UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 02-41729
ADELPHIA COMMUNICATIONS CORP.,	.	New York, New York
	.	Tuesday, December 12, 2006
Debtors.	.	A.M. Session
. . . . .	.	10:08 a.m. to 1:37 p.m.

TRANSCRIPT OF HEARING ON CONFIRMATION
VOLUME 7
BEFORE THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Marc Abrams, Esq.
Paul Shalhoub, Esq.
Terence K. McLaughlin, Esq.
Brian E. O'Connor, Esq.
Rachel C. Strickland, Esq.
Myron Trepper, Esq.
Roger Netzer, Esq.
WILLKIE, FARR & GALLAGHER, LLP
787 Seventh Avenue
New York, New York 10019

(Appearances continued)

Audio Operator: Electronically Recorded by Court Personnel

Transcription Company: Rand Transcript Service, Inc.
311 Cheyenne Road
Lafayette, New Jersey 07848
(973) 383-6977

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES: (Continued)

For the Official Committee of Unsecured Creditors:	David M. Friedman, Esq. Adam L. Shiff, Esq. Michael C. Harwood, Esq. Howard W. Schub, Esq. KASOWITZ, BENSON, TORRES & FELD, LLP 1633 Broadway New York, New York 10019
	David M. Stern, Esq. Edward T. Attanasio, Esq. KLEE, TUCHIN, BOGDANOFF & STERN, LLP 2121 Avenue of the Stars, 33rd Fl Los Angeles, California 90067
For the ACC Bondholders:	Martin J. Bienenstock, Esq. Vernon S. Broderick, Esq. Richard W. Slack, Esq. Adam P. Strochak, Esq. WEIL, GOTSHAL & MANGES 767 Fifth Avenue New York, New York 10153
(Via Telephone) -	Melanie Gray, Esq. Bruce Lucas, Esq. James T. Grogan, III, Esq. WEIL, GOTSHAL & MANGES, LLP 700 Louisiana, Suite 1600 Houston, Texas 77002
For the Ad Hoc Committee of Lenders:	Richard L. Wynne, Esq. KIRKLAND & ELLIS, LLP 777 South Figueroa Street Los Angeles, California 90017
For Calyon Securities: (Via Telephone) -	Andrew Brozman, Esq. Angelique Shingler, Esq. CLIFFORD CHANCE, US, LLP 31 West 52nd Street New York, New York 10019

APPEARANCES: (Continued)

For the FrontierVision Ad Hoc Committee:	Kenneth H. Eckstein, Esq. Jeffrey S. Trachtman, Esq. KRAMER, LEVIN, NAFTALIS & FRANKEL, LLP 1177 Avenue of the Americas New York, New York 10036
For the Official Committee of Equity Security Holders:	Gregory A. Blue, Esq. Peter D. Morgenstern, Esq. Eric B. Fisher, Esq. MORGENSTERN, JACOBS & BLUE, LLC 885 Third Avenue New York, New York 10022
For the Ad Hoc Committee of Non-Agent TCI and Parnassos Lenders:	Jennifer Feldscher, Esq. BRACEWELL & GIULIANI, LLP 1177 Avenue of the Americas New York, New York 10036
For the U.S. Trustee:	Alicia M. Leonhard, Esq. Tracy Hope Davis, Esq. OFFICE OF THE U.S. TRUSTEE 33 Whitehall Street, Suite 2100 New York, New York 10004
For the Class Action Plaintiffs:	John H. Drucker, Esq. COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A. 460 Park Avenue, 8th Floor New York, New York 10022
For W.R. Huff Asset Management Co., LLC:	Gary L. Kaplan, Esq. FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, LLP One New York Plaza New York, New York 10004

APPEARANCES: (Continued)

For Wachovia Bank, NA:	Peter V. Pantaleo, Esq. Elisha D. Graff, Esq. SIMPSON, THACHER & BARTLETT, LLP 425 Lexington Avenue New York, New York 10017
For Perry Capital, LLC:	Kathryn L. Turner, Esq. CADWALADER, WICKERSHAM & TAFT, LLP One World Financial Center New York, New York 10281
For Bank of America:	Robin E. Phelan, Esq. Judith Elkin, Esq. HAYNES AND BOONE, LLP 153 East 53rd Street, Suite 4900 New York, New York 10022
For Certain Investment Banks:	Lindsee P. Granfield, Esq. Luke A. Barefoot, Esq. Jane Kim, Esq. CLEARY, GOTTLIEB, STEEN & HAMILTON, LLP One Liberty Plaza New York, New York 10006
For the Ad Hoc Bondholders' Committee (a/k/a "Committee II"): (Via Telephone)	Dean A. Ziehl, Esq. PACHULSKI, STANG, ZIEHL, YOUNG, JONES & WEINTRAUB 780 Third Avenue, 36th Floor New York, New York 10017 Richard M. Pachulski, Esq. PACHULSKI, STANG, ZIEHL, YOUNG JONES & WEINTRAUB 10100 Santa Monica Boulevard 11th Floor Los Angeles, California 90067
For Prestige Communications:	Christopher R. Belmonte, Esq. SATTERLEE, STEPHENS, BURKE & BURKE, LLP 230 Park Avenue New York, New York 10169

APPEARANCES: (Continued)

For Rembrandt Technologies, LP:	Marc B. Hankin, Esq. SHEARMAN & STERLING, LLP 599 Lexington Avenue New York, New York 10022
For the Fort Myers Noteholders:	Lee S. Attanasio, Esq. SIDLEY AUSTIN, LLP 787 Seventh Avenue New York, New York 10019
For Highfields Capital Management and Tudor Investment Corporation:	Michael K. Isenman, Esq. GOODWIN PROCTER, LLP 901 New York Avenue Washington, D.C. 20001
	Allan S. Brilliant, Esq. GOODWIN PROCTER, LLP 599 Lexington Avenue New York, New York 10022
	Gina Lynn Martin, Esq. GOODWIN PROCTER, LLP Exchange Place Boston, Massachusetts 02109
For Soceite Generale: (Via Telephone)	Wendy Simkulak, Esq. Lawrence J. Kotler, Esq. DUANE MORRIS, LLP 30 South 17th Street Philadelphia, Pennsylvania 19103
For Elliot Associates, LP and John Pike:	David Parker, Esq. KLEINBERG, KAPLAN, WOLFF & COHEN, PC 551 Fifth Avenue New York, New York 10176
For the Law Debenture Trust Company of New York as Senior Notes Trustee:	Arlene Alves, Esq. SEWARD & KISSEL, LLP One Battery Park Plaza New York, New York 10004

APPEARANCES: (Continued)

For U.S. Bank, N.A., as Indenture Trustee:	David J. McCarty, Esq. SHEPPARD MULLIN, RICHTER & HAMPTON, LLP 333 South Hope Street, 48th Floor Los Angeles, California 90071
For the Ad Hoc Committee of Arahova Noteholders:	J. Christopher Shore, Esq. WHITE & CASE, LLP 1155 Avenue of the Americas New York, New York 10036
For the United States Securities and Exchange Commission:	Patricia Schrage, Esq. UNITED STATES SECURITIES AND EXCHANGE COMMISSION 3 World Financial Center New York, New York 10281
For Wilmington Trust Co.:	Geoffrey W. Castello, Esq. KELLEY, DRYE & WARREN, LLP 200 Kimball Drive Parsippany, New Jersey 07054
For U.S. Bank, N.A., as Indenture Trustee:	Katherine A. Constantine, Esq. DORSEY & WHITNEY, LLP 50 South Sixth Street Minneapolis, Minnesota 55402
For Credit Suisse and Royal Bank of Scotland:	Joel Millar, Esq. WILMER, CUTLER, PICKERING, HALE & DORR, LLP 300 Park Avenue New York, New York 10022
For the Bank of Nova Scotia:	Michael Luskin, Esq. LUSKIN, TERN & EISLER, LLP 330 Madison Avenue New York, New York 10017

INDEX

(Proceedings commence at 10:08 a.m.)

THE COURT: I apologize for keeping you all waiting. The decision on the motion in limine will necessarily be a lengthy one.

But before I deliver that, do we have views on the matter of the declassification of yesterday's designation decision? Mr. Friedman?

MR. FRIEDMAN: Your Honor, I've polled the parties other than the ACC Bondholder Group, and I believe all of them are prepared to have it go on the public docket.

THE COURT: Very well. Mr. Bienenstock?

MR. BIENENSTOCK: Your Honor, we also would like it unsealed.

THE COURT: Unsealed?

MR. BIENENSTOCK: Yes.

THE COURT: All right. It will go on ECF sometime today.

All right. Now turning to the motion in limine.

The motion in limine to exclude the testimony and expert report of Harrison Goldin is granted in part and denied in part, as more fully set forth below and in the marked testimony handout that my law clerk will circulate.

Similarly, certain pages of the expert report also marked to show deletions will be circulated at that time.

As conceptual matters, the motion in limine will be

granted (and hence evidence will be excluded) to the extent that Mr. Goldin's testimony expressed legal conclusions or opinions as to the outcome of disputed legal issues, notwithstanding the FRE 704 argument I heard yesterday. The motion in limine is denied (and thus the evidence is admissible) to the extent the evidence discusses how *Mr. Goldin* would analyze the issues if he were a trustee, and, (though the matter is close) how he thinks other trustees would analyze the issues -- in each case an as an aid (but only that) for me in assessing the evidence. The motion in limine is also granted (and thus the testimony will be excluded) to the extent that it purports to establish numeric weights for certain legal issues in the MIA dispute and, as importantly or more so, then uses those numeric weights to make the computation spit out a number to represent the lowest level of reasonableness.

The motion in limine is denied to the extent that it discusses the impact on recoveries that particular rulings would have, or discusses the effect of particular issues in the settlement process or discusses the perceived economic impact of the plan. And it's denied to the extent that it asserts that the entirety of the testimony is inadmissible by reason of contentions of failures to provide a list of documents relied on in assessing the settlement, without prejudice to a motion to strike any portion of the testimony

if he's not capable of identifying what he relied on.

Where I've denied the motion, it's of course without prejudice to the rights of the plan proponents to make the same points in cross examination and in argument.

The plan proponents make essentially four arguments in support of their objections (some of which break down into sub-arguments), and I'm going to take them partly out of turn to address related concepts together.

1. Legal Opinions/Ultimate Issue

The first contention is that the declaration and expert report should be excluded because each contains expert testimony on ultimate issues of law.

When I took oral argument on the matter yesterday afternoon, I did so based on my reading of the briefs, without having the opportunity to read the key underlying cases. I had noted FRE 704 and noted that the ACC Bondholders Group had addressed and relied on Rule 704, as supporting admissibility, while the plan proponents hadn't addressed Rule 704. And I had assumed before oral argument that Rule 704 would be applicable and decide the legal opinions matter. Upon reading the underlying cases, however, I think that I had then read Rule 704 too broadly, that is before and during oral argument, and in any event failed then to take into account what I think is binding Second Circuit authority, and persuasive authority at the district court.

In *Hygh v. Jacobs*, 961 F.2d 359,363 (2d Cir 1992), the Second Circuit stated:

> The standard for evaluation of Cox's expert testimony regarding Jacobs' conduct is provided by Fed.R.Evid. 704(a), which provides in pertinent part, "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." While Rule 704 has abolished the common law "ultimate issue" rule, however, *it has not lower[ed] the bars so as to admit all opinions.*

It went on to say:

> This Circuit is in accord with other Circuits *in requiring exclusion of expert testimony that expresses a legal conclusion.*"

Hygh was quoted from, and once more FRE 704 was reconciled with the "no legal conclusions" rule, in a lengthy and very thorough decision by Judge Sweet of the district court in this District, *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450,528 (S.D.N.Y. 2001). After doing that, Judge Sweet explained what I think is the key distinction here. Judge Sweet found an expert's assignment flawed from the outset because:

> Rather than being asked to develop an expert opinion

that *might happen to embrace* certain ultimate issues, he was asked to reach legal conclusions regarding those ultimate issues.

Similar direction from the Circuit appears in *U.S. v. Bilzerian*, 926 F.2d 1285,1294, (2d Cir. 1991). There the Circuit didn't speak about Rule 704 (which by then had been in place for a little more than fifteen years), but it nevertheless held that as a general rule, an expert's testimony on issues of law is inadmissible. "Although an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts." *See also Good Shepherd Manor Foundation v. City of Momence*, 323 F.3d 557 (7th Cir. 2003) (noting, where proffered testimony was largely on purely legal matters and made up solely of legal conclusions, "the district court correctly ruled that expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible").

Similarly, in *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207,1212 (D.C. Cir. 1997), the D.C. Circuit once again considered an argument that Rule 704(a) permits legal conclusions. It started by quoting Rule 704, and its provision that:

-- "otherwise admissible" opinion testimony "is not objectionable because it embraces an ultimate issue

to be decided by the trier of fact."

From that, it concluded that a litigant couldn't successfully argue that the testimony was inadmissible because it went to an "ultimate issue," but the expert evidence as to legal matters nevertheless was not "otherwise admissible." That's within the meaning of Rule 704, of course. It held:

> Whether expert testimony is "otherwise admissible" depends, in part, on whether it will "assist the trier of fact" in either understand[ing] the evidence or ... determin[ing] a fact in issue. *See* FED.R.EVID. 702. Expert testimony that consists of legal conclusions cannot properly assist the trier of fact in either respect and thus is not "otherwise admissible."

At another point the *Burkhart* Court captured succinctly the principle applicable here, one that's particularly applicable to conclusions as to a litigation's outcome:

> Each courtroom comes equipped with a legal expert, called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.

I also note that the ACC Bondholder Group's reliance on my predecessor Judge Garrity's decision in *Adler Coleman*,

a case that's now on my watch, is misplaced. Judge Garrity did indeed hold that an expert's use of the terms "fraud" and fraudulent," and lengthy testimony claiming fraud, was admissible as it was used as a layman and not a legal conclusion. But Judge Garrity expressly stated, in language the ACC Bondholders did not include in their brief, that "an expert cannot testify to legal conclusions." *Mishkin v. Ensminger (In Re Adler, Coleman Clearing Corp.*, 1998 Bankr. LEXIS 404, at Page 20. He cited four cases for that proposition, including two of the cases that I had cited above, preceding his listing of the cases holding that an expert can't testify to legal conclusions with a, "*See* for example."

It's been pointed out that most of the law in this area has been in cases where there's a right to jury trial, and I don't disagree with the argument that jurors are more likely to be confused or misled as to legal matters than a judge would be. But Rule 702 is not limited to jury cases, and the cases do not limit their holdings to jury cases. Adler Coleman was a decision by Judge Garrity in this Court, in a nonjury trial. And as the D.C. Circuit held in *Burkhart*, the "otherwise admissible" requirement in Rule 702 depends, in part, on whether it will "assist the trier of fact" in either "understand[ing] the evidence or... determin[ing] a fact in issue," and expert testimony that

consists of legal conclusions cannot properly assist the trier of fact in either respect. Those considerations apply equally in jury and nonjury cases.

It was argued by the ACC Bondholders Group (in their brief at Page 3 and in oral argument), that "courts" have held that expert testimony regarding the reasonableness of settlement may be admissible when it assists the trier of fact, citing *GAB Business Services v. Lloyds Syndicate 627*, 809 F.2d 755, 761-762 (11th Cir. 1987), and *Harbor Insurance Company v. Continental Bank Corp.*, 1991 U.S. Dist. LEXIS 15272, at *17-*18. While that statement is technically true (and I'll permit the Goldin evidence to the extent it passes muster under that standard) using the holdings of either of those cases for the broader proposition the ACC Bondholders Group argues -- that Mr. Goldin can express legal opinions -- is inappropriate.

Neither case involved a situation like the one we have here, whether a Court should or should not approve a prospective settlement, especially one involving a case that is ongoing in the same Court. *GAB* involved a diversity lawsuit under Florida law, over a dead race horse, where a Lloyd's Insurance syndicate and its local agent were arguing about the losses incurred when the agent allegedly mishandled the claim -- causing the Lloyd's syndicate to have paid out a hefty sum of money in a settlement to the underlying insured.

The syndicate and the agent pointed fingers at each other as to whether Lloyds had settled for too much.

On that issue, there was no evidence *at all*, as the syndicate "introduced no evidence whatever to establish why it settled and whether the settlement was reasonable." 809 F. 2d at 762. The Seventh Circuit ruled that "expert testimony and other evidence relating to the strength of [the underlying insured's] claim was not only relevant, but absolutely essential. *Id*. at 761-762. I don't regard GAB as conclusive here for several reasons. First, it involved a case where there was no evidence at all to permit an evaluation of the settlement. Second, it did not involve an application to settle a dispute pending before the same judge who has first hand knowledge of the issues and evidence, and better knowledge than an expert would -- and indeed involved a jury trial as to the wisdom of a past settlement. Third, it never made mention of Rule 702 or 704, or the law involving the exclusion of evidence as to legal conclusions. And fourth (even if it were otherwise directly on point), it's a decision out of the 11th Circuit, and I'm sworn by my oath to follow Second Circuit law, which "require[es] exclusion of expert testimony that expresses a legal conclusion." *Hygh*, 961 F. d at 363.

Harbor Insurance, the other case cited, is even weaker in its support for the ACC Bondholder Group position.

Like GAB, it was an insurance case (there, a D&O policy case), and did not involve a motion to approve a prospective settlement. And while it involved a settlement, it did not involve the wisdom of the settlement, but rather whether through the carrier's refusal to contribute the money to fund one was appropriate or not. The issue then involved what the plaintiff company's corporate bylaws said about the duty to indemnify officers and directors who were charged with fraud.

Continental, which was a Delaware corporation, sought to introduce the testimony of Frank Balotti, a well known Delaware corporate lawyer, as an expert witness as to whether Continental was permitted or required by its charter to indemnify its officers and directors in the settlement. This issue was important because the insurance companies were not liable under the insurance policy unless Continental's charter permitted or required indemnification of its officers and directors.

In an earlier ruling, the Seventh Circuit had ruled that the charter language was ambiguous, and that both parties should be allowed to present extrinsic evidence to clarify the intended meaning of the charter at a second trial. The Seventh Circuit had also stated that a lawyer experienced in indemnification matters could be a proper witness to opine on the charter's probable meaning. However, it went on to say that the legal expert could only testify as

to *facts* that would aid the jury in interpreting the charter. *See* 922 F. 2d at 366.

The district court, on remand, held that a legal expert could explain the ordinary practices of other corporations who deal with similar indemnification terms in their charter. But it went on to say that a legal expert could not give a legal opinion as to the meaning of the ambiguous contract terms, nor could a legal expert give a legal opinion as to the legal standards believed to be derived from the charter. Those were the standards that Balotti and any other indemnification witnesses would need to follow.

While the motion in limine was thus denied as a general matter and the Harbor Insurance District Court declined to strike the testimony as a whole, it made clear that it would selectively exclude any aspects of the expert testimony that went beyond appropriate bounds. It said:

> The insurance companies argue that this testimony should be barred because Balotti is improperly basing his testimony on Delaware law rather than inquiring into the intent of the drafters of Continental's charter.
>
> Once again, the proper context of trial is necessary for a ruling on this evidentiary question. Based upon the standards outlined above, Balotti may

testify about the ordinary practices of Delaware corporations that have identical indemnification language in their charters. If during trial the insurance companies believe that Balotti has overstepped his bounds by giving legal opinions, the insurance companies may object. The Court shall then rule in the proper context of trial. Since the insurance companies have failed to demonstrate that Balotti's testimony is clearly inadmissible on all possible grounds, the motion to exclude Balotti's testimony is denied.

Thus *Harbor Insurance* supports neither side in full, and supports a middle ground approach. It teaches me that I should not exclude the testimony in toto, and that I should not let in legal conclusions. It says, rather, that I should examine the testimony in context; let in the portions that truly aid me in ascertaining facts; and that I should exclude the portions that deal with matters of law -- which in my view include predictions of outcome of litigation under the law, or that purport to say who has the better of legal issues.

Unless I missed some, the legal issues here come up in two paragraphs of Mr. Goldin's testimony. In Paragraph 22, Mr. Goldin expresses the view that the ACC Bondholders are highly likely to prevail on certain MIA issues. In

Paragraph 23, he opines that they have the "far stronger equities" respecting key disputed issues that drive value allocation. Particularly with respect to the first of them, these are exactly the kinds of things as to which he isn't permitted to express an opinion. He can tell me whether, if the ACC Bondholders were to prevail, what the impact on creditor recoveries would be, but he couldn't express opinions of the type I just quoted from even if he had been sitting next to me during the MIA trial, and had personally read all of the underlying briefs and cases.

The next objection is that opinions are expressed on issues that aren't listed in the TMT factors -- most significantly, what Mr. Goldin thinks an independent fiduciary would do in analyzing a settlement of this character. As a general matter, I don't find the proffered testimony excludable for that reason. And though it's problematical in other respects, I think the other respects can be addressed by individualized objection.

It's true that the TMT factors don't explicitly include what an independent fiduciary would do, but I read those factors as establishing a floor, rather than a limit, on what people should address in helping a court decide what's in the best interests of an estate. In general, when higher courts list factors for Courts to consider in deciding matters in the exercise of their discretion, those factors

aren't exclusive. Non-enumerated factors may be of lesser relevance, but I don't think consideration of them is forbidden. There is a separate issue as to whether aspects of the proffered testimony -- and in particular what an ACC fiduciary would do -- would be too speculatative and/or would insufficiently fail to take into account other factors, but I think I can and should deal with them individually, and they can be brought out in cross-examination.

The third matter is the failure to provide a list of documents relied on.

On the matter of the documents list, I'll take it individually and consider any failures to identify documents in context. I recognize that in the MIA, there were thousands of pages of documents to potentially rely upon, so I think we need to take a common sense approach here. But on the other hand, I don't think that a witness could support an opinion by simply waving to the document room and saying in generalized terms that he relied on stuff in there without giving us an indication of its substance, if not its Bates number. I'll consider motions to strike after establishing reliance on unidentified documents giving rise to an inability to cross-examine. In general, I won't strike testimony based on documents that were identified, but to the extent Mr. Goldin formed opinions that weren't based on identified documents, I'll either strike that portion of the

testimony on a motion to strike or be receptive to arguments that I should consider any such testimony highly suspect and unpersuasive.

Turning now to *Daubert* and methodology issues.

Though the plan proponents' brief and oral argument at trial yesterday diverge somewhat in their thrust, they make a number of points as to Mr. Goldin's "subjective and non-fact based opinion" that if the MIA continues, the ACC Bondholder Group is likely to succeed on the merits on every issue that he considers to be a major "value driver." The plan proponents complain in particular as to lack of methodology (and say, if there is one, that it isn't a scientifically valid or widely-respected methodology) and assert a disconnect between his experience and his opinions. They say that in my evidentiary gatekeeper role, I should exclude Mr. Goldin's testimony in its entirety.

I agree that I have a responsibility to exercise a gatekeeper role here, and that it does require exclusion of part of Mr. Goldin's testimony, but I don't agree that it requires exclusion of the entirety of the testimony or the bulk of it.

In *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 1993, the United States Supreme Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. And in a second

decision, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court clarified that this gatekeeper function applies to *all* expert testimony, not just testimony based in science. At the risk of stating the obvious, those decisions are binding on me, and do not grant me the luxury or easy way out of simply letting any and all expert testimony in, and then taking it for what its worth.

The *Daubert* requirements were codified in amendments to the Federal Rules of Evidence in the year 2000, and now Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if
>
> (1) the testimony is based upon sufficient facts or data,
>
> (2) the testimony is the product of reliable principles and methods, and
>
> (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert*, the Supreme Court identified four specific factors to be considered in determining the

requisite reliability to satisfy the court's gatekeeper function:

> Whether the theory has been or can be tested;
>
> Whether the theory has been subject to peer review or has been published;
>
> When a particular technique is used, that technique's known rate of error; and
>
> The extent of acceptance of the theory in the relevant scientific community.

As the Rule 702 2000 Amendments Advisory Committee notes provide -- these are those that were with respect to the amendments in the year 2000 -- the Supreme Court in *Kumho Tire* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony depending upon "the particular circumstances of the particular case at issue." It noted that

> We agree with the solicitor general that the factors identified in *Daubert* may or may not be pertinent in assessing reliability depending on the nature of the issue, the expert's particular expertise ... and then it went on. 526 U.S. at 150.

Here I think *Daubert* considerations don't come close to being a bar to Mr. Goldin telling us how he's dealt with like issues in his experience, and how he'd analyzed the issues here. But when he moves into the realm of numeric and

quantitative analysis, I think the *Daubert* factors necessarily have to take over, and here his testimony doesn't come close to satisfying the *Daubert* requirements. That's especially so since the Advisory Comments to Rule 702 add, as another factor, relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact:

> "Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give."

I don't think the arguments that this is different than scientific evidence are persuasive here. I agree that all expert opinion evidence isn't scientific. It only need be, as Rule 702 provides, "scientific, technical or other specialized knowledge." But it must still satisfy the three requirements of Rule 702, and as the 2000 Amendments Advisory Notes to Rule 702 observe, after *Kumho Tire*, the gatekeeper function applies to all expert testimony, not just testimony based on science. Under FRE 104(a), the proponent of the evidence has the burden of establishing that the pertinent admissibility requirements are met, by a preponderance of the evidence, and I rule that in this respect the ACC Bondholders haven't done so.

The plan proponents asserted that a showing of methodology was missing from Mr. Goldin's expert report and,

indeed, his deposition. Proving a negative can be tricky, but I looked at both the expert report and the ACC Bondholder Group's brief, and I couldn't find any basis for the methodology or for the "risk weights" either, other than -- well, period.

To the extent -- I'll come back to the exception, or argued exception.

To the extent that Mr. Goldin has experience in settling cases, or recommending settlements, I think he's entitled to testify as to how he goes about deciding what's a good settlement or a bad settlement. If, as I sense is true, he also has experience in linking legal issues with the economic effects of various outcomes, I think he's entitled to testify as to how he analyzes the linkage. But if he proposes superimposing upon a discussion of how he applies his training and experience to a numerical computation as a decision maker or a decision influencer, I think we have to subject such a methodology to a *Daubert* analysis. If, of course, the methodology is one as to which we can't test the premises or the computational technique, or the computational technique lacks a foundation in current or past usage or scholarly work, that raises *Daubert* concerns.

Here Mr. Goldin assigns certain "risk weights" to matters that he regarded as the principal drivers of value in this case -- the AIH receivable, the Arahova Payable, and the

Silo Netting. But while he plainly has experience in many areas, I see nothing in the record as to how his experience, or any methodology that has been described, provides a basis for establishing numerical weights to legal issues, and then taking those numerical weights as functions (which expression I use in the mathematical sense) to convert them, mathematically, into dollar values for appropriate settlements.

I have read the Prager declaration, particularly Paragraphs 11 to 23 of it -- which were relied upon by the ACC Bondholders -- and see nothing that causes me to believe that a satisfactory basis for establishing these subjective and essentially arbitrary weighting exists based on that testimony either.

Judge Sweet addressed unsupported conclusions in *Primavera*, and while I'd prefer to put it more delicately than he did, I'm compelled to come to the same result. Judge Sweet said:

> While it is permissible for [the expert] Malkiel to base his opinion on his own experience, he must do more than aver conclusorily that his experience led to his opinion. 130 F. Supp. 2d at 530.

Thus the evidence fails to pass muster under any of the three requirements of Rule 702, all of which must be satisfied, that it be "based upon sufficient facts or data,"

that it be the product of "reliable principles and methods," and that the witness has applied the principles and methods reliably to the facts of the case.

I've already ruled that Mr. Goldin can't express conclusions on legal issues. These include views as to who should win on MIA issues, though he can talk about what issues he regards as issues whose determination are "value drivers," and the effects of a win or loss on various issues that are elements of the MIA. He can talk about why he thinks aspects of the settlement aren't in the interests of the estate. He can talk about why he would ascribe low risk to the disputes pertaining to particular issues, in terms of their economic effect on the outcome, but can't speculate as to whether any other fiduciary would do likewise. And while he can talk about the range of recoveries that would result from assumptions he makes to compute his own species of a waterfall analysis, he can't establish a numeric computational model based on any experience or methodology I can find satisfactory, under which he can put assumptions into a formula for determining settlement reasonableness that will make a number pop out.

With respect to the valuation of the company, Mr. Goldin can take hypothetical or actual figures for TWC stock value as input for expressing views as to fairness, but he hasn't displayed the requisite experience or methodology for

doing the valuation himself.

I'll be circulating copies of the declaration, marked to show the excluded testimony, and the expert report, showing the portion that must be excluded. We'll then take a recess to allow you to review that, and to take it into account in cross-examination.

One open issue. I went through the declaration and the expert report with as much care as I could given the level of fatigue at the time. I don't rule out the possibility that something that is governed by the general principles that I just articulated applies to something I missed. This decision is without prejudice to your rights to argue that the principles that I articulated apply to something in the testimony that in essence remains in the declaration and the expert report.

My law clerks have about five copies of the decision which I'm confident isn't going to be sufficient. What I would suggest is that they hand them out to the ACC Bondholders and one or two of the counsel for the plan proponents and that during the break they give them to other people who might have an interest in participating in the proceedings or following the proceedings.

At this point I think we should take a recess.

MR. BIENENSTOCK: May we ask a few questions, Your Honor?

THE COURT: Yes, you may.

MR. BIENENSTOCK: I guess if the witness were on live for direct and the Court sustained objections to certain testimony based on the reasoning Your Honor just read into the record on different types of issues, the questioner would be allowed to try to find other ways, permissible ways in the view of the Court, to get other evidence -- the witness's opinions into evidence.

We really need time to see what Your Honor has done to the declaration and to see whether within the confines of your decision there are other things Mr. Goldin can put in a declaration to satisfy the needs of our clients and to vindicate their rights. So we really need time for that.

Second, as Your Honor was reading it, obviously, you know, we were all hearing it for the first time, several issues for reconsideration occurred to me and my colleagues that, you know, we'd like the opportunity to try to convince Your Honor.

And, third, based on Your Honor's -- I'm assuming Your Honor would like to hear all my questions before I stop.

THE COURT: Go on.

MR. BIENENSTOCK: Based on Your Honor's reference today to Your Honor as the person best able to basically tell us what's reasonable because Your Honor was personally involved in presiding over the MIA hearings, I guess this

brings us to a ticklish or sensitive point.

If what we're dealing with is a Court that's also decided that it's the best witness, we haven't had a chance to depose Your Honor. And I don't say that as a wisecrack. I say that as that sounds to us like where this is coming out. Your Honor has obviously a lot of thoughts, observations, about that MIA process. There are some things Your Honor focused on and remember and, obviously, some things Your Honor didn't because nobody can absorb it all and have it all at one's fingertips at the same time. And we don't have the benefit of knowing any of that. And if that's going to be the essence of this decision where Your Honor is the primary witness and fact-finder and judge, there's an unfairness there that I want to note for the record.

We think the Court is applying the wrong legal standard in that respect. But I just want to note it for the record now so that we're not deemed to have waived it later.

THE COURT: Are you suggesting that I should put blinders over my eyes and ears and disregard my view of the credibility of witnesses, my analysis of the legal issues as I went along and my views of what I personally saw in a trial?

MR. BIENENSTOCK: No. What I'm suggesting is that to the extent those factors should come into play, it was the debtors' obligation to raise them, to say that it was

debtors' view and the Committee's view that such-and-such witness was not credible, was credible, that these were the key issues, so they're on the table and we can deal with them, not for this black box. I don't mean that in any negative way. But for -- we have no idea what Your Honor remembers, what Your Honor's observations were and it also opens up the notion, Your Honor, that, you know, we asked to go back to the MIA hearing and Your Honor said no. If Your Honor has such firm views as to how that comes out, it seems inconsistent to us why we couldn't just have returned to the MIA hearing and finished it.

The process seems very unfair and I want to lodge those both observations and objections and questions.

THE COURT: Mr. Friedman, do you or any of the debtors want to respond?

MR. FRIEDMAN: I certainly do, Your Honor.

First of all, just taking these points in order, the time -- the opportunity to fix a declaration is just not available. You submit an expert report, you submit a declaration, and you live by the evidentiary rulings. You don't listen to the evidentiary rulings, then go back and then alter your testimony, especially an expert report, rewrite testimony to deal with issues. You live with the evidentiary rulings. That's what everybody does.

Your Honor will deal with the reconsideration points

when you hear them. We will respond when we hear them.

The last point, Your Honor, just frankly floors me. The notion -- you know, this isn't the first time that a Court heard a 9019 motion or a settlement issue on a plan where the Court presided over the case. This is probably the hundred-thousandth time that that's happened.

Judge McKenna just approved a class action settlement in the Adelphia matter something like $450 million going out the door to thousands and thousands and thousands of security holders. He heard the case. Didn't trouble him to decide whether or not the settlement was fair. This happens every day of the week that the Bankruptcy Court, or in the case of class actions of other similar types of litigation, where the Trial Court also hears the settlement. And not only is it not unusual for that to happen, but I believe that Courts generally on the Appellate level are happy when the Court approves a settlement or disapproves a settlement based upon that level of familiarity with the matter.

The notion that Your Honor is a witness in this case is offensive, it's uncalled for, it's insulting to all the parties. We have never looked at Your Honor as a witness. And the notion that this is a black box is absurd.

We filed a brief in excess of a hundred pages in response to their brief in excess of a hundred pages dealing

with the record of the MIA, referring to the record, referring to the witnesses, referring to the legal issues, referring to the TMT standards, referring to the nature and the arm's-length and the good faith of the negotiations.

There's no black box here, Your Honor. There is no void as to what this case is about.

The Constitution of the United States establishes Bankruptcy Courts. It doesn't establish that many other specialized Courts. You know, you don't have patent courts. Those are complicated cases. Those typically get tried by a District Court. I don't think you have matrimonial courts. That's generally pretty complicated.

There's all kinds of specialized areas of law where the founding fathers elected not to establish separate courts. But they decided to have bankruptcy courts. Article I gave the -- gave somebody, I assume it's the Congress, I'm not -- it's a long time since I remember my Constitutional law. But somebody has the right to establish courts of Bankruptcy.

THE COURT: I think the Constitution says Congress shall have the power to establish uniform laws relating to Bankruptcy, or words to that effect.

MR. FRIEDMAN: Okay. I defer. This is not my field.

(Laughter.)

MR. FRIEDMAN: But I remember enough to know that in the 18th Century people thought it was important enough to deal with Bankruptcy on a uniform level and ultimately to have bankruptcy courts that were specialized. And that's for a reason. This is highly specialized stuff and the policy of this nation is to have bankruptcy courts deal with these types of issues, not as witnesses, but as triers of fact and as arbiters of the law.

What we're doing in this case, Your Honor, is Bankruptcy 101. I think I've said that before. And it is literally absurd to say at this time that somehow Your Honor's role in this case is anything other than the traditional role of a jurist in a bankruptcy proceeding.

MR. BIENENSTOCK: May I reply, Your Honor?

MR. MC LAUGHLIN: Your Honor, before he does, just briefly from the debtors.

THE COURT: Mr. McLaughlin?

MR. MC LAUGHLIN: Your Honor, I don't want to belabor the point, but I do want to make one or two additional points on the black box argument. A couple of things.

Number one, there is no black box here. The transcripts of those hearings have all been, to the extent they weren't already available fully made available unsealed. There's no secret as to what the evidence was, as to what --

I think the point was we don't know what the Court knows. We all know -- everybody knows the same thing. Everybody has access to the testimony. Everybody can read the transcripts.

And, indeed, these parties, while they're represented by new counsel, participated in that process. Mr. Bennett was a participant in the process. And they know exactly how the evidence came in. These clients know exactly how the evidence went in and they know exactly what the Court heard and they know exactly what arguments Mr. Shore made, they know exactly what arguments their own counsel made, they know exactly what the evidence is.

Number two, the notion that there's been some kind of unfair surprise I think is really not supported by the record. Number one, the opportunity to fix any deficiencies in their expert report, these deficiencies were identified in the motion in limine. They had an opportunity to reply to the motion in limine. They put in their reply. Their reply is what it is. Now that they've heard the Court's ruling I'm not sure that it's appropriate to allow them to try to fix things.

Number two, there's been no secret in terms of how we were going to be proceeding with the conformation hearing. So, again, the notion that there has been a black box or some kind of an unfair surprise, they knew exactly what was coming at this confirmation hearing. If they wished to make an

issue of any witness credibility or any facts or evidence in the MIA, they certainly had the opportunity. There was lengthy briefing on the issue.

THE COURT: All right. Mr. Bienenstock?

MR. BIENENSTOCK: Your Honor, neither party answered my first point which is that at a trial where we have live direct when the Court sustains evidentiary objections the questioner can ask other questions, and frequently, the result is through another route the evidence comes in. And that's what's being denied us here.

Second, when the Court goes through the expert report and I assume either strikes some of it or says some of it can be allowed for one purpose but not another, however Your Honor did it, Your Honor has essentially created a new report. That's not the report that Mr. Goldin signed.

He and our clients are entitled to read the result to see if he would sign what Your Honor has now created by deletion because it may or may not flow to the results in his report and the results that he would testify to and the opinions he'd testify to.

As far as, well, reconsideration, we'll abide by whatever -- if ever Your Honor would want to listen to that.

And as far as the issue I raised with the role of Your Honor, I'd say the -- this is not something for the debtor or the Committee and I hope the Court to take some

self-righteous offense and make it seem like we're offending the Court. We're not.

There is a straightforward way to deal with the weight to be given to what happened in the MIA hearing. And that straightforward way is for the parties to say -- to have said, they've rested so far as their case against us, this is what we saw in the MIA hearing that we think would support us, et cetera, et cetera. We could then say, here is what we saw, they could talk about credibility of witnesses, whatever they want. But on the table. Not something where the disclosure statement is silent, their case is zero and when Your Honor finally has the evidence closed, Your Honor goes into Your Honor's chambers and says, now I'm going to write down what I think was important about the MIA hearing and I'm going to issue my opinion and after this opinion is issued will be the first time that the ACC Bondholders or any other party here knows the facts of that hearing that I thought were most important and that I'm going to concentrate on.

THE COURT: Let me give you a concrete example and move from the abstract to the specific because it's my memory that the witnesses in the MIA were credible. So the notion that somebody would have something and I would say that the opposite is true is at least to my memory, subject to your respective rights to be heard, not a material concern.

But there was one witness on a relatively important

issue. I'm not sure if it was the historic entries or something else, I'll have to go back and check and you bet I will, where she said that, I booked a transaction one way rather than another way because it was easier. Not because it was right, because it was easier. And she was cross-examined on that and the point was certainly in my face.

Now are you suggesting that because I did not say on the record that that's a good point and that if you make a financial entry because it's easier rather than because it's right the judge who heard that testimony and was troubled by it at the time but didn't articulate a final conclusion on it can no longer express a view on testimony of that character?

MR. BIENENSTOCK: What I'm saying is Your Honor can't in fairness surprise us with a list of that type of observation that we'll first see after Your Honor writes your decision. If they have specific points --

THE COURT: Well, people who were in the courtroom, unless they were deaf, dumb and blind, would have understood that's an issue.

MR. BIENENSTOCK: Well, there were issues on both sides, Your Honor. And there's nothing wrong with sunshine with the other side having could have come forward and said, Your Honor, look at all these points we scored, we think that give us a high probability of success. And we could have responded to that. But they didn't.

It's now -- we don't know what points Your Honor is going to dwell on. And there's one other point that this raises, Your Honor.

If Your Honor recalls, we moved for reconsideration of Your Honor's opinion, I think it was in connection with -- I could be wrong, but I think it was the exclusivity and MIA motion or some opinion recently -- you know, in the last few months. And one of the points we made, and I know the Court will remember this, is that if -- I think we were talking about a settlement offer that had been rejected. And we said we wanted assurances from the Court that something that was going to be considered evidence at confirmation we would be told it's being considered evidence so that we could react to it. And Your Honor gave us that assurance in that decision.

That's completely contrary to the procedure that the plan proponents are asking, that we not be told what facts the Court is going to dwell on or they're going to dwell on, but rather, we'll find out for the first time when we see the Court's decision. That's exactly what we were trying to avoid.

THE COURT: I lost you, Mr. Bienenstock. You're right that you have a motion that I haven't yet ruled on to exclude the settlement proposal, which is the thing we were talking about then.

MR. BIENENSTOCK: Yeah. I'm talking about Your

Honor's decision.

THE COURT: Well, then I may be confusing two things. But then I've got to confess that I've lost you. Try again, please.

MR. BIENENSTOCK: Okay. I'm -- we moved for -- I think we've only moved for reconsideration once. I could be wrong, but I think just once. And I think it was of the -- Your Honor's decision on the --

THE COURT: Well, this was the one for clarification or in the alternative for reconsideration?

MR. BIENENSTOCK: Exactly.

THE COURT: And my memory is that I clarified upon -- either denied reconsideration or upon reconsideration adhered to the original decision.

MR. BIENENSTOCK: My recollection is Your Honor denied reconsideration but provided some clarifications that we asked for.

THE COURT: Uh-huh.

MR. BIENENSTOCK: And one of the clarifications we asked for was that at confirmation, if my memory serves, the only facts this Court would consider would be facts we're told about that are in this record and the Court is considering, that there wouldn't be something from left field that we don't hear about until we have to read Your Honor's decision, or there wouldn't be things that go into Your

Honor's decision that we never know about.

This should be tried, Your Honor, as if Your Honor had not been in charge of the MIA, that Your Honor came into this case and was -- had that record and everybody in this case who's a litigant should know what about that record is being urged on Your Honor to come out one way or the other, not what I said before, a black box.

We can only deal with facts that are pointed out. And when I -- as Your Honor will recall, when I was cross-examining Ms. Wittman and some of my questions certainly led the Court to believe maybe I was trying to re-litigate MIA issues which I don't think that's what I was doing but don't have to talk about that now, Your Honor very quickly voiced the Court's dismay because there was this other record. And Your Honor said you had better witnesses. Your Honor recalls what Your Honor said.

Well, fine, there's this better record. But we want to know what parts of that record are they relying on, the Court relying on. We can rebut what we know. We tried both from some questions that we've asked on cross-examinations and through the expert report of Messrs. Goldin and Prager, we tried to deal with the MIA hearing. Our view is that risk-weighting issues is not legal conclusion at all. Two different things. Whether someone is settling any type of issue, writes down on a piece of paper, I'm assigning X

percent likelihood or doesn't write it down, implicitly if they get to a deal there is a calculus for it. There has to be.

And coming up with that as a businessperson negotiating a deal is not being a judge. So we've tried our best in the absence of an iota of mention in the disclosure statement of what the issues were, an iota of mention by any of the plan proponents why they think they had the upper hand on any of the issues, in the absence of anything they've put into evidence at this confirmation hearing we tried to deal with the MIA hearing. They did not try to deal with it.

And now our attempt to deal with it apparently is in part, I can't tell how much yet, gutted by Your Honor's ruling and they seem very content to go along with the comfort that Your Honor knows how to deal with this, you'll just come up with something based on sat at that hearings and we won't know until we read Your Honor's decision. To us that's not due process. And I don't say that disrespectfully. I'm raising it now so it doesn't have to be that way.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: Yeah, Your Honor. I wasn't involved in the MIA hearing and Mr. Bienenstock wasn't involved in the MIA hearing. And, frankly, both sides, as I look at the briefs, looked at the MIA hearing, looked at the issues,

looked at the briefs, the expert reports, and they made their arguments as to why they thought, at least in our case and I'm not sure about theirs as much, but in our case we didn't litigate the MIA in our brief. We raised the issues. We raised the -- we canvassed the issues as best we could. We raised the arguments that we thought could lead a Court to go in one direction or the other. And, again, I think that's just the way one approaches this type of an issue.

We're not relying upon the fact that we sat through the MIA and they didn't. And we're not relying upon the fact that we trust the Court to make up something on its own having sat through the MIA. We wrote over a hundred-page brief and we made detailed citations to the record.

And, Your Honor, nothing in our brief in any way rests upon the credibility determinations by the Court. Now I don't know if Your Honor is -- I don't know whether or not Your Honor's conclusion that you felt all the witnesses were credible is the ultimate conclusion you'll make. But it doesn't matter because we didn't ask the Court to make credibility decisions. We focused on the words of the witnesses and accepted them at face value.

So there is really nothing about the Court's actual observation of the MIA proceeding that puts the Court in a different position than any other judge, other than the fact that having sat through this, Your Honor is simply smarter

than any other judge on these issues. If we went and brought this to Judge Bernstein or Judge Gonzales and started talking about historic entries and the CCH recap and the Bank of Adelphia paradigm, they just wouldn't know what we're talking about.

It has nothing to do with giving Your Honor an ability to take an advantage. It's just that you know this stuff already. And, frankly, that's the only way in which Your Honor as opposed to any other judge is different. Just the fact that you have a familiarity with the issues so that when someone writes 110, a hundred-and-twenty-page brief you're not going back to square one.

I was never, you know, an expert on the MIA. When I started working on this, it is very dry technical stuff. So the fact is, Your Honor, the Court having the ability simply to understand the issues, not based upon credibility assessments or something unique to a jurist, but just having lived through it, is an advantage that I think, again, I can't imagine any Appellate Court or any other Court or Congress or otherwise wouldn't think would be -- wouldn't view you as being ideally situated for that reason alone to be able to decide these issues.

The notion that none of us -- that they don't know what Your Honor is thinking, neither do we. We don't have a clue what Your Honor is thinking. Your Honor didn't tip us

off or indicate how Your Honor was thinking about this. And, frankly, I think their argument that, you know, Your Honor should have said, you know, good point, bad point, I like that point, that's helpful, that really changes the way I think, that's so inconsistent with the way a judge is supposed to behave. And, frankly, cases would never get settled if the Court tipped its hand all the time because then whichever way the hand is tipped is going to influence the settlement discussions.

So I just don't understand the point that somehow Your Honor had an obligation to give people greater insight into the Court's thought. That works both ways. And, frankly, it's because the Court didn't offer anything other than sort of the most balanced and neutral commentary which was, by the way, requested by the parties, that's what frankly drove all of this to a settlement.

Your Honor, the declaration can be withdrawn if that's what Mr. Bienenstock wants to do. Or it can be signed as stricken. It cannot be rewritten. You know, experts do not have the option of going back and rewriting their reports.

The report was filed. The depositions were taken. The positions were made. You can't go back and rewrite it. You just can't. That's just not the way the law works. You file your report, you take your chances, you subject yourself

to whatever evidentiary objections there are and you move forward.

And finally, Your Honor, just the -- you know, I really think there's some serious flailing around to my right. The argument that Your Honor didn't grant reconsideration of a prior order, let's just talk about what that was about.

Your Honor found in the context of the disclosure statement hearing that the debtors didn't violate their neutrality and that from the Court's perspective the agreement seemed to have been negotiated, I'm not sure what the exact words were, but they suggested some level of good faith or arm's length.

Mr. Bienenstock said, we want to challenge that. And Your Honor said, well, at the confirmation hearing if you want to come back and put on facts that I didn't consider at the disclosure statement hearing I will most certainly consider it.

Well, those facts, Your Honor, from our perspective were put up by Mr. Schall and Your Honor heard the extent of their cross-examination of Mr. Schall. So, I mean, I think, you know, it is possible to get up and just say things and raise issues. But, ultimately, someone has to be accountable for what they mean. And on this issue, Your Honor, this is devoid of substance, this issue, because there is nothing to

it.

Your Honor, by the way, I think at this point we're getting very close to closing arguments. And I think we ought to take a recess.

THE COURT: Here's what we're going to do, folks.

Yes, Mr. Bienenstock?

MR. BIENENSTOCK: I'm going to respond. Mr. Friedman leaves out that we had Mr. Pike and his declaration and we did take on Mr. Schall and the issues inherent in that and totally answered just now by creating an issue I did not raise and answering that instead of what we did raise. But I know the Court can figure that out.

THE COURT: All right. We are, both sides, drifting into summation now. Here's what we're going to do.

We are going to take a recess. I want somebody from each side after you get a copy of the affidavit showing the evidentiary exclusions and the expert report showing the evidentiary exclusions. Actually, in the latter case it's not that. There are four or five pages that have markings on them. The rest of the report is in.

Then let my chambers know how much of a recess you consider appropriate before we come out again. It is my view that I will hear an immediate motion for re-argument at the conclusion of the recess if you think you can say anything consistent with I think our local rule is 9023-1, don't hold

me to the exact number, and/or the standards in this District and under the case law for re-argument which is essentially something I've overlooked.

And failing that, or failing a material change in the decision, and I have to tell you folks that while I decided it overnight as a fifteen-page decision that I read might suggest, I thought about these things a little bit, the proponents of the Goldin testimony will have the right to withdraw the declaration, although, you know, I'm not going to tell you how to practice law. If I had a declaration that went into the extent that you're going to see that the testimony is going in, I don't think I'd pull it. But, you know, that's your call. You can do that.

I'm not going to adjourn the hearing or provide a do-over on the submission of the testimony, especially since it has its underpinnings in an expert report and we have provisions in the Federal Rules that deal with that.

On the third matter, that of what I guess I'd call the substantive standards as to which I will impose blinders on myself and decline to impose -- or to apply my expertise in the case going forward, I'm not going to decide that issue on the spot. I'm going to think about it on the break and probably more than the break and I'll let you know before summation. I mean, you've each prepared your cases. It's not going to change the testimony you put forward. But to

the extent you're right, Mr. Bienenstock, you're going to want to know about it before you sum up.

I think there probably is an entitlement to an articulation of the ground rules under which I would or would not use my expertise, although I don't rule out the possibility that I should give both sides more opportunity for argument on an issue of that character.

So my view is that we should take a break at this point and you should see the testimony and then we'll decide how much of a break we're going to have. And then if, as I assume, there's still an awful lot of testimony that the plan proponents are going to want to try to address, we're going to have a cross-examination.

Mr. McLaughlin?

MR. MC LAUGHLIN: Just a clarification, Your Honor. One thought that occurred to me, there was the issue raised by the ACC Bondholders as to Whether or not if this was direct testimony they would have the opportunity to in effect rehabilitate or cure any defects. There hasn't been a definitive ruling on that.

But if this had been a direct examination I don't think they would have the right to confer with the witness to fix any problems. So I would ask Your Honor can we have an instruction that the ACC Bondholders are not to confer with their witness during the break in an attempt to prepare for

any redirect that they might have that they would use to rehabilitate the witness?

THE COURT: The problem I have, Mr. McLaughlin, and I'd invite you to comment on it without suggesting that I've formed a view on it, they have a witness who signed a declaration. I would have thought that they're entitled to find out whether he's comfortable with signing a declaration and remaining onboard on a declaration that he's executed. And I have some difficulty seeing how Mr. Bienenstock or his partners could do that without talking to Mr. Goldin.

MR. MC LAUGHLIN: That's fine. We have no objection to them inquiring as to that. But we would have a problem if they start preparing for what their redirect is going to be.

THE COURT: Well, you know, Mr. McLaughlin, this is going to be rough justice and it's imperfect. But I got to tell you, everybody in this court knows Mr. Goldin and everybody in this court knows the lawyers who are your opponents.

I feel pretty comfortable in relying on their good faith in this regard.

MR. MC LAUGHLIN: That's fine, Your Honor.

THE COURT: Okay. All right. Let's take a recess. After you've had a chance to look at it, give my chambers some indication as to how much time you want. Thank you.

MR. FRIEDMAN: Thank you.

(Recess taken at 11:23 a.m.)

(Proceedings resume at 12:29 p.m.)

THE COURT: Okay. Where are we?

MR. STROCHAK: Your Honor, Adam Strochak, Weil, Gotshal & Manges, for the ACC Bondholder Group.

I'd like an opportunity to ask for a clarification on the Court's rulings on Mr. Goldin's testimony and report and then an opportunity to reargue one aspect of it.

Let me start, if I could, with the clarification. The Court's comments on Page 3 of Mr. Goldin's declaration regarding valuation was that the valuation -- the sentence on valuation of the Time Warner stock comes out under Rule 702, but that it's okay to the extent it's an expression of a reliance on the work of others as an expert may do. And I just wanted to clarify that that ruling pertains to all the material stricken from the report and the declaration on the valuation issue because there was not a similar comment on some of the other references.

THE COURT: You mean any other places like in the expert report where that same six-billion figure was used?

MR. STROCHAK: Exactly.

THE COURT: Sure. Sure.

MR. STROCHAK: Thank you.

THE COURT: In other words, just as it's okay in the declaration, it's okay in the expert report, as long as it's

understood that it's premised on someone else's valuation.

MR. STROCHAK: That's correct, Your Honor. That's my understanding and I wanted to clarify that.

THE COURT: Yes. No problem.

MR. STROCHAK: And if I could now, let me turn to -- well, let me back up and talk just about process and procedure for a second.

What we'd like to do, Your Honor, is take this opportunity for additional argument, obviously hear from our opponents, and then recess for lunch to give us an opportunity to have a little more time to adjust to the rulings and prepare for the rest of the afternoon, as long as that's acceptable to Your Honor.

Let me turn now to the testimony on what I kind of classify as order of magnitude issues. This is particularly the testimony stricken from Pages 13 and 14, Paragraphs 34 through 36 of Mr. Goldin's declaration. And let me offer some analysis that I don't think we've offered, at least not in quite this way before, and try and give the Court a little sense as to why we think it's error to exclude this information.

The stuff that's taken out, the risk analysis and the quantification that's based on the risk analysis, is really the judgment piece of the expertise that Mr. Goldin offers. And I understand the Court's concerns about

methodological issues under Rule 702 and the absence of any desk reference or authoritative source that you could go to to find these types of numbers. And I certainly appreciate that.

But what I would suggest, Your Honor, is that really is not any different than any effort to quantify this type of judgment call that any other expert might do. And let me illustrate with an example, if I could.

On valuation matters where valuation testimony is heard, it is quite common for investment bankers or other financial analysts to do a valuation based on a variety of different methods. They might do a discounted cash flow valuation, they might do a comparable public companies valuation, they might do a comparable transaction valuation based on other transactions in the marketplace that took place, all different methods of arriving at a value, whether it be an enterprise value or a market value or whatever it's called in the particular case, a reorganization value.

Quite often, when it's necessary to get a degree of granularity on the valuation determination that gets it down to a point number, that is we need to know is this company worth five, seven, $9 billion, whatever it is, valuation experts will weight the different methods that they used in an effort to come up with what they believe is an appropriate point value.

That type of analysis, Your Honor, is very similar to what Mr. Goldin does in his report. And it's a judgment call. You might assign a two weight to the DCF valuation and you might assign a three-times weight to the comparable public companies valuation or some other variant of that. That judgment, how to weight each value, is a matter of judgment for the expert on valuation. And you can't go to a desk reference and say, you always must weight a discounted cash flow twice as heavily as you weight a comparable public company's methodology, or anything else. There is no such desk reference. It's a matter of judgment for the expert.

And I certainly recognize the concerns about not being able to cross somebody on a matter of judgment because the answer often is, well, that was my judgment, these are the factors I considered and that was my judgment. But that doesn't make it inadmissible and it doesn't make it an improper subject for expert testimony under Rule 702. It's simply the judgment part of the exercise and an opposing expert can be put on to offer a different judgment. But it's not a basis, Your Honor, we respectfully submit, to striking that testimony as not compliant with Rule 702.

What Mr. Goldin did in this case was evaluate the inherent assumptions in the settlement that's before the Court. He had to work backwards. So he looked back and derived essentially an implicit sense of what are the risk

weights that are factored into the settlement before the Court.

And the purpose of his quantification of how far he thinks that's off of what is reasonable is much like the investment bankers or the financial analysts' effort to come up with a point value. It could have been expressed as a range. It could have been expressed in various different ways. He chose to express it as a point value here and with his risk weights, the twenty-percent factor and so forth, but that doesn't make it inadmissible under Rule 702, we respectfully submit, Your Honor.

Let me make a point. Your Honor seemed to be concerned in the Court's opinion it was two issues: the idea that Mr. Goldin was opining on legal conclusions -- as to legal conclusions and the Rule 702 requirements. And let me just offer one point to try and bring those two items together in a way that I think might have been bothering the Court.

There is much more to assessing probabilities as Mr. Goldin has done than simply looking at the legal disputes in issue, that is the fourteen issues that were set forth in the MIA litigation, and making an assessment as to who has the stronger legal argument. There are many factors that go into evaluating the probabilities of successful outcome, many subjective factors that go far beyond legal conclusions.

And, again, let me illustrate with an example.

You might look at a dispute and say that on the law, both parties have an equal chance of success. The law is divided, perhaps there's a split in the Circuits or perhaps there's no authority on a matter that reasonable people could look at and say it comes out either way.

You still might conclude that one party has a ninety-percent chance of winning the dispute for a variety of different reasons. You might come out and say that, well, this party has much more at stake here. You might say, this party has much deeper pockets, they can afford to fund a litigation for a longer time. You might say this party has much stronger counsel and they are more likely to win for that reason. You might apply many of the same factors in figuring out what a reasonable settlement is. That is, you might look around and say, well, both parties might have an equal chance on the law, this party has much more to lose and we don't think that they would settle for this type of result. And you might evaluate all those different factors that go into a litigation in making an assessment of the probabilities of success or failure and reaching some result -- some analysis as to whether or not a particular settlement falls within the range of reasonableness.

And it seemed to me, although I know Your Honor broke down the ruling in terms of legal conclusions and Rule

702 issues, but it seems to me that there's some blending of the two. And to the extent the Court was concerned about the assessment of probabilities and the risk-weighting that Mr. Goldin applied, to the extent that the Court was concerned about that insofar as it presumed some determination of the outcome of the legal issues, I would respectfully submit, Your Honor, that it's far more complicated than that and it should not be stricken under Rule 702 for that reason.

That's all I have, Your Honor. Thank you.

THE COURT: Thank you. Mr. Friedman, do you want to be heard?

MR. FRIEDMAN: I just wanted to be heard, Your Honor, to point out the obvious which is that the standards for re-argument have not been met. There has not been any identification of anything that the Court remotely wasn't aware of. To suggest that the Court needed to be pointed to the difference or the similarities with a valuation expert I'm sure was not necessary. The Court obviously has significant experience with valuation experts and I'm sure that nothing that was said about that was something the Court wasn't aware of already.

Your Honor, they've been given the opportunity, which I think frankly is somewhat charitable, to allow Mr. Goldin to tell his story about what he would have done here or what he might have done here had he been a trustee. And I

think that's more than enough.

And what I would like to do, Your Honor, I don't have a problem with a recess. But just before the recess, I'd just like to very quickly refer Your Honor to a couple of other points in the report, my partner Mr. Schub can do it, just to make clear because I think there might have been a couple of almost identical points that Your Honor might not have seen.

So I'd like to have the opportunity to do that on the record and I think it will take five minutes.

THE COURT: All right. I'm going to deny re-argument because I don't think the arguments I heard pass muster under either the requirements for re-argument under this Court's local court rules or my case management order have been satisfied. Trust me, folks. I gave this decision a lot of thought before I issued it.

Mr. Friedman, you or Mr. Shiff or one of your folks can raise -- oh, is it Mr. Schub?

MR. SCHUB: Yes, Your Honor.

THE COURT: I'm sorry. Can raise any matters that you think I overlooked in applying the principles that I articulated. But, of course, that's without prejudice of your opponent's rights to be heard on the matter.

Mr. Schub, why don't you come to the main lectern, please?

MR. SCHUB: Thank you, Your Honor. If Your Honor has the Goldin report and the Goldin declaration perhaps side-by-side, it might make it a little bit easier to go through this.

THE COURT: All right. Well, I have the declaration and the report. What do you want me to focus on?

MR. SCHUB: Okay. Well, first, Your Honor, looking at Paragraphs 22 at the end, Your Honor struck --

THE COURT: Of the declaration?

MR. SCHUB: Of the declaration. Your Honor struck out Mr. Goldin's conclusions with respect to the ACC Senior Noteholders' likelihood of prevailing on the AIH Arahova and silo netting issues.

THE COURT: Uh-huh.

MR. SCHUB: And there are additional references to their likelihood to prevail in Paragraph 25, for example, the opening line. Mr. Goldin states his belief that the ACC Senior Noteholders have a very small probability of losing. We believe that should be stricken.

And Paragraph 26, after going through the reasons, he also states that he believes they are likely to prevail on the merits of the AIH receivables issue.

THE COURT: What was the second reference, Mr. Schub?

MR. SCHUB: I'm sorry. Paragraph 26, Your Honor.

THE COURT: Uh-huh. What else?

MR. SCHUB: The same issue for Paragraph 28, the opening sentence about that they have a very small probability of losing the Arahova receivable issue. And Paragraph 29 that, for that reason, they are very likely to prevail on the merits of that issue.

THE COURT: All right. Go ahead, Mr. Schub.

MR. SCHUB: And, finally, Paragraph 32 about the reference to the ACC Senior Noteholders highly likely to prevail on the merits of the silo netting issue.

(Counsel confer.)

MR. SCHUB: Oh, I'm sorry. The opening of 31 as well. I believe the --

THE COURT: All right. Well, the -- forgive me, Mr. Schub. Go ahead.

MR. SCHUB: That those fall within the same category, Your Honor.

THE COURT: All right. Well, the issue I have for you is whether he's making these points to convince me that he's right on the merits or whether he's telling me how he would analyze it if he were a trustee.

MR. SCHUB: Well, we have no objection, Your Honor, to him testifying how he would analyze it as a trustee. But consistent with your prior ruling, we don't think that he should be opining as to the ultimate likelihood of success on

the merits. And if there's some way for this perhaps to be redrafted, that may be the only way to address the concern.

MR. BIENENSTOCK: Your Honor, we might make that easy. It is intended to mean what he would do and believe as a trustee.

THE COURT: All right. Well, if the purpose isn't to convince me that he's right and to help me understand how he would look at the issues if he were a fiduciary, I'm wondering if that should satisfactorily address the concerns that I have.

I did rule, Mr. Schub, that he's allowed to give us his approach as to how he would analyze the issues, so I need you to respond to that telling me I guess two things: one, do you object to Mr. Bienenstock's modification? I do have to caution you that that might be the way that I would read that testimony whether or not he had offered -- he, Mr. Bienenstock, had offered to change the testimony that way.

Do you object to the modification? And, if so, do you believe that there's still a problem?

MR. SCHUB: No objection, Your Honor.

THE COURT: Okay. And then the second half of my compound question is do you think there's still a problem?

MR. SCHUB: No, Your Honor.

THE COURT: Oh, okay. Then I think we've resolved that issue.

MR. SCHUB: Okay. Perhaps there should be a notation in the declaration similar to the manner in which other declarations are being revised to reflect rulings that Your Honor has made during the course of the hearing that this evidence will only be taken for that purpose.

THE COURT: I'm wondering if that might be helpful. Mr. Bienenstock or one of your folks, any problem with that?

MR. BIENENSTOCK: Your Honor, Mr. Goldin doesn't want to change his declaration. We have no problem if we can -- I think we're getting the transcripts daily. We can attach these pages if that helps to the end so it's clear.

THE COURT: I think Mr. Schub's concern, if I can read his mind, is that no balls fall between the outfielders and get overlooked in terms of implementing the ruling in case I were to look at an older version of this and somehow forget the colloquy that's going on now.

I'm flexible as to the mechanics, folks. But I think that if we're going to clean up the other declarations to reflect evidentiary exclusions and the like, it's appropriate to have this one cleaned up in the same fashion.

I can understand why Mr. Goldin wouldn't want to in essence have something that he signed changed without his consent, but of course, to the -- if, which is the case, that it's testimony, testimony always raises the risks of evidentiary exclusions and what goes into the record even

though he offered something different and what he offered is what he offered, it's going to be what I have approved in my gatekeeper role.

So, in concept, your desire is approved, but I need you to work with your opponents to work out a mechanical method to skin the cat. And any reasonable method will be satisfactory to me.

MR. MC LAUGHLIN: Your Honor?

THE COURT: Mr. McLaughlin, yes, sir?

MR. MC LAUGHLIN: Just for clarification, however this is handled will be the same across the board for all the declarations? So if we're going to attach portions of the transcript we'll do that for all the declarations?

THE COURT: Well, yes, although I have to confess to you folks that attaching transcript is not as useful for me as marking it up on the underlying declarations.

My druthers would be that while we'll state explicitly that what Mr. Goldin signed was what he signed, that the form of the evidence as I'm taking it is going to be as marked up. You know, maybe we can say that it isn't Mr. Goldin's decision, it's the decision of the judge. I don't care how we do it that much. But, frankly, I'd prefer something where I don't have to put a couple of pages next to each other and go back and forth between them. Okay.

MR. SCHUB: Okay. Now let me move on to another

issue.

THE COURT: Sure.

MR. SCHUB: That is in Paragraph 20 Your Honor struck the reference to the settlement being below a reasonable zone of -- sorry, a reasonable settlement zone by at least $600 million. And you deleted that last -- the amount by which it was reduced.

THE COURT: Right.

MR. SCHUB: And there are two references in the declaration elsewhere that the settlement falls significantly below the range of reasonableness. So that's Paragraph 2 and Paragraph 33.

Now I don't know if we're getting into the arena of splitting hairs. But --

THE COURT: You're reading my mind, Mr. Schub.

MR. SCHUB: Okay. If Your Honor doesn't feel that clarification is necessary --

THE COURT: It's the methodology that tries to make it sound very, very precise as a consequence of using the risk -- I forgot the last --

MR. SCHUB: Weights?

THE COURT: Risk weight analysis that troubles me. I think he's allowed to express the opinion that he doesn't think it's reasonable. And if he wants to say that he thinks it's really bad, I think he has the right to say that, too.

I think it's the mathematical precision with which that was said that caused me the concerns.

MR. SCHUB: Okay. The last concern relates to a sentence in Paragraph 62 of the declaration. And it's the sentence that says, "By setting the deemed value far below the current market value." That phrase should be stricken which would be consistent with Your Honor's deletion of Mr. Goldin's opinions with respect to the value in the Goldin report, specifically, Pages 13, 21 and 45.

THE COURT: Well, my memory of the testimony, Mr. Schub, is that the estate's valuation comes out with a range of between 5.5 and 6.5. I suppose it's true that 5.4 isn't all that far from 5.5, but it -- if I remember the testimony also, it was in substance that the probability of any number along the spectrum of 5.5 and 6.5 was equal, which means as a practical matter that maybe ninety percent of the numbers in the proponent's expert's testimony would be higher than 5.5.

And, you know, I looked at that when I was doing it last night and it struck me as being fair argument. I think you're splitting hairs again.

MR. SCHUB: Okay.

THE COURT: It's plainly below and it's far below a good chunk of the numbers in the spectrum. I think that the estate has to deal with that one on the merits. I'm not going to exclude it entirely.

MR. SCHUB: Okay. If I could ask Your Honor to turn now to the report?

THE COURT: Sure.

MR. SCHUB: Page 10 of the report, which is the risk weight analysis, was stricken in its entirety. Page 76 of the report, Your Honor, is the same methodology using different valuations for the stock. And we would request that that page be stricken in its entirety as well.

THE COURT: I need you to help me more on this one, Mr. Schub. I didn't recognize it as being the same thing. Are you saying that the numbers are derived from the risk weight analysis?

MR. SCHUB: Yes, Your Honor. If you look at the middle box, well, there's really no middle. There's four. But you see under "Risk Weights," twenty percent and fifty percent on the left top?

THE COURT: Oh, now I do.

MR. SCHUB: And that's based upon a stock valuation of 5.4 billion. And then on the lower right quadrant there is a stock value of seven billion and the same risk weights are applied to this. So this is the same methodology and we think it falls under the same category and should be stricken just as Page 10 was stricken.

THE COURT: All right. I'll hear your opponents on this, but I have to tell you folks I'm afraid that this is

one that I just overlooked in implementing my concerns about the use of risk weight.

Mr. Bienenstock?

MR. BIENENSTOCK: Your Honor, I was going to say that there's a middle ground of excluding the risk weight but not the other columns showing what this witness as a fiduciary or businessperson would consider reasonable.

THE COURT: Well, I need help from you and/or Mr. Schub, and I'll give each of you a chance to comment on it.

If the risk weight was used as a multiplier or other function to derive additional figures on this chart, I need to know whether that's so.

MR. BIENENSTOCK: I think it does -- the risk weight is multiplied by the impact column to get to the settlement threshold column.

THE COURT: That's what I suspected you would say. Then it's a yield settlement threshold, right?

MR. BIENENSTOCK: Yes, Your Honor.

THE COURT: All right. Well, then, I think that I need to strike the information under settlement threshold as well, although I'll hear argument as to whether there's no harm, no foul in allowing impact and the stuff on the left to remain.

MR. BIENENSTOCK: Your Honor, I just realized as I spoke that I might have misspoke, because when you multiply

the numbers they don't come to the percentages that are in the right-hand column.

THE COURT: I hear you. But let me tell you conceptually, folks, what's bothering me.

Mr. Schub was right that I failed sufficiently to consider that risk weight was used in places other than the places where I had picked it up. This is an example.

Risk weight in my view can't be used in anything that is multiplied -- anything that is multiplied with risk weight is not necessarily disqualified, but the product of the multiplication or if it's more complex than the multiplication, the mathematical result of matters that use risk weight as a function are, in my view, no longer acceptable.

MR. BIENENSTOCK: Okay. Your Honor, I was right the first time. It is a multiplication. I just didn't realize how it was rounded.

THE COURT: Okay. Okay. So my tentative, but I'll give you one more chance each to be heard, is that the portions of this Page 76 that have the twenty and fifty percent for a risk weight in two places on the document and the settlement threshold need to be excluded. And if the minimum acceptable recovery is in turn a function of numbers that appear above it, I think that has to be excluded as well.

MR. BIENENSTOCK: Your Honor, one --

THE COURT: I mean, it's without prejudice to your position that I got it wrong on the risk weight, but once we have the premise that risk weight has got to go, do you quarrel with my analysis, Mr. Bienenstock?

MR. BIENENSTOCK: For consistency, no. I would -- but applying consistency, I would then have a request on Page 10. Page 10, which the Court's initial ruling struck entirely, we believe --

THE COURT: Wait. Is this 10 of the report or 10 of --

MR. BIENENSTOCK: The report. The report.

THE COURT: All right. And if I can read your mind, you're saying that I should simply strike the portions of risk weight and settlement threshold and the sum and not the remainder of the page?

MR. BIENENSTOCK: Your Honor, it's scary. That was exactly what I was thinking.

THE COURT: Mr. Schub, you want to be heard on that?

MR. SCHUB: One moment, Your Honor.

THE COURT: Sure.

(Pause in proceedings)

MR. SCHUB: I guess we'd have to take it bullet point by bullet point, Your Honor. Some of the language might be okay, but there -- this language in here is

describing the risk-weight methodology, and it's based upon Mr. Goldin's view that a fiduciary would ascribe a low-risk weight to the three issues, and that's in the second bullet point. And that low-risk weight is the twenty percent that shows up in the box on the right side.

Same thing, the third bullet point on the left, on the bottom. A fiduciary would ascribe with half the desired value. That's the fifty percent risk weight. It's just the literary version of the numbers in the box. And the top bullet point on the right side, that's a conclusion as to the amount of value that it's off because of the minimum threshold, which is calculated in the boxes.

So we think it all has to go, Your Honor, except for maybe the first bullet point on the page.

MR. BIENENSTOCK: Briefly, Your Honor.

THE COURT: Yes.

MR. BIENENSTOCK: First, the bullet points starting with the first on the left explains what Mr. Goldin, as fiduciary businessperson, what methodology he would follow, and there are no numbers. The number on the bullet -- first bullet point on the right-hand column is not the six-hundred-million number Your Honor struck It's simply an amount of value that goes to Arahova creditors in satisfaction of inter-debtor disputes, as the expert report computes.

So that's -- I don't -- unless -- you know, unless

we misunderstood the Court's ruling before, I don't think there's anything in any of these bullet points that purport to, by using a number, imply that there's a scientific formula to get to the number. This is just a methodology which -- it's a thought process that a fiduciary or business person would go through in determining a reasonable settlement. We didn't understand that that's what the Court wanted to exclude.

THE COURT: Mr. Schub, if you don't have anything further, you folks are both going to have to give me a minute.

MR. SCHUB: I have nothing further, Your Honor. If you would like more than a minute, Your Honor, I think we're going to recess for lunch anyway, so if --

THE COURT: No, I want to get this buttoned up --

MR. SCHUB: Okay.

THE COURT: -- so you can take my ruling into account.

(Pause in proceedings.)

THE COURT: All right, gentlemen. I'm going to allow portions of this page to go in, but with the following modifications:

In the first bullet, the words "risk weighted" will be deleted. Dauber.

The second paragraph, second bullet, "given the

clear merits in favor of ACC," stricken as legal conclusion.

Third bullet is admitted, but subject to the qualification we had before, in terms of how he or he believes another fiduciary would look at the issue, not the way I should, necessarily.

The fourth bullet, which is now starting on the top of the second column, is deleted.

The portions in the boxes that are in the lower right-hand corner of the second column, "Risk weight," "settlement threshold," and "minimum acceptable recovery" are deleted.

MR. SCHUB: Thank you, Your Honor.

THE COURT: All right.

MR. SCHUB: Final comments on the report are a series of pretty much one-liners that were stricken in the declaration about likelihood of prevailing on the merits. And for example, Your Honor --

(Counsel confer.)

MR. SCHUB: And we're like to treat them the same way, that those are just his opinion, but that they shouldn't be given any greater weight than that. And if Your Honor would like an example --

THE COURT: I would.

MR. SCHUB: -- Page 37, for example. The bottom left, the last bullet on the page, "A fiduciary would assume

that the merits of this issue favor ACC's position."

THE COURT: And what are you asking me to do with that?

MR. SCHUB: Well, we don't -- this falls under the same category of Mr. Goldin offering an opinion as to who's likely to prevail on the merits. There are a number of these references that are framed either this way or, on Page 39, for example, there's another slightly different formulation that says, "A fiduciary would consider ACC highly likely to prevail on the issue."

So as long as these fall under the same category and aren't given any greater weight, and the matter is referred to in the declaration --

THE COURT: Yeah, frankly, I read these as saying -- expressing his view as to how a fiduciary would look at it.

MR. SCHUB: Okay.

THE COURT: I didn't view it as an indication of how I should look at it.

MR. SCHUB: Okay. All right. That's it then on the Goldin declaration and on the Goldin report, as your ruling affects Mr. Goldin.

There are also references in the declaration of Mr. Prager to the risk weights, and his views about legal opinions, which we think should also fall by the wayside; most particularly, Paragraphs 19, 20, and 22 of the Prager

declaration.

(Pause in proceedings.)

MR. SCHUB: Paragraph 22, Your Honor, is actually not on the risk weights; that deals with the valuation of the TWC stock. It contains the same reference to the valuation range of the various analysts that was stricken from the report.

THE COURT: All right. So you're --

MR. SCHUB: I have --

THE COURT: -- objecting to --

MR. SCHUB: Well --

THE COURT: -- everything in 19 through --

MR. SCHUB: No, Your Honor. Let me be a little bit more specific. In Paragraph 19, starting on Page 9, from the top of the page, after "discussions with our team" --

THE COURT: Yeah.

MR. SCHUB: -- he understands that he attributed a -- "Mr. Goldin attributed a twenty percent likelihood," until the end of the paragraph.

THE COURT: Okay.

MR. SCHUB: We would request that that be stricken.

THE COURT: So the portion of Paragraph 19 that starts at the top of Page 9 --

MR. SCHUB: 9.

THE COURT: -- and down to the end of Paragraph 19,

I assume.

MR. SCHUB: Correct.

THE COURT: All right. And then --

MR. SCHUB: And Paragraph 20, just the last sentence.

THE COURT: "Rather than evaluate"?

MR. SCHUB: "Accordingly, he assigns them a fifty percent risk weight."

THE COURT: Oh, forgive me. Okay.

And are you objecting to 21?

MR. SCHUB: No, Your Honor.

THE COURT: Okay. And 22 raises a different issue, which is the --

MR. SCHUB: 22 is -- correct.

THE COURT: -- evaluation.

MR. SCHUB: And the part that we're referring to in Paragraph 22 is the on the top of Page 10, the sentence beginning with "my team determined."

THE COURT: Right. Yeah.

MR. SCHUB: To the end of that sentence.

THE COURT: Okay. Mr. Bienenstock, do you or any of your folks want to be heard on these things? Mr. Broderick, yes, sir.

MR. BRODERICK: Yes, Your Honor. I believe with regard to -- if my understanding of Your Honor's ruling is

accurate, that Mr. Goldin could still rely on what others -- and in this case, the others would be the market research, although he's not -- I know Your Honor has said he's not a valuation expert, he could still rely on that research. And that's all that the sentence at the top of Page 10 does.

THE COURT: In other words, your point being that experts can rely on anything, including hearsay?

MR. BRODERICK: Exactly, Your Honor.

MR. FRIEDMAN: Your Honor, can I respond to that?

THE COURT: Yeah.

MR. FRIEDMAN: Well, I think it's clear that he's not a valuation expert. I thought I understood Your Honor to rule that he could rely on valuation work, to the extent he wanted to present illustrations that used various assumed valuations. But I think it's clear that he's not a valuation expert; his firm did not a valuation report, they don't offer any valuation testimony. And the fact that his team read some research reports cannot be used as valuation evidence in this case. I thought that was fairly clear.

THE COURT: All right. Mr. Broderick.

MR. BRODERICK: Your Honor, I think this is classic -- is classic sort of expert reliance type of materials. I mean, it is the type of material that someone in Mr. Goldin's position as a fiduciary would rely on. You know, we are not -- he is not providing an opinion to say he is merely

utilizing what others have basically indicated in the --

THE COURT: When he knows that the only valuation evidence in the case is between five-five and six-five?

MR. BRODERICK: That's correct, Your Honor. He's still entitled to rely on information that's out there in the marketplace.

And, Your Honor, I'll also point out that it is basically used to run certain scenarios; in other words, to input those figures, so that the numbers could be run.

MR. FRIEDMAN: Your Honor, the question is for what purpose he's relying upon this. If he's relying upon it to inject numbers into a model, I mean, he's entitled to illustrate that, if the value were higher, there would be different outputs, but you can't rely on valuations of others to establish value. I mean, I understood --

THE COURT: All right. That's the problem, Mr. Broderick. If the number were used merely for illustrative purposes, I wouldn't have the problem. But, in essence, this is elevating the market, you know, whatever it is, to a higher level. And assuming, as I do, that experts are allowed to rely on hearsay in forming their opinions, I still don't think it passes muster under 702.1, the testimony is based upon sufficient facts or data. So that's my ruling, Mr. Broderick. I really don't want to debate that one anymore.

MR. BRODERICK: Just a point of clarification, Your Honor.

THE COURT: Yes, sir.

MR. BRODERICK: With regard to using those figures, whether it's 6 billion or 7 billion, there are illustrative sort of examples where the numbers are run using a seven-billion-dollar figure.

THE COURT: Well --

MR. BRODERICK: Without saying that Mr. Goldin is providing an opinion or saying that that is, in fact, the value.

THE COURT: Well, I didn't understand that it was merely illustrative. If it's illustrative to -- in essence, to create a new kind of waterfall based upon a seven assumption, if it's merely illustrative, that's fine. But if you try to equate that into a valuation of anything, then it falls apart for the reasons that Mr. Friedman articulated.

MR. BRODERICK: Understood, Your Honor.

THE COURT: If it uses a number within the 5.5-to-6.5 range, which is, frankly, the only evidence that I'm aware of in the record, you're on much safer ground.

Now I guess you can argue for illustrative purposes, based on your cross of the witness as a valuation expert, that I should consider the possibility that the value could be greater than six-five, or that it could move up past six-

five with market movements. But that isn't evidence, that's just a possibility.

MR. BRODERICK: Understood, Your Honor. That is the point that we're -- one of the points we're making. The other one is, though, that in Mr. Goldin's report and in the report it's utilized in an illustrative fashion.

THE COURT: All right. Well, Mr. Friedman or Mr. Schub, my tentative is that it can be used, but only in an illustrative fashion. Do you want to be heard on that?

MR. FRIEDMAN: Your Honor, anybody is entitled to plug a number into a model, but as long as the fact -- there should be no difference. I think that's the best way to put it. There should be no difference to Mr. Goldin saying, I want to illustrate this at a seven-billion-dollar number, as if he's saying, the market research says I should look at it as a seven-billion-dollar number. As long as it's just a number that he's plugging in and is offered for nothing more than an illustration, that's fine. It's the weight that he's attempting to bestow it with by referring to market research reports that I have a -- that's objectionable. So the illustration is fine, as long as the illustration is just an illustration, and doesn't deserve any greater consideration because the illustration happens to tie into some market research that he refers to.

THE COURT: Mr. Broderick, do you agree with that,

or is there an issue as to which I need to rule?

MR. BRODERICK: Your Honor, I agree with that. But your point about the Kuhn cross-examination is also -- is also accurate. I agree that it's used in Mr. Goldin's report and in his declaration and is used in Mr. Prager's declaration. The seven-billion-dollar figure is used as an illustrative --

THE COURT: Okay.

MR. BRODERICK: -- as an illustrative figure.

THE COURT: I'm not expressing a view or ruling now on what can be done by Kuhn cross beyond what he testified to, and that's a matter as to which both sides' rights are going to be reserved on summation and/or thereafter.

MR. BRODERICK: Understood, Your Honor.

THE COURT: Okay.

MR. FRIEDMAN: Can I just -- Your Honor, I would just like to give the Court a sense of what we'd like to try to accomplish this afternoon.

THE COURT: Sure.

MR. FRIEDMAN: I believe that we can conclude both Mr. Prager and Mr. Goldin this afternoon. I don't expect the -- I can't speak to the redirect, but I would expect the cross in both cases would accommodate the afternoon schedule. I'm not sure ...

(Counsel confer.)

MR. FRIEDMAN: Yeah, I'm not sure if it can get done by normal, you know, 5, 5:30, but I think, maybe pushing a little bit, we should get done today. I hope we can try to do that.

THE COURT: Okay. Mr. Broderick, are you rising on that matter?

MR. BRODERICK: Your Honor, yes, just to merely point out that, in addition to redirect, Mr. Prager, and I believe Mr. Goldin, were designated also as rebuttal witnesses. There will be some very limited rebuttal, certainly with regard to Mr. Prager. I assume it will follow the same process that we followed with regard to Mr. Pike, and we will be prepared to do that, Your Honor, when we reconvene.

THE COURT: That would be my presumptive approach, unless there's some reason for changing from that. Okay.

MR. SCHUB: Your Honor, before we --

THE COURT: Yes, Mr. Schub.

MR. SCHUB: Could I get a ruling on Paragraph 19 and 20?

THE COURT: Oh, I'm sorry.

MR. SCHUB: I think that slipped through the cracks when we jumped over to the valuation issue.

(Counsel confer.)

MR. SCHUB: Prager, Paragraph 19 and 20.

THE COURT: Yes. On the top of Page 9, in the run-over portion of Paragraph 19, objection sustained in its entirety under Daubert and the 702 provisions that were put in, in 2000 to implement Daubert.

Last sentence of Paragraph 20, objection sustained for the same reasons.

MR. SCHUB: Finally, Your Honor, there are a series of what I'll refer to as "legal opinion assertions" in the declaration, which I think fall within Your Honor's prior ruling with respect to the Goldin Associates opinion as a whole, that there shouldn't be any such opinions. And these do not speak as to, I don't believe, Mr. Prager's opinion as to what a fiduciary would do, as he offered no such opinion in his -- in the report or at his deposition.

For example, Paragraph 44 --

THE COURT: Did you say 44?

MR. SCHUB: 44, on Page 17.

(Pause in proceedings.)

MR. SCHUB: Specifically the sentence beginning with "However, as ACC's creditors have argued, this contention would not result in an avoidance of the September 2001 transfer because, rather than hinder or delay payment to creditors, it was specifically designed," et cetera.

We would object to the language beginning with "this

contention would not result in avoidance through payments to creditors," and ask that that be stricken.

THE COURT: Where does the proposed language to be stricken end, after?

MR. SCHUB: The sentence would read, "However, as ACC's creditors have argued, it was specifically designed."

THE COURT: So the portion in between --

MR. SCHUB: The conclusion as to what would happen if this were litigated.

THE COURT: So you're saying it's okay for them to argue the fact that it was specifically designed to retire the maturing Arahova bridge facility and to pay creditors on the CCHC credit facility, but the legal conclusion from that you want deleted.

MR. SCHUB: Correct.

THE COURT: ACC Bondholders want to be heard on that? My tentative, folks, is that I need to sustain that objection as a legal conclusion.

MR. BRODERICK: One moment, Your Honor.

THE COURT: Yes.

(Counsel confer.)

MR. BRODERICK: Your Honor, with regard to the items that -- that they are seeking to strike, I believe that the -- after "because," where it says "rather than hinder or delay payment to creditors," I believe that's part of the ACC

creditors' argument. And so, you know, the portion before that, "This contention would not result in avoidance of the September 2001 transfer," and then "because" --

THE COURT: I'm going to interrupt you, Mr. Broderick, because I take your point, and I agree with it. So what I am going to do is I am striking the portion that begins, "This contention," I'm going to read the full amount that I am deleting: "This contention would not result in an avoidance of the September 2001 transfer because."

MR. SCHUB: Next paragraph, Your Honor.

THE COURT: Yes.

MR. SCHUB: I guess the entire thing could be read, as well, to be the ACC Bondholders' argument; however, the sentence that says -- I think it's the second sentence:

"To the extent the September 2001 transfer is voidable as an actual fraud, the prior transfers should be similarly voidable."

There doesn't appear to be a qualification on this paragraph that this is the ACC Bondholders' argument, as opposed to his legal opinion on the merits. So if there is that qualification, I guess we can live with it, but again, we don't think that he should be opining on matters of law or how they will ultimately be resolved.

THE COURT: Mr. Broderick, do you want to be heard on it?

MR. BRODERICK: Yes, Your Honor. I mean, this would be the bondholders' position. And I believe, Your Honor, even without regard to any sort of legal matter, just as a matter of consistency, if one is found voidable, the other one should, also.

Having said that, we would agree that this is the argument of the ACC Bondholders', Your Honor.

THE COURT: Well, I'm inclined to give you your choice, Mr. Broderick. If, consistent with your witness's testimony, you want to precede 45 with, "The ACC Bondholders would contend that," then I'll let you have all of 45.

Alternatively, if you want it exactly as is, then I would have to strike the sentence, "To the extent the September 2001 transfer is voidable as an actual fraud, the prior transfer should be similarly voidable." I don't care. One or the other. You can either cure the objection, or I've got to sustain it.

MR. BRODERICK: No, Your Honor, we would cure the objection; we'd take the former.

THE COURT: Okay.

MR. SCHUB: All right. Just a couple more, Your Honor, and I think these fall in the same category.

Paragraph 49, on Page 19, the first clause: "Although the Arahova Noteholders' Committee has failed to prove that Arahova was insolvent." I'm not aware of any such

ruling. I can't recall if the ACC Bondholders made this argument in their brief. I'm confident that they did. But I think there should be a similar qualification, or that clause should be stricken.

THE COURT: Mr. Broderick. Excuse me.

MR. BRODERICK: Your Honor, we would accept the qualification with regard to this sentence, also.

THE COURT: Okay.

MR. SCHUB: Next paragraph, Your Honor, Paragraph 50, that "if the transfer is to be voided, the remedy likely belongs to CCHC."

MR. BRODERICK: It's similar. We would agree that, "It would be the ACC Noteholders' argument that."

THE COURT: Okay.

MR. SCHUB: All right. And Paragraph 52, finally, as the last one, Your Honor. Paragraph 52, "If the September 2001 transfer constituted actual fraud, the prior transfers would result in claims by ACC Ops against Arahova," and the next sentence, "The result of which" -- "the result would be an offset of the two claims." If we can get that qualification.

THE COURT: Mr. Broderick?

MR. BRODERICK: Yes, Your Honor.

THE COURT: All right. Fair enough.

MR. BRODERICK: We'll accept that qualification.

THE COURT: Okay.

MR. SCHUB: Thank you, Your Honor. That's all I have.

THE COURT: All right. Is this is a good time for lunch? It's probably a lot longer -- later than you wanted to.

Are you folks getting down in the elevators quickly enough nowadays? Do you need more than an hour?

MR. FRIEDMAN: I don't think so, Your Honor.

THE COURT: All right. Let's reconvene at 2:30. We're in recess.

MR. FRIEDMAN: Thank you.

(Luncheon recess taken at 1:27 p.m.)

(Afternoon Session in Volume 8)

*****

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

December 12, 2006

Cathryn Lynch, NJ Cert. No. 565
Certified Court Transcriptionist
For Rand Transcript Service, Inc.

December 12, 2006

Coleen Rand, AAERT Cert. No. 341
Certified Court Transcriptionist
Rand Transcript Service, Inc.