1

2 UNITED STATES BANKRUPTCY COURT

3 DISTRICT OF DELAWARE

4 Case No. 08-12229(MFW)

5 -x

6 In the Matter of:

7

8 WASHINGTON MUTUAL, INC., et al.,

9

10 Debtors.

11

12 -x

13

14 United States Bankruptcy Court

15 824 North Market Street

16 Wilmington, Delaware

17

18 October 6, 2011

19 9:03 AM

20

21 B E F O R E:

22 HON. MARY F. WALRATH

23 U.S. BANKRUPTCY COURT JUDGE

24

25 ECR OPERATOR: BRANDON MCCARTHY

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2 CERTIFICATION OF COUNSEL Regarding Amended Order Vacating Order

3 Under 11 U.S.C. Sections 1105 and 362 and Fed. R. Bankr. P.

4 3001 and 3002 Establishing Notice and Hearing Procedures for

5 Trading in CCB Guarantee Claims

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7 STATUS HEARING Regarding Mediation and Issues Related Thereto

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25 Transcribed by: Lisa Bar-Leib

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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 morning.
4 MR. ROSEN: Your Honor, there are two things on the
5 agenda this morning. The first is one that the Court put on.
6 This was with respect to the motion of Tricadia, the motion to
7 vacate an order which is a trading order associated with the
8 NOL protections, Your Honor. The Court had already granted
9 that relief or they have withdrawn it and counsel had submitted
10 an order to chambers. But for some reason, the Court asked
11 that that be placed on this morning's agenda. So we have
12 another copy of the amended order here vacating the prior
13 order. And I believe counsel for Tricadia is here as well.
14 THE COURT: Had I granted it?
15 MR. ROSEN: I believe you had, Your Honor.
16 MS. HARRIS: Good morning, Your Honor. Donna Harris
17 here on behalf of Tricadia. Yeah, the original order vacating
18 the first order had been entered. That is on the docket. This
19 is merely amending the order to change the effective date, if
20 you will, of the vacating of the order given the fact that the
21 debtors haven't been able to consummate a plan yet.
22 THE COURT: Well, it was to be effective on
23 confirmation?
24 MS. HARRIS: Exactly. Exactly. And we didn't
25 anticipate that it was going to be quite this long. So the

1 effective date is changed. And that's essentially the main
2 change of the order why we sought to amend the order.
3 THE COURT: Well, I think you sought to amend it to
4 make it effective in January?
5 MS. HARRIS: Yes. Yes.
6 THE COURT: Nunc pro tunc? I mean, has Tricadia been
7 trading then?
8 MS. HARRIS: I apologize, Your Honor. I wasn't
9 involved in the original negotiation. That was done at a
10 business level. So that's why I wanted to ask my client.
11 THE COURT: You may.
12 MS. HARRIS: Tricadia has not been trading. The
13 intent of the date was to go back to the original -- I guess,
14 the original opinion that -- with respect to the first plan.
15 And that was why that date was picked. But they have not been
16 trading. So I don't necessarily believe that that date is --
17 THE COURT: Well, should we make it --
18 MS. HARRIS: -- set in stone.
19 THE COURT: -- respective then?
20 MS. HARRIS: Yes, that's fine, Your Honor.
21 THE COURT: All right.
22 MS. HARRIS: Would you like us to change that and
23 resubmit it?
24 THE COURT: Yes. You can hand it up at the end of the
25 hearing today if you want to revise it.

1 MS. HARRIS: That's fine. Thank you, Your Honor.
2 (Pause)
3 MR. ROSEN: Your Honor, I think that takes us then to
4 the reason that everybody seems to be in this courtroom which
5 is the status conference that the Court established as a result
6 of or at the end of your opinion that you rendered on September
7 13th.
8 Your Honor, you rendered that 139-page opinion on the
9 13th. And as the debtors stated, the first 109 pages were
10 dedicated to the Court's views regarding jurisdictional issues
11 and the findings with respect to the modified plan. The last
12 thirty pages were focused on the Court's holding with respect
13 to the standing motion that had been filed by the equity
14 committee. And after completing that discussion, Your Honor,
15 or near the end of it, the Court recognized the cost and the
16 delay associated with the standing motion and the litigation
17 that it would foster. And the Court stayed the effectiveness
18 of its order regarding the standing motion. And on page 138 of
19 the opinion, the Court said that it would refer that issue to
20 mediation "as well as the issues that remain an impediment to
21 confirmation of any plan of reorganization in this case".
22 And while many people, Your Honor, have posited as to
23 what the Court meant by that since September 13th, on the 20th,
24 at an omnibus hearing here, Your Honor, that we had and it was
25 also the continuation or the conclusion of the LTW trial, the

1 Court stated that the scope of the mediation was something that
2 would have to be discussed at this conference. And we, of
3 course, went back then, Your Honor, and wanted to figure out in
4 our minds what it is that needed to be done, what needed to be
5 mediated, what may be an impediment to confirmation. And while
6 everyone who read the Court's opinion may have their own
7 particular view, all that would be meaningless, of course, if
8 the view was not the same as the Court's.
9 So the debtors went back through the opinion on an
10 issue by issue basis. And we wanted to make sure that every
11 view of the Court had been captured. And we put together a
12 chart detailing the Court's holdings throughout the opinion,
13 Your Honor, and what steps, if any, had to be taken to achieve
14 confirmation.
15 Your Honor, if I could hand up to the Court a chart
16 that does that?
17 THE COURT: You may.
18 MS. HARRIS: Your Honor, I don't mean to interrupt but
19 I have the order if I may hand it up. And I do have a hearing
20 in front of Judge Walsh in a little bit. So I'd like to be
21 able to sneak out if you don't mind.
22 THE COURT: You may. And if you hand up the order,
23 I'll enter it then. Thank you.
24 (Pause)
25 MR. ROSEN: As you can see, Your Honor, this chart

1 sets forth each holding of the Court regarding confirmation
2 issues starting with the Court's views of the Stern v. Marshall
3 and divestiture jurisdictional arguments. And you'll see that
4 with respect to certain issues, the Court's holding required
5 additional steps to be taken. Specifically, Your Honor, when
6 we get down to the third box there, it has the fees of the WMB
7 noteholders and the liquidating trustee. And we were referring
8 to the Court's opinion on pages 23 and 4. And we noted in the
9 next steps that Section 43.18 had already dealt with the bank
10 bondholder issue. But in order to accommodate the issue
11 associated with the liquidating trustee, we needed to modify
12 the liquidating trust agreement as well as Section 281.12 of
13 the modified plan.
14   The Court had also held that there should be A
15 discretionary removal of the liquidating trustee and that
16 representation on the board of the liquidating trust should
17 modify as the economic interests in the trust do change and the
18 liquidating trust interest will pass down from one group to the
19 next pursuant to the plan. And we noted that those changes had
20 to be made in the liquidating trust agreement.
21   The Court also worked with the valuation of 210
22 million dollars rather than one that had been posited at the
23 hearing. And we noted that there was no need for any
24 modification to the plan because the plan had been self-
25 effectuating in that regard to take into account that it could

1 be a different valuation determined by the Court and that the
2 value would change or the stock would change on a dollar for
3 dollar basis.
4 On the next page, Your Honor, we go through the issues
5 associated with the post-petition interest rate. And we note
6 that the Court determined that the federal judgment rate would
7 be appropriate requiring a change to Section 1.151. The rate
8 will be calculated as of the petition date, modification to the
9 same section. Issues will be compounded annually. And we
10 noted that the waterfall exhibit already had that in there, the
11 waterfall exhibit that people had seen, but we would make a
12 corresponding change to 1.151. And also that the Court had
13 determined that notwithstanding the federal judgment rate that
14 payover would occur at the contract rate pursuant to the
15 contractual subordination provisions. But we noted also that
16 there needn't be another change to the plan because, again, the
17 plan already included the fact that contractual subordination
18 provisions would govern. And therefore, nothing had to be
19 done.
20 Based upon these holdings, Your Honor, the debtors
21 undertook an analysis as to what remained as an impediment to
22 confirmation. And like many others, the debtors believe that
23 it is to modify the plan as the Court requested. But our
24 analysis, the debtors' analysis, did not stop there. Making
25 the changes to the plan and to the liquidating trust agreement

1 are easy, Your Honor, and not complicated in any way. The
2 debtors then undertook a quantification of the effect of such
3 modifications economically to see what if and to what extent
4 distributions to creditors would be altered. And as set forth
5 in the statement that we filed with the Court on Monday, based
6 upon the Court's rulings, even with the delay from July 31 to
7 October 31, the projected distributions remain virtually
8 unchanged.
9 But again, Your Honor, the debtors did not stop there.
10 It was important for the debtors to understand the overall
11 effect of a modification and confirmation and consummation
12 versus a mediation including the timing associated with
13 mediation and the cost to the estate and to creditors if
14 confirmation and consummation of a plan were in any way
15 delayed. The debtors did not approach this or this analysis
16 with an eye towards a result, Your Honor. Rather, the debtors
17 have always had one goal: maximize the value of the estates,
18 minimize the amount of liabilities and distribute estate assets
19 as quickly as possible in order to achieve the highest recovery
20 for all involved. The debtors maintain no preconceived notion
21 regarding the mediation, Your Honor, whether it is the right or
22 the wrong thing to do, whether it will be successful or not.
23 Indeed, the statement as filed was designed to show that there
24 is a way to achieve the debtors' goal to consummate the fully
25 negotiated and approved global settlement agreement and to make

1 distributions as expeditiously as possible.
2 The debtors did this by annexing the pleadings in
3 draft form that would be used to accomplish this. The debtors
4 did not file any of these documents because we wanted to get
5 the Court's sense of whether the Court perceived additional
6 impediments or whether the Court wanted all parties to
7 participate in the mediation prior to making distributions to
8 creditors. Again, Your Honor, the debtors illustrated the
9 risks associated with the latter course of action. But the
10 debtors said and remain steadfast in their view that the scope
11 of mediation is something for the Court to determine and the
12 debtors will participate in any mediation fully and in good
13 faith.
14 What happened as a result was not unexpected. The
15 debtors anticipated that the two main parties that have
16 objected to confirmation would disagree with the debtors'
17 perspective. The equity committee has unabashedly stated
18 throughout these cases that its goal is to delay as much as
19 possible and attempt to disrupt the global settlement agreement
20 which the Court has twice found to be fair and reasonable and
21 in the best interest of the estate.
22 Now, while that effort continues, the equity committee
23 asked for a mediation where JPMorgan Chase and the FDIC are
24 required to participate or, as counsel for the equity committee
25 has stated, JPM seeks to step up and fill the gap so that the

1 equity committee may be in the money -- the equity holders --
2 excuse me -- may be in the money instead of the recognized out-
3 of-the-money status.
4 Of course, the debtors would be grateful if JPMorgan
5 Chase would increase its contribution to the settlement and the
6 FDIC would voluntarily reduce what it is taking. The debtors
7 doubt, however, that these parties are inclined to do either or
8 to participate in a mediation for issues that have nothing to
9 do with their controversy.
10 But all that dismisses the fact that there was a
11 complete negotiation with the equity committee, Your Honor,
12 that an agreement in principle was reached, the document -- and
13 announced on the record of this Court in May of this year, the
14 documents were substantially negotiated and that the equity
15 committee determined not to go forward with such a negotiated
16 resolution for a variety of reasons including the fact that,
17 based upon the Third Circuit's Armstrong decision, no value can
18 be contributed or gifted to equity and, certainly, the holders
19 of WMI's common stock without adherence to the absolute
20 priority rule and the payment in full of WMI's seven and a half
21 billion dollars of preferred stock.
22 But leaving that aside, Your Honor, the equity
23 committee claims that there are other impediments to
24 confirmation that require a full scale mediation. By making
25 these statements, it is clear that there is a general

1 misunderstanding of the plan provisions. And several examples
2 of this are as follows:
3 The equity committee claims that -- and I believe the
4 TPS consortium as well -- claims that the burn rate is only
5 eleven and a half million dollars or approximately eleven and a
6 half million dollars as a result of the federal judgment rate
7 being applied. They fail to take into account, Your Honor,
8 though, the ongoing fees and expenses that are incurred as well
9 as the effect of the payover provisions pursuant to the plan
10 and the contractual subordination and what effect that would
11 have on lower classes of creditors.
12 They claim there's no harm because the debtors' cash
13 accrues interest enough to match whatever would be lost. Well,
14 Your Honor, the debtors have limited funds. And what the
15 debtors do have, by the United States trustee guidelines, must
16 be invested in T-bills which accrue interest of less than one
17 basis point.
18 As to the money the debtors hope to obtain by way of
19 the global settlement agreement, that is held by JPMorgan Chase
20 and only earns five basis points. So the ongoing accrual of
21 post-petition interest is extremely detrimental to all parties
22 involved.
23 With respect to net operating losses, Your Honor,
24 here, the equity committee totally misunderstands the issue
25 again. And as was made clear several times over, including at

1 the confirmation hearing, Your Honor, and then Your Court's
2 subsequent hearing with respect to the abandonment of the stock
3 of WMB at which hearings the equity committee totally concurred
4 in the position of the debtors, based upon the five-year window
5 closing with respect to taking these rights, it makes sense to
6 abandon the stock subsequent to the effective date and the
7 limitation that's been talked about is no longer as relevant an
8 issue.
9 With respect to claims against the settlement
10 noteholders, Your Honor, here, the law is what it is.
11 THE COURT: Let's go back.
12 MR. ROSEN: Yes, ma'am.
13 THE COURT: Would there be more unlimited NOL if the
14 stock were abandoned January 2nd versus this year?
15 MR. ROSEN: No.
16 THE COURT: Why?
17 MR. ROSEN: Because the periods have changed, Your
18 Honor, and it no longer -- because confirmation has been
19 delayed so long it's no longer as relevant an issue.
20 THE COURT: Well, it may not be relevant, but will, in
21 fact --
22 MR. ROSEN: I don't believe so.
23 THE COURT: -- the amount of the unlimited be larger -
24 -
25 MR. ROSEN: Yes.

1 THE COURT: -- because it can be --
2 MR. ROSEN: I don't want --
3 THE COURT: And if I understood, the unlimited portion
4 of the NOL was that portion that was after the effective
5 date --
6 MR. ROSEN: Excuse me one second.
7 THE COURT: -- on a pro rata day by day basis.
8 MR. ROSEN: Your Honor, my understanding is no. But
9 we will -- before we're done, we'll have that exact answer for
10 you.
11 With respect to the claims against the settlement
12 noteholders, Your Honor, here, the law is what it is and it
13 clearly states that even if a party is granted standing to
14 pursue a claim on behalf of the debtors' estate, the right to
15 compromise and settle the claim for which standing had been
16 granted still rests with the debtor. But there should be no
17 concern about that as far as the debtors -- in the debtors'
18 opinion, for if, in fact, there is a compromise in settlement,
19 that would require court approval if an adversary proceeding
20 had been commenced by the equity committee. But to the extent
21 that the equity committee believes the liquidating trust
22 agreement says otherwise, the debtors will certainly modify it
23 to make sure that that is consistent before it is filed.
24 It also needs to be said that the claims are not
25 disputed. The equity committee, in its responsive papers, Your

1 Honor, I think misunderstands the point. Pursuant to several
2 orders of this Court, first being the bar date order, the Court
3 directed that indenture trustees shall file the claims on
4 behalf of the holders of the funded indebtedness. And as a
5 result of that, the Court entered orders then subsequently
6 disallowing all of the duplicative claims that have been filed
7 by individual holders. Third, the Court had entered
8 stipulations throughout the case allowing the claims of the
9 indenture trustees in the amount of the funded indebtedness and
10 certain other amounts.
11 So there are no claims against the estate, Your Honor,
12 by any settlement noteholders. Rather, the claims are there on
13 behalf of the indenture trustees. And what happened, Your
14 Honor, pursuant to the plan, and any plan, is that the debtor
15 will make distributions to the indenture trustees. The
16 indenture trustees will then take those monies and put them
17 through the system, if you will, through DTC. And the holders
18 will be the bankers, the brokers, the nominees on behalf of
19 people including the settlement noteholders. So what really is
20 being attempted, Your Honor, is nothing with respect to the
21 claims disallowance, if you will, the claims against the
22 estate. It's the claims that are being held by these people
23 within the indenture itself or as a result of the indenture
24 itself.
25 And once we do those distributions, Your Honor, once

1 we do the contractual payovers that are obligated to be paid
2 made pursuant to the plan, it's at that point in time that
3 somebody is looking to actually stop a payment. This is
4 nothing that impacts the estate, Your Honor.
5 What the equity committee is really asking for in its
6 papers when they talk about reserves, Your Honor, is they want
7 some degree of prejudgment attachment once a litigation were to
8 be commenced. And the debtors are confident that that would be
9 addressed in that context and considered in accordance with the
10 applicable standards for a prejudgment attachment.
11 But as the debtors have discussed with counsel for the
12 equity committee prior to filing the statement, the equity's
13 position -- the equity committee's position is inconsistent
14 with the equity committee's cited case of Adelphia which said
15 that distributions should be made actually to the holders of
16 claims. And if there was some sort of liability that
17 disgorgement would be the result.
18 The equity committee also talked in its papers about
19 the reorganized stock. And there were statements concerning
20 the voting rights of a liquidating trustee and, of course,
21 personal attacks made by the equity committee upon Mr.
22 Kosturos. But such statements fail to acknowledge, Your Honor,
23 that the liquidating trust has no discretion with respect to
24 the voting of the reorganized stock which may be set aside.
25 There in their papers, they said that both were going to be

1 made by the liquidating trustee. But the stock is held by the
2 trust and, pursuant to the plan, is to be voted on an issue by
3 issue basis in the same exact proportion as those people who
4 actually do both. So if there was some mechanism put in place
5 with respect to the stock that would otherwise go to people at
6 the end of the day, it wouldn't matter, Your Honor, because the
7 liquidating trustee is bound to just take that other stock and
8 vote it on that same proportion by proportion basis.
9 THE COURT: Is this a change from the prior sixth
10 amended?
11 MR. ROSEN: No. It's been there since the beginning
12 of time, Your Honor.
13 THE COURT: The common stock in reorganized debtors
14 were always to be given to the trust?
15 MR. ROSEN: No. To the extent of a disputed claim,
16 Your Honor, that is held by the trust. And it's that stock.
17 And in our case, Your Honor, the amount of stock that we're
18 talking about I believe is 357,000 dollars worth out of what
19 was previously perceived to be 160 million dollars value. And
20 now that would be grossed up to a little bit -- over 400,000, I
21 believe it is. And that is because of the only disputed
22 claims, Your Honor, are the GUC -- some of the GUCs and the
23 LTWs which may be general unsecured claims. So that is the
24 amount of stock that we're talking about, that that provision
25 was put in the plan to ward against. But if, in fact,

1 something were to be done with respect to this other stock, the
2 mechanism is there, Your Honor. That is our point.
3 Likewise, Your Honor, there is a board of the
4 reorganized debtor. And the liquidating trustee, while it may
5 have certain rights with respect to the stock, it's the board
6 of that reorganized debtor that will make the decisions on
7 behalf of the reorganized debtor.
8 There were statements in their papers, Your Honor,
9 regarding the liquidating trust and their desire to actually --
10 the liquidating trust and their desire to actually run it.
11 Your Honor, I believe the Court already addressed that in the
12 opinion. We cited it in our chart here, Your Honor, on that
13 first page where I said it required modification if the
14 economics were shifted. So we believe the Court has already
15 addressed that.
16 Lastly, I think -- and this is perhaps the issue
17 that's nearest and dearest to some people's heart which was the
18 payment of fees associated with the prosecution of any claims
19 against the settlement noteholders. And, Your Honor, we had,
20 in the draft of the modification that we annexed to our
21 statement, we had said that the equity committee should
22 continue to the extent that there is any pending mediation,
23 litigation or contested matter to which the equity committee is
24 a party as of the effective date of the plan. And to the
25 extent that there is this mediation associated with the insider

1 trading claims that the equity committee would be still in
2 existence and, of course, they could still be compensated as a
3 result. And as noted by the TPS folks in their pleading,
4 there's sufficient money in the trust to handle these types of
5 things. And I believe their quote was fifty to seventy million
6 and they were quoting obviously testimony from the confirmation
7 hearing. So we don't think that the issues of the equity --
8 the fees of the equity committee in connection with the
9 litigation is an impediment to confirmation.
10 The issues that are raised by the Trust Preferred
11 Securities in their pleading, they're really issues that they
12 raised and the Court ruled upon. And they're saying because
13 they didn't like the ruling, they would like those mediated.
14 They didn't like the divestiture ruling. They didn't like the
15 Stern v. Marshall ruling. They didn't like the prior rulings
16 about the Court with Class 19 and the fifty million dollars to
17 be paid by JPMorgan Chase.
18 Your Honor, to us, to the debtors, these are not any
19 issues associated with confirmation. We believe that we
20 addressed all of your issues and your varying accounts here.
21 We addressed all of your issues in this proposed draft that we
22 annexed to the statement. If, in fact, there are additional
23 impediments, Your Honor, as I said before, the debtors are
24 perfectly prepared to participate in what we perceive to be a
25 mediation that will be timely, very timely, and will be

1 excessive delay to the estate and will further erode
2 distribution to people in the creditor body. And when all
3 people say that there is a gap of only X dollars -- and that
4 was wrong because the gap, as of today, would be eighty-two
5 million dollars not something smaller -- that gap potentially
6 increases as well, Your Honor. So it is our goal, Your Honor,
7 to stop this so that people can lock in what it is right now.
8 Money can go out the door. Post-petition interest can stop
9 being accrued and that the parties can then deal with these
10 other issues which we believe are tangential instead of being
11 on all fours with the confirmation issue.
12 So, Your Honor, that is our view with regard to the
13 scope of the mediation. But as I said, Your Honor, if the
14 Court believes that it's an expansive scope or it should be
15 more expansive, the debtors are perfectly prepared to abide by
16 that.
17 THE COURT: All right. Thank you.
18 MR. ROSEN: Thank you.
19 MR. HODARA: Good morning, Your Honor. Fred Hodara,
20 Akin, Gump, Strauss, Hauer & Feld, for the official committee
21 of unsecured creditors. Your Honor, I'm going to speak very
22 precisely to only three points this morning. I'll speak
23 precisely and economically because that is the major concern of
24 the creditors of this estate in the wake of Your Honor's
25 decision, the economics of where we are. The recoveries to

1 creditors that we have for so long spoken to the Court about
2 are now significantly eroding and bear the risk of major
3 erosion if the proposal of the debtor is not followed to a
4 quick conclusion of a confirmed plan of reorganization.
5 The creditors' committee has worked with the debtor to
6 fashion these relatively simple modifications of the plan that
7 were outlined in Mr. Rosen's chart. We think that they work
8 based on our understanding of Your Honor's decision. We
9 understand that the equity committee and certain other parties
10 are not happy with various provisions of the plan based on what
11 they filed yesterday. But these are parties who are at the
12 moment out of the money. To the extent that it turns out that
13 there is somewhat more value than currently projected either
14 through litigation recoveries or otherwise then this plan, of
15 course, has a pure waterfall where those additional proceeds
16 would fall down to the next in line, whether that be 510(b)
17 creditors, the Trust Preferreds. I think we all recognize
18 that, unfortunately, will never flow to seven billion dollars
19 of preferred claims to get to the common. But we understand
20 that those parties are unhappy with certain provisions of the
21 plan. We think the Court has ruled on all of those issues.
22 And we think that the interest rate and other issues with which
23 Your Honor had problems or concerns are fixed in what the
24 debtor proposes to file.
25 We think the debtor did it right here by filing with

1 the Court a draft of their proposed modifications rather than
2 simply filing it and trying to go ahead with a modified plan.
3 We really need Your Honor to tell us whether we have it right
4 so that we don't another thirty million dollars in the month of
5 November to erode for creditors and thirty million dollars in
6 December and so on. And the difference between the eleven
7 million asserted by the objecting parties and the thirty
8 million that we're talking about is exactly as Mr. Rosen stated
9 it. It's real dollars at the moment to the PIERS holders
10 because of the contractual subordination provisions which the
11 Bankruptcy Code tells us have to be honored in bankruptcy. And
12 soon, unfortunately, that'll become the problem of the CCB
13 holders and following.
14 So we, as a creditor body, really need the input of
15 the Court so that we can avoid that continued erosion.
16 Now, all of that still permits the mediation to go
17 forward as it should. We understand Your Honor's direction in
18 that regard. And the creditors' committee supports the concept
19 of having that mediation and having it as promptly as possible.
20 We believe that it's important that at the mediation,
21 the mediator be a person not only with the skill set that was
22 described in some of the filings that were made with the Court,
23 meaning, having hands on experience in securities law issues
24 which are at the heart of what's being attacked by the equity
25 committee.

1 But more importantly to us, that the mediator be
2 someone with sufficient time to sit down with the parties and
3 work as hard and long and fast as we all can to get through the
4 issue so that we can have a full resolution of everything
5 that's in front of this Court. Thank you, Your Honor.
6 THE COURT: Thank you.
7 MR. FOLSE: Good morning, Your Honor. Parker Folse
8 from Susman Godfrey on behalf of the equity committee. We
9 support what we believe the Court intended in the September
10 13th opinion which is a mediation that includes not only the
11 disputes over the claims asserted against the estate by the
12 settlement noteholders on which the equity committee has been
13 granted standing to proceed but also issues that could become
14 an impediment to plan confirmation. We don't believe that the
15 debtors' proposal to proceed with another plan confirmation
16 hearing in advance of mediation is workable or prudent for two
17 main reasons.
18 The first is that the debtors' proposal to proceed, as
19 it's been outlined in the statement before the Court, is going
20 to produce another contested plan confirmation hearing if they
21 proceed without attention being given to the effect of the
22 challenges to the settlement noteholders' claims. I'm not sure
23 of the exact amount but from what I've understood, it's at
24 least three billion dollars worth of claims that are now in
25 dispute.

1 The second is that the debtor proposal to proceed in
2 advance of mediation with plan confirmation would preclude the
3 possibility of changes in the modified plan that could
4 facilitate resolution of all of the disputes and lead to a
5 consensual plan that's acceptable to all the parties. We
6 believe the Court should order the mediation to go forward, as
7 originally envisioned, and that no hearing on plan confirmation
8 should be scheduled under the mediation has been completed.
9 The equity committee, despite the pejorative
10 statements that Mr. Rosen made this morning and has made
11 before, is not interested in delay for the sake of delay. He
12 said that the equity committee has made clear throughout the
13 case that it simply wants to delay this as long as possible. I
14 think any fair-minded view of the procedural history of this
15 case would instead come to the conclusion that we are still
16 here today without a confirmed plan of reorganization because
17 of decisions the debtors made because of its failure to honor
18 its obligations to the estate, because of its failure to
19 convince the Court that the strategic decisions it made were,
20 in fact, in the best interest of the estate and consistent with
21 the Bankruptcy Code. What we are doing is simply trying to
22 protect the rights of our constituents in the face of actions
23 which continue all the way up to this moment designed to
24 prejudice them.
25 With respect to the speed of the mediation, Your

1 Honor, we will move as quickly as anyone wants to move or as
2 quickly as the Court orders. If the Court believes, for
3 example, that it would be useful to set a deadline for the
4 completion of the mediation, we will live with it. It doesn't
5 matter what it is. We would go forward and do our best in good
6 faith to reach an agreement.
7 I would add, Your Honor, that before this morning, I
8 had thought, as I believe the Court thought, that there would
9 be reasons to not be as concerned about delay given the point
10 at which we are in the year because of the increased value to
11 the tax NOLs if the stock were abandoned in January. Now Mr.
12 Rosen said this morning that it is irrelevant, that there would
13 be no change in the valuation of the NOLs, if I understood him
14 correctly, although he said he's going to get confirmation for
15 the Court. All I can say, Your Honor, is having sat through
16 the testimony at the plan confirmation, that doesn't make any
17 sense to me. It's inconsistent with the evidence that was
18 presented to the Court previously. And we certainly -- the
19 Court certainly shouldn't be making decisions this morning
20 based on the representation of counsel, which many of us find
21 surprising, and without at least some ability to talk about
22 that and examine it and understand what it means.
23 But in any event, I think the main point is we are not
24 trying to artificially delay the process. I think there is an
25 independent issue about whether or not the debtors' decisions

1 about (indiscernible) to abandon the stock are really in the
2 best interest of the estate and will maximize the value of the
3 estate. That is one among what I'm going to identify is, I
4 think, a number of issues that could fruitfully be discussed in
5 a mediation rather than hearing about them for the first time
6 this morning or in brief phone calls that Mr. Rosen and Mr.
7 Sargent had earlier this week for the first time.
8 By the way, the debtors' statement was not shared with
9 us. We saw it when you saw it. Yesterday, we did file a
10 written response. It was done in a hurry. It certainly
11 doesn't represent the considered and exhaustive thinking that
12 we would give to all of the issues the debtor raised if they
13 were to file that motion that they attached as a draft. But it
14 does set out our thinking at this point. I'm not going to go
15 through it in detail but I do want to hit some of the high
16 points.
17 But I also want to be clear what we understood was on
18 the calendar for this morning which was a discussion with the
19 Court about the scope of the mediation and the logistics for
20 proceeding with it. And the debtors, and aided by the
21 creditors' committee, have now gone well beyond those subjects
22 and are essentially asking the Court to render advisory
23 opinions about draft changes to their sixth amended plan and
24 about whether resolicitation of creditor votes would be
25 necessary. They've gone so far to submit a draft motion, a

1 draft version of the modified plan while making clear that they
2 reserved the right to change it. And then they got up here
3 this morning and fairly clearly invited the Court to tell them
4 whether what they're doing is correct or not at a time when no
5 other interested parties have had a full and fair opportunity
6 to understand, consider and brief the issue when it is not on
7 calendar. I think it is procedurally improper to do what they
8 have done. I'm going to talk about some of the things that Mr.
9 Rosen said. But I don't want that to be misunderstood as a
10 consent to the invitation to the Court to render this group of
11 advisory opinions on matters of substantial importance to a
12 resolution of this case. It is not up to the Court to tell Mr.
13 Rosen and the debtors and the creditors' committee whether they
14 are on the right track or not.
15 The Court has already found that there are colorable
16 claims for equitable disallowance of the settlement
17 noteholders' claims against the estate and that the debtors
18 have refused to pursue them and that because the claims are
19 colorable, the debtors' refusal to pursue them is not
20 justified. Those were the elements required for the Court to
21 grant the equity committee standing to proceed. Yet, the
22 debtors have made no provision in the plan that addresses the
23 issues in dispute in light of those findings. Because the
24 claims of the settlement noteholders are disputed, payments on
25 those claims should not be made pending resolution of the

1 disputes. Now Mr. Rosen attempted to suggest otherwise this
2 morning by arguing that the indenture trustees of the
3 securities are the legal owners of the claims, that there is no
4 dispute with respect to their right to obtain payment, that the
5 money should simply be paid over to them and that in the event
6 the settlement noteholders' claims are later disallowed in
7 whole or in part that we can just go get it back.
8 Number one, the definition of "disputed claims" in the
9 current plan clearly encompasses the settlement noteholders'
10 claims as of the Court's decision -- if not as of the Court's
11 decision to grant the equity committee standing to proceed, at
12 least as of the time that the adversary complaint is filed
13 rendering those claims in dispute. And I'm referring to
14 Section 1.88 of the current proposed plan which refers to --
15 which defines "disputed claim". And I would also refer the
16 Court to footnote 44 in the Court's opinion of September the
17 13th. And I quote: "The indenture trustee for the PIERS
18 contends that even if the Court equitably disallows the claims
19 of the settlement noteholders, the indenture trustee, as the
20 holder of the claims, is still entitled to payment of a hundred
21 percent of those claims. The Court disagrees. To the extent
22 the Court disallows those claims, they are disallowed
23 regardless of who holds them." Citing Enron Corp. v.
24 Springfield Associates.
25 It equally applies, I submit, Your Honor, that no

1 monies should be paid out to the indenture trustee any more
2 than it should be paid out to the settlement noteholders in
3 light of the fact that those claims are disputed. And frankly,
4 Your Honor, it would imprudent for the estate to do so relying
5 on the speculative ability to go out and recover up to thirty
6 billion dollars or more in money paid out to someone at
7 somewhere down the road.
8 The question then is what happens, what ought to
9 happen with respect to those disputed claims until they are
10 resolved. That raises a number of significant issues
11 concerning the design of the plan and how it should operate
12 going forward which are not addressed by Mr. Rosen today
13 adequately and are not addressed in the current plan even as it
14 has been modified. And it's not only a question of should
15 there be an estimation of the claims, should a reserve be
16 established, and if so, how and when, what would happen to the
17 stock of the reorganized debtor that would go to the settlement
18 noteholders in the event the claims are allowed in full, what
19 happens to that stock in the meantime. There are other parties
20 entitled to receive shares of stock. Mr. Rosen suggests that
21 all of the stock that would otherwise go to the settlement
22 noteholders, which I suspect is a significant majority given
23 their holdings of PIERS, would apparently then go into the
24 hands of the liquidating trust and be voted by the liquidating
25 trust consisting of an advisory board three out of four which

1 are representatives of the creditors and the settlement
2 noteholders and Mr. Kosturos. They would be, in effect, given
3 control of the reorganized debtor. Is that proper? Is that
4 fair? Does that make sense? What if the claims of the
5 settlement noteholders are disallowed in whole or in part given
6 the substantial amount of money at stake? Today, it would flow
7 down through the waterfall and people who would be receiving
8 shares of stock in the reorganized debtor, if the plan were
9 confirmed today would instead be getting additional cash. And
10 that stock instead would be going to someone else, most likely
11 to equity. How do we unwind that? How to we unring that bell
12 if those distributions of stock are made upon an effective date
13 that occurs somewhere in the next two or three months if the
14 litigation against the settlement noteholders ultimately
15 results in a significant -- all or at least significant portion
16 of disallowance of their claims. Those issues are not
17 addressed.
18 What should be done with respect to the debtors'
19 existing right to settle those claims, if anything? It has
20 been made abundantly clear that the debtors believe these
21 claims -- this dispute, the grounds for equitable disallowance,
22 to be baseless. Mr. Kosturos, the liquidating trustee, did his
23 level best as a witness in July to support the settlement
24 noteholders with respect to these issues. And yet, that is the
25 body under the existing plan that would have the authority to

1 settle these claims. Mr. Rosen says well, don't be concerned
2 about that because the Court would have to approve any
3 settlement. And that is some consolation but we all know the
4 legal standards governing settlement. It is the fact that the
5 Court would have the ability to pass on the fairness and
6 reasonableness of a settlement under those legal standards, I
7 suggest, is not an adequate substitute with the judgment that
8 ought to be brought to bear independently, in the first place,
9 as to whether and how such claims should be settled. Mr. Rosen
10 suggested, well, if the equity committee is still worried
11 notwithstanding the fact that a settlement would be submitted
12 to the bankruptcy court for approval, we can deal with that; we
13 can make some other changes. Fine. That should be one of the
14 issues discussed at a mediation. But I would further add, Your
15 Honor, that as the current plan and the current -- and I'm
16 talking about what was submitted in draft form. The current
17 liquidating trust agreement, the liquidating trustee and the
18 advisory board of the trust are authorized to settle claims
19 without the approval of the bankruptcy court. And the
20 definitions of the claims they can settle without approval of
21 the bankruptcy court can certainly be construed to encompass
22 the disputed claims of the settlement noteholders.
23 I'm just continuing to tick off issues that relate to
24 the design and confirmability of the plan that ought to be
25 addressed in a mediation.

1 Should there be limitations placed on the ability of
2 either the debtors, in the short term, or the liquidating trust
3 post-confirmation to settle the claims against the settlement
4 noteholders? Even with respect to the mediation, Your Honor,
5 we have some concerns about how useful it will really be if the
6 debtors are permitted to engage in discussions which, for all
7 we know, are already happening with the settlement noteholders
8 and then they announce a settlement in which the equity
9 committee really has not been a meaningful participant. And
10 one of the things we would ask the Court to consider in the
11 context of ordering the mediation to go forward is to require
12 that representatives of the equity committee be party to any
13 negotiations that the debtors conduct with respect to the
14 claims of the settlement noteholders, that it not be done in
15 the backroom or in private phone calls and then a deal gets
16 announced and presented to the Court for approval when we have
17 not had a fair opportunity to be a participant. I mean, that's
18 not only unfair but it is also another recipe for further
19 disputes and litigation. If this is going to happen as we
20 think it should, all parties really ought to be given a
21 meaningful opportunity to participate.
22 The second point I wanted to make, Your Honor, with
23 respect to whether or not it makes sense for a plan
24 confirmation hearing to go forward without completion of
25 mediation is that it is conceivable that a settlement could be

1 produced that would require changes to the plan and could
2 require a resolicitation of creditor votes. And I'm talking
3 obviously in the context of a mediation about something that
4 everybody agrees makes sense. Proceeding with plan
5 confirmation in the meantime either would be a waste of estate
6 resources to the extent it then later has to be redone or it
7 could preclude the possibility of options in the context of the
8 mediation that might actually be positive in producing an
9 overall consensual plan.
10 There is a cost to allowing the mediation to go
11 forward first. There will be some additional time. How much
12 additional time again depends on the willingness of all the
13 interested parties to really work hard to proceed with this
14 quickly which we are certainly prepared to do. I would just
15 throw out as one example of a way to make it go faster and less
16 expensively is many of these issues have already been briefed
17 to fare-thee-well. Give the mediator the briefs that have
18 already been written. Give the mediator the transcripts of the
19 plan confirmation hearing, the Court's opinion. There's not a
20 lot of additional writing that needs to be done with respect to
21 all of those issues that have already occurred.
22 So, in a nutshell, Your Honor, we think the mediation
23 of broad scope could lead to a consensual plan. I don't think
24 either the Court, the debtors, the creditors' committee or
25 anyone else should rule that out that, at a minimum, a

1 mediation could lead to an agreement about the procedures that
2 would then be embodied in a plan governing what will happen to
3 the disputed claims of the settlement noteholders until those
4 claims are resolved that will address how litigation would be
5 managed, whether there would be modifications on the settlement
6 authority of the liquidating trust, trust advisory board and so
7 forth. We would at least have the ability to sit down and try
8 to map all of that out in a way that could minimize disputes
9 that would occur at a plan confirmation hearing.
10 And I've been meaning to mention. There's another
11 issue that we also believe needs to be addressed in the context
12 of a mediation. And that is whether or not the liquidating
13 trust and Mr. Kosturos and the trust advisory board should be
14 given unfettered authority with respect to the claims against
15 officers and directors which were not even -- most of them not
16 even the subject of a tolling agreement until the eleventh hour
17 at the plan confirmation hearing. And yet, as matters now
18 stand, they have -- they would have unfettered authority to
19 resolve those claims against the debtors' current officers and
20 directors without approval of the Court.
21 A few other points I want to touch on that Mr. Rosen
22 made. He has repeatedly gotten up here and made assertions
23 about why the settlement in principle that the equity committee
24 negotiated with the debtors, the settlement noteholders earlier
25 this year came apart. I have always thought that that was

1 inappropriate. I have always believed that those kind of
2 assertions would be of no interest to the Court because
3 they're, in fact, not relevant to any of the issues that have
4 been put before the Court. Yet, he continues to do it. I will
5 only say that his description of what happened and why the
6 settlement fell apart is incorrect, that it was a result of
7 retrading of the deal on the part of persons other than the
8 representatives of the equity committee. I'm not going to say
9 anything more about it. I wish I hadn't had to say that. But
10 I've just heard those assertions one too many times to let it
11 go yet again without a response.
12 I will say the fact that there was at one time an
13 agreement, to me, suggests that there may yet be room for
14 another agreement but not if the debtors proceed as they're
15 asking the Court to proceed this morning.
16 Your Honor, I actually believe that those are the main
17 points I wanted to express.
18 THE COURT: Thank you.
19 MR. FOLSE: Thank you.
20 MR. STARK: Good morning, Your Honor. Robert Stark
21 from Brown Rudnick on behalf of the TPS consortium. We agree
22 with Mr. Folse almost wholeheartedly, almost to the word. So I
23 don't think I need to embellish the record much further. And
24 I'm prepared to rely upon the pleadings. Suffice it to say, we
25 disagree with Mr. Rosen's characterization of our position. We

1 very much disagree with the notion that we should be excluded
2 from the mediation. We historically have been a fairly
3 significant litigant here. And again, if we're excluded, I
4 only perceive that to bring more litigation not less.
5 We're prepared to meet in good faith and give it the
6 good college try to mediation and we'd like to be invited.
7 THE COURT: Thank you. Anybody else?
8 MR. SACHS: Very briefly, Your Honor. Robert Sachs
9 from Sullivan & Cromwell on behalf of JPMorgan Chase. There
10 have been some suggestions in the papers that the mediation
11 should include JPMorgan Chase and, I believe, the FDIC. There
12 are no confirmation issues or impediments to confirmation that
13 involve JPMorgan Chase in this particular case. The issues
14 that have been raised as impediments to confirmation are
15 intercreditor issues and issues between the equity committee
16 and the debtor and the equity committee and other creditors of
17 the estate. But none of them involves JPMorgan Chase at all.
18 The TPS holders seem to regard your order as an
19 invitation to have a mediation to revisit the global settlement
20 agreement as though JPMorgan Chase is prepared to come to the
21 table and offer more money. That's not what I understood your
22 order to say and that's not realistic to believe. Your Honor,
23 the global settlement agreement expires, by its terms, on the
24 15th of this month. After the 15th of this month, any party to
25 that agreement has the ability to terminate it. It is not a

1 perpetual agreement where everybody here can sit by and assume
2 that the parties will live by that agreement forever. It was
3 entered into, well, in March of 2010. We are now a year and a
4 half into the settlement agreement. The expectations of the
5 parties have fundamentally changed. You've twice ruled that it
6 was a fair and reasonable settlement, properly negotiated at
7 arm's length. It was a very complicated agreement. It would
8 be a shame to see it fall apart under these circumstances. But
9 we are now sitting here at the end of 2011. And I don't think
10 we should sit in this conference and assume that all the
11 parties will necessarily extend it in perpetuity so that these
12 intercreditor disagreements can be resolved.
13 I would urge that Your Honor proceed to confirmation
14 as soon as possible to address those issues as quickly as
15 possible and that we have a path towards resolution so that we
16 can consummate the global settlement that is at the heart of
17 this plan. Thank you, Your Honor.
18 THE COURT: Thank you.
19 MR. CALIFANO: Good morning, Your Honor. Tom Califano
20 on behalf of the FDIC. I want to echo Mr. Sach's statements.
21 While the equity committee in their presentation didn't mention
22 that the FDIC should be a party to the mediation, in their
23 filing they did. And we believe it's highly inappropriate, at
24 best, for the FDIC, a party to a twice-approved global
25 settlement agreement, to be involved in any mediation. The

1 Court has said, as the parties have said here, that the
2 mediation is to resolve issues that remain an impediment to
3 confirmation of the plan of reorganization in this case. Not
4 to renegotiate those elements of the plan which the Court has
5 found twice to be fair and reasonable which is apparently what
6 the equity committee seeks.
7 Your Honor, as is JPMorgan Chase, we are not prepared
8 to renegotiate the global settlement agreement nor do we
9 believe it's appropriate.
10 Your Honor, this Court has twice determined that the
11 global settlement agreement is fair and reasonable. Thus, it
12 cannot be an impediment to confirmation. Just because the
13 equity committee would like to pretend otherwise doesn't make
14 it so. The Court should deny the equity committee's thinly
15 veiled attempt to reopen the global settlement agreement by
16 seeking to include all the parties in the mediation process.
17 And therefore, we respectfully request that the Court decline
18 to include the FDIC in this mediation process. Thank you.
19 MR. ECKSTEIN: Your Honor, good morning. Kenneth
20 Eckstein of Kramer Levin representing the Aurelius funds. I'd
21 like to express our views, Your Honor, on some of the issues
22 that have been raised. Your Honor, we did not file a statement
23 in advance of the hearing and so, I apologize that I haven't
24 been able to convey our views in advance. But frankly, Your
25 Honor, we saw the debtors' statement on Monday; we saw the

1 equity committee's statement yesterday. And that was actually
2 quite useful to us in terms of trying to assess what, at least
3 from our perspective, would make sense.
4 And actually, Your Honor, I think that I could say
5 that we agree with statements in both of the pleadings. And we
6 think that there is, in fact, an opportunity to reach some
7 common ground although I'd like to lay out what we see as key
8 issues dealing with, number one, the scope of mediation which I
9 think really goes to the question of whether it makes sense for
10 the plan to go forward now or to await mediation; number two,
11 the qualifications of the mediator; and then, number three, a
12 few points on the terms of mediation which have not yet been
13 addressed. I'd like to mention those points.
14 Your Honor, with respect to the scope, when I read
15 Your Honor's opinion, I agree with what Mr. Rosen started with
16 which was that the initial reaction probably was that all of
17 the issues were at least contemplated to be addressed as part
18 of a mediation before going into another plan process.
19 That said, I found what the debtor had presented to be
20 a very constructive path. And I think the debtor made some
21 very useful attempts to try to cut through a lot of the issues
22 and help get a plan put forward that could go to confirmation.
23 The equity committee has raised some issues that I can
24 appreciate dealing with precisely how their litigation will get
25 managed, making sure funding gets dealt with. And I would

1 assume that those are issues that will get ironed out. At the
2 end of the day, if certain qualifications could be satisfied,
3 we would actually think that going forward with a plan earlier
4 rather than later would overall be advantageous.
5 There is, however, Your Honor, one issue that has
6 surfaced today that I think, as Your Honor could imagine, would
7 certainly, from our perspective, create great concern. And
8 while I do not think that today is a day to adjudicate or even
9 express views on the issue, from the Court's perspective, I
10 think it's important for the Court to appreciate at least
11 Aurelius' views on the issue. And that is this question of
12 what do you do with the distributions to the settlement
13 noteholders and the issue of holdbacks.
14 Your Honor, we do not believe that we are the subject
15 of disputed claims although we recognize that Your Honor has
16 authorized a litigation to go forward against the settlement
17 noteholders. And if the matter can't be resolved, we assume
18 that that complaint will go forward and then it'll have to be
19 dealt with. Your Honor, the notion of suddenly using equitable
20 disallowance to transfer that into what is disputed claims and
21 therefore hold back what Mr. Folse suggested may be three
22 billion dollars of claims or distributions in respect of those
23 claims -- and I don't know the precise amount but it's clearly
24 a substantial amount of claims -- we think is a path to
25 creating a lot of dispute, another contested confirmation

1 hearing that will go into what is the scope of damages, what
2 isn't appropriate, is it a prejudgment attachment, are we
3 creditors, are we not creditors. And that's before we get into
4 the merits, Your Honor. I think Your Honor knows the
5 settlement noteholders feel quite strongly that they do not
6 have liability in this case, that there is no basis for
7 liability and that even if there were to be liability, Your
8 Honor, that the amount of damages in respect of these claims
9 would be very, very minimal.
10 Now I'm not suggesting that we need to get to that
11 today, but I believe that if we're going to go down a path of
12 talking about holdbacks, I think, invariably, that becomes a
13 new area of dispute. And I think the equity committee
14 suggested in its pleadings that we'll have more briefing, we'll
15 have discovery, we'll have testimony on issues revolving around
16 damages, potentially estimation of claims. We would
17 respectfully suggest that that is not what is in the best
18 interest of this case right now.
19 Now Mr. Rosen did raise with Your Honor a structure
20 that I am familiar with and I know this Court is familiar with
21 in terms of how Courts have dealt with distributions to
22 creditors, whether they're bondholders, whether they're bank
23 creditors, who are going to be the subject of post-effective
24 date litigation. And it was used by Judge Gerber in Adelphia.
25 It was used by Judge Fitzgerald in Kaiser Aluminum. It's been

1 used by the Courts in this district in Capmark. It's been used
2 in TOUSA where there have been post-effective date litigations
3 or post-distribution litigations. And in that context, there
4 is a structure where the defendants provide satisfaction to the
5 estate, so to speak, that they are able to satisfy a judgment
6 if a judgment ultimately is entered. And what is usually
7 structured around net asset value of the parties relative to
8 what distributions might be received.
9 Now that is the structure that I'm familiar with, Your
10 Honor. I think most of the parties in this case are familiar
11 with. And if that kind of suggestion were raised, it would
12 seem to me, Your Honor, that we might be able to navigate to
13 that conclusion. That has the benefit of potentially averting
14 a very difficult dispute, both legal and factual, over whether
15 or not there is a basis to hold back and what that holdback
16 would be. And, Your Honor, from our perspective, if that were
17 suggested, I think we would use our best efforts to try to get
18 to an agreement or an understanding that would facilitate the
19 plan being confirmed. So that would be number one, Your Honor.
20 But if, on the other hand, if there's a sense that we
21 have to grapple with issues of holdbacks, least likely would
22 prefer that that go to mediation because I do not think it is
23 in anybody's interest to embark upon that litigation right now.
24 Number two, Your Honor, we think that Mr. Rosen has
25 proposed a plan which provides that, for purposes of

1 confirmation, the Court will use the federal judgment rate with
2 respect to post-petition interest. And I think the plan
3 provides any other rate that ultimately is determined by a
4 final order. Your Honor, that issue is now a subject to an
5 appeal. I actually think it would be an issue that warrants,
6 at some point, an expression by an appellate court as to what
7 the answer is -- on that issue is -- Your Honor, I know,
8 appreciates full well there are many different views on what is
9 the appropriate rate for post-petition interest. And we would
10 be comfortable at this point in time as long as that appellate
11 process could continue post-effective date. I think that it
12 should not be an impediment to confirmation. And I think -- I
13 think that is consistent with what the debtor contemplates in
14 its submission and I would imagine that that is not a subject
15 that has to be an impediment to anybody's views of going
16 forward.
17 The issue of resolicitation -- I know it's been raised
18 and I think there have been some suggestions by the equity
19 committee that there needs to be resolicitation. From our
20 perspective, if the post-petition interest issue can be
21 preserved essentially for appeal, I'm not sure that there's a
22 lot of benefit to resoliciting in order to utilize the federal
23 judgment rate. There is the issue, however, of the litigation
24 trust interests. The amended proposed by the debtor
25 contemplates now that the litigation trust interests will no

1 longer be freely transferrable; originally, they were. The
2 debtors' submissions say that if that's going to be a concern
3 that's going to trigger resolicitation, they would reluctantly
4 go back to making it transferrable. From our perspective, Your
5 Honor, we believe that it's important -- it was always
6 important that these be freely transferrable. And we would
7 think that the suggestion that that be modified be adopted. If
8 there is a little more expense in connection with making these
9 transferrable, we think that is important in a restructuring of
10 this size with the number of parties involved. And so, we
11 think awarding the problem of resolicitation can be solved at
12 least with respect to the liquidating trust interest by making
13 them transferrable.
14 The last item that we think has not been addressed
15 that we think again can be fixed relatively easily is, in light
16 of the modifications and the issues that have come up, the
17 question of whether or not there should be new elections made
18 with respect to cash versus stock and with respect to releases.
19 I know the TPS raised that in their pleading and felt strongly
20 that it was important that parties be given the right to
21 reelect. And we think that that is correct. We think that is,
22 in fact, consistent with the way the ballots were structured.
23 But again, I don't see that as an impediment to what Mr. Rosen
24 has suggested. That's probably a matter that can be done in
25 two to three weeks and it doesn't even have to happen until the

1 effective date. And so, we think it would make sense to avoid
2 the disputes to allow the elections to be redone, make sure
3 that all parties are having an opportunity to elect based upon
4 current information. And we think that that could avoid
5 disputes around that issue.
6 I would, as a practical matter, believe, Your Honor,
7 that some form of discussion needs to happen on these issues.
8 Whether it requires a mediator to resolve these issues, I think
9 with the first issue I discussed, which is how to deal with the
10 holdback, if the parties want to resolve that, if they want to
11 resolve it, I believe that the parties probably could, in a
12 matter of two to three weeks, work through that issue and see
13 whether or not we could agree to a structure. And I think if
14 that were the case, my sense is the other issues could also be
15 resolved. And if there was a sense of trying to get a plan out
16 and confirmed, my sense is it could be done -- I don't have a
17 view right now, Your Honor, on the NOLs. My guess is that as a
18 practical matter just given the nature of things, by the time
19 we get to another confirmation hearing and the debtor actually
20 gets ready to go effective, I would be surprised if we're not
21 very close to the end of the year. And if, in fact, the equity
22 committee's view is correct that there's actually tax benefits
23 by waiting till January 1, my guess is we're probably going to
24 be there anyway just given the calendar. So I wouldn't let
25 that be the determining factor.

1 So, I guess, to sum up maybe a long presentation on
2 the first point, Your Honor, we think that there is a great
3 deal of merit to trying to get a plan out if it can be done
4 without debilitating litigation. If it cannot be done without
5 litigating what we think are difficult issues, we, in fact,
6 would agree that we're better off trying to go to mediation at
7 least on those issues as well as the others that have been
8 suggested.
9 If I can move, Your Honor, briefly to point two, which
10 is the qualifications of the mediator.
11 THE COURT: Yes.
12 MR. ECKSTEIN: Certainly, we understand Your Honor's
13 suggestion that the mediation should deal, at a minimum, with
14 the cause of action that the equity committee has been
15 authorized to bring against the settlement noteholders. And on
16 that point, we share the view that the most significant form of
17 expertise that we think should be present in a mediator to deal
18 with that issue, we believe is a familiarity with and an
19 ability to really grapple with difficult issues involving the
20 securities laws. We think those are primarily securities
21 related issues rather than reorganization issues. And if the
22 scope is going to be primarily on the settlement noteholder
23 equity committee dispute, we think that whether it's going to
24 be a district court judge or a former district court judge or
25 even a practitioner that has access to the federal securities

1 expertise, we think that that would be useful.

2 In the event the mediation is going to be --

3 THE COURT: Well, do you think that I can appoint a

4 district court judge as a mediator? I think it goes the other

5 way.

6 MR. ECKSTEIN: I appreciate -- well, Your Honor, the

7 suggestion was made in some of the pleadings. I did not --

8 actually, I said -- I'm responding to the pleadings. I

9 appreciate the practical point you're raising. And that's why

10 I quickly moved to former district judge.

11 THE COURT: Thank you.

12 MR. ECKSTEIN: But I think the point -- the point I'm

13 making, Your Honor, is I think that it would benefit from the

14 securities expertise. And I understand Your Honor's point.

15 And that's why I think that, as a practical matter, there are

16 practitioners or private parties who have that expertise out

17 there who might actually be very useful here. And I don't

18 think we should rule that out either.

19 THE COURT: Okay.

20 MR. ECKSTEIN: If the scope is going to be broader

21 then I actually think that the securities expertise remains

22 very important because these claims are going to necessarily be

23 part of the mediation. But I think that the restructuring

24 expertise would be important as well to be able to resolve plan

25 issues. And I think both of those expertise ideally could be

1 brought to bear on a mediation.
2 The last point, Your Honor, that I wanted to touch on
3 is we think that it's important to have a mediation order put
4 in place here. I know that those are commonly used and there
5 are rules that are relied on in this district. And we would
6 suggest that a proposed order be circulated.
7 There is one issue that I want to at least flag, Your
8 Honor. And that is that I think that -- we think that if
9 there's going to be a mediation involving plan issues that it's
10 important for all the parties who are part of the plan to
11 participate because one of the things that we feel it's
12 important to avoid is to get to any type of an agreement and
13 then have somebody who has been participating in confirmation
14 hearings previously come in and say I was not party, I didn't
15 have a chance to be heard and then find that we're just
16 inviting another dispute after we have concluded a mediation.
17 And so, we would be inclined to think that the participation
18 should be broader rather than narrower and should encompass the
19 parties who have a real interest in the case. And I can
20 appreciate certain parties saying they'd rather not
21 participate. But I think, to be practical, if we're going to
22 pursue the type of structure that Mr. Folse was suggesting
23 which is a more holistic approach to the plan, I think that
24 realistically, it is going to involve other parties at least
25 being at the table and seeing how this gets done. The

1 confirmation issues and the absolute priority issues are not
2 easy. And it's going to require a lot of consent.
3 We also think that a mediation order should include a
4 protection, probably in the form of a report that would come
5 out by the mediator at the conclusion of the mediation, to
6 protect parties who are going to participate in the mediation
7 that they are not inadvertently becoming subjected to the
8 materially nonpublic information as a result of participating
9 in settlement negotiations in the mediation. And I don't think
10 that's -- it's intended by the Court but I think it's an issue
11 that we actually should grapple with. And I believe that there
12 is a structure that we can come up with and I would think that
13 it's done through the mediation order and we would present a
14 structure to Your Honor that could be court-approved so that
15 parties could be comfortable that if the mediation is not
16 successful and we find ourselves in a litigation that could go
17 on potentially for years that parties are not inadvertently
18 restricted as a result of being in possession of settlement
19 negotiations that were unsuccessful but nonetheless took place.
20 And I think we could accomplish that by proposing a structure
21 in the mediation order using a report from the mediator that
22 ultimately the Court could approve at the conclusion of the
23 mediation.
24 So, Your Honor, those are our views and hopefully Your
25 Honor can incorporate those into what ultimately is a

1 conclusion.

2 THE COURT: Thank you.

3 MR. ECKSTEIN: Thank you.

4 MR. CURCHACK: Good morning, Your Honor. Walter

5 Curchack of Loeb & Loeb on behalf of Wells Fargo, the indenture

6 trustee for the PIERS. I'll try to be brief because most of

7 what needs to be said has been said. But I do have to rise on

8 behalf of the real victims of the potential litigation morass

9 that we find ourselves heading to. And those are the holders

10 of the PIERS who aren't settlement noteholders.

11 Your Honor, I beg the Court to see the charade being

12 carried out here by the plan opponents in seeking to delay

13 confirmation of a plan here and urge the Court to support the

14 debtors' suggestion of bifurcating the confirmation from the

15 insider trading litigation, perhaps incorporating some of the

16 constructive suggestions that Mr. Eckstein made to address what

17 may be some practical issues to protect the outcome of that

18 litigation but not to let that litigation hold up the rest of

19 the train.

20 Your Honor, PIERS are publicly held so the trustee

21 doesn't know exactly who holds what. But we believe there's a

22 fairly good guess that forty percent is held by nonsettlement

23 noteholders. And based on the allowed claims not taking

24 account of post-petition interest, that's more than 300 million

25 dollars of disputed -- of not disputed allowed claims in this

1 case. And counsel of the equity committee before asked for
2 some reasons to proceed on a bifurcated basis. Well, there's
3 300 million right there.
4 Your Honor, there are three possible outcomes of the
5 dispute between the equity committee and the settlement
6 noteholders. The settlement noteholders could win; the
7 settlement noteholders could lose. Or they could reach a
8 settlement between the two of them, settlement noteholders and
9 Susman Godfrey on the other side -- whether it's during
10 mediation or after mediation. No reason to suspect it's going
11 to be quick the way the rest of this case has gone.
12 The new common thread that runs through all of those
13 possible outcomes and that's the innocent PIERS lose because
14 time is not on our side here. And based on Your Honor's ruling
15 with respect to the interest rate issue, there is certainly no
16 question that whatever small recovery the PIERS may have is
17 rapidly diminishing. And if this goes on much longer, we'll be
18 gone altogether.
19 I was going to address the misrepresentation that the
20 equity committee and the trust preferred holders put in their
21 papers about the burn only being eleven million dollars. That
22 may be correct with respect to the debtor but Your Honor has
23 ordered contractual subordination by the PIERS. So, the full
24 thirty million dollars is getting taken out of our pockets
25 every month for interest. And that doesn't include the cost

1 and expenses that go along with this process.
2 Your Honor, we weren't just happy -- we don't agree
3 with your decision, obviously, on that point. But that doesn't
4 have to hold up the confirmation as Mr. Eckstein pointed out.
5 The issue of the interest rate differential could be appealed
6 from a subsequently confirmed plan. The debtor has reserves.
7 There is more than adequate given the size of its estate.
8 We're only talking about the marginal increase in value here.
9 And that really leads me to the last point I want to make which
10 is tied at the subordination.
11 Your Honor, where's the justice in forcing innocent
12 creditors, the 300 million dollars in PIERS that aren't held by
13 the settlement noteholders -- and I don't mean to suggest that
14 I think they're not innocent here, by the way. But where is
15 the justice in forcing subordination against them for the
16 benefit of equity? And that's why subordination provisions
17 including subrogation rights. Junior creditors may be
18 subordinated to senior creditors but equity is subordinated to
19 subordinated creditors. And the result that equity is seeking
20 in this case is certainly to take value out of the pockets of
21 the PIERS, who are creditors undisputably, and put it into
22 their own pockets. And, yes, the subordinated creditors agreed
23 contractually to be subordinated. But, Your Honor, equity
24 agreed contractually to be subordinated to creditors as well.
25 And I don't think Your Honor can lose sight of that in the

1 ultimate outcome of this case.
2 We've heard the equity committee and the trust
3 preferred and in their papers raise all the issues they'd like
4 to reconsider in the mediation going so far as to reopen the
5 global settlement agreement. I don't think that's what Your
6 Honor intended. If it is, then I'll go home. I think that's
7 the end for my constituency here. If it's going to include
8 everything, it's got to include the interest rate issues as
9 well. You can't have one without the other. And the issue of
10 solicitation, Your Honor, certainly demonstrates the hypocrisy
11 of the junior capital positions here 'cause the only party
12 that's hurt by anything that's going on here is the PIERS. And
13 there's no need to resolicit for three months, burn up their
14 distribution in order to give them the benefit of voting on
15 something that's worse for themselves. It simply makes no
16 sense.
17 So, Your Honor, we believe the debtors proposed a
18 sensible way out of this maze. It doesn't make us happy but we
19 think it is the best result we could achieve at this point. It
20 maximizes creditor recoveries. It allows those who want to
21 pursue remedies, if there are any, to pursue them against the
22 parties that they claim acted improperly assuming they did act
23 improperly. But it doesn't hold up everybody else. And at
24 this late stage, we think that's the only sensible and just way
25 to proceed. Thank you, Your Honor.

1 THE COURT: Thank you.
2 MR. SHER: Good morning, Your Honor. Barry Sher on
3 behalf of Appaloosa. I just want to make two quick points.
4 One was to -- an issue that was raised by the equity committee
5 and discussed by the debtor and also Mr. Eckstein made a point
6 about reserves or holdbacks are somehow interfering with the
7 distributions of my client, Appaloosa in particular. And one
8 of the things that I heard Mr. Folse say was to express this
9 now relating to not having -- I wrote it down -- a full and
10 fair opportunity to brief the issues and the unfairness of
11 that. That related to something that was going on between him
12 and the debtor.
13 As the Court may appreciate, that is something that
14 has particular significance to us given our view about where we
15 find ourselves and where Appaloosa has been brought into this,
16 we believe, unfairly. But, in particular, with respect to this
17 issue of reserves or holdbacks of things, that's something we
18 believe that we should be given the opportunity if it's even
19 under consideration and we don't think it should be. And the
20 important reason of that is we think that if litigation goes
21 forward, this should just be treated like any other litigation.
22 They should bring their claims if they have them and we'll
23 fight them on it.
24 The second point relates to the mediator, if all that
25 can be avoided in a mediation. We do believe that it is

1 critical that whoever is the mediator have a significant amount
2 of experience in securities issues. Those are at the heart of
3 these claims. We think that would be very, very important. We
4 think that if a former district judge could be found to do this
5 or someone else with -- we think ultimately a district judge
6 will be hearing these anyway, so that would be -- make a lot of
7 sense to us. Thank you, Your Honor.
8 THE COURT: Thank you.
9 MR. MORRIS: Good morning, Your Honor. Matthew Morris
10 from Grant & Eisenhofer for the WMB noteholders. Your Honor,
11 as you probably know, we filed a notice of appeal from the
12 Court's 9/13 ruling regarding distribution of post-petition
13 interest to general unsecured creditors prior to that of
14 allowed subordinated claims.
15 With respect to confirmation and mediation, we
16 generally agree with the equity committee's point regarding the
17 value of expeditious mediation now in advance of confirmation
18 and with their view of the scope of issues to be mediated,
19 i.e., any issue that may have a substantial impediment to
20 confirmation. Echoing Mr. Eckstein's view that it probably
21 makes sense to include all parties who are parties to the
22 confirmation process in mediation so as to avoid objections and
23 so on later on, we would respectfully request that we have a
24 seat at the mediation table as well. We certainly don't
25 envision being any sort of an driving roll. We'll probably be

1 in the back seat, very far in the back seat, I would imagine.
2 None of the issues probably are not germane to us but certainly
3 some are. For example, to the extent that there's any
4 discussion regarding the status of resolution of any of the
5 appeals or any distribution to equity that might deviate from
6 the Armstrong restrictions on gifting to equity part of the
7 distribution above other creditors. Those would certainly
8 impact us. And while we can, of course, object to those in the
9 confirmation process or through the appeals process later, I
10 think it would make sense to have us at the table to the extent
11 that those issues at least arise in mediation.
12 So, again, Your Honor, it goes without saying but
13 we'll adhere to whatever timetable or schedule is put in place
14 by the parties of the Court. But we would respectfully request
15 to be involved in that.
16 THE COURT: Thank you.
17 MR. MORRIS: Thank you, Your Honor.
18 MR. HALPERIN: Good morning, Your Honor. Alan
19 Halperin, Halperin Battaglia Raicht, on behalf of Normandy
20 Hill. I just want to address one point. And I agree with both
21 sides with respect to this point and that's the word I think I
22 heard both of them say: expeditious. As a PIERS holder, given
23 where things stand at the moment, it's our ox that's being
24 gored. And whichever way we're going to go, we'd like to see
25 it go quickly, get to resolution quickly and get to an ending

1 quickly because we're the ones that are getting gored at this
2 time as this process rolls along. That's all.
3 THE COURT: Thank you.
4 MR. CROWLEY: Your Honor, good morning. Leo Crowley
5 for the Bank of New York Mellon as indenture trustee for the
6 senior notes. I wasn't going to speak this morning, Your
7 Honor, but I heard a couple of things that alarmed me a little
8 bit that I wanted to address briefly. And just to put it in
9 context, as you know, the senior notes represent over four
10 billion dollars in principal. And a somewhat more important
11 fact is that the best information I have is the settlement
12 noteholders hold less than ten percent of the senior notes. So
13 as I said at the confirmation hearing, I want to reiterate, the
14 senior noteholders are effectively caught in the crossfire
15 here.
16 The first thing I heard that alarmed me that I wanted
17 to speak to is I thought I heard the equity committee suggest
18 that an appropriate holdback might be to block the entire
19 distribution to the indenture trustees. And one thing I know
20 for sure is that that can't possibly be the right answer. If
21 somebody wants to make a motion for a holdback with respect to
22 the settlement noteholders' distributions, they can make a
23 motion and they can negotiate for something and we deal with it
24 with respect to their distributions not with respect to the
25 ninety plus percent of senior noteholders that have nothing to

1 do with this dispute.

2 The second thing that I heard this morning that

3 alarmed me a little bit is the equity committee, I think,

4 hinted at least that one of the goals they had in mediation and

5 the reason that they wanted to defer plan confirmation pending

6 mediation is because they thought maybe they could negotiate

7 something in the plan that might redown to their benefit.

8 Well, the issue with that, Your Honor, frankly, is that the

9 estate's assets cannot be used to settle the equity committee

10 claims against the settlement noteholders. Those are claims

11 against individual creditors and you can't use estate assets to

12 settle them.

13 The third thing I heard that alarms me was the

14 comment -- well, I'm not surprised I heard it but nonetheless

15 alarmed me -- the comment that reminded the Court that the

16 global settlement agreement will not last in perpetuity. And I

17 would respectfully submit that the number one goal of everybody

18 in the courtroom should be to preserve the enormous value in

19 the global settlement agreement and that every time we delay

20 and defer, we're putting that value incrementally at risk.

21 So we completely agree with the debtor, Your Honor.

22 We should proceed with confirmation. Let the mediation proceed

23 on a parallel track. Thank you.

24 THE COURT: Thank you.

25 MR. HARRIS: Good morning, Your Honor. Adam Harris

1 from Schulte Roth & Zabel on behalf of Owl Creek Asset
2 Management. Your Honor, I'm not going to belabor the record by
3 echoing a lot of what other people have already said here today
4 but one point I think we do need to make here is that as a
5 substantial PIERS holder, as well as a substantial creditor
6 throughout the capital structure, even though Owl Creek is one
7 of the entities against whom the equity committee has asserted
8 allegations, we think the clock needs to stop on the interest
9 accrual. The money that's being shuffled around in terms of
10 payover provisions simply by the passage of time needs to come
11 to an end. Creditors should get paid. And the deal with the
12 issues relative to the settlement noteholders is separate and
13 independent from getting the plan confirmed. I think Mr. Rosen
14 has come up with a very constructive path forward. As I sit
15 here and listen to the issues that have been raised by parties
16 as to why the plan should not move forward, it seems to me that
17 they are of the variety in many respects that are dealt with by
18 debtors in cases all the time. They seem to be more process
19 than substance, issues like modifying the liquidating trust
20 agreement, who has authority to settle, where are the fees
21 going to come from. These are the subject of bilateral
22 discussions between -- or multi-party discussions between the
23 debtor and parties in interest in almost every case, Your
24 Honor. They're not unique to this and probably don't require
25 mediation with what sounds to me like five, ten, fifteen

1 people, party after party sitting in conference rooms in
2 somebody's office running up administrative expenses for the
3 estate.
4 Your Honor, I think those issues, if the equity
5 committee and others sat down with the debtors, could work
6 through the process points here. If there are a couple of
7 issues that need to be dealt with through mediation, maybe they
8 can get done on an expedited basis although I don't think those
9 would actually be necessary to get to a plan confirmation.
10 Settlement noteholders, Your Honor -- even though we were not
11 named in the original motion for standing, I understand Your
12 Honor's footnote. I don't think that it actually reflects
13 accurately the record that was at the confirmation hearing
14 about what the equity committee's position was relative to Owl
15 Creek. But be that as it may, Your Honor, we understand those
16 issues exist. We think Mr. Eckstein had a constructive
17 proposal on how they would be dealt with in the context of the
18 plan. The mechanics of the plan distributions, Your Honor -- I
19 think Mr. Curchack put it accurately on the record after Mr.
20 Crowley that there are tons of mechanics that need to be dealt
21 with here. But there are appropriate -- appropriate remedies
22 have been used by other Courts to deal with this issue. This
23 is not a unique situation.
24 But, first and foremost, Your Honor, from our
25 perspective, we have an economic interest here. It's been

1 challenged. We understand that. But let's lock it in, let
2 everybody else get their money. We can get our money, too;
3 that's fine. But let's stop the interest accrual because every
4 day there's a huge degradation to a potential recovery here
5 assuming we've determined to have done nothing wrong which we
6 think is going to be the outcome. At the rate we're going,
7 Your Honor, we're losing just by the passage of time. So if
8 there's a means to get to a confirmation here of the plan,
9 Your Honor, I think Mr. Rosen and his team should sit down with
10 the equity committee. I did not hear anything of major
11 substance, either in their statement or otherwise, that would
12 suggest that this is mostly process and can't be dealt with in
13 a way that would allow the plan to get confirmed very promptly
14 and to deal with mediation which we're prepared to go into and
15 work for in good faith to try and get the equity committee's
16 issues on behalf of the estate resolved as well. Thank you,
17 Your Honor.
18 THE COURT: Thank you. Anyone else? Good. Well, let
19 me give my thoughts. Quite frankly, although the debtors
20 suggest that we can go ahead with confirmation, I just don't
21 think we can. There's just way too many issues. And I'm not
22 going to have another contested confirmation hearing without
23 trying to have this mediated and resolved all issues.
24 There were prior settlement discussions that
25 apparently bore some fruit. I'm not going to go into why they

1 failed or not. And I don't think it's appropriate to discuss
2 any of the details. But I think that mediation can be useful.
3 And it should include not only the settlement noteholder issues
4 but the confirmation issues. I think all of the suggestions of
5 the debtor that we can go ahead with confirmation either
6 requires that I give an advisory opinion which I'm not prepared
7 to do on the proposed revisions to the plan or even on the
8 issue of whether or not it needs to be resolicited without full
9 notice and opportunity of everybody in the case to weigh in on
10 it. And I, again, don't think that would be fruitful if we can
11 get all of the relevant parties in a room to try and resolve
12 this.
13 I agree that maybe the confirmation issues can be
14 settled first to allow this to proceed forward without
15 resolving all the issues. But I think all the issues have to
16 be on the table in the first instance before a mediator.
17 I agree that there should be a mediation order. I
18 agree with Mr. Eckstein. And it should be laid out. And I
19 think the parties need to sit down and work on the terms of
20 that.
21 With respect to the timing, I will set an initial
22 deadline of November 7, our November 7 omnibus hearing, for a
23 report from the mediator that we have a settlement, no hope of
24 a settlement or hope that things can be settled if more time is
25 given. In that connection, I don't think the parties should be

1 giving the mediator the briefs they've already filed or
2 anything substantive. I would suggest to the mediator a five-
3 page limit on just a review of what the issues are that need to
4 be addressed and discussed. And I think even that is too long.
5 But I don't think that the mediator should be required to go
6 through the reams of legal statements and positions that I have
7 had to do. I think that this is -- there is a path that the
8 parties can go through and get to a settlement. And a good
9 mediator should figure out how to do that.
10 I do not have the authority to appoint a district
11 judge as a mediator. I suggested previously that my
12 recommendation would be a sitting bankruptcy judge. But on
13 reflection, if the parties think -- because I think the issues
14 here are confirmation issues really. And a bankruptcy judge
15 who is familiar generally with how to get a settlement achieved
16 in a bankruptcy case is more important than understanding the
17 intricacies of the securities laws.
18 I think that the parties that should go should include
19 the debtor, the equity committee, the creditors' committee, the
20 settlement noteholders, the TPS holders, the WMB noteholders
21 and Normandy Hill. I do not think, in the first instance, the
22 FDIC or JPMorgan Chase should be included in that list because
23 I think their issues are settled already. That said, however,
24 I will look to them to agree to extend the global settlement
25 agreement for thirty days so that the mediation can proceed and

1 hopefully get some progress proceeding in this case.
2 MR. ROSEN: Your Honor, could you repeat the parties
3 that you said you thought should be there?
4 THE COURT: Yes. The debtor, equity committee,
5 creditors' committee, settlement noteholders, TPS holders,
6 Normandy Hill and the WMB noteholders.
7 MR. ROSEN: Thank you.
8 MR. STEINBERG (TELEPHONICALLY): Your Honor, this is
9 Arthur Steinberg. Did you mean to exclude the LTW holders?
10 THE COURT: I did because I think your issue is
11 subject to a separate litigation. And I think one way or the
12 other, if you win, we know how you're going to be treated; if
13 you lose, we know how you're going to be treated. So I did.
14 And I did not include the indenture trustees either.
15 MR. CROWLEY: Your Honor, may I approach briefly?
16 THE COURT: You may.
17 MR. CROWLEY: Thank you, Your Honor. Leo Crowley for
18 the Bank of New York Mellon as trustee. I think we may be the
19 only party in the case who's directly adverse to Normandy Hill.
20 I would at least like to reserve on the question of whether we
21 should be in mediation. I don't think the debtor has an
22 economic interest in the intercreditor issue presented by
23 Normandy Hill. And the creditors' committee is sort of on both
24 sides of it because the PIERS are on the committee.
25 THE COURT: Yeah.

1 MR. CROWLEY: So if it's --

2 THE COURT: Well, does Normandy Hill want to go to

3 mediation?

4 MR. HALPERIN: I have to discuss it with my client,

5 Your Honor.

6 MR. CROWLEY: If they're out, we don't need to be

7 there. Is that okay if we participate?

8 THE COURT: Yes.

9 MR. CROWLEY: Thank you.

10 MR. HALPERIN: Your Honor, I have to discuss it with

11 the client. It's going to be a cost issue. I know there's

12 concerns to make sure our ox isn't gored to get somewhere

13 because a lot of issues that don't impact us. I have to

14 discuss the cost with the client but I appreciate being

15 included.

16 THE COURT: All right. If Normandy Hill is not in

17 then the indenture trustee --

18 MR. GARA (PH.): Your Honor, Dick Gara (ph.)

19 representing Tricadia. Did you mean to exclude the CCB holders

20 at Tricadia?

21 THE COURT: Do they have any remaining issues?

22 MR. GARA: Well, we are, yeah, senior to the PIERs and

23 I think we do have major interests in this case.

24 THE COURT: Well, I was not going to include them, no.

25 I think your treatment has been laid out. And I didn't know

1 that there was still objection to that.
2 MR. GARA: In a sense that with the passage of time,
3 obviously, we are next in line. And so -- and whenever that
4 day passes, we are very much in danger.
5 THE COURT: Well, I won't include you because I think
6 the more parties included the harder it is to get to a
7 resolution swiftly. But I won't preclude you from being heard
8 if a settlement is reached or if we go ahead with confirmation.
9 MR. GARA: Okay. Thank you.
10 THE COURT: Well, my suggestion for a mediator would
11 be Ray Lyons who sits in Trenton in the district of New Jersey.
12 He has advised that he has time in the next thirty days to give
13 the parties -- I won't use his words but to give you sufficient
14 time to get a mediation resolved. Again, I think this is more
15 a bankruptcy issue than a securities law issue. But I will
16 welcome the parties discussing this and giving me a proposed
17 form of order. If the parties can agree on a different
18 mediator then I will consider that. Otherwise, I will appoint
19 Judge Lyons.
20 And I'd like to see a form of order to me by the end
21 of tomorrow so that we can get this going.
22 MR. ECKSTEIN: Your Honor, Kenneth Eckstein. Just one
23 point going back to the parties in the mediation. We think it
24 would be constructive, Your Honor, if the senior noteholders
25 were also participating. Since we're going to be talking about

1 a plan, we think that having them at the table would be more
2 efficient and useful.
3 THE COURT: So you want their indenture trustee there?
4 MR. ECKSTEIN: Or White & Case.
5 THE COURT: Any objection by any of the parties?
6 MR. FOLSE: Not from the equity committee, Your Honor.
7 THE COURT: All right. I will include them.
8 MR. ROSEN: Your Honor, as far as the preparation of
9 the order, the debtors are happy to take an initial whack at
10 trying to put together an order and distribute it to the
11 parties. I would suggest, though, Your Honor, just like you
12 had to move this status conference from tomorrow to today --
13 THE COURT: Oh, because of Yom Kippur.
14 MR. ROSEN: -- because of the holiday, if we could get
15 the order to you by the close of Monday, I think would be
16 helpful to all the parties.
17 THE COURT: All right. I did forget. Yes, then
18 Monday would be fine.
19 MR. ROSEN: And, Your Honor, if I could also ask, if
20 the parties to the mediation could send to the debtor if they
21 have alternative names to be included as a mediator, if we
22 could get those and we could circulate it around to all the
23 other parties as well.
24 THE COURT: Okay.
25 MR. ROSEN: Your Honor, I've just been told that you

1 may not be here on Monday due to Columbus Day.

2 THE COURT: I am not.

3 MR. ROSEN: So Tuesday morning, if we get it to you.

4 THE COURT: Oh, I leave for the NCBJ on Tuesday

5 morning. But I can do it -- I can deal with it. Give it to me

6 by 4:00 on Monday.

7 MR. ROSEN: Okay, Your Honor.

8 THE COURT: Well, docket it by 4:00 Monday --

9 MR. ROSEN: Yeah. I --

10 THE COURT: -- 'cause you'll do that electronically

11 and I can just get it off the docket.

12 MR. ROSEN: And the notice of proposed mediation

13 order?

14 THE COURT: Yes.

15 MR. ROSEN: Okay.

16 THE COURT: Okay. Under --

17 MR. CROWLEY: Your Honor, Leo --

18 THE COURT: -- certification of counsel.

19 MR. ROSEN: Yes.

20 THE COURT: Yeah.

21 MR. CROWLEY: The trustees have motions on tomorrow as

22 to which certificates of no objection were filed. Do you want

23 us to come in -- to appear?

24 THE COURT: You do not. I saw those this morning and

25 I have entered the orders based on the --

1 MR. CROWLEY: Okay.

2 THE COURT: -- either CNO or COCs.

3 MR. CROWLEY: Okay. Thank you.

4 MR. ROSEN: I still think that there's one other item

5 on tomorrow's calendar.

6 THE COURT: An individual creditor's motion for

7 summary judgment, yes.

8 MR. ROSEN: Exactly, Your Honor.

9 THE COURT: Obviously, everybody doesn't have to be

10 here for that.

11 MR. ROSEN: Right. And I think Mr. McRoberts will be

12 here for that.

13 MR. MCROBERTS: Or Mr. Merchant, either one.

14 THE COURT: All right. All right. That's all then.

15 We'll stand adjourned then. Thank you.

16 (Whereupon these proceedings were concluded at 10:47 a.m.)

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6 R U L I N G S

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	DESCRIPTION	PAGE	LINE
9	Motion of Tricadia to amend effective date of	28	23
10	the order to vacate entered		
11	Confirmation hearing not to proceed before	83	21
12	all substantive issues are resolved and all		
13	parties have an opportunity to negotiate them		
14	Mediation order to be set in place	84	17
15	Initial deadline of 11/7/11 set for	85	22
16	Court to receive report from mediator		
17	Parties ordered to attend mediation are:	85	19
18	debtor, the equity committee, the creditors'		
19	committee, the settlement noteholders,		
20	the TPS holders, the WMB noteholders and		
21	senior noteholders represented by White & Case;		
22	Normandy Hill and Bank of New York Mellon have		
23	the option of whether they wish to attend or		
24	not		
25			

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2 I N D E X

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4 T E S T I M O N Y

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6 R U L I N G S

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	DESCRIPTION	PAGE	LINE
9	Unless parties agree on a mediator, Court will	88	10
10	appoint Judge Raymond Lyons to be the mediator		

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2 C E R T I F I C A T I O N

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4 I, Lisa Bar-Leib, certify that the foregoing transcript is a

5 true and accurate record of the proceedings.

6

7 ___________________________________

8 LISA BAR-LEIB (CET**D-486)

9 AAERT Electronic Certified Transcriber

10

11 Veritext

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16 Date: October 7, 2011

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