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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

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

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

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

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

11 THE COURT: Very well. Mr. Bienenstock?

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

14 THE COURT: Unsealed?

15 MR. BIENENSTOCK: Yes.

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

18 All right. Now turning to the motion in limine.

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

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

25 As conceptual matters, the motion in limine will be

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

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

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

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

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

9 *1. Legal Opinions/Ultimate Issue*

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

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

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

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

13 It went on to say:

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

17 *Hygh* was quoted from, and once more FRE 704 was
18 reconciled with the "no legal conclusions" rule, in a lengthy
19 and very thorough decision by Judge Sweet of the district
20 court in this District, *Primavera Familienstifung v. Askin*,
21 130 F. Supp. 2d 450,528 (S.D.N.Y. 2001). After doing that,
22 Judge Sweet explained what I think is the key distinction
23 here. Judge Sweet found an expert's assignment flawed from
24 the outset because:

25 Rather than being asked to develop an expert opinion

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

4 Similar direction from the Circuit appears in *U.S.*
5 *v. Bilzerian*, 926 F.2d 1285,1294, (2d Cir. 1991). There the
6 Circuit didn't speak about Rule 704 (which by then had been
7 in place for a little more than fifteen years), but it
8 nevertheless held that as a general rule, an expert's
9 testimony on issues of law is inadmissible. "Although an
10 expert may opine on an issue of fact within the jury's
11 province, he may not give testimony stating ultimate legal
12 conclusions based on those facts." *See also Good Shepherd*
13 *Manor Foundation v. City of Mومence*, 323 F.3d 557 (7th Cir.
14 2003) (noting, where proffered testimony was largely on
15 purely legal matters and made up solely of legal conclusions,
16 "the district court correctly ruled that expert testimony as
17 to legal conclusions that will determine the outcome of the
18 case is inadmissible").

19 Similarly, in *Burkhart v. Washington Metropolitan*
20 *Area Transit Authority*, 112 F.3d 1207,1212 (D.C. Cir. 1997),
21 the D.C. Circuit once again considered an argument that Rule
22 704(a) permits legal conclusions. It started by quoting Rule
23 704, and its provision that:

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

1 to be decided by the trier of fact."

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

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

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

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

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

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

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

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

4 It was argued by the ACC Bondholders Group (in their
5 brief at Page 3 and in oral argument), that "courts" have
6 held that expert testimony regarding the reasonableness of
7 settlement may be admissible when it assists the trier of
8 fact, citing *GAB Business Services v. Lloyds Syndicate* 627,
9 809 F.2d 755, 761-762 (11th Cir. 1987), and *Harbor Insurance*
10 *Company v. Continental Bank Corp.*, 1991 U.S. Dist. LEXIS
11 15272, at *17-*18. While that statement is technically true
12 (and I'll permit the Goldin evidence to the extent it passes
13 muster under that standard) using the holdings of either of
14 those cases for the broader proposition the ACC Bondholders
15 Group argues -- that Mr. Goldin can express legal opinions --
16 is inappropriate.

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

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

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

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

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

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

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

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

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

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

18 The insurance companies argue that this testimony
19 should be barred because Balotti is improperly
20 basing his testimony on Delaware law rather than
21 inquiring into the intent of the drafters of
22 Continental's charter.

23 Once again, the proper context of trial is necessary
24 for a ruling on this evidentiary question. Based
25 upon the standards outlined above, Balotti may

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

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

22 Unless I missed some, the legal issues here come up
23 in two paragraphs of Mr. Goldin's testimony. In Paragraph
24 22, Mr. Goldin expresses the view that the ACC Bondholders
25 are highly likely to prevail on certain MIA issues. In

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

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

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

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

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

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

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

4 Turning now to *Daubert* and methodology issues.

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

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

22 In *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S.
23 579, 1993, the United States Supreme Court charged trial
24 judges with the responsibility of acting as gatekeepers to
25 exclude unreliable expert testimony. And in a second

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

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

11 If scientific, technical or other specialized
12 knowledge will assist the trier of fact to
13 understand the evidence or to determine a fact in
14 issue, a witness qualified as an expert by
15 knowledge, skill, experience, training or education,
16 may testify thereto in the form of an opinion or
17 otherwise if

18 (1) the testimony is based upon sufficient facts or
19 data,

20 (2) the testimony is the product of reliable
21 principles and methods, and

22 (3) the witness has applied the principles and
23 methods reliably to the facts of the case.

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

1 requisite reliability to satisfy the court's gatekeeper
2 function:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 doing the valuation himself.

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

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

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

23 At this point I think we should take a recess.

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

1 THE COURT: Yes, you may.

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

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

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

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

21 THE COURT: Go on.

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

1 brings us to a ticklish or sensitive point.

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

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

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

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

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

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

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

16 MR. FRIEDMAN: I certainly do, Your Honor.

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

25 Your Honor will deal with the reconsideration points

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

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

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

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

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

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

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

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

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

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

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

25 (Laughter.)

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

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

14 MR. BIENENSTOCK: May I reply, Your Honor?

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

17 THE COURT: Mr. McLaughlin?

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

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

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

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

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

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

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

4 THE COURT: All right. Mr. Bienenstock?

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

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

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

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

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

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

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

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

25 But there was one witness on a relatively important

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

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

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

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

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

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

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

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

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

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

1 Honor's decision.

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

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

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

11 MR. BIENENSTOCK: Exactly.

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

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

18 THE COURT: Uh-huh.

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

1 Honor's decision that we never know about.

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

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

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

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

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

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

21 THE COURT: Mr. Friedman?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 to whatever evidentiary objections there are and you move
2 forward.

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

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

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

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

1 it.

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

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

6 Yes, Mr. Bienenstock?

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

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

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

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

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

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

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

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

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

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

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

14 Mr. McLaughlin?

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

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

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

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

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

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

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

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

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

25 MR. FRIEDMAN: Thank you.

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

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

3 THE COURT: Okay. Where are we?

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

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

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

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

21 MR. STROCHAK: Exactly.

22 THE COURT: Sure. Sure.

23 MR. STROCHAK: Thank you.

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

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

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

4 THE COURT: Yes. No problem.

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

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

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

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

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

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

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

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

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

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

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

1 weights that are factored into the settlement before the
2 Court.

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

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

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

1 And, again, let me illustrate with an example.

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

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

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

1 702 issues, but it seems to me that there's some blending of
2 the two. And to the extent the Court was concerned about the
3 assessment of probabilities and the risk-weighting that Mr.
4 Goldin applied, to the extent that the Court was concerned
5 about that insofar as it presumed some determination of the
6 outcome of the legal issues, I would respectfully submit,
7 Your Honor, that it's far more complicated than that and it
8 should not be stricken under Rule 702 for that reason.

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

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

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

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

1 think that's more than enough.

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

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

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

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

19 MR. SCHUB: Yes, Your Honor.

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

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

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

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

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

9 THE COURT: Of the declaration?

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

14 THE COURT: Uh-huh.

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

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

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

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

1 THE COURT: Uh-huh. What else?

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

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

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

11 (Counsel confer.)

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

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

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

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

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

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

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

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

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

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

20 MR. SCHUB: No objection, Your Honor.

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

23 MR. SCHUB: No, Your Honor.

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

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

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

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

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

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

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

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

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

8 MR. MC LAUGHLIN: Your Honor?

9 THE COURT: Mr. McLaughlin, yes, sir?

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

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

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

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

1 issue.

2 THE COURT: Sure.

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

8 THE COURT: Right.

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

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

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

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

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

21 MR. SCHUB: Weights?

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

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

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

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

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

21 MR. SCHUB: Okay.

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

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

3 THE COURT: Sure.

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

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

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

17 THE COURT: Oh, now I do.

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

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

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

3 Mr. Bienenstock?

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

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

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

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

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

18 MR. BIENENSTOCK: Yes, Your Honor.

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

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

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

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

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

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

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

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

1 MR. BIENENSTOCK: Your Honor, one --

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

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

10 THE COURT: Wait. Is this 10 of the report or 10 of
11 --

12 MR. BIENENSTOCK: The report. The report.

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

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

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

20 MR. SCHUB: One moment, Your Honor.

21 THE COURT: Sure.

22 (Pause in proceedings)

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

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

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

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

15 MR. BIENENSTOCK: Briefly, Your Honor.

16 THE COURT: Yes.

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

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

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

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

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

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

16 MR. SCHUB: Okay.

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

19 (Pause in proceedings.)

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

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

25 The second paragraph, second bullet, "given the

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

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

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

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

12 MR. SCHUB: Thank you, Your Honor.

13 THE COURT: All right.

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

18 (Counsel confer.)

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

23 THE COURT: I would.

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

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

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

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

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

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

16 MR. SCHUB: Okay.

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

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

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

1 declaration.

2 (Pause in proceedings.)

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

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

9 MR. SCHUB: I have --

10 THE COURT: -- objecting to --

11 MR. SCHUB: Well --

12 THE COURT: -- everything in 19 through --

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

16 THE COURT: Yeah.

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

20 THE COURT: Okay.

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

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

24 MR. SCHUB: 9.

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

1 I assume.

2 MR. SCHUB: Correct.

3 THE COURT: All right. And then --

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

6 THE COURT: "Rather than evaluate"?

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

9 THE COURT: Oh, forgive me. Okay.

10 And are you objecting to 21?

11 MR. SCHUB: No, Your Honor.

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

14 MR. SCHUB: 22 is -- correct.

15 THE COURT: -- evaluation.

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

19 THE COURT: Right. Yeah.

20 MR. SCHUB: To the end of that sentence.

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

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

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

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

8 MR. BRODERICK: Exactly, Your Honor.

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

10 THE COURT: Yeah.

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

20 THE COURT: All right. Mr. Broderick.

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

1 utilizing what others have basically indicated in the --

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

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

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

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

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

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

3 THE COURT: Yes, sir.

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

8 THE COURT: Well --

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

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

18 MR. BRODERICK: Understood, Your Honor.

19 THE COURT: If it uses a number within the 5.5-to-
20 6.5 range, which is, frankly, the only evidence that I'm
21 aware of in the record, you're on much safer ground.

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

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

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

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

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

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

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

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

8 THE COURT: Okay.

9 MR. BRODERICK: -- as an illustrative figure.

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

14 MR. BRODERICK: Understood, Your Honor.

15 THE COURT: Okay.

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

19 THE COURT: Sure.

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

25 (Counsel confer.)

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

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

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

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

17 MR. SCHUB: Your Honor, before we --

18 THE COURT: Yes, Mr. Schub.

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

21 THE COURT: Oh, I'm sorry.

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

24 (Counsel confer.)

25 MR. SCHUB: Prager, Paragraph 19 and 20.

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

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

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

15 For example, Paragraph 44 --

16 THE COURT: Did you say 44?

17 MR. SCHUB: 44, on Page 17.

18 (Pause in proceedings.)

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

25 We would object to the language beginning with "this

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

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

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

7 THE COURT: So the portion in between --

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

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

15 MR. SCHUB: Correct.

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

19 MR. BRODERICK: One moment, Your Honor.

20 THE COURT: Yes.

21 (Counsel confer.)

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

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

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

10 MR. SCHUB: Next paragraph, Your Honor.

11 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

20 THE COURT: Okay.

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

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

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

5 THE COURT: Mr. Broderick. Excuse me.

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

8 THE COURT: Okay.

9 MR. SCHUB: Next paragraph, Your Honor, Paragraph
10 50, that "if the transfer is to be voided, the remedy likely
11 belongs to CCHC."

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

14 THE COURT: Okay.

15 MR. SCHUB: All right. And Paragraph 52, finally,
16 as the last one, Your Honor. Paragraph 52, "If the September
17 2001 transfer constituted actual fraud, the prior transfers
18 would result in claims by ACC Ops against Arahova," and the
19 next sentence, "The result of which" -- "the result would be
20 an offset of the two claims." If we can get that
21 qualification.

22 THE COURT: Mr. Broderick?

23 MR. BRODERICK: Yes, Your Honor.

24 THE COURT: All right. Fair enough.

25 MR. BRODERICK: We'll accept that qualification.

1 THE COURT: Okay.

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

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

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

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

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

12 MR. FRIEDMAN: Thank you.

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

14 (Afternoon Session in Volume 8)

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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

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December 12, 2006

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