentially erroneous finding concerning the GSA.

13. The Debtors dispute the grounds for interlocutory appeal by mischaracterizing the issue as a complaint about application of an existing legal standard to the facts of this case. This is not the issue raised in the Equity Committee's motion. The Equity Committee seeks review not of the application of law to the facts, but of a more fundamental legal question: whether a party advocating for the reasonableness of a settlement must submit some record evidence of a legal analysis of the claims being settled or whether, as here, such a party may rely on the court as a legal expert to perform its own analysis, in chambers and beyond the reach of cross-examination, based on pleadings and factual evidence. This purely legal issue concerning the applicable standard for approval of a settlement distinguishes this case from the cases relied on by the Debtors. *See In re Frascella Enter. Inc.*, 388 B.R. 619, 624 (E.D. Pa. Bankr. 2008) (determining that the District Court was unlikely to grant interlocutory review because the appellant's argument "merely evidences disagreement with my application of the law and does not reflect a divergence of opinions among courts so as to demonstrate doubt over the applicable standards.") (cited in Debtors' Br. at p. 12-13); *Patrick v. Dell Fin. Servs.*, 366 B.R. 378, 386 (M.D. Pa. 2007) (cited in Debtors' Br. at p. 13.)

14. In the Order that the Equity Committee seeks to appeal, this Court explicitly discussed this legal issue before engaging in its analysis of the actual record in this case. The Court made an independent determination that it could apply its own legal expertise to fill the

evidentiary gap in the plan proponents' case and evaluate the legal merits of the various tort, antitrust, and other claims at issue. Order at pp. 20-23. Contrary to the issues raised in the cases cited by the Debtors, this question is plainly distinct from the application of the legal standard to the facts of this case and, indeed, can be decided independent of any evaluation of those facts. The Debtors' claim that this issue "would necessarily entail a review of the facts and circumstances particular to this case" (Debtors Br. at 19) is simply incorrect, as the Court's Order addressing this issue independently demonstrates.

15. The necessity of evidence concerning legal analysis is also an issue on which there is undoubtedly room for disagreement. This Court cited no other case law supporting its decision to conduct its own analysis, nor have the Debtors or any of the other parties opposing this motion identified a single reported case in which a court undertook this role.

16. The Debtors argue that interlocutory review is improper because a successful appeal by the Equity Committee would lead to additional proceedings in the bankruptcy court, presumably a second fairness hearing on this GSA or an amended GSA. It may be the case that additional hearings would be required, but this would be true in most appeals seeking to overturn a final order that disposed of a fundamental issue in the case and it would also be true even if the Equity Committee's effort to appeal this issue is continued until after a final plan confirmation order. Review at this stage will require no more extensive post-appeal hearings than it would at any other, and review now is more efficient and expeditious than review after further proceedings have been conducted in this Court.

4. THIS APPEAL SATISFIES THE FOR IMMEDIATE CERTIFICATION TO THE THIRD CIRCUIT COURT OF APPEALS.

17. The standard for direct certification of a bankruptcy appeal to the circuit court is set forth in 28 U.S.C. § 158(d)(2)(A). It requires certification if any one of these factors is

satisfied: (i) the order on appeal involves a question of law as to which there is no controlling precedent or involves a matter of public importance; (ii) the order on appeal involves a question of law requiring a resolution of conflicting decisions; or (iii) an immediate appeal may materially advance the progress of the case or proceeding. *Id.* Although only one of these factors must be satisfied to require certification, all three are met here as the Equity Committee explains in its moving brief.

18. The Debtors insist that this appeal involves only settled law. Although the Debtors frame their failure to submit any legal analysis evidence as routine, they are unable to cite any authority whatsoever that supports the Court's ability to reach a binding determination on the fairness of a settlement with no evidence concerning the legal merits of the claims. The Debtors argue that the Equity Committee's insistence on having the opportunity to challenge such evidence would require the Debtors to waive attorney client privilege. (Debtors Br. at 18; see also Creditors Comm. Br. at 17.) This is nonsense. Waiver is certainly one option, but another possible procedure is for proponents of a settlement to offer expert testimony on the relevant legal analysis, an expert whose conclusions are addressed in open court and who is subject to cross-examination. *See e.g., In re Spansion, Inc.*, 2009 WL 1531788 (Bank. D. Del. June 2, 2009). The Creditors' Committee reliance on *TMT Trailer* for the proposition that the bankruptcy court must make an independent determination of fairness do not resolve the issue because they do not determine what evidence the bankruptcy court must consider in making its determination. (Creditors Committee Br. at 13-14 citing *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

19. The Debtors' effort to analogize to a Court's determination of likelihood of success in the context of a preliminary injunction or stay motion is also unavailing. In those

contexts, the court has the benefit of full merits briefing and argument, not simply allegations in pleadings. More importantly, in a motion for preliminary injunction, a court is rendering a tentative conclusion on the merits of an issue being litigated in *that case* before *that court*; such a court is not, as here, evaluating the merits of claims from other cases based on pleadings or, for claims that have not yet been filed, based only on summary descriptions by lay witnesses and lawyers' argument. In this context, with no record evidence setting out the plan proponents position as to the legal merits of the claims, the plan objectors have no means to test this crucial element of the fairness determination.

20. The second factor for certification of an appeal directly to the circuit court is also satisfied here because there is disagreement on the need for legal analysis evidence in evaluating the fairness of a proposed settlement. In *Spansion*, Judge Cary rejected a proposed settlement due to the absence of evidence offered by the settlement proponents. Although *Spansion* did not explicitly hold that such evidence is required, its absence was unquestionably the driving factor in the decision to reject the settlement. *Spansion*, 2009 WL 1531788 at 16 (Bankr. D. Del. June 2, 2009) (rejecting the proposed settlement because of “the largely conclusory record with which I am presented to evaluate the likelihood of success of the Actions. . .”) The Debtors argue that Judge Cary rejected the settlement because he doubted the Debtor in that case’s claim to have evaluated the litigation without advice of counsel. (Debtors Br. at 18). Judge Cary does express disbelief that the *Spansion* debtor could have evaluated claims without legal advice, but this is dicta, not the justification for refusing to approve the settlement. Approval of a settlement under *TMT Trailer* is an objective inquiry, not an investigation into the reasonableness of the debtor’s process, and Judge Cary’s rejection of the settlement reflected the lack of evidence before the

Court—in particular the lack of any legal analysis of the claims—not the failure by the debtor to do its own analysis. *See Spansion*, 2009 WL 1531788 at 13-14.

21. The need for settlement proponents to submit evidence of legal analysis of the claims is an issue of public importance, likely to recur in other bankruptcy cases, further justifying certification of this appeal. The Debtors argue that the absence of any authority on point is inconsistent with the EC's position that this issue recurs with some frequency. (Debtors Br. at 17). But the lack of controlling authority may reflect any number of factors, including the difficulty of appealing this issue before it becomes equitably moot and the infrequency with which settlement proponents attempt to obtain approval *without* such evidence. The issue of the character and quantum of evidence necessary to support approval of a settlement recurs in countless bankruptcies and the existence of appellate court guidance on the question would undoubtedly be beneficial to courts and litigants other than those involved in this case.


22. Finally, there can be no serious question that appeal at this stage could materially advance this bankruptcy case. The Debtors have acknowledged that they intend to seek confirmation of a revised plan based on a settlement agreement with the same essential terms and to avoid re-litigating fairness. Appellate review of the fairness determination should commence as expeditiously as possible to minimize the potential inefficiency caused by proceedings based on a potentially erroneous ruling. The Debtors arguments that appeal at this point would be inefficient because the Court may reject the final plan based on this settlement is pure gamesmanship and ignores the Debtors' stated reliance on the fairness determination as "law of the case."

CONCLUSION

The Equity Committee's motion to certify presents a novel legal issue that is crucial to the approval of the multi-billion settlement in this bankruptcy. It is ripe for appeal now. For this reason and the other reasons set forth above, the Equity Committee respectfully requests that the Court grant this motion and certify the issue for immediate review by the Third Circuit Court of Appeals.

Dated: February 3, 2011

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EXHIBIT A

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-12229 (MFW)

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In the Matter of:

WASHINGTON MUTUAL, INC., ET AL.,

Debtors.

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824 North Market Street

Wilmington, DE

January 20, 2011

2:04 PM

B E F O R E:

HON. MARY F. WALRATH

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: MICHAEL MILLER

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Objection of Proof of Claim 2692 Filed by Robert Alexander and James Reed, Individually and on Behalf of Others Similarly Situated (Docket No. 2528)

Motion of Robert Alexander and James Lee Reed for Relief from Automatic Stay to Continue Pre-Petition Class Action Against Washington Mutual, Inc. (Docket No. 5948)

Debtors' Sixty-Second Omnibus (Non-Substantive) Objection to Claims (Docket No. 6389)

Debtors' Sixty-Third Omnibus (Substantive) Objection to Claims (Docket No. 6391)

Notice of Status Conference Regarding, Among Other Things, the Opinion with Respect to Confirmation of the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (Docket No. 6564)

Motion to Schedule a Discovery Conference (re: Adv. Proc. No. 10-50911) (Adv. Docket No. 139)

Pre-Trial Conference (Adv. Proc. No. 10-53420)

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ALSO PRESENT:

ETHAN BUYON, Peter J. Solomon Company, Telephonically

LAWRENCE N. CHANEN, JPMorgan Chase Bank, N.A.,
Telephonically

JOE CRISCIONE, Esopus Creek Advisors, LLC, Telephonically

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MITCHELL E. SUSSMAN, Stone Lion Capital, Telephonically

WILLIAM VRATTOS, York Capital Management (USA),
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1 P R O C E E D I N G S

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

3 THE COURT: Good afternoon.

4 MR. ROSEN: Good afternoon, Your Honor. Brian Rosen,
5 together with my partner Adam Stochak, Weil, Gotshal & Manges
6 on behalf of the debtors. We're also here with Mr. Mark
7 Collins and Chun Jang from Richards, Layton & Finger.

8 Your Honor, we start the agenda at item number 28 and
9 29. These are matters associated with the Alexander and Reed
10 claims. The first was our objection to their proof of claim
11 and the second was their motion for relief from the automatic
12 stay.

13 Your Honor, as we indicated to the Court in connection
14 with the confirmation, we have resolved against this claim
15 against the estate, and we are in the process -- and we just
16 completed a term sheet with respect to it, and we're in the
17 process of fully documenting the settlement agreement. And as
18 a result of that, the claim against the estate will be
19 withdrawn, and so will the motion for relief from stay.

20 So items 28 and 29, when we complete that
21 documentation, Your Honor, will come off of the agenda.

22 THE COURT: Okay.

23 MR. ROSEN: Your Honor, items 30 and 31, the sixty-
24 second and sixty-third omnibus will be handled by Mr. Jang.

25 MR. JANG: Good afternoon, Your Honor. Chun Jang of

1 Richards, Layton & Finger on behalf of the debtors.

2 Your Honor, as Mr. Rosen indicated, the next two items
3 are the debtors' sixty-second and sixty-third omnibus
4 objections. The sixty-second was a non-substantive objection,
5 and we did receive two letter responses indicating that those
6 claimants could not appear at this hearing. It turns out that
7 after communicating with those two claimants, they really
8 cannot appear at any hearing during the weekday, and they're
9 reluctant to appear by phone because of their level of English
10 proficiency.

11 But regardless, they did submit those two letters.
12 They don't contest that they own stocks. But we did revise the
13 form of order so that their claim is subordinated to the level
14 of stock, rather than just being disallowed as stock, similar
15 to what we've done in the past. I don't know if that was your
16 preferred --

17 THE COURT: That is my preferred --

18 MR. JANG: Okay, Your Honor. If I may approach, I
19 have a form of order and the blackline of the changes.

20 THE COURT: You may hand it up.

21 All right, and I will overrule the letter objections
22 to the extent they are objections and will enter the order,
23 then.

24 MR. JANG: Your Honor, the next item is the debtors'
25 sixty-third omnibus objection. This is a substantive objection

1 where we objected to three different claims. With respect to
2 these three claims, one of them we agreed to continue while
3 we're waiting for further information from the claimant; that's
4 with respect to claimant Live Nation Marketing.

5 There was one response filed, and that was by Mr.
6 David Pappalardo, and we have reached out to him. He has
7 agreed to the subordination of his equity claim to the status
8 of equity, and we've adjusted the form of order accordingly.

9 And the third claim, Your Honor, that we're objecting
10 to is a claim based on a violation of a truth in lending act.
11 And we did not receive a response. However, it's clear from
12 the face of the claim that it says that the claim is against
13 the FDIC as a receiver of WaMu and JPMorgan, so it's not a
14 claim against the debtors.

15 And therefore, we ask the Court grant the objections
16 at this time.

17 THE COURT: Is there anybody here for the sixty-third
18 omnibus objection?

19 All right, I will sustain the objection.

20 MR. JANG: And Your Honor, I do have a form of order
21 and a blackline, as well.

22 THE COURT: You may hand that up.

23 All right, I'll enter that order, then.

24 MR. JANG: All right, Your Honor, with that, I'd like
25 to turn the podium over -- back over to Mr. Rosen who will

1 handle some of the status conferences.

2 MR. ROSEN: Your Honor, when we were last here on
3 January 6th, the Court announced that we would be receiving the
4 Court's ruling the following day, and of course, we all went
5 back and we waited and waited, and we got it. And we
6 appreciate the fact that the Court took such time to write
7 three different opinions on the three different issues,
8 including the most voluminous one which was the approximately
9 109-page decision with respect to confirmation of the plan.

10 Your Honor, as a result of that and a lot of the
11 thought that went into it and review of that and discussions
12 with many people, we thought it would be best to come back to
13 the Court by way of this status conference to discuss the
14 opinion and the next steps for moving towards confirmation. We
15 obviously understood the Court's direction, and specifically,
16 as the Court found, on page 2, about the debtors' plan not
17 being confirmable unless certain deficiencies are corrected.
18 And it's our goal, Your Honor, to correct all of those
19 deficiencies or make any modifications that the Court thinks is
20 appropriate and move forward as quickly as we can so that we
21 can make distributions to creditors.

22 As I indicated, Your Honor, we took the opportunity to
23 create this notice of the status conference and attached to it,
24 as Exhibit A, a chart. The chart specifically goes through
25 each of the points that the Court raised in the opinion and the

1 steps that the debtor was proposing to take to correct or make
2 the modifications that the Court was suggesting. And Your
3 Honor, we believe that, for the most part, we absolutely
4 clearly understood what the Court was suggesting in the
5 opinion. But as the Court will note in the exhibit, there were
6 a few instances where we noted or said, in the event that the
7 Court intended something different, guidance from the Court
8 would be appreciated.

9 So Your Honor, if I could just turn to those few items
10 because we want to make the plan the way the Court thinks the
11 plan should be, and we want it to read exactly as the Court
12 believes it should be read. And if I could fo --

13 THE COURT: I'm not sure if you're looking for an
14 advisory opinion here, but --

15 MR. ROSEN: No, I'm going back to the original
16 opinion, Your Honor.

17 THE COURT: Okay.

18 MR. ROSEN: And just saying what is it -- I'm not
19 asking for a second one.

20 Your Honor, specifically, if I could get the Court to
21 focus on that Exhibit A and ask you to turn to what is, I
22 believe, the fourth box down on that first page, the overall
23 boxes say "released by the debtors" and the fourth one said
24 "the releases provided by the debtors should not be extended to
25 all present and former affiliates of the lease parties". And

1 we refer the Court back to page 72 of the Court's opinion. And
2 Your Honor, what we indicated there on our resolution, because
3 the way we interpreted it, was that we will -- section 43.5 of
4 the plan will be amended consistent with the opinion, but it
5 would include and provide for a release of affiliates of
6 JPMorgan and the FDIC from the debtors because we interpreted
7 the Court to say that based upon the consideration that is
8 being provided by those parties pursuant to the global
9 settlement agreement, they were entitled to a release for the
10 benefit of their affiliates from the debtors and the debtors
11 alone.

12 The next item, Your Honor, is -- I believe it relates
13 to, Your Honor -- I just want to make sure -- on page 3. And
14 this goes to the third-party releases. And it refers to page
15 84 of the opinion, specifically, as we included in the middle
16 section, Your Honor, the third-party releases may be granted by
17 those who affirmatively consent by voting in favor of the plan
18 and not opting out of the third-party releases. Your Honor, we
19 had included in the right-most box what we believed had to be
20 done, and I would like to say that I've subsequently been
21 informed, since we filed this on Monday, that we may even have
22 to modify that to a certain extent. Specifically, Your Honor,
23 as we indicated in the notice that we thought what the Court
24 was asking us to do was send a release election form expressly
25 setting forth that no distribution will be made without the

1 holder's affirmative agreement to the third-party releases
2 provided in section 43.6, and that shall be sent to, A,
3 impaired creditors who previously opted out of the releases or
4 failed to return a ballot, and B, holders of disputed claims
5 who did not receive a ballot in connection with the prior
6 solicitation. Additionally, that all unimpaired creditors or
7 impaired creditors who affirmatively voted for the plan and did
8 not opt out of the releases would be deemed to have granted the
9 third-party releases. That was how we saw it, Your Honor.

10 We have been told subsequently that purely as an
11 effect or a result of the DTC manner in which securities are
12 held that it is virtually impossible to determine who the
13 people were that may have not opted out previously, and that we
14 actually need to send the notice to all impaired creditors,
15 meaning even those who may have opted out previously. So it
16 would be a solicitation of that election form only across the
17 entire securities. So all senior note people, Your Honor, all
18 senior sub people --

19 THE COURT: Okay.

20 MR. ROSEN: -- all PIERS people.

21 That does raise an issue, Your Honor, as we indicated
22 on page 4. And we ask for the Court's guidance there, as well.

23 THE COURT: Well, who are the unimpaired?

24 MR. ROSEN: The unimpaireds, Your Honor, and -- if I
25 can pull out my plan -- Your Honor, we looked at Class 4, the

1 WMI medical plan claims, 5, the JPNC rabbi trust policy claims,
2 6, other benefit plan claims, 7, qualified plan claims, 8, WMB
3 vendor claims, 9, Visa claims, 10, bond claims, 11, WMI vendor
4 claims, and 13, I guess, convenience claims.

5 Your Honor, everyone but the convenience claims, those
6 are the claims that are being paid by JPMorgan pursuant to the
7 plan, they're being -- those obligations are being assumed and
8 being taken care of by JPMorgan a hundred cents on the dollar,
9 and that's why they were treated as unimpaired, pursuant to the
10 plan.

11 And specifically, Your Honor, I believe we
12 identified --

13 THE COURT: Now, should they be giving a release to
14 JPMorgan if JPMorgan is assuming their claim?

15 MR. ROSEN: They're getting paid a hundred cents on
16 the dollar on day one, though, Your Honor.

17 THE COURT: Are they being paid on day one?

18 MR. ROSEN: Yes.

19 THE COURT: Or are they being assumed and paid -- for
20 example, the vendors?

21 MR. ROSEN: Paid.

22 THE COURT: They're being pa --

23 MR. ROSEN: Out of the fif --

24 THE COURT: Does JPMorgan agree with that?

25 MR. ROSEN: It's out of the fifteen million dollar

1 escrow that's established.

2 MS. FRIEDMAN: Your Honor, Stacey Friedman from
3 Sullivan & Cromwell on behalf of JPMorgan Chase. We do agree
4 with that. And the fundamental premise that we had read in
5 your opinion on third-party releases for nondebtors was vote,
6 consent, and then you can have your nondebtor release. And I
7 think when we're talking about the classes that are clearly
8 voting and clearly consenting, we understood your opinion quite
9 clearly, I think. What Mr. Rosen is teasing up is the
10 unimpaired classes who are -- instead of people who are getting
11 a hundred cents on the dollar on day one, where we read your
12 opinion and maybe read Middle Forming (ph.) and a few others,
13 and are here for guidance as to what was intended.

14 THE COURT: Okay.

15 MS. FRIEDMAN: But we do want to do whatever Your
16 Honor thinks is correct.

17 THE COURT: Well, I was concerned about the unimpaired
18 and are they really -- I mean, are they unimpaired simply
19 because you're retaining their legal rights, in which case that
20 is in contrast to a release --

21 MR. ROSEN: No, I --

22 THE COURT: -- versus are they getting a check and
23 being paid off in full on day one. That was, I think, my --

24 MR. ROSEN: Your Honor, you're absolutely correct.
25 There might be a discrepancy or a distinction between those

1 like the medical plan or the rabbi trust who have claims that
2 have not ripened at this time. Absolutely. But I would say
3 half of them are in that category and half are not. Some are
4 getting cash on day one.

5 But my concern would be, of course, in that instance,
6 if we were going to go out and solicit them and they did not
7 return, does JPM assume their obligation or not? And of
8 course, we would hope that JPM would assume that obligation,
9 and I think they would want that, as well.

10 This gets to another point, Your Honor. And --
11 thanks, Stacey -- and I bring it up in the context of the
12 securities claimants, because to me, that is the one where it
13 appears to be the greatest likelihood of somebody not
14 responding. Your Honor, the Court previously entered orders,
15 at least three of them -- and I say that with respect to the
16 senior notes, the senior subnotes, and the PIERS -- as allowing
17 the claims in certain amounts. They are not in any way claims
18 that we are objecting to; they are not disputed in any way.
19 And a lot of these people received their election forms and
20 responded. Our great concern, Your Honor, is that you may have
21 some holders of these securities who get a new election form
22 from DTC and say, I already signed this; why am I going to do
23 it again. Or, I'll just throw it in this pile, or I'll just
24 throw it in that pile, and they won't get it back. And we see
25 a great inequity as a possibility that these people with

1 allowed claims who aren't going to get their money. And we
2 want to make sure that they can get their money. And that was
3 why we reflected in the chart, Your Honor, we wanted to discuss
4 with you a mechanism for providing this.

5 We think, Your Honor, maybe we'd do it, we'd just send
6 them repeated notices every three months until six months and
7 say, guys, we're really serious; you need to sign this. And
8 they may call us at some point and say, where's my money, and
9 we'll say, because you didn't sign the form, you didn't get it
10 back. We understand the Court's reluctance to say send them a
11 check and if they negotiate the check, then they've deemed to
12 give the release, but we think maybe that's a possibility as
13 well, Your Honor, because these are people who are clearly with
14 allowed claims; they're securities people, and we want them to
15 get their money. But at the same time, Your Honor, we
16 understand your concern about somehow coercing a third-party
17 release. But we really think that we have to come up with some
18 resolution to this issue to get these people their money and
19 not just have it out there in the great abyss.

20 What if a nominee, a broker doesn't send it to the
21 actual holder, so the holder actually can't sign it and send it
22 back, and they don't get their money? These are the issues
23 that we've been grappling with for the last two weeks. How do
24 we try and solve this problem? We want these people to get
25 their money as quickly as possible.

1 THE COURT: Are you doing the distribution directly to
2 the beneficial holders, or are you issuing the check to the
3 indenture trustees or others?

4 MR. ROSEN: It is going -- it goes to the indenture
5 trustee, then it goes through DTC. So it is possible that
6 it -- for that very reason about these forms not making their
7 way back through there, Your Honor. And that's our concern.

8 THE COURT: But I mean the distribution of the cash.

9 MR. ROSEN: The initial one will be held by the
10 indenture trustee.

11 THE COURT: Right.

12 MR. ROSEN: Yes.

13 THE COURT: I don't know the answer to that.

14 MR. ROSEN: So we were -- as I said, we were trying to
15 come up with some novel ways to do it. One was this
16 possibility of treating it as an undeliverable for a certain
17 period of time and send them repeated notices. And as I said,
18 the other way, Your Honor, might be if we could -- if there
19 could be a check actually sent to them with the notice. If you
20 negotiate this check, you will be deemed to give the third-
21 party release required by section 43.6 of the plan.

22 THE COURT: Again, your check is going to go to the
23 indenture trustee.

24 MR. ROSEN: Correct.

25 THE COURT: So the indenture trustee's going to sign

1 it?

2 MR. ROSEN: Well, he's going to have to give the
3 notice saying that this is what will happen if you do negotiate
4 that check -- or, do negotiate this distribution.

5 THE COURT: I'm missing it. Are you writing one
6 check --

7 MR. ROSEN: Our distribution --

8 THE COURT: -- to one indenture trustee --

9 MR. ROSEN: Well --

10 THE COURT: -- for the senior secured noteholders --
11 senior noteholders?

12 MR. ROSEN: Mr. Crowley represents one of the
13 indenture trustees.

14 MR. CROWLEY: Your Honor, good afternoon. Leo
15 Crowley, counsel for the Bank of New York Mellon which is
16 trustee for the senior notes. In concept, on the effective
17 date or ten days after the effective date, assuming that
18 there's enough to pay the senior notes in full, we would get a
19 single payment. I think, as the plan was originally cast, that
20 payment would be short by the amount of opt-outs.

21 THE COURT: Um-hum.

22 MR. CROWLEY: So it might be short by five million
23 dollars; I think there's a million and a half dollars in opt-
24 outs, originally. And then we would deposit it to DTC. DTC,
25 in turn, would fund those participants.

1 THE COURT: Right.

2 MR. CROWLEY: And what Mr. Rosen is suggesting, I
3 think, makes a lot of sense which is that we'll get a handful
4 of people who are simply not going to return ballots at all.
5 In fact, there were -- of the four plus billion dollars of
6 senior notes claims in the original solicitation, there was
7 something like ninety-one million on which no ballots came back
8 at all. And while I recognize, Your Honor, that it's a bit of
9 a stretch in view of your ruling in the Zenith case, I think,
10 because we're dealing with a very small constituency, and it's
11 a constituency that in all probability is going to be paid in
12 full, that saying, when they -- for those people, if they don't
13 affirmatively opt out, then by accepting the payment, they're
14 deemed to have released. I think that would be consistent with
15 the spirit of the case law on releases in this context.
16 Because otherwise -- it's a lesser of two evils problem.

17 THE COURT: Um-hum.

18 MR. CROWLEY: Either you reach a little bit beyond
19 your ruling in Zenith, which I acknowledge, I think both of us
20 are asking you to do, or you run the risk that there's somebody
21 out there -- and there was a retail distribution; there are
22 individual investors who own these securities -- you run the
23 risk that somebody, out of ignorance, is simply not going to
24 get their distribution when they would have intended to give
25 their release and they would've wanted the distribution.

1 THE COURT: Well, I don't know if anybody else wants
2 to weigh in on this issue.

3 MR. STARK: Good afternoon, Your Honor. Robert Stark
4 from Brown Rudnick on behalf of the TPS Consortium. I don't
5 want to weigh in specifically on this issue, other than
6 harkening back to your original statement, is this an advisory
7 opinion. I presume there's going to be a new plan filed. I
8 presume these people on this side of the aisle can figure out
9 these issues. And I presume that we're going to have another
10 hearing on confirmation of that plan. And so the idea of
11 raising sort of intermediate issues and saying, hey, Judge, how
12 should we fix them, it's kind of an interesting idea. I think
13 it's completely out of order, though.

14 MR. HODARA: Your Honor, with respect to the specific
15 issue that was just being discussed -- Fred Hodara, Akin, Gump,
16 for the official committee of unsecured creditors -- with
17 respect to that specific issue, the creditors' committee, over
18 the past two weeks, has talked about the very issue that Mr.
19 Crowley just addressed. And we think, as he stated well, it
20 is, in a sense, the lesser of evils. We think that the risk
21 that individual holders will miss out on their distribution
22 because they have not affirmatively checked the box and granted
23 the release is a greater evil. And so we do think that the
24 suggestion that on receipt and then cashing of the distribution
25 the release is deemed to be given is a fair way to do it and,

1 in the circumstances, the appropriate way to proceed.

2 THE COURT: Okay, anybody else?

3 MR. MAYER: Yes, Your Honor. My name is Tom Mayer;
4 I'm from Kramer Levin and we represent Aurelius in its
5 individual capacity as a PIERS holder and holder of securities.
6 Just a question: the issue of exactly who would get the new
7 opt-outs has been a matter of some debate among the settling
8 noteholders, and we were hoping that we could limit it just to
9 people who need the new opt-out, as your opinion suggested.
10 Mr. Rosen's now said that's not possible. We're not sure we
11 get that. But I have a -- just a question as to mechanically,
12 how that's supposed to work because you're going to get a whole
13 bunch of people who signed the opt-outs "correctly" the first
14 time. They're now going to get a second set of opt-out forms.
15 Which form is going to govern? The most recently received
16 form? The first form? The second form? That was one of the
17 benefits of just trying to make sure only the people who needed
18 a do-over got. You've got a lot of people who did it
19 "correctly" the first time who'll now get a chance to do it
20 differently, and the question is which form will govern.

21 THE COURT: My guess is the last one.

22 MR. MAYER: So the last form received governs.

23 THE COURT: That's usually the rule, I think.

24 MR. MAYER: This is basically a completely new opt-
25 out.

1 UNIDENTIFIED SPEAKER: Unfortunately, that's the way
2 it's done.

3 MR. MAYER: Okay, thank you. I'm sorry.

4 THE COURT: Is that the debtors' thought, too?

5 MR. ROSEN: It's, unfortunately, the result that we
6 get to because of the DTC structure, Your Honor, yes. We have
7 to -- we can't tell the universe of those that did not opt out,
8 so we have to go back and ask. And we will have to set new
9 record dates in order to accomplish this. And Your Honor,
10 there may be people who sold out of the prior position; they
11 may hold it now, too. So that's why you have to do it this
12 way.

13 Your Honor, that takes me to page 4 of the chart.
14 We're in the section "released claims" and we're focused on
15 page 86 of the Court's opinion. And in page 86, in the first
16 full paragraph, the Court focused on language that was in
17 section 1.159(ii) of the definition of released claims and felt
18 that that was inappropriate. And what we suggested there in
19 the proposed resolution, Your Honor, was modifying that as the
20 Court described in the next full paragraph on page 86, and
21 inserting that into the Romanette (ii). And again, Your Honor,
22 if the Court intended otherwise, we would ask the Court for
23 guidance.

24 THE COURT: Well, I do have some concern about -- many
25 of these look like you're correcting it, but without everybody

1 having a chance to see what language you actually put in and --

2 MR. ROSEN: Well, Your Honor, in this --

3 THE COURT: -- being given the chance to -- as Mr.
4 Stark says -- object to confirmation if there's some suggestion
5 or some other issue or some disagreement as to what the proper
6 correction should be, I'd like the parties to either talk about
7 it or we'll have another hearing on it.

8 MR. ROSEN: Okay. Your Honor, this is obviously a
9 provision that is of paramount for JPMorgan and the FDIC with
10 respect to these third-party releases, and that's why we were
11 trying to get it right, here, and make sure that we follow the
12 Court's directive. And one of the issues that we have, Your
13 Honor, is the fact that the global settlement agreement has a
14 131 expiration date, and parties want to know if, in fact,
15 they're getting what they think they're getting before they
16 sign on for any additional extensions of that.

17 THE COURT: Um-hum.

18 MR. ROSEN: We obviously hope that they will, but
19 that's why we were looking, at least with respect to this one,
20 right away, Your Honor, for the Court's guidance.

21 THE COURT: Well --

22 MR. ROSEN: I heard you.

23 THE COURT: -- it looks like what I said on page 86,
24 so --

25 MR. ROSEN: Okay. Thank you, Your Honor.

1 THE COURT: -- but you can see that as well as I.

2 MR. ROSEN: Thank you, Your Honor.

3 Your Honor, next -- I don't know if I -- oh, we're
4 down on the bottom of page 4, Your Honor, with respect to the
5 post-petition interest, and the Court's -- we're referring,
6 now, to page 89 and 90, Your Honor, of the opinion. And of
7 course, the Court referenced in there the necessity to make
8 sure that late-filed claims are covered, and obviously, we will
9 make the modifications to the waterfall to make sure that the
10 late-filed claims are included.

11 Honestly, Your Honor, I'm a little bit baffled, here,
12 because I don't know where you cut off a late-filed claim. And
13 so, Your Honor, one of the things that we've been discussing is
14 is a late-filed claim one that is beyond the bar date that
15 satisfies the Pioneer standard of excusable neglect, or is it
16 any claim that is filed beyond the bar date, and if so, up
17 until what date? And the opinion did not say it; I, honestly,
18 couldn't find anything in the Code that dealt with this issue.

19 THE COURT: I don't think 726 addresses it, either,
20 though, does it?

21 MR. ROSEN: It doesn't, Your Honor. And so the
22 question is what is, or how do you define the universe of what
23 a late-filed claim is? Is it one that just satisfies Pioneer?

24 Right now, Your Honor, we see the magnitude of this to
25 be approximately five million dollars. It is not a large

1 number. But we're still trying to understand what the Court
2 would like there..

3 THE COURT: Well, as I recall, this was raised by the
4 LTW holders. So -- maybe you can tell us what 726 means.

5 MR. STEINBERG: Well, Your Honor, I think that the
6 most simplest and practical way of dealing with this is that
7 since they never sent notice to the LTW holders, and that's why
8 we have this problem and the LTW litigation's being handled as
9 a class action, then the simple matter is that if we win the
10 litigation, the entire group will be allowed, and if we don't
11 win the litigation, the entire group will not be allowed. And
12 the issue about late filed and not late filed won't apply to
13 the LTW holders.

14 MR. ROSEN: Actually --

15 THE COURT: So you're really only worried about your
16 constituents.

17 MR. ROSEN: Right.

18 MR. STEINBERG: Yeah. I mean, unless someone else
19 wants to pay me.

20 MR. ROSEN: And honestly, I wasn't even talking about
21 him.

22 THE COURT: I know.

23 MR. STEINBERG: He never worries about me, I know.

24 THE COURT: Because there's a separate escrow for
25 that.

1 MR. ROSEN: Right, because we've focused on them
2 separately, Your Honor, and included them in the general
3 unsecured class from the get-go. We're focused on everybody
4 else who may have filed a late-filed claim.

5 MR. STEINBERG: No, I assumed he wasn't talking about
6 us because our number was more than five million dollars.

7 THE COURT: Five million, that's what I thought.

8 MR. STEINBERG: So I assume that what I said is the
9 way that he's planning on dealing with this, but we'll wait to
10 see it when we see it in paper.

11 MR. SILVERSTEIN: But Your Honor, just to add two
12 words, if you want the amicus answer -- it's Paul Silverstein
13 from Broadbill.

14 THE COURT: Yes.

15 MR. SILVERSTEIN: I mean, if it's the Pioneer
16 standard, under Pioneer, they're not late-filed claims because
17 if you satisfy Pioneer, you're deemed to be a timely-filed
18 claim.

19 THE COURT: Good point.

20 MR. SILVERSTEIN: So that's my only amicus comment on
21 that one.

22 MR. ROSEN: I appreciate that. So then I need a back-
23 end date, and I have no idea what that back-end date could be,
24 Your Honor.

25 THE COURT: The distribution date, is what you're

1 suggesting? I don't know.

2 MR. ROSEN: Yeah.

3 THE COURT: U.S. Trustee have any comment on this? I
4 don't --

5 MR. ROSEN: We would suggest the confirmation date,
6 Your Honor. We think you have to call the question at some
7 point, but --

8 MS. SARKESSIAN: Your Honor, Juliet Sarkessian for the
9 U.S. Trustee. I'm here covering this for Jane Leamy. I'm --

10 THE COURT: She's right behind you.

11 MS. SARKESSIAN: Oh, is she here? Oh, you're back.

12 THE COURT: She's backing you up.

13 MS. SARKESSIAN: Sorry.

14 MS. LEAMY: Your Honor, unfortunately, I had to run
15 out for another hearing that got pushed again, so I didn't get
16 the issue. I apologize.

17 THE COURT: The issue is with respect to the inability
18 to pay interest on unsecured claims until late-filed -- or,
19 excuse me, late-filed claims get paid before interest gets paid
20 on unsecured claims, and the question is, do we have to hold on
21 distribution to see if some late-filed claim gets filed --

22 MS. LEAMY: Right, well, I don't know if this --

23 THE COURT: -- years from now, or do we just go ahead
24 and make the distribution --

25 MS. LEAMY: Right.

1 THE COURT: -- based on what "late-filed" claims have
2 been filed to date.

3 MS. LEAMY: Well, I don't know if the issue of any
4 reserve was discussed. I mean, I guess if the parties could
5 come to an appropriate reserve amount.

6 THE COURT: The debtor estimates that these -- today,
7 anyway, the late-filed claims are five million --

8 MR. ROSEN: They're about five million --

9 THE COURT: -- other than the LTWs.

10 MR. ROSEN: Right. Other than the ones -- there were
11 other late-filed claims that we have already objected to on
12 substantive grounds like one you disposed of earlier today,
13 Your Honor.

14 THE COURT: Um-hum.

15 MR. ROSEN: Those that have not been disposed of, yet,
16 are approximately five million dollars. So it's not a reserve
17 issue as much as, again, we need to just call the question at a
18 certain point of time. We think the confirmation date should
19 be the appropriate date, Your Honor, since that's when everyone
20 is locked in. We can't have this going on forever and ever.

21 MS. LEAMY: Well, I think if there's a choice, we want
22 to make allowance for some late-filed claims. Obviously,
23 someone has to prove their case, but I would like to make -- I
24 would think that there should be allowance for the -- for any
25 late-filed claims.

1 THE COURT: I think there should be a reserve for
2 those that have been filed through -- let's say through
3 confirmation date, and then we'll deal with it that way.

4 MR. ROSEN: Thank you, Your Honor.

5 Your Honor, going back, then, that paragraph on post-
6 petition interest, again, the Court indicated that in
7 accordance with 726(a), as expressly subject to subordination
8 pursuant to 510, interest can be paid on unsecured claims upon
9 the payment in full of unsecured claims, including late-filed
10 claims. We will now make sure that we have the late-filed
11 claims included in that. They will be catalogued, if you will,
12 Your Honor, up to the confirmation date, and as I said, we
13 estimate those to be five million dollars at this point.

14 And the plan already provides, Your Honor, for the
15 payment in full of all of those allowed unsecured claims, and
16 as I indicated, we will make sure that the waterfall contains
17 these late-filed claims that we know of, prior to the payment
18 of the post-petition interest.

19 Your Honor, on the top of page 5 of the chart, there
20 is an issue there with respect to the applicability of contract
21 rate rather than at the federal judgment rate. And as we
22 indicated, Your Honor, we submitted that as there was no
23 admissible evidence warranting the application of the judgment
24 rate, the contract rate should apply. We, Your Honor, don't
25 see any reason not to do that at this time. I know the Court

1 made mention of this in the opinion at page 94 without saying
2 whether the Court needed to reach the issue, however, because
3 the Court felt that there were other issues that the Court was
4 dealing with in the opinion itself.

5 THE COURT: I'm sure others have a comment on this.

6 MR. ROSEN: Some may, Your Honor.

7 MR. STARK: Your Honor, this is a large trialable
8 issue. The plan, as I recall Your Honor saying, the plan was
9 not being confirmed. It wasn't actually a tried issue. It
10 wasn't my burden of proof; it was theirs. But in any event,
11 there'll be a new plan, and in response to all the discussion
12 with Jane Leamy, I presume there'll be a new record date
13 motion. There'll be lots of procedure. There's a 2004 on
14 these issues. But as I read Your Honor's opinion and I read
15 Mr. Toma's (ph.) objection, we have an open issue that we have
16 to explore through discovery and raise at confirmation. That's
17 where we are. The fact that Mr. Rosen warrants -- says that
18 this doesn't warrant, in his quasi-adjudication capacity,
19 further consideration is interesting, but he's only one side of
20 the aisle. There are lots of others on this side of the aisle
21 who think quite differently.

22 MR. STEINBERG: Your Honor, Arthur Steinberg for the
23 LTW holders. I actually think the simple fix is simply that
24 the post-petition rate will be set pursuant to the Court's
25 order at confirmation when you will have the presentation of

1 all the evidence; why not have a flexible document that will
2 not have to be resolicited if it turns out that Your Honor
3 wants to consider the federal judgment rate. You won't have
4 to, then, do the whole process again. So I don't know why this
5 thing is not structured so that it just provides you post-
6 petition interest to be paid at either the federal judgment
7 rate or the contract rate as set forth in the Court's
8 confirmation order.

9 MR. JOHNSON: Your Honor, Robert Johnson from Akin,
10 Gump on behalf of the official committee of unsecured
11 creditors. It's our view that the record closed on December
12 7th, and Mr. Toma's --

13 THE COURT: Well, on that plan.

14 MR. JOHNSON: Yes.

15 THE COURT: But aren't we going to have another plan?
16 I didn't confirm that plan.

17 MR. JOHNSON: That's right. That's right. But Mr.
18 Toma's objection was filed on November 19th. Discovery was
19 still in process. It is our view that there was a time for
20 discovery, and that time for discovery passed. And so we are
21 reluctant to see any reopening of the record. So that's the
22 position of the committee on that.

23 THE COURT: So the debtor won't be presenting any
24 evidence in support of its modified plan? I don't know if --
25 I'm not sure I agree with you.

1 MR. JOHNSON: I see the point, Your Honor.

2 THE COURT: Yeah.

3 MR. SARGENT: Your Honor, Edgar Sargent, Susman
4 Godfrey on behalf of the equity committee. Just briefly want
5 to register our agreement with Mr. Stark that the record is, in
6 fact, not closed, that this will be a new plan, and we've filed
7 a motion for 2004 discovery related to these issues, and we'd
8 like to be permitted to proceed with that and to use the
9 information in the subsequent confirmation hearing. Thank you.

10 MR. CURCHACK: Good afternoon, Your Honor. Walter
11 Curchack on behalf of Wells Fargo as trustee for the PIERS. I
12 just want to make one point with respect to this argument. I
13 don't rise here to address the unsubstantiated allegations that
14 have been made against certain holders of the PIERS.

15 THE COURT: Yes.

16 MR. CURCHACK: I simply rise on behalf of all the
17 other PIERS holders, including Mr. Toma, who I don't believe
18 should pay the price if, in fact, there was some misconduct by
19 another member of their class. This is quite the contrary from
20 the situation in the Coram case. The PIERS didn't benefit as a
21 class by any of the alleged misconduct, assuming there was any,
22 and I certainly am not suggesting that there was any. And I
23 think the concept that the entire class ends up losing its
24 recovery because of -- it's contractually-obligated to pay
25 contract rate interest because there might have been something

1 done by some members of the class is absurd. And I don't even
2 think Mr. Toma realized the hole he might have dug himself for
3 if that was the case that that's the way that this is
4 interpreted.

5 THE COURT: Um-hum.

6 MR. CURCHACK: Thank you.

7 THE COURT: I think I'll be hearing all this again at
8 a future time. But that's why I made no ruling on it.

9 MR. WITZEL: Your Honor, Steven Witzel from Fried
10 Frank on behalf of the noteholders. Good afternoon. We would
11 just argue that the time for the equity committee to take
12 discovery of the settlement noteholders has passed. They fully
13 and completely took part in the confirmation discovery process.
14 They chose not to take any discovery of the settlement
15 noteholders, and their objection to confirmation had no
16 reference to the settlement noteholders. And the executive
17 committee, in particular, was fully aware of the -- well, I'll
18 say the baseless hearsay allegations of misconduct, and they
19 chose not once but several times to forego any factual
20 investigation prior to confirmation.

21 Look, the settlement noteholders are prepared to
22 demonstrate that these hearsay allegations are, in fact,
23 baseless and meritless. They're not prepared to put up with
24 what we would call absurdly broad and time-consuming and
25 wasteful document and deposition requests, motivated, we

1 believe, in large part to delay this otherwise orderly process
2 and seek intrusive discovery on very confidential and
3 proprietary information. We would, to the extent that the
4 Court believes that this needs to be reviewed or put forth, we
5 would ask for some time to respond to the 2004 and also to work
6 with the debtors and creditors' committee if the Court believes
7 it's necessary to come up with a process to address the Court's
8 concerns and supplement the record as needed.

9 THE COURT: All right, well, I will get to the
10 discovery motion. I did not schedule it for today.

11 MR. WITZEL: Thank you.

12 THE COURT: But I'll discuss scheduling of it at the
13 end.

14 MR. MAYER: Your Honor, Tom Mayer again for Aurelius.
15 I'd like to try to narrow and respond to something you said
16 about another hearing.

17 Your Honor, there was a plan, and there were a set of
18 modifications proposed to that plan in order to address issues
19 that Your Honor raised in your order. That doesn't require a
20 completely new plan, and if the completely new plan deals with
21 changing a rate of interest from coupon to federal judgment
22 rate, that requires complete resolicitation. That was never
23 our deal. People voted an balloted based on getting the coupon
24 rate. So obviously, if Your Honor decides that the whole plan
25 fails because of that, that's Your Honor's decision to make.

1 But I don't think we're in a situation where you have to do a
2 complete new plan and then you get a new confirmation hearing,
3 because if we're doing a completely new plan including that
4 material term, Your Honor, we're talking 15 to 1600 basis
5 points worth of recovery here.

6 THE COURT: Um-hum. Um-hum.

7 MR. MAYER: That's a new resolicitation; that's back
8 to square one. I didn't think we were going that way; I hope
9 we're not. Our hope was there's a set of modifications, there
10 may be some required testimony on those particular
11 modifications; maybe not. But there will have to be,
12 obviously, a hearing on the approval of the plan with those
13 modifications. But that doesn't, in my view, shouldn't allow a
14 complete reopening of the first confirmation hearing. The
15 issue before the Court, I think, is there were several things
16 wrong with the plan. Basic deal got approved. Several things
17 wrong with the plan. Try to fix it. A set of modifications,
18 has to be a hearing on those modifications. Maybe there's
19 evidence on those modifications. But that's not, okay, now,
20 let's go back and start over and raise all sorts of issues that
21 could have been raised months ago. Because if we're going to
22 start tinkering with an enormously material term like 1,500
23 basis points of recovery for a particular class, that is a
24 resolicitation and that's going back to square one. And I was
25 hoping we were not there. I don't think that's appropriate.

1 MR. STARK: Your Honor, may I respond to that?

2 THE COURT: You may.

3 MR. STARK: Again, I feel like we're having a debate
4 over interlineating an order. Okay? You had a plan; it didn't
5 get confirmed. You issued a very lengthy opinion as to why and
6 said go back and figure it out amongst yourselves how to make
7 it comply. They haven't done that, yet. They're coming up in
8 succession, all the people on that side of the aisle, and
9 saying, hey, Judge, does this work for you? Well, maybe Mr.
10 Mayer doesn't -- one idea doesn't work for him. They have a
11 lot of work to do, apparently. And eventually, they'll file
12 something, and eventually, we'll all get to look at it. And
13 then we'll all get to litigate it, if appropriate. But the
14 idea to come here and sort of say, well, I'm not really sure
15 what procedure we're going to use, Your Honor, and we don't
16 have agreement among ourselves; what do you think?

17 THE COURT: Um-hum.

18 MR. STARK: And then say, well, it's just little, tiny
19 modifications. Your Honor, you ruled that the PIERS class
20 couldn't divert -- within that class, you couldn't have partial
21 rights offerings; you had to go to the full class. And as I
22 read this on page 5, it says they're now going to go to a full
23 class of rights offering. That feels like a different plan to
24 me.

25 Again, I'm not trying to prejudge what they haven't

1 done yet, but it seems kind of strange to me that they keep
2 coming up in succession, saying, well, tease this out a little
3 bit. Help -- we're going to tease out a little bit of
4 additional advisory opinion about how we can get this done as
5 quickly as possible. I frankly think, Your Honor, is it's your
6 job, litigants. Go figure it out amongst yourselves and come
7 back when the time's right.

8 MR. ROSEN: Your Honor, I know Mr. Stark's going to
9 raise whatever he can because of what happened in his little
10 adversary proceeding on the summary judgment, but let's talk
11 about what usually happens in a case, which is when you reach
12 conclusion of a confirmation hearing, and as you and I have
13 done together on other cases, the Court will inform the debtor
14 of certain modifications that you would like, and then you will
15 enter a confirmation order. And I understand the reasons why
16 that was not done in this particular circumstance, but I also
17 understand that the Court in the opinion did say that -- fix
18 these few things and then come back. And I also do understand
19 that the Court noted that 1129 was satisfied in many other
20 respects. And you went down the list of what was satisfied,
21 and you said please fix these things.

22 Why he said succession? Because I keep getting
23 interrupted, Your Honor. I could do this all at once. People
24 want to -- Your Honor, I could go right to the bottom line
25 which is what I think my global approach to this is, and I'm

1 happy to get there as soon as we finish the chart.

2 THE COURT: Well, but I think his point is you can
3 tell us what your global approach will be, and then I'll remain
4 silent and you'll do it, and then people will object, and then
5 we'll have a hearing to see if that passes muster.

6 MR. ROSEN: Well, that is one way to approach it. But
7 I would say that that's probably not the most efficient; it's
8 certainly not the most cost-effective. But we could do it that
9 way, Your Honor.

10 The other thing I would note is with respect to some
11 of these things that you've suggested that we do, they are
12 small changes. They are not anything significant. The one that
13 Mr. Mayer suggests would be a big change, and it could have an
14 effect if I had to go solicit his class. His class voted no on
15 the plan, Your Honor, and frankly, I'll take the no vote. And
16 I won't go back and resolicit them, necessarily, because I'll
17 just go along with all the other classes who voted in support
18 of the plan. That would be one thing for us.

19 But Your Honor, let me go to what my bottom line is
20 because I think it's the best way to approach this. Your
21 Honor, we think that there are modifications that have to be
22 made to address the Court's opinion. We've -- using his words,
23 Mr. Stark's, that is -- we've teased them out, here. Your
24 Honor, we understand what the modifications are; those that we
25 have some questions on, we were looking for insight from the

1 Court. And I known at least with respect to some of these, the
2 Court has given us that insight.

3 Your Honor, we would like to move forward as quickly
4 as possible. We said that in the notice. We, in fact, as the
5 equity committee noted in their motion to expedite everything,
6 we said that in the press release after the Court rendered its
7 opinion. Your Honor, we aim to do this by way of filing --

8 THE COURT: I didn't read your press release.

9 MR. ROSEN: I know, but they did --

10 THE COURT: Okay.

11 MR. ROSEN: -- and they cited it in their papers.

12 THE COURT: Right, okay.

13 MR. ROSEN: Your Honor, we aim to do this -- we could
14 file a short few page modification or we could give you the
15 composite addresses it. And I know from being before you on
16 many occasions, including at the confirmation hearing, you'd
17 like to see the full blacklined version so that it's all on one
18 piece of paper. And that's what we've done, Your Honor. We've
19 created -- we're in the process of finalizing, subject to what
20 we're doing today, a seventh amended plan. But it really only
21 addresses the modifications that are in the opinion.

22 We don't want to go out, Your Honor, and solicit
23 acceptances and rejections again. We think that's a waste of
24 time. We would like to move forward. We would like to do it,
25 Your Honor, by way of a wrap. A supplemental disclosure

1 statement wrap that essentially goes around the other one.
2 People have already got the disclosure statement. We'd like to
3 give them a short piece of paper that explains what the Court
4 did, explains what we're doing to address what the Court did,
5 and now letting everybody know, here's an election form for
6 you. Please send it back. If you're someone who didn't get a
7 stock election form previously, like a disputed claimant like
8 the Court asked us to do, please let us know if you want a
9 stock election. If in fact you're somebody who's below that
10 threshold that we designated for a rights offering, here's your
11 chance. But I would have to say, Your Honor, we may get to the
12 point, and we included it in this notice, that we can't -- if
13 go that low, meaning to that low below the threshold, we may
14 not be able to satisfy that subscription rights offering, and
15 we may have to yank it completely and just return the thirty-
16 one million dollars that we already received because it won't
17 satisfy certain obligations under something called the
18 "principally/partly rule" which is beyond me and I need better
19 people to explain it. But that is a possibility.

20 So Your Honor, it's our goal to give you this wrap,
21 for you to look at this wrap and say it satisfies whatever 1125
22 supplemental disclosure I need to do. Go out and solicit
23 everybody that you said, Mr. Rosen, which is now everybody in
24 the world for this election form, subject to whatever we
25 decide, Your Honor, on that unimpaired grouping, and then come

1 back.

2 Now, Mr. Stark has stood up and he said, I want a full
3 hearing on this. Well, you know what, a full hearing would be
4 nice, but I really don't think it's necessary. The Court gave
5 sixty-five pages in its opinion, detailed discussion of the
6 global settlement agreement. And unless, as a result of what
7 we're doing here, we're modifying the global settlement
8 agreement, other than tweaking it to remove people who
9 otherwise were getting a release, consistent with the Court's
10 opinion, or extending the date of the termination itself, why
11 do we have to come back here and have another hearing on that?
12 Let the Court take the hearing, the transcript that you had
13 previously, all that was before the Court, take the findings,
14 put it into a piece of paper, and by the way, that may be an
15 appealable order when the Court confirms a plan. There's no
16 reason to go through that process again.

17 What else would we do at a confirmation hearing, Your
18 Honor? It would be just showing you that we satisfied
19 everything else because the Court already told us we satisfied
20 1129 in going down the list of whatever ones that we did do and
21 the ones that the Court noted. To the extent that there was
22 one that the Court didn't reference, we're happy to do it
23 again.

24 There was a reference, Your Honor, to the payment of
25 fees and expenses and not having them subject to the Court's

1 review is reasonable. We're now making that change in the
2 plan, and that, obviously, would satisfy 1129 as you see that
3 one subsection to be applicable.

4 So that's what we envisioned, Your Honor. A wrap,
5 getting that approved, going out with an election form to
6 everybody, coming back here as soon as possible to have this
7 confirmation hearing. To the extent that the equity committee
8 or Mr. Stark or anybody else in this courtroom wants to appeal
9 from that confirmation order, if the Court decides to enter
10 one, then let's do that. But let's get through that process,
11 let us satisfy what the Court asked us to satisfy, let's do it
12 as expeditiously as possible.

13 When do we want to do this, Your Honor? We think,
14 Your Honor, that we can get this wrap filed very quickly.
15 There is an omnibus date on February 8th, and I know that if I
16 filed it tomorrow, that would be less than twenty-some odd days
17 required by the rules, and you might say, Brian, I don't want
18 to have it. You may say Mr. Rosen.

19 THE COURT: Mr. Rosen, I would.

20 MR. ROSEN: You may say, Mr. Rosen, I don't want to
21 have it on February 8th. And I would say, Your Honor, okay, I
22 understand that, but waiting for the omnibus late into February
23 may be too late. Can we pick a date in the middle of February
24 that would work that would satisfy the Bankruptcy Rules. And I
25 would say, that would work for me. And then I would want to go

1 out, Your Honor, and have another one. And so on down the
2 line, Your Honor. So our goal is to try to reach confirmation
3 and consummation as quickly as possible, and at the same time,
4 giving everybody the right to make these elections that the
5 Court thinks it's important to have made.

6 So that's our goal, Your Honor. That's where we come
7 out. It's to give everybody the opportunity to step up, but at
8 the same time, take advantage of what the Court did over a
9 course of a week and a half and not belabor the Court and
10 everybody else here to redo the process.

11 Now, if I can go back to one other thing, and I think
12 I already did say it, which is the last issue I saw on this
13 chart, Your Honor.

14 MR. STARK: Can I have an opportunity to come back and
15 respond to that?

16 THE COURT: You can.

17 MR. STARK: Appreciate it.

18 MR. ROSEN: The last issue, Your Honor, was the one
19 that I just mentioned, but I want to repeat it, and it was the
20 subscription rights, Your Honor. We saw what the Court wants
21 us to do as far as the threshold. We're willing to dip below
22 it if, in fact, it does not bring into violation any securities
23 laws, and if it does, Your Honor, it would be our intention to
24 withdraw the rights offering to the plan itself.

25 THE COURT: Okay. All right, responses to that

1 suggestion of process, going forward?

2 MR. SARGENT: Your Honor, Edgar Sargent again on
3 behalf of the equity committee. Now, Mr. Rosen points out that
4 the Court approved certain parts of the proposed plan and GSA
5 and requested modifications to others. One of the issues that
6 the Court requested modification to or had concerns about was
7 the interest rate. And the Court had concerns about that
8 because there wasn't -- the Court had concerns about certain
9 allegations which had not been fully developed. The debtors
10 and the creditors' committee, by seeking to cut off discovery
11 and push this confirmation process through with no further
12 development on that issue, are essentially asking for
13 reconsideration of that ruling.

14 We think the Court's order is clear that the existing
15 record is not adequate to rule on that issue, and that,
16 therefore, further discovery needs to be developed.

17 Now, we have a scheduling proposal --

18 THE COURT: Let's not talk about the discovery yet,
19 but in concept --

20 MR. SARGENT: It's just I was using it -- I'm sorry,
21 Your Honor, but I was using it --

22 THE COURT: As one example. But in concept, with
23 respect to those items that I did decide, they're not going to
24 be relitigated.

25 MR. SARGENT: Correct.

1 THE COURT: Okay. It's law of the case, basically.

2 MR. SARGENT: We would agree with that.

3 THE COURT: Okay.

4 MR. SARGENT: But there are open issues that need to
5 be explored. And we have a proposal for a schedule that I
6 believe is somewhat longer than Mr. Rosen's, although it is
7 roughly within the same ballpark. It's not months longer. We
8 think that there's approximately a month's worth of discovery
9 that needs to be taken. The issues that need to be explored,
10 there's discovery; we've served, as has already been noted, the
11 Rule 2004 discovery requests into the settling noteholders
12 investments. There are document requests and interrogatories.
13 We think two weeks, assuming the settling noteholders cooperate
14 properly. There's not a lot of objection or motion practice
15 related to that. That discovery could be completed in two
16 weeks. And we noted depositions for each of the four settling
17 noteholders and complete those in another two weeks.

18 There's discovery into the -- the other major issue,
19 factual issue that I believe needs some discovery is the
20 revaluation of the reorganized debtor. The Court found in the
21 order that the evidence submitted by the debtors, the value of
22 that entity is not sufficient, not proper. We would propose
23 that the debtor would provide us with a new valuation at some
24 point prior to plan confirmation, and we would have a chance to
25 explore that in discovery and respond to it. Probably need two

1 weeks, at least, to do that. And the timing for that would key
2 off of when the debtors would be able to come forward with
3 their new valuation.

4 We need some time to respond to our -- we filed a
5 motion, in addition to our motion for Rule 2004 discovery, the
6 equity committee has filed a motion to certify certain issues
7 in this case for appeal. We would want some time for that
8 motion to certify; we don't need, obviously, the entire appeal
9 to have been resolved before we proceed with confirmation, but
10 we would ask that at least that motion to certify be resolved.

11 There's going to have to be the solicitation and
12 consent to the releases. Apparently, the debtors' planning on
13 doing that without first getting Court approval -- although
14 that wasn't completely clear to me -- of the revised language.
15 And that's going to take at least several weeks.

16 We have -- there's one other, I think, more minor
17 issue that we're going to conduct some discovery into; we're
18 going to serve discovery requests either later today or
19 tomorrow on the debtors, going to this question of the PIERS
20 and whether or not the PIERS are properly treated as debt or
21 equity. It may well be that we can just resolve that
22 informally -- I hope so -- with the debtors in just a matter of
23 days by getting the information that we need. But that's one
24 other thing we want to resolve before the hearing.

25 Then we would need to see the proposed revised plan,

1 including, of course, the revisions to the releases. We would
2 need probably two weeks after having received that to prepare
3 objections, and that objection period, of course, would also
4 have to be subsequent to the discovery.

5 So I'm thinking of a month for discovery, putting us
6 to roughly February 20th or 25th to complete the discovery that
7 we've mentioned. The plan is out by that point, two additional
8 weeks to prepare our objections, and then the Court could
9 schedule a hearing at its convenience at some point after that,
10 sometime from mid-March to sometime in April. That would be
11 our proposal for a schedule, Your Honor.

12 MR. WITZEL: Your Honor, Steven Witzel for the
13 settlement noteholders again, understanding that the Court is
14 just interested, at this moment, in the process point and
15 limited to that and not the discovery. Again, just simply
16 noting -- talking about the PIERS and debtor equity, these are
17 all issues that should have -- could have, should have been
18 brought up in round one. Why this is coming up now is -- we
19 don't know. And certainly the -- again, just --

20 THE COURT: Well, but it could have, but no decision
21 was made, so.

22 MR. WITZEL: Well, we -- okay, we would argue that
23 the -- all that information was available, and they should have
24 brought it up. But with respect -- the important point is with
25 respect to the allegations of the misconduct, again, we just

1 repeat that these are hearsay allegations, they're baseless,
2 they're meritless, and the idea that there's going to be a
3 month or months of discovery, it was these same considerations,
4 the avoidance of the sort of costly and time-consuming
5 discovery based on, frankly, very flimsy and unsupported
6 allegations that led the Supreme Court to change the notice
7 requirements in Iqbal and Twombly, and the idea that they can
8 make these allegations and then try to get wholesale discovery
9 for process point, we would strongly oppose that. But we can
10 talk about that later.

11 THE COURT: Okay.

12 MR. WITZEL: Okay, thank you.

13 MR. MAYER: Thank you, Mr. Stark.

14 Your Honor, Tom Mayer, again, for Aurelius. The
15 hearing on discovery will be held at some future time, and we'd
16 like to argue at that point that no discovery is -- on the
17 points sought is justified or required and we'll put in papers
18 to deal with it. That's not for today. We understood that
19 that was -- that motion to shorten time was not being granted,
20 and therefore, I will not address the appropriateness of
21 discovery or not.

22 But again, I think it comes back to the point, you
23 asked for process and hearing. The question is what are you
24 going to hear? Are you going to hear just the modifications,
25 or are you going to deal with issues that could have been

1 raised earlier but weren't on the grounds that this is a
2 completely new plan. We hope that you look at this as a set of
3 modifications and not as a completely new plan because I do
4 think that puts us back to square one with a whole bunch of
5 things. Mr. Rosen is correct that on numerosity grounds, the
6 PIERS class voted against the plan, but it's also true that the
7 large holders of the PIERS elected not to litigate cram-down
8 because we were in support of the settlement.

9 Again, if this is a set of discrete modifications, we
10 can get this case done. If it's a completely new plan, it's a
11 completely new hearing.

12 MR. CURCHACK: Your Honor, Walter Curchack again on
13 behalf of the PIERS trustee. I'd just like to limit myself to
14 the process point and remind the Court -- I'm sure it's not
15 necessary but I will anyway -- that every day that this case
16 goes on is money out of the PIERS' pockets, the innocent PIERS'
17 pockets, as well as the allegedly not-so-innocent PIERS'
18 pockets. And the most important thing is to reach closure as
19 soon as possible in this case or there will simply be no
20 recovery for this class at all, and it's not going to go
21 anywhere else except into the pockets of the senior creditors
22 by reason of the contractual subordination.

23 THE COURT: Um-hum.

24 MR. CURCHACK: So I would urge Your Honor to find as
25 short a timetable as possible to reach that.

1 THE COURT: Okay.

2 MR. STARK: Again, Robert Stark from Brown Rudnick on
3 behalf of the TPS Consortium.

4 I guess what troubles me is the kind of "trust me"
5 notion. And maybe I just don't understand it, and if -- so
6 maybe I'll just ask some questions, and maybe Mr. Rosen will
7 come back and tell me if I have it right or wrong.

8 If the idea is that he's going to do a new plan, an
9 amended plan, and he's going to have, as he refers to it, an
10 1129 wrap, that sort of says, I have another disclosure
11 statement; you've seen it, or maybe I'll even attach it, and
12 here are some additional, kind of, pages that sort of explain
13 what we've done that's different due to Your Honor's opinion,
14 and that's what he's going to submit, I don't know that I have
15 a problem with that. And if the idea is that he's going to
16 submit it to Your Honor on notice to everybody so that we can
17 see what his wrap says and come back and say, you know, that
18 1125, it says what adequate disclosure and parties are supposed
19 to be able to opine upon that for Your Honor to see if
20 additions and deletions are appropriate, I don't know that I
21 have a problem with that, either. There are aspects of it that
22 sort of, I think, are a little interesting about, from a timing
23 and sequencing perspective that he's going to be soliciting
24 votes from people on issues about releases when we won't have a
25 record developed with respect to the matters that are the

1 subject of the 2004 motion, and maybe that just comes out in a
2 contested matter over a plan confirmation, but okay, he's going
3 to file a motion that says, okay, here's my wrap. Come and
4 make your commentary if you want to see it, and we'll all have
5 a hearing before Your Honor, an appropriate course pursuant to
6 1125 and applicable rules, and thereafter, he can submit that
7 to the parties, I think that's a fine procedure. I don't have
8 a problem with it, as long as it runs in tandem with people's
9 discovery rights and the ability to be heard at the appropriate
10 time at confirmation. Works for me.

11 MR. LAURIA: Good afternoon, Your Honor. My name's
12 Tom Lauria. I'm with White & Case. We represent the senior
13 note group. Your Honor, what I'm concerned about is
14 efficiency, at this point. The equity committee, last summer,
15 told us that they needed an examiner and they would live by
16 what the examiner determined. The examiner determined that
17 they were not going to get the twenty billion dollar homerun
18 that they were looking for in the litigation, and lo and
19 behold, the equity committee did not live with what the
20 examiner determined. So we had a confirmation hearing, and
21 they had discover, they had a full opportunity to make their
22 case that the settlement should not be approved. And they lost
23 again. Now, they have a remedy, which is to file an appeal if
24 and when there is a confirmed plan. Right now, we don't have
25 that. And I think the notion that an appeal can go forward

1 from an order denying confirmation of a plan that they opposed
2 that may not ever get confirmed is outrageous. There are
3 issues of justiciability that I think the equity committee is
4 overlooking, and I don't think that they should be overlooked.

5 But the important thing, here, is that the equity
6 committee's had their shot. They've had more than their shot.
7 And they still have at some point in time, if there is a
8 confirmed plan, the remedies that are provided under the Code
9 to seek an appeal from an order confirming a plan that they
10 don't like, and to try to get a stay of that order confirming a
11 plan. That's how the game is played. The notion that they
12 should get a pre-appeal from an order applying to issues they
13 don't like where a plan hasn't yet been confirmed. And the
14 notion that we should bog this thing down with an entire new
15 record is equally as nonsensical.

16 I don't know exactly what the debtors' going to file.
17 I think the debtor should be commenced for trying to identify
18 what it understood the issues that the Court had raised in its
19 confirmation order and for making an attempt to give everybody
20 a heads up regarding what their intention is to resolve those
21 issues, and certainly, we're caught in a bit of a difficult
22 situation here. I think we're all trying to be efficient, or
23 at least I think some of us are trying to be efficient and not
24 play a guessing game here. This is not a game of hide-and-
25 seek. There are billions of dollars at stake, here, and

1 literally, millions and millions of dollars of interest that
2 continue to accrue that may, in fact, never get paid, depending
3 on how certain issues are resolved and what ultimate values
4 turn out to be here. And what -- I think that it just needs to
5 be made clear that more discovery and more delay has never been
6 free in this case, and that at some point -- and I believe
7 we've reached that point; based on the record today, the scales
8 tip -- and we've got to find the most efficient course to try
9 to get to an end zone.

10 Section 1127 of the Bankruptcy Code and Bankruptcy
11 Rule 3018 tell us how the game is played if a debtor modifies a
12 plan at any time before confirmation. And I think we are, in
13 fact, before confirmation. It doesn't say before confirmation
14 or prior to denial of confirmation. So I think we've got to
15 take the plain meaning of the statute at its face. So 1127
16 still applied. And I think if the debtor files amendments, we
17 look to 1127 and Bankruptcy Rule 3018 to determine if there
18 have to be additional solicitations and who has to be
19 solicited. And until the debtor actually --

20 THE COURT: I'm not sure anybody's contesting that,
21 are they?

22 MR. LAURIA: Well, I heard talk about new
23 solicitations, and it sounded to me like we're getting way
24 ahead of ourselves.

25 THE COURT: Well, the debtor's resoliciting based --

1 MR. LAURIA: Well, I think there --

2 THE COURT: -- for the opt-out.

3 MR. LAURIA: I think there are elections that people
4 can make. Those aren't solicitations. And I guess we can all
5 have a discussion about that at the appropriate time, but I
6 know of no reason why those elections couldn't be made post-
7 confirmation.

8 THE COURT: Well --

9 MR. LAURIA: To try to --

10 THE COURT: -- I'm not writing the plan --

11 MR. LAURIA: Right.

12 THE COURT: -- so talk to Mr. Rosen.

13 MR. LAURIA: Right. What I'm trying to do is just
14 focus on the fact that there's a lot of money at stake here,
15 and there's a lot of money being spent every time we come here.
16 And there's seem to be people in the room who have no real
17 economic stake in this estate, as it currently exists, who've
18 made their best shot, not once but twice, to get an economic
19 stake, and they still do not have it. And they're content to
20 spend the money of the people who do have an economic stake,
21 seemingly endlessly. And we just have to get --

22 THE COURT: Well --

23 MR. LAURIA: -- to an end line here --

24 THE COURT: All right.

25 MR. LAURIA: -- and see if we can have a confirmed

1 plan.

2 THE COURT: What do you think of the process? Bottom
3 line. The debtor files a plan, modification. That's the only
4 thing that is going out on notice.

5 MR. LAURIA: That --

6 THE COURT: You have no objection to that.

7 MR. LAURIA: I think that's right, Your Honor. I
8 think we should have a hearing set on those modifications as
9 quickly as possible. And if people want to object and try to
10 argue at that time that there should be delays, for whatever
11 reason they want to argue, I guess they're free to do that, and
12 the Court will decide.

13 But I think the best thing for all concerned is to get
14 on as tight a timeline as possible now. In other words, let's
15 set a date by which the debtor has to file the modifications.
16 Let's get a hearing on those modifications as soon as possible.
17 And then, let everybody do what they got to do. But let's
18 preserve, for the estate, the opportunity to get to that end
19 zone quicker instead of later.

20 THE COURT: All right.

21 MR. STEINBERG: Your Honor, Arthur Steinberg for the
22 LTWs. I will be brief. With regard to the process, I think
23 enough people have argued what they think is appropriate that I
24 will just follow along with the group as to what Your Honor
25 collectively decides without trying to present an independent

1 thought.

2 But to pick up on Mr. Lauria's point about being
3 efficient, and since Mr. Rosen did circulate his proposed
4 resolution, and for many of the people here, they never had an
5 opportunity to comment on it, on those that I think are
6 contrary to Your Honor's order and to the extent that they
7 would helpful and efficient so that it would be corrected now
8 as compared to be corrected then, I'd like to just point out a
9 couple of things.

10 With regards to the releases by the debtors, which is
11 on his first page, he provides that the released parties will
12 include the debtors' estates, the debtors and the reorganized
13 debtors; I don't think it's appropriate to put into a released
14 section by the debtor that the debtor is releasing the debtor
15 or an entity that has not even been created yet, the
16 reorganized debtors, et cetera.

17 To the extent that he references page 70 of Your
18 Honor's opinion and says that Your Honor had ruled something
19 with regards to a time reference as prior to the petition date.
20 I think if he looks at page 70, he'll see that's a
21 rearticulation of his argument. Your Honor had said that those
22 releases to the -- you are not granting releases to those
23 parties without regards to whether it was prior to the petition
24 date or after the petition date. Anybody who gets protected
25 after the petition date will be protected by the exculpation

1 provision.

2 With regard to the exculpation provision on page 74,
3 the LTW carve-out includes officers as well as directors of the
4 debtors.

5 THE COURT: What -- where are you?

6 MR. STEINBERG: On the exculpation provision as it
7 relates to the --

8 THE COURT: LTW.

9 MR. STEINBERG: -- LTW --

10 THE COURT: Yeah.

11 MR. STEINBERG: -- carve-out. Your Honor --

12 MR. ROSEN: He's on page 2 of the chart Your Honor.

13 THE COURT: Got it, got it.

14 MR. STEINBERG: Your Honor had ruled that it applies
15 to both the officers and the directors of the debtors. The
16 debtors' chart only says the debtors. On the third-party
17 releases, the debtor also makes the reference to the prior to
18 the petition dates, citing to Your Honor's opinion, on page 81
19 and 82. I don't think Your Honor referenced the applicability
20 of third party of third-party releases as it relates to a time
21 period pre-petition date versus post-petition.

22 And so I make those comments, and the debtor can
23 either agree with me or not, but I put them on the record
24 because I figured that this was the opportunity to do so.

25 There is one process point that no one has really

1 focused on, and that is that Your Honor, in your opinion around
2 page 100, talks about the fact that since we are now not
3 confirming before year-end, but confirming after year-end that
4 the valuation presented by the debtor has now changed because
5 of the applicability of the net operating loss. For those
6 people, including my clients, who are now going to be given an
7 opportunity to make a stock election, a stock election to take
8 stock instead of a cash distribution, to the extent that we
9 become an allowed creditor of a reorganized debtor, would
10 necessitate a review of what the new valuation of the new
11 company is in view of the NOL situation and in view of the
12 other infirmities in the valuation process that Your Honor had
13 highlighted in the opinion around page 100.

14 And I do think it is critical that if there's a
15 registration rights agreement, which is essentially supposed to
16 raise capital for the reorganized entity so that there could be
17 a greater utilization of what could potentially be as much as a
18 five billion dollar NOL, that before people make the election
19 as to whether to take stock or not, they should know whether
20 there's a registration rights agreement, the success of it, and
21 if the debtor plans on pulling, that they should have the
22 opportunity of knowing that before actually making their
23 election.

24 I don't know, really, how that fits into the debtors'
25 timing. I do think that's critical if you're going have a

1 meaningful stock election, especially if you're going to take
2 stock in an entity where you absolutely will be a minority
3 stock holder and no control over the situation as compared to
4 others.

5 Finally, the two last points is that Mr. Rosen did
6 recite that the global settlement will expire as of January 31
7 unless extended, and I do think that whatever is done here, we
8 obviously should know whether there's a global settlement still
9 in place. There were changes to the types of releases that
10 JPMorgan will get from third parties and whether JPMorgan
11 entities, as compared to JPMorgan, are going to be released as
12 part of the plan. They will need to be clarified one way or
13 the other.

14 And I guess my final point is is that I think I
15 understood Mr. Rosen's points on third party releases and late
16 file claims as it relates to the LTW's. I think I understand
17 the language in this proposed resolution. I would only ask,
18 for efficiency's sake, before it actually gets in to a piece of
19 paper, he run it by myself and my colleague, Mr. Silverstein,
20 to think with here, so that we believe that it conforms to what
21 is represented today, and we don't have to argue about it again
22 in front of Your Honor.

23 MR. ROSEN: Your Honor --

24 THE COURT: You didn't think it would be easy.

25 MR. ROSEN: It hasn't been in two years or plus, Your

1 Honor. Your Honor, with respect to some of the things that Mr.
2 Steinberg said, obviously, we're not going to waste the Court's
3 time, and ours as well, in filing a wrap, if you will, if in
4 fact there's no extension of the global settlement agreement.
5 So we're going to address that issue before we even get going
6 here.

7 I want to make clear that 1125, Your Honor, relates to
8 the solicitation of acceptances and rejections to the plan, and
9 that's not what we're intending here. So I noticed I
10 referenced time frames, Your Honor, twenty-eight days under
11 2002. I'm not sure if that will be applicable if, in fact, we're
12 not really even soliciting acceptances and rejection, but
13 rather we're just soliciting the elections themselves, or --
14 and in that regard, the stock election; and in that regard
15 also, whether or not we're doing a subscription. And we will
16 make those calls before we bother the Court with that, Your
17 Honor.

18 I understand Mr. Lauria's point with respect to you
19 could do this post-confirmation on the election process, but
20 it's of paramount importance to the other parties to the global
21 settlement agreement. And by the that, I mean, specifically,
22 JPMorgan Chase and the FDIC that we have closure on this issue
23 beforehand and not have a post-effective date kind of
24 solicitation on the election process.

25 But nevertheless, Your Honor, we still think it's wise

1 to come to the Court and let the Court see what we're
2 suggesting as to letting these people know about what is going
3 on.

4 To Mr. Steinberg's point about evaluation in the
5 opinion, I know that the Court said some things about the
6 evaluation. I don't necessarily agree with those, but that's
7 for another day, Your Honor, but we'll make that the wrap that
8 we have before the Court will discuss the evaluation, which
9 was, as the Court knows, uncontested testimony by Mr. Zelin.
10 We will also, to the extent that we do the rights offering,
11 have in the wrap information concerning the value, because
12 anyone who does subscribe, if there is a positive value, that
13 is a deduct from their other distributions that they are to
14 receive, pursuant to the plan. So all of that will be in this
15 wrap, Your Honor, and we will get it before the Court.

16 As to Mr. Sargent and what seemed to be an endless
17 stream of I need this, I need that, and this is the time frame
18 that I need it for, Your Honor, we think that that all can go
19 on, contemporaneously, with what we're suggesting. And that's
20 the way we handled thing on the pre-December confirmation
21 basis, and there's no reason to change the process.

22 If Mr. Sargent wants to take discovery and the Court
23 thinks it's appropriate, the debtors certainly aren't going to
24 stand in the way. And we're happy that he does whatever he
25 wants to do. As far as admissibility of it, Your Honor, that's

1 fine, and we'll deal with those issues whenever they arise,
2 Your Honor.

3 THE COURT: I don't think he's filed a 2004 against
4 the debtor, though.

5 MR. ROSEN: No. But he said he was going to serve me
6 with discovery --

7 THE COURT: Okay.

8 MR. ROSEN: -- today or tomorrow.

9 THE COURT: Okay.

10 MR. ROSEN: Your Honor, we think that we should back
11 in front of you in mid-February to look at this wrap. We think
12 that we should back in front of you, Your Honor, mid-March, to
13 confirm the plan as modified. That's our time frame, and
14 everything that has been suggested today can be accomplished
15 very neatly within that time frame.

16 And to address Mr. Lauria's and Mr. Curchack's
17 concerns, we're not going to have this estate further
18 dissipated, pushing this thing out into April or May or
19 whatever. We want to come back. We want to address the
20 Court's issues, and we want to start making distributions.

21 So that's the time frame that we're looking for, your
22 Honor.

23 THE COURT: Tell me when you will have the wrap
24 language. I know you've --

25 MR. ROSEN: Your Honor --

1 THE COURT: -- got a draft but --

2 MR. ROSEN: I do have a draft. I have a draft of many
3 different things here, every different version. It depends on
4 what you want that day. Your Honor, I think that we could file
5 it, clearly, by the end of this month, which is January 31st,
6 even perhaps January 28th. The only reason I say not sooner
7 because there are so many people. We have to take account what
8 we talked about today, and I want to make the appropriate
9 modifications.

10 To the extent that I can get it filed by a week from
11 today, that would be a goal.

12 THE COURT: Well, it looks like it's -- it can't be
13 heard the 8th, and unfortunately I'm out the following week.
14 So it looks like February 24 is going to be the hearing on the
15 wrap.

16 MR. ROSEN: Well Your Honor, if that's --

17 THE COURT: Let me see.

18 MR. ROSEN: Your Honor? Your Honor, we already have a
19 hearing Friday of that week, on the 25th, so if you want to go
20 on the 24th --

21 THE COURT: Oh, is it -- I was saying the 24th because
22 I assumed that was your date.

23 MR. ROSEN: I'll go -- I'll come on the 24th, and I'll
24 stay for the 25th of the omnibus.

25 THE COURT: No.

1 MR. ROSEN: It doesn't matter. I'll move the omnibus
2 up a date as well.

3 MR. STARK: Your Honor --

4 THE COURT: I thought it was on the 24th.

5 MR. ROSEN: I --

6 THE COURT: You're saying it's the 25th?

7 MR. ROSEN: I have the 25th.

8 THE COURT: You're right.

9 MR. STARK: Your Honor, if I may. I apologize.
10 There's a fair amount of murmuring on this side of the room
11 only from the standpoint that that's president week, and I know
12 a lot of folks have plans. I'm sure people can change them if
13 they need to or are told to, but that is an issue.

14 MR. ROSEN: Your Honor, from the debtors' standpoint,
15 nothing is more important than this --

16 THE COURT: I can't --

17 MR. ROSEN: -- and we would like to go forward that
18 week, if possible.

19 THE COURT: Well, I can't get my calendar up.

20 (Pause)

21 THE COURT: Well --

22 MR. ROSEN: Can you -- do you need a calendar or the
23 Court's calendar?

24 THE COURT: My calendar's back up.

25 MR. ROSEN: Okay.

1 THE COURT: It is the 25th. I'm inclined to leave it
2 the 25th.

3 MR. ROSEN: Your Honor, that's at 2 p.m. Your Honor,
4 the only thing I would ask --

5 THE COURT: I'm sure it's going to take more than an
6 hour, you think?

7 MR. ROSEN: That's exactly right, Your Honor. And I
8 know that you like to keep an omnibus to an hour.

9 THE COURT: I can move you to 12 on the 25th. I don't
10 have time on the 24th.

11 MR. ROSEN: That's fine, Your Honor. Your Honor, if
12 you wanted to keep to that time frame, the omnibus in March is
13 on March 28th, currently scheduled for 10:30 in the morning.

14 THE COURT: March 28th, it is, yes. How many days do
15 you think we're going to need this time?

16 MR. ROSEN: Well, Your Honor, if it is what we think
17 it should be, I think it's a one day affair. I can't speak for
18 others because they'll do what they want to do. But things
19 that we got out in the first one, Your Honor, the way we talked
20 about already it be the law of the case, I think there are very
21 few issues that remain.

22 MR. SARGENT: Your Honor?

23 THE COURT: Others disagree.

24 MR. ROSEN: Of course, Your Honor.

25 MR. SARGENT: Actually, we hope that it could be done

1 in a day. We won't know until we take our discovery if we have
2 additional evidence to submit.

3 MR. ROSEN: Obviously, Your Honor, on each of those
4 days we would move whatever other omnibus things there to
5 another date so that we would free the calendar up.

6 THE COURT: Well, I'll leave it. If you want to
7 change the 28th to 9:30, I have one other matter at 2 that
8 should be short, and it looks like you can, otherwise, have the
9 full day.

10 MR. ROSEN: That'd be great, Your Honor.

11 THE COURT: And I think, then, parties agree that the
12 issues will be -- with respects to issues I did not decide on
13 my opinion and the issues that are raised by the debtors'
14 modifications.

15 MR. ROSEN: Your Honor, there are two additional items
16 on the agenda for today. One is the pretrial with respect to,
17 what we referred to, as the WNB senior note adversary
18 proceeding. And Your Honor, I would just want to move that to
19 February 8th. There is nothing to discuss at this point in
20 time. All the parties are just waiting for confirmation of the
21 plan involve -- the defendants on the other side. And we've
22 extended answer periods with respect to that one.

23 MR. STROCHAK: Specifically, Your Honor, I apologize,
24 that is --

25 THE COURT: Are you talking about Broadbill? No,

1 you're talking about number --

2 MR. STROCHAK: 34.

3 THE COURT: -- 34, okay.

4 MR. STROCHAK: 34, Your Honor.

5 THE COURT: I'm sorry.

6 MR. ROSEN: 33 is the Broadbill one, and my partner's,
7 Mr. Strochak is here, and I believe --

8 MR. STROCHAK: Your Honor, it's Adam Strochak for the
9 debtors. On the Broadbill matter, I think what was the
10 calendar today was a discovery conference that had been
11 requested at the plaintiff's request at the last hearing. We
12 adjourned it because the Court's opinion was forthcoming on
13 summary judgment. We now have that, and what we've done is
14 we've taken the initiative and proposed a, kind of, case
15 scheduling order for the plaintiffs. They indicated they were
16 not prepared to discuss that today, so I think what we'd like
17 to do is move this matter to February 8th and then have a,
18 essentially, a case scheduling conference where we hopefully
19 can agree on a scheduling order for the whole case and get on
20 track to a resolution.

21 THE COURT: Go ahead.

22 MR. SILVERSTEIN: Paul Silverstein from Broadbill.
23 That's correct, Your Honor.

24 THE COURT: Okay. Let's talk about scheduling with
25 respect to the matters that the equity committee filed; the

1 discovery conference and, I guess, the certification of direct
2 appeal.

3 MR. SARGENT: Yes, Your Honor, did you want argument
4 on the scheduling or --

5 THE COURT: Well, let me tell when -- I ask people
6 when they're available. I think it was a suggestion. We're
7 not ready to discuss going ahead on that today.

8 MR. STROCHAK: Your Honor, Adam Strochak, again, for
9 the debtors. Yes, we're not prepared on the twenty-six hours
10 notice we had on the certification for direct appeal to the
11 third circuit, as we indicated in the papers we filed. We
12 think that there are jurisdictional issues as to whether that's
13 even a final order that's appealable, so we'd like some time to
14 fully brief that. We can put it on February 8th if the Court
15 wants to do it before then. I think I'm available most days
16 next week other than a couple that I have to be in New York.

17 I'd think we'd want, at a minimum, a week to submit
18 papers and make that that's fully briefed. Also, given the
19 schedule that we've just talked about with the confirmation at
20 the end of March, I think the need to move quite as quickly as
21 the equity committee wanted is alleviated quite a bit.

22 MR. SARGENT: I'm not sure I would agree with that. I
23 mean, we've heard several complaints today that the equity
24 committee's trying to drag things out, slow it down. At the
25 same time, they're opposing our two motions to expedite. We

1 think that these issues need to be resolved before planning
2 confirmation, and the sooner the better.

3 THE COURT: Well, I don't know about the
4 certifications of direct appeal needs to be expedited, does it?

5 MR. SARGENT: Not necessarily. Again, we would like a
6 ruling from Your Honor and also from the third circuit before
7 the confirmation is decide on the certification question, which
8 we think it's possible, assuming that we do move it ahead
9 expeditiously. And February 8th, that certainly works on our
10 end if it works for the debtor.

11 THE COURT: All right. Well, anybody oppose doing the
12 certification February 8th? All right, we'll put that on for
13 February 8th. Let's talk about discovery. You're suggesting
14 sooner rather than later --

15 MR. SARGENT: Yeah.

16 THE COURT: -- because everybody's accusing you of
17 dragging your feet.

18 MR. SARGENT: Yeah, certainly the discovery motion
19 more than the certification motion does tie in to the schedule
20 for the plan confirmation hearing. And we would very much like
21 that to proceed as rapidly as possible. Sooner than February
22 8th, if at all possible for the Court.

23 MR. WITZEL: Judge, on behalf of the segment
24 nonholders, we'll try and move expeditiously, so I think the
25 same schedule, in view of the timing, would work for us. We

1 can get a response in in a week, and we could have oral
2 argument on the 8th as well. We'll be ready for that. We'll
3 move quickly.

4 THE COURT: Well, if I grant the discovery will you be
5 providing it to them within thirty days, as suggested, by then:
6 two weeks for documents and two weeks for deposition. So by
7 the end of February -- well, the first week of March, they have
8 everything so they can prepare for confirmation?

9 MR. WITZEL: The short answer is we hope we don't have
10 to get there. But obviously, whatever the Court -- the answer
11 is we'll -- the answer is yes, if that's -- we'll do everything
12 we can to follow that schedule. But again, we're relatively
13 confident that that won't happen, but we'll file our papers in
14 a week, and we'll -- we can have oral argument on February 8th
15 as well.

16 THE COURT: Is that okay with you?

17 MR. SARGENT: That's fine, certainly, yes, yes. Thank
18 you, Your Honor.

19 MR. STARK: Your Honor, may I be heard?

20 THE COURT: I have the -- yes.

21 MR. STARK: It's not my motion, and I'm not a target
22 for discovery, so it's a little out of order. We have a
23 contested matter now. As I heard the schedule that was
24 established for the new plan and a wrap and a confirmation
25 hearing at the end of March, as best I can tell, there's a

1 contested matter that's live today. Everybody knows where my
2 client and the equity committee stands, to a degree, it's
3 somewhat mooted by the applicability of the federal rules --
4 the bankruptcy rules that say that now we have contested matter
5 in this discovery. If the issue is --

6 THE COURT: So you don't think they need to have filed
7 their motion for 2004?

8 MR. STARK: Well, we didn't know up until half an hour
9 what they were going to do. But okay, now that we know what
10 they -- we didn't -- but I guess -- we didn't know what they
11 were --

12 THE COURT: What who were going to do?

13 MR. STARK: WE didn't know what the debtors' strategy
14 was to get from where we are today --

15 THE COURT: Oh, okay.

16 MR. STARK: -- to getting a plan confirmed. Now we
17 know that. Everybody knows that we have a contested matter.
18 It's just a question of prolonging or having an argument about
19 2004, which, to me, is more of a scope question than anything
20 else. I'm just trying to obviate things.

21 THE COURT: Um-hum. Anybody disagree with that?

22 MR. SARGENT: Not with the equity committee, Your
23 Honor.

24 MR. MAYER: Your Honor, Tom Mayer for Aurelius again.
25 Let's go forward on February 8th. We'll take our crack arguing

1 the discovery. It certainly -- certain pieces of that they
2 asked for were definitely not appropriate. You can determine
3 scope at that time, and we don't need to get bogged down in
4 procedural issues of the sort that Mr. Stark mentioned. It's
5 clear that you want to have a discovery conference -- hearing
6 on what discovery, if any, is appropriate on the 8th, and we'll
7 take our shot then.

8 MR. SARGENT: Your Honor, we're happy to proceed as we
9 would with typical discovery and meet and confer with them
10 about the scope of the request. If, as Mr. Stark has
11 suggested, these are proper because it's now a contested
12 matter, and they have objection to certain of them. They can
13 let us know what those objections are, and we can try to come
14 to terms with them or take it to the Court. But proceeding --
15 obviously proceeding now, it's going to be more efficient and
16 quicker than waiting to the 8th to start the horses running.

17 MR. MAYER: I'm sorry, Your Honor, Tom Mayer again.
18 We have a pleading ready to file. We'll file it. They'll know
19 what our objections are. They'll prepare to respond to it on
20 the 8th. Let's keep the 8th, and let's get the decisions on
21 discovery done on the 8th and not fall back into what, I think,
22 the equity committee is discussing, which is the usual
23 adversary proceeding, months worth of discovery, which we'll
24 push to all the other dates.

25 Let's keep the 8th, and let's get a decision.

1 MR. SARGENT: No, we're sticking to the, roughly,
2 month that I suggested when we were discussing the schedule
3 leading up to a confirmation hearing: two weeks for paper
4 discovery and two weeks for depositions. And if they have
5 objections, I think that there's no need to bother the Court
6 with them. We can take a look at their paper and, again, meet
7 and confer with them on it. If there's a problem, we can
8 contact the Court by phone or informally or set a hearing for
9 the 8th or sometime before.

10 MR. WITZEL: Your Honor, we'd like to file papers. We
11 can get it in in a week, and we can have the Court have a
12 hearing on the 8th and decide what, if anything, is appropriate
13 and how, if any, discovery is appropriate to proceed. And we
14 think that's the -- in the best interest of the estate and in
15 the best interest of moving this forward.

16 THE COURT: Well, as I understand it, you've attached
17 your proposed discovery to your motion?

18 MR. SARGENT: They have copies of all the requests,
19 yes.

20 THE COURT: So, I mean, they've been served, if you
21 will, and if it's not -- if it's a contested matter, they have
22 to answer in thirty days. They're suggesting that they're
23 going to be doing it if I grant -- if I don't sustain their
24 objections on the 8th within two weeks of that, so I think
25 we're really not taking about the -- more than a week's

1 difference, not even a week's difference. It's the same, so
2 we'll deal with it on the 8th.

3 MR. STARK: Thank you, Your Honor.

4 MR. SARGENT: Thank you, Your Honor.

5 THE COURT: They have your discovery, so --

6 MR. JANG: Your Honor, just one point of
7 clarification. With respect to the certification motion, can
8 we assume that our objection to that certification motion is
9 due one week before February 8th, so on February 1st.

10 THE COURT: February 1st? Yes.

11 MR. JANG: Thank you, Your Honor.

12 THE COURT: Should we make that the date for all of
13 the objections to the motions? February 1st, all right.
14 Anything else, then, today? Oh, I keep getting -- and I've
15 gotten a third copy of the BKK, and what was the other
16 settlement?

17 MR. ROSEN: Keystone, Your Honor.

18 THE COURT: Keystone. I had understood those to be in
19 connection with the plan confirmation. Am I to approve the
20 settlements now?

21 MR. ROSEN: No, you should hold those, Your Honor.

22 I --

23 THE COURT: Okay.

24 MR. ROSEN: We won't send them out until --

25 THE COURT: Good.

1 MR. ROSEN: -- the right time. I didn't know that
2 they were forwarded.

3 THE COURT: Well, I had gotten them at the
4 confirmation hearing and then got a couple more copies, so --

5 MR. ROSEN: But you still have the originals, I
6 believe, Your Honor, from that day in December.

7 THE COURT: I do.

8 MR. ROSEN: Okay. Thank you, Your Honor.

9 THE COURT: All right. We'll stand adjourned then.

10 (Whereupon these proceedings were concluded at 3:39 PM)

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I N D E X

RULINGS

	Page	Line
Order re: Sixty-second Omnibus Objection	14	21
Entered		
Sixty-third Omnibus Objection Sustained	15	19

1
2
3
4
5
6
7
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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

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