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Motion Hearing

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BY THE COURT: We've got quite a bit of

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business to tend to today, and I think I

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would rather start with the various motions

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in limine filed by the plaintiffs, and it

6 doesn't matter which order we take them up
7 in.

8 BY MS. SLATER: I'll begin, Your Honor.

9 BY MR. KIRKSEY: I didn't hear the
10 Court.

11 BY THE COURT: I was saying that I'll
12 take up the plaintiffs' motions in limine
13 first.

14 BY MS. SLATER: Your Honor, we have a
15 motion in limine to preclude evidence of the
16 other litigation between the parties, which
17 refers to the tobacco litigation pending in
18 the federal court and the lawsuit that was
19 brought before by the Scruggs defendants
20 against the Wilson plaintiffs, Mr. Luckey and
21 the Merkel and Cocke firm.

22 BY THE COURT: Have you received any
23 indication they intend to get into that?

24 BY MR. BALDUCCI: May it please the
25 Court. Just to move things along, our

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1 position on all of the other litigation, as
2 the Court is aware, we have filed a similar
3 motion with regard to the Luckey matter, and
4 our position is that we think that none of
5 the other litigation is relevant to this
6 case.

7 We agree that the federal case should
8 not be mentioned, nor the Jackson County
9 case, and we submit that the Luckey case is
10 not relevant either here.

11 As it relates to the Jackson County
12 case, I guess the only question I have is in
13 plaintiffs' motion they allege that it's not
14 relevant unless the defendants intend to
15 interpose a defense in response to the claim
16 of breach of contract that Mr. Wilson
17 repudiated the contract, et cetera, and
18 plaintiffs allege that in that event they
19 ought to be able to bring up the Jackson
20 County case in some limited fashion.

21 We disagree with that. We object to

22 that, and we would like to be heard on that
23 if that's still an issue after Ms. Slater is
24 finished.

25 BY THE COURT: We're not there yet, but

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1 what I'm hearing is you don't intend to get
2 into this other litigation that's the subject
3 of their motion in limine unless you feel
4 that it's been opened up or made relevant
5 during the course of the trial. Am I right
6 about that?

7 BY MR. BALDUCCI: Just so that we're
8 clear -- that's correct, Your Honor. But
9 just so that we're clear, Mr. Scruggs in
10 defending himself on the breach of contract
11 allegations does fully intend to interpose a
12 defense that Mr. Wilson repudiated the terms
13 of the contract.

14 BY THE COURT: All right. We're not
15 there yet. I'm just dealing with this one
16 motion at a time.

17 BY MR. BALDUCCI: Yes, sir.

18 BY THE COURT: Your motion, Ms. Slater,
19 will be granted. Whenever I rule on motions
20 in limine it's always with the understanding,
21 I guess, or it's the intent of the Court that
22 it be without prejudice, so to speak.

23 In other words, I fully recognize that
24 while something may appear not to be relevant
25 at this point, it could be made relevant

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1 during the course of the trial.

2 However, any attorney that believes that
3 the door has been opened, so to speak, is not
4 to just delve into that immediately in front
5 of the jury. It needs to be brought to my
6 attention first out of the presence of the
7 jury. I'll give both sides an opportunity to
8 argue, and then I'll make a ruling, and we'll
9 proceed on.

10 BY MS. SLATER: Yes, sir.

11 BY THE COURT: But for right now it's
12 granted.

13 BY MS. SLATER: Yes, sir. Next, Your

14 Honor, is our motion to disclose Chad
15 Chambliss as the court appointed expert.

16 Mr. Chambliss -- we have always intended
17 to call Mr. Chambliss as to the audit that he
18 conducted. He gathered data both for our
19 expert and for their expert Stephanie Smith,
20 and he has recently performed some
21 calculations for us on III(2)(b) that we
22 filed with the Court.

23 And I believe that this is very
24 important to our case to reveal this to the
25 jury as it was the alteration of the

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1 bookkeeping records and accounting records
2 that brought the court audit into existence
3 to begin with.

4 It goes to Wilson's breach of accounting
5 claim. It goes to Wilson's breach of
6 fiduciary duty and possibly bad faith breach
7 of contract claim, and it's part of Wilson's
8 damages for the breach of the accounting, and
9 it's just the plain ol' truth that that's

10 what Chad Chambliss is.

11 And so we would move the Court for
12 permission to disclose Chad Chambliss as the
13 court appointed expert.

14 BY THE COURT: Response.

15 BY MR. BALDUCCI: Is it all right if I
16 respond from here, Your Honor?

17 BY THE COURT: Yes, sir.

18 BY MR. BALDUCCI: If it please the
19 Court, first of all, so that we put this into
20 some context, this motion in limine by the
21 plaintiffs has application and bearing to
22 some of the other motions that the defendant
23 has filed in this case, particularly in
24 relation to Mr. Chambliss's now new
25 calculations regarding III(2)(b) entitlement.

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1 BY THE COURT: All right. I'm not going
2 to cut you off from argument, but to make
3 sure I understand the issue at hand, I
4 understood the motion to be to request the
5 Court to disclose to the jury that

6 Mr. Chambliss was appointed by the Court. I
7 don't think I previously ruled that he can't
8 testify.

9 BY MS. SLATER: Right. Your Honor, what
10 your previous order said was that they asked
11 back in August of 2005 for Mr. Chambliss to
12 be dismissed. You referred that to the
13 special master, and he recommended that
14 Mr. Chambliss continue to be retained.

15 And so you found that he should be
16 retained and that he could testify, but you
17 said that nobody could disclose it unless we
18 filed a Rule 706 motion. So that's why I'm
19 filing a Rule 706 motion.

20 BY THE COURT: That's what I understood
21 it to be. I just wanted to make sure. We're
22 not dealing here at this time with whether he
23 can or can't testify or any particular
24 subject matter. Just only the disclosure to
25 the jury.

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1 BY MR. BALDUCCI: Yes, sir.

2 BY THE COURT: That he was appointed by
3 the Court.

4 BY MR. BALDUCCI: And in response to
5 that, I certainly wasn't trying to sidetrack
6 the Court. I just wanted to make the Court
7 aware of that issue and not offer what I was
8 about to say as a waiver of that position.

9 Setting that matter aside about the
10 propriety of his testimony, Your Honor, and
11 responding just strictly to the substance of
12 Ms. Slater's motion, I would submit to the
13 Court that it's important for the Court, if
14 Mr. Chambliss testifies, to instruct the jury
15 that he was appointed by the Court as the
16 Court's auditor and as the Court's expert.

17 I am quite confident that the Court is
18 competent and will instruct the jury
19 appropriately on what that entails.

20 All of the extraneous information,
21 however, that's included in the motion in

22 limine as to the reasons that the Court ought
23 to give as to why a court appointed auditor
24 was necessary we object to that.

25 First of all, most, if not all, of that

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1 is hotly contested as issues in this case.

2 And certainly Mr. Scruggs has defenses that
3 he would interpose on that evidence when
4 presented at the court.

5 But on the limited issue if the Court is
6 going to allow Mr. Chambliss to testify, we
7 would submit it's appropriate for the Court
8 to make a general statement in the Court's
9 discretion regarding the fact that he was
10 appointed without any kind of other
11 extrapolation of the arguments as to why it
12 was needed, as Ms. Slater has submitted in
13 her motion.

14 Certainly, if she wants to argue that to
15 the jury at some point, if she's allowed to
16 do that, that's a separate issue. We would
17 just submit that's not the province at this

18 time for the Court to instruct the jury on
19 that.

20 BY THE COURT: All right.

21 BY MS. SLATER: Yes, sir, and I'm not
22 asking for that. I did put in a lot of stuff
23 that I know he disagrees with, but,
24 basically, my motion is to reveal him to the
25 jury.

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1 BY THE COURT: If it's simply to let the
2 jury know that Mr. Chambliss was appointed by
3 the Court as an expert, I understand the
4 defense has no objection to that, so it will
5 be granted.

6 BY MS. SLATER: Next, Your Honor, is we
7 have a motion in limine. There have been I
8 don't know how many depositions taken in this
9 case, and many of the depositions that were
10 taken of Wilson employees or lawyers who had
11 practiced with Wilson would be asked
12 questions about legal skill and competence
13 and personal habits and traits, have you ever

14 heard Mr. Wilson use the N word, do you know
15 if Mr. Wilson ever sexually harassed anybody,
16 and questions like this.

17 And, furthermore, the August 7, 1992
18 agreement contains a statement that the
19 parties to the agreement agree that they have
20 contributed sufficient time and money to the
21 venture prior to August 7, 1992.

22 But there has been testimony from the
23 defendants about, you know, calling
24 Mr. Wilson's legal skill into question, and
25 I'm sure there may have been that coming from

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1 this side as well about Mr. Scruggs.

2 And we don't feel like anybody's legal
3 skill or competence or personal habits or
4 traits or whether they ever had an affair or
5 used the N word or any of that is relevant to
6 this breach of contract case, and we would
7 ask the Court to disallow any evidence in
8 that regard.

9 BY MR. BALDUCCI: If it please the
10 Court, as to number one and number two of the
11 motion, legal skill and competence, personal
12 habits or traits, we agree with Ms. Slater on
13 everything she said, and we would only ask of
14 the Court that the order be reciprocal. As
15 it has no place in evidence as to Mr. Wilson,
16 fairness would dictate the same as it relates
17 to Mr. Scruggs.

18 BY THE COURT: You said one and two.
19 What about three?

20 BY MR. BALDUCCI: I'm not sure
21 Ms. Slater argued three just now.

22 BY MS. SLATER: Three, Your Honor, goes
23 to -- I did touch on it, but I didn't go into
24 it. But, anyway, the work --

25 BY THE COURT: -- that the agreement

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1 reflected.

2 BY MS. SLATER: Yes, sir.

3 BY THE COURT: That everybody had done
4 what they were supposed to do.

5 BY MS. SLATER: Right.

6 BY THE COURT: What is your position on
7 that?

8 BY MR. BALDUCCI: Our position on that,
9 Your Honor, is that the agreement speaks for
10 itself on that point.

11 Now, the Court has already put this into
12 context, and, again, just out of an abundance
13 of caution and not to make an issue where
14 it's not, we want to make sure we understand
15 the ground rules that are going to be set for
16 the trial.

17 The Court has already ruled that the
18 1992 agreement is a clear and unambiguous
19 document, that it's a valid and binding
20 contract, and it is relevant to the jury
21 putting in context that the 1992 agreement
22 severed the professional relationship between
23 Mr. Wilson and Mr. Scruggs and that
24 Mr. Wilson's entitlement, if any, as the
25 Court has already ruled, is a derivative of

1 the rights and obligations reflected in that
2 agreement.

3 BY THE COURT: Regardless of what work
4 may have been done by the respective parties?

5 BY MR. BALDUCCI: Right. We just want
6 to make certain. That is relevant evidence,
7 we think, that the jury needs to know just to
8 put this breach of contract issue into
9 context and to give it some meaning, and
10 that's consistent with what the Court has
11 already ruled.

12 BY THE COURT: All right. What evidence
13 is it you want to get into to put it in
14 context?

15 BY MR. BALDUCCI: Only what I've just
16 said, Your Honor, that the 1992 agreement
17 operated to sever the professional
18 relationship between the two parties, as it
19 says it does under its plain language, and
20 that Mr. Wilson's rights and obligations are
21 defined by that agreement. Nothing more and
22 nothing less was required of him other than
23 what is under the terms of that agreement, as

24 is Mr. Scruggs.

25 BY THE COURT: I really don't hear any

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1 disagreement. I mean do you disagree with

2 that?

3 BY MS. SLATER: No, sir. I don't

4 disagree with that. And if I could just be

5 more specific, there have been comments,

6 well, Mr. Wilson had moved to Jackson, and he

7 didn't live in Pascagoula anymore.

8 Well, you know, that, first of all, was

9 all before the 1992 agreement. Second of

10 all, Mr. Bozeman lived in Florida when he was

11 a shareholder in the Scruggs, Millette firm.

12 And so I just think it would be very

13 confusing for the jury to try to sit there

14 and figure out who did what. It basically

15 goes to the same thing as legal skill or

16 competence.

17 BY MR. BALDUCCI: Just to put that issue

18 to rest, I think we're saying the same thing.

19 BY MS. SLATER: Okay.

20 BY MR. BALDUCCI: Our position that
21 Mr. Wilson was entitled to six million or
22 seven million dollars, whatever it was under
23 the contract, we don't seek -- we're not
24 going to seek to introduce any type of
25 evidence or make any argument that he was not

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1 entitled to that money for some reason for
2 his lack of work or lack of participation in
3 the earning of those fees.

4 It's our position that he's entitled --
5 whatever he is entitled to he's entitled to
6 because of the terms of the agreement, and I
7 think we're in agreement on that.

8 BY THE COURT: It will be granted.

9 BY MS. SLATER: Thank you. Next, Your
10 Honor, we have filed a motion for preclusive
11 effect of the order of Judge Tom Lee as
12 reported at 371 F.2d 837 regarding the fact
13 that the August 7, 1992 agreement created an
14 express trust and gave rise to a fiduciary

15 duty.

16 The Court has found other opinions of
17 Judge Lee persuasive, and the defendants have
18 argued other opinions of Judge Lee, and we
19 have argued the case of Wilson versus Scruggs
20 that was presented to Judge Lee.

21 And we just don't feel that there is any
22 need to relitigate this issue, that it would
23 be confusing, that this case is due equal
24 persuasive authority at least or more with
25 other non-final judgment cases of Judge Lee

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1 that have been -- one in particular cited by
2 the Court and several cited by the
3 defendants.

4 And we would ask that the Court for
5 purposes of judicial economy and comity and
6 such as that just go ahead and determine that
7 Judge Lee's order should be followed in this
8 respect, and that's what the basis of our
9 motion in limine on that is.

10 BY MR. BALDUCCI: Your Honor, we object

11 to that motion in limine. If I may, I want
12 to come to the podium on this one.

13 BY THE COURT: Assuming you're through
14 with your argument, Ms. Slater.

15 BY MS. SLATER: Yes, sir.

16 BY MR. BALDUCCI: Your Honor, the case
17 that is before this Court is the breach of
18 fiduciary duty case. This Court is the venue
19 that the plaintiffs chose to litigate the
20 claim of breach of fiduciary duty.

21 The issue of whether or not a fiduciary
22 duty exists under this agreement is ripe
23 before this Court, not ripe before Judge
24 Lee's court. That issue was never before
25 him. That is a constructive trust case.

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1 Now, this language that's quoted in the
2 motion in limine by the plaintiffs here to
3 the contrary is dicta. It's not a holding in
4 that case. The Court was not provided with
5 that opinion as an attachment here, but
6 that's not a holding. That's just simply

7 dicta from that court.

8 And the issue there and still is in that
9 case is whether Mr. Wilson is entitled to a
10 constructive trust over tobacco fees earned
11 by Mr. Scruggs because the allegation is that
12 Mr. Scruggs used Mr. Wilson's money in
13 pursuit of the tobacco case.

14 Now, as the Court is aware, constructive
15 trust it's a legal fiction. It's a creation
16 of law. It's not a creation of a contract
17 like what we're dealing with here on the
18 claim of breach of fiduciary duty.

19 The validity of the August 1992
20 agreement, its rights, its responsibilities
21 upon the parties is before this Court upon
22 the plaintiffs' instance. The breach or not
23 of the contract, the breach or not of a
24 fiduciary duty, which may rise under that
25 agreement, is before this Court.

1 Judge Lee, in fact, recognized that,
2 Your Honor, when he stayed the federal

3 proceedings on the constructive trust.
4 And he stayed those federal proceedings
5 in deference to this court and this trial and
6 this outcome pending a determination here as
7 to whether or not Mr. Wilson was even
8 entitled to any fees for asbestos cases, and,
9 if so, in what amount, and then the issue
10 would become at that point whether or not the
11 plaintiffs could prove that that money was
12 used in the pursuit of the tobacco case, and,
13 if so, whether or not Mr. Wilson has any
14 right to a constructive trust based on that.

15 Judge Lee did not have before him the
16 issue of whether the 1992 agreement created a
17 fiduciary duty. That issue is before this
18 Court, and it is before this Court on the
19 plaintiffs' choice by their pleadings they've
20 put in evidence here.

21 Thus, Your Honor, there's no decision
22 for this Court to give preclusive effect
23 unto. That is not an order from Judge Lee
24 finding that there is a fiduciary duty that
25 rises under this 1992 agreement.

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1 And the last thing, Your Honor, this is
2 ground that's already been traveled. This
3 Court has already addressed this issue on
4 breach of fiduciary duty. It's been argued
5 and briefed at least twice that I can think
6 of off the top of my head relative to that
7 issue before the Court.

8 The Court has been fully advised of
9 that, and the Court has already passed on the
10 issue, and the Court has said that here in
11 this case that whether or not a fiduciary
12 duty is created under this contract and
13 whether or not, if it does, if it was
14 breached that that is an issue for a jury in
15 this case.

16 All the parties have recognized that.
17 The plaintiffs have even submitted jury
18 instructions in this case for this jury on
19 breach of fiduciary duty. The Court heard
20 the same arguments before on the breach of
21 fiduciary duty issue in summary judgment

22 proceedings.

23 Quite frankly, there is no order to give
24 preclusive effect to because the issue of
25 breach of fiduciary duty has been, remains

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1 and always will be in this court, not in
2 Judge Lee's court, Your Honor.

3 BY THE COURT: Rebuttal.

4 BY MS. SLATER: Your Honor, I believe
5 that I did attach to the Court's copy of the
6 motion a copy of Judge Lee's opinion, and if
7 I did not, I have one here. I meant for it
8 to go out that way.

9 BY THE COURT: I do have it, and, in
10 fact, I recall considering it persuasive
11 authority when I addressed the issue of
12 fiduciary duty.

13 BY MS. SLATER: Well, if I'm
14 misapprehending something that the Court has
15 already done, I apologize. But what Judge
16 Lee said is that the precise issue for the
17 state court or that he understood was in the

18 state court is the amount due Wilson from
19 Scruggs, which is at the last page of Judge
20 Lee's opinion.

21 This fiduciary matter was briefed.
22 Judge Lee told us he had a stack of briefs
23 and papers about six or seven feet tall on
24 it.

25 BY THE COURT: I believe that.

22

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1 BY MS. SLATER: And, basically, what he
2 said is this court does not view this case as
3 being simply about an alleged debt owed by
4 Scruggs to Wilson, but rather Scruggs'
5 alleged failure to turn over Wilson funds
6 which Scruggs had collected from others on
7 Wilson's behalf.

8 Your Honor, I will just -- and then
9 given the promise and covenant of Scruggs for
10 and on behalf of Wilson as Wilson's trustees,
11 all of the provisions of the August 7, 1992
12 agreement must be viewed in the light of this
13 fiduciary duty, and any doubts about the

14 interpretation of the August 7, 1992
15 agreement must be viewed in the light most
16 favorable to Wilson.

17 So there was a finding before Judge Lee
18 of that. So we feel that it should be given
19 preclusive effect, Your Honor. If you need
20 another copy of it, I think the opinion
21 speaks for itself, and Your Honor is
22 certainly capable of reading that.

23 I just wanted to bring it to the Court's
24 attention one more time on that point and
25 would ask that the Court give preclusive

23

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1 effect to that finding of Judge Lee on
2 fiduciary duty.

3 BY THE COURT: All right. As I say, the
4 Court does recall Judge Lee's opinion and did
5 follow that opinion in disagreeing with the
6 special master on this issue and ruling in
7 Mr. Wilson's favor on Mr. Scruggs' motion for
8 summary judgment on the breach of fiduciary
9 duty claim.

10 And in the Court's opinion following the
11 motion by Mr. Scruggs to reconsider that
12 decision the Court held whether or not a
13 fiduciary relationship existed between the
14 parties is a question of fact for the jury,
15 and it may arise in one of two general ways
16 in Mississippi, one, when a dominant
17 overmastering influence controls over a
18 dependent person or, two, where there is a
19 trust justifiably reposed.

20 A fiduciary relationship exists when a
21 special confidence justifiably is reposed in
22 one who in equity and good conscience is
23 bound to act in good faith and with due
24 regard to the interest of the one reposing
25 the confidence. It exists whenever trust and

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1 confidence are reposed by one person in the
2 integrity and fidelity of another.

3 And in reviewing not just Judge Lee's
4 opinion but in reviewing the August 1992
5 agreement between these parties, the Court in

6 that decision stated that the jury may
7 reasonably find that the agreement created an
8 express trust by Wilson justifiably reposed
9 in Scruggs.

10 The Court is not ruling at this time
11 that a fiduciary relationship was thus
12 created as a matter of law. That issue is
13 not presently before the Court.

14 And this Court was and is of the opinion
15 that as a matter of law the agreement -- I
16 agree with Judge Lee that the agreement on
17 its plain terms creates a fiduciary
18 relationship.

19 But the plaintiff never brought on --
20 all that was before the Court at that time
21 was a motion for summary judgment filed by
22 the defendants. The plaintiff never brought
23 on a motion for summary judgment that it did,
24 in fact, create a fiduciary relationship.

25 I'm treating and considering the motion

1 before the Court today, however it's phrased,

2 to ask the Court to make that determination
3 as a matter of law, and I do so.

4 I find that the agreement does create a
5 fiduciary relationship, but I reiterate the
6 Court's previous rulings on this that the
7 scope of that relationship, the scope of
8 those duties and whether or not they were
9 violated is strictly to be determined by the
10 unambiguous terms and conditions of the
11 agreement itself. All right.

12 BY MS. SLATER: Thank you, Your Honor.

13 BY THE COURT: Defendants' motion in
14 limine, and this is the one that deals with
15 just two items, evidence or arguments
16 concerning the purpose of withdrawals from
17 set aside accounts and matters concerning the
18 Luckey Scruggs litigation.

19 BY MR. BALDUCCI: If it please the
20 Court, on that motion on the first issue, the
21 withdrawal of sums by Mr. Scruggs from the
22 set aside account, what's been referred to
23 generically here as the set aside account,
24 the facts and the proof at trial will show

25 that the account that we're talking about

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1 here has been generically referred to as a
2 set aside account was an account that
3 Mr. Scruggs maintained internally within his
4 firm and put all sorts of different monies
5 into. It was basically just a savings
6 account for lack of a better word.

7 Now, some of the money that was put into
8 that account was money that Mr. Scruggs was
9 anticipating at some point Mr. Wilson might
10 have an interest in, and he was, therefore,
11 setting that aside.

12 BY THE COURT: Mr. Balducci, let me stop
13 you just for a second. I want to make one
14 clarification in the ruling that I just made
15 concerning the fiduciary duty.

16 Now, I do not agree with Judge Lee's
17 statement that any doubts about the
18 interpretation of the agreement must be
19 viewed in the light most favorable to Wilson
20 because in this case what's been before this

21 Court indicates, in fact, that the specific
22 provisions of the agreement itself reflect
23 that both parties drafted that agreement
24 through their attorneys after a full
25 investigation. So this is not a situation

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1 where the fiduciary alone drafted the
2 document and puts another party at their
3 mercy.

4 So I'm not ruling and will not instruct
5 the jury that any doubts about the
6 interpretation of the agreement are to be
7 viewed in light favorable to one party or the
8 other. All right. I'm sorry. You can
9 proceed.

10 BY MR. BALDUCCI: Thank you, Your Honor.

11 So the other amounts of money that may have
12 been put into this set aside account were
13 matters of financial planning internally for
14 Mr. Scruggs, and they were clearly his funds,
15 his money.

16 And so, as the Court has already, I

17 think, learned through motion practice of the
18 Court, this was not a dedicated or segregated
19 fund solely for the anticipated benefit of
20 Mr. Wilson. It had other funds that
21 Mr. Scruggs had deposited in there and,
22 likewise, had withdrawn from there for his
23 own use and benefit.

24 As Ms. Slater was talking about earlier,
25 there has been throughout the history of this

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1 case reference made by plaintiffs about the
2 nature and the reason why Mr. Scruggs may
3 have taken some of his money out of that
4 account, the allegations of him buying a
5 building, buying a boat, buying an airplane,
6 anything like that.

7 Our motion simply is, Your Honor, to the
8 extent that there were withdrawals made by
9 Mr. Scruggs from that account, the withdrawal
10 of the money may be relevant evidence, but
11 the purpose of the withdrawal for those types
12 of activities alleged by the plaintiffs has

13 no relevance in the trial here, and it's not
14 germane to any issue that could be
15 adjudicated here by the Court or the jury and
16 that the plaintiffs ought to be precluded
17 from asking or introducing any evidence on
18 that point.

19 BY THE COURT: All right. Response.

20 BY MR. MERKEL: Your Honor, like so many
21 things in this lawsuit, the version of events
22 changes over the course of time.

23 This account has in the past by the
24 defense been alleged as an escrow account for
25 Mr. Wilson's monies. It's been alleged in

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1 opposition to the constructive trust that
2 since the funds were escrowed and earmarked
3 for Mr. Wilson, as long as the amount of the
4 obligation to Mr. Wilson did not exceed the
5 amount of this set aside account that there
6 could be no use of the money by Mr. Wilson or
7 by Mr. Scruggs for pursuit of the tobacco
8 venture.

9 Now, the facts of the matter are
10 that that account was built beginning in May
11 or -- no, not May -- in June of 1994 when
12 Mr. Scruggs discontinued making any payments
13 or accounts to Mr. Wilson.

14 Up until June of 1994 sporadic but
15 periodic accountings were furnished to
16 Mr. Wilson. The calculations were made of
17 the amount of money he was entitled to, and
18 checks in those specific amounts were
19 tendered to him through the month of May
20 1994.

21 Beginning with June's month 1994 the
22 monies were no longer tendered to Mr. Wilson,
23 but they were put into this account. This
24 account was created with these monies that
25 were earmarked WRW.

30

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1 And the account grew between June of
2 1994 and December of 1994 to a total of about
3 \$600,000.00, which coincided exactly with
4 Kelly Singleton's calculation of Mr. Wilson's

5 exact amounts for each of those months.

6 In December of 1994 Mr. Scruggs sent
7 around a memo to his office telling them to
8 take from this account \$350,000.00 or
9 \$370,000.00, that he needed it to pay his
10 year end bonus and some taxes, and such was
11 done. The account was cut down to about
12 \$140,000.00.

13 Mr. Singleton was then instructed to
14 recalculate all of Mr. Wilson's fees at ten
15 percent and to recalculate the balance in
16 this set aside account to jibe with the ten
17 percent instead of with the way that the fees
18 had been calculated up to that point and
19 time. And then after that additional funds
20 were put back into that account that were
21 earmarked WRW.

22 There was not a sufficient amount of
23 funds ever in that account from any other
24 source for Mr. Scruggs to have withdrawn the
25 amounts that he withdrew except from

1 Mr. Wilson's monies.

2 It was not a totally dedicated account.

3 There were some other odds and ends in it,
4 but very minute amounts were deposited other
5 than these checks that were put in there as
6 calculated by Mr. Singleton to be due to
7 Mr. Wilson.

8 So this was a dedicated account at least
9 to the extent of those calculations. It was
10 earmarked as WRW funds. The memos from
11 Mr. Scruggs to his staff said take from the
12 WRW funds \$350,000.00, take from WRW
13 \$80,000.00 so that we can buy an office.

14 And every earmark that came out of there
15 was referred to as WRW funds, and this is
16 certainly an issue for the jury to determine
17 whether those were Mr. Wilson's funds that
18 were being escrowed or set aside by
19 Mr. Scruggs in that account before he decided
20 to take it for his own purposes.

21 And the nature for which he took it was
22 clearly personal, which is one of the
23 elements that proof will be required of going

24 to the conversion issue, that he took the
25 funds that were set aside for someone else

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1 and used them for his own purposes, i.e., his
2 bonus.

3 BY THE COURT: Rebuttal.

4 BY MR. BALDUCCI: I want to make certain
5 that the Court is clear on the purpose of
6 this account and not confused relative to it
7 being an escrow account in the general nature
8 and sense that we, as lawyers, refer to
9 escrow accounts.

10 I hope the Court understands that this
11 is not an escrow account for client funds.

12 This is not the traditional type of escrow
13 account where lawyers like us would receive a
14 settlement and put it into an escrow account
15 to cut fees and expenses from and disburse to
16 clients. That's not what this was, and I
17 don't think there is any allegation it has
18 been, but I want to make certain the Court
19 understands that.

20 Everything that the Court has just heard
21 from plaintiffs' counsel in this case is
22 contested. It's been spoken as if it's an
23 established fact here in this case, Your
24 Honor, but it's not.

25 The proof in this case from the defense

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1 standpoint if this issue of this set aside
2 account reaches the jury, then the proof that
3 the defendants in this case are going to put
4 forward through expert testimony is exactly
5 opposite of what Mr. Merkel told you.

6 The fact is that it was an account where
7 various different types of money were put
8 into. The fact is that at no time did the
9 account drop below any amount that Mr. Wilson
10 might have been entitled to.

11 There were always funds sufficient or in
12 excess of what his anticipated interest might
13 be in those disputed fees under the contract
14 and that, in fact, he was in for a large
15 portion of the time an overpayment situation

16 relative to this set aside account.

17 The fact that Mr. Scruggs may have taken
18 money in and out of that account, as I said
19 earlier, for his personal use does not a
20 conversion claim make. Plaintiffs have to
21 first establish entitlement to those funds.

22 And we will put on expert testimony, if
23 this issue reaches the jury, Your Honor, that
24 the calculations that Ms. Smith, our expert,
25 will show to this jury about Mr. Wilson's

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1 entitlement are exactly the calculations that
2 this Court adopted when confronted with this
3 issue on the motion for quantification at the
4 plaintiffs' request. The Court has already
5 established the entitlement to Mr. Wilson
6 under paragraphs III(2)(a), III(2)(b) and
7 III(2)(d) of the agreement.

8 What the Court and what the jury, if
9 it's allowed to go to a jury on that issue,
10 will see by our expert testimony is that once
11 the Court established those values that the

12 money that corresponds by the expert's
13 testimony of how those funds were accumulated
14 and how Mr. Wilson's interest accrued
15 relative to those payments was, always has
16 been and continues to the extent that there
17 would be any left to be available in that set
18 aside account along with other funds of
19 Mr. Scruggs.

20 But the issue for the motion, Your
21 Honor, is Mr. Scruggs is entitled as a matter
22 of law, as a matter of practice, as a matter
23 of fact, to use his own money, and whether or
24 not he took money out of his own account, an
25 account that Mr. Wilson has yet to establish

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1 any right to as a matter of law, the fact
2 that Mr. Scruggs took money of his own that
3 he put in there and took back out, that he
4 may have used for any number of business or
5 personal reasons, is not germane to any fact
6 that this jury could ever reach in this case.

7 BY THE COURT: All right. The Court is

8 of the opinion that the fact that it is very
9 hotly contested means that the Court
10 shouldn't grant the motion.

11 It creates an issue of material fact
12 whether the account or accounts meet the
13 definition set out by the Court in its
14 opinion on the defendants' motion for summary
15 judgment regarding the conversion claim. And
16 as Mr. Merkel has pointed out, the plaintiff
17 has the burden of proving on that conversion
18 claim that it was for personal use.

19 Of course, the Court will revisit this
20 upon any motion for directed verdict after
21 the plaintiff rests its case in chief, but
22 the Court just cannot cut off all attempt or
23 opportunity of the plaintiff to attempt to
24 meet that burden. So the motion as to part
25 one will be overruled.

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1 All right. As to part two, was there
2 any objection to that, Ms. Slater? It was
3 brought up earlier.

4 BY MS. SLATER: Mr. Merkel, Your Honor,
5 will be handling that.

6 BY THE COURT: Dealing with the Luckey
7 Scruggs litigation.

8 BY MR. MERKEL: What, Your Honor? I'm
9 sorry.

10 BY MR. KIRKSEY: Luckey Scruggs.

11 BY THE COURT: The Luckey Scruggs
12 litigation.

13 BY MR. MERKEL: Your Honor, I don't
14 think that there is any particular relevance,
15 particularly for phase one of the trial, as
16 to the existence of the Luckey Scruggs
17 litigation.

18 But, certainly, any testimony that was
19 taken under oath in that, just like a
20 deposition or anything else of any other
21 witness, will be used.

22 Now, the jury doesn't have to be told
23 this was taken in such and such a case or
24 presentation before the federal court as
25 opposed to just a simple deposition, but we

1 certainly will intend to use testimony for
2 impeachment or cross-examination of witnesses
3 to the extent that they testified in that
4 trial.

5 I mean we will be using that, but we
6 don't intend to make any reference to the
7 existence of that trial in phase one of this
8 case. If we get to punitive damages, then
9 maybe we would ask to revisit the issue with
10 you at that time, but certainly not in this
11 stage.

12 BY THE COURT: What's the defendants'
13 position?

14 BY MR. BALDUCCI: We would accept that,
15 Your Honor.

16 BY THE COURT: Defendants' motion to
17 quash subpoena of Michael Ellingburg.

18 BY MR. BALDUCCI: If it please the
19 Court, I don't think it's contested that
20 Mr. Ellingburg was one of the attorneys of
21 record of Mr. Scruggs and by virtue of that
22 has established an attorney-client
23 relationship with him that would blanketly

24 cover probably everything that was
25 communicated between them and on his behalf.

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1 BY THE COURT: I think we may have an
2 announcement here.

3 BY MR. MERKEL: Your Honor, I don't know
4 if Mr. Ellingburg has ever been a counsel of
5 record in this particular lawsuit. I don't
6 think that he can -- that he was. He
7 appeared in the federal court action of
8 Mr. Luckey's against Mr. Scruggs as a
9 participating trial counsel.

10 In this case he has authored a letter of
11 some eight or nine pages of his instructions
12 to Stephanie Smith, their expert, and it's
13 attached to one of her reports.

14 And, certainly, we're not -- we don't
15 have him subpoenaed to come here and ask him
16 anything about anything he's done as a
17 counsel of record in this action, but to the
18 extent he gave instructions to the expert and
19 whether she's followed or not followed his

20 instructions, that's the purpose he's been
21 subpoenaed for.

22 And I don't think his appearance in
23 another action as a counsel precludes him
24 from being questioned about the role he's
25 assumed in this case.

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1 He had already been their counsel when
2 they used him to instruct their expert
3 witness in this case, and he's never entered
4 an appearance to my knowledge, and I don't
5 think he is trial counsel in this case. He
6 was simply someone who gave instructions to
7 their expert witness.

8 So we're not -- we confess the motion as
9 far as any attorney-client privilege type
10 information would be from the Luckey
11 involvement or anything of that nature.

12 BY MR. BALDUCCI: Your Honor,
13 Mr. Ellingburg gave instructions, written
14 instructions, to Ms. Smith as part of her
15 calculations, that's correct, on five

16 discreet legal issues which are incorporated
17 in her expert report. In fact, his letter or
18 his memorandum to her on those issues are
19 included in her report.

20 BY THE COURT: And was that provided to
21 the plaintiffs in discovery?

22 BY MR. BALDUCCI: Absolutely. It's part
23 of her expert report and has been ever since
24 it was tendered, I think, in '04.

25 Now, to that extent his opinions on the

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1 law are clearly established in the memo to
2 her. So if the substance of what plaintiffs'
3 counsel is arguing here is that they're
4 entitled to know what those opinions were,
5 they're manifest in the document itself.

6 And to the extent that she relied on
7 those opinions they can ask her that. That's
8 proper cross-examination for her if she
9 relied on that.

10 But to call Mr. Ellingburg to gather
11 opinions from him on what his opinion of the

12 law would be in instructing her would be
13 manifestly inappropriate.

14 In fact, this Court has already
15 addressed that very specific issue before
16 about the propriety of calling lawyers on
17 what their opinions of the law in this case
18 would be.

19 And just as a practical matter, the same
20 thing occurred and does occur in every case.

21 The same thing occurred in this case with the
22 plaintiffs' lawyers here. Mr. Solomon, their
23 expert, has disclosed that part of the
24 calculations that he made were based on
25 instructions that he received from Ms. Slater

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1 and Ms. Mitchell.

2 Now, it would be equally inappropriate
3 for us in representing the defendant in this
4 case to try to call Ms. Slater or
5 Ms. Mitchell to find out what was it that
6 they told Mr. Solomon and what legal advice
7 did they give him as far as legal

8 interpretation of the contract to come to his
9 conclusions about entitlement for Mr. Wilson.

10 In fact, what Mr. Scruggs has done in
11 this case has gone even one step further by
12 providing that information. It's in written
13 form. It was given to Ms. Smith, and it was
14 attached as part of her expert report in this
15 case. So that's even more than what the
16 plaintiffs have done here.

17 So that information, although it may be
18 appropriate to ask Ms. Smith how she relied
19 on it and what she did in relying on those
20 opinions, Mr. Ellingburg's opinions of the
21 law as it applies are not discoverable, and
22 they're certainly not relevant to an issue
23 for the Court -- for the jury.

24 And, moreover, those issues have already
25 been ruled on by the Court. The Court has

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1 adopted Ms. Smith's opinions essentially in
2 the motion for quantification in establishing
3 Mr. Wilson's entitlement.

4 And it will be our position, as we go
5 through some of these other motions, Your
6 Honor, that those are all dead issues anyway
7 in this case, and so we're arguing about an
8 issue that, frankly, ought not even be an
9 issue and is not an issue based on the
10 Court's rulings already.

11 And one more thing, Your Honor, just for
12 the record. I'm sorry. The last thing is
13 it's a technical point, but Mr. Ellingburg
14 has never been disclosed as a witness for the
15 plaintiffs. He's not on their witness list
16 and has never been provided. Until he was
17 subpoenaed it was never even an issue that
18 plaintiffs would seek to elicit testimony in
19 this case.

20 I'll ask, since it's my motion, I
21 thought this was my rebuttal, but if
22 Mr. Merkel is going to get an opportunity, I
23 would like to rebut again what he's going to
24 argue.

25 BY THE COURT: You'll have that

1 opportunity. He interjected during your
2 argument.

3 BY MR. MERKEL: I was just trying to
4 save some of it, Your Honor, and I'm going to
5 try to save that again.

6 BY THE COURT: I understand. I just
7 want to make sure he will get the last
8 argument.

9 BY MR. MERKEL: We're not interested in
10 Mr. Ellingburg's legal opinions. We think,
11 as you have already ruled about other
12 experts, that we don't need lawyers to tell
13 the jury what the law is. You'll instruct
14 them in that.

15 However, Mr. Ellingburg goes further
16 than legal opinions, and he gives specific
17 instructions to Ms. Smith as to how to
18 calculate certain fees for certain groups of
19 payments.

20 And to the extent she has failed to do
21 what she was told to do, that she is in error
22 simply in trying to apply the very
23 calculations that you've approved,

24 Mr. Ellingburg's testimony would be relevant
25 to that.

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1 Now, obviously, as Mr. Balducci says, if
2 he's successful and we don't even have a
3 trial because there's nothing left to try, as
4 they want to urge on the Court, then
5 obviously Mr. Ellingburg is not going to
6 come, and we're not going to have him here.

7 But if we get to go to trial on these
8 issues, what Ms. Smith did mechanically to
9 implement what he told her to do with one,
10 two, three type instructions is something
11 that would be relevant as impeachment of her
12 calculations.

13 BY THE COURT: All right, sir.

14 BY MR. BALDUCCI: Very briefly, Your
15 Honor.

16 BY THE COURT: I set aside the whole
17 afternoon, so take your time.

18 BY MR. BALDUCCI: I'm going to try to
19 keep you from having to use it.

20 What Mr. Merkel has just argued is at
21 the heart and the soul of the controversy
22 that's before the Court this afternoon about
23 all of this extraneous evidence.

24 Mr. Merkel is suggesting to the Court
25 that there's an error in the methodology of

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1 Ms. Smith's calculations that this Court
2 addressed in the plaintiffs' motion for
3 quantification of amounts due Mr. Wilson.

4 And the response to that simply, Your
5 Honor, is the Wilson plaintiffs paid their
6 nickel, and they rode the ride. They asked
7 the Court to quantify what he was due under
8 the contract, and the Court did it.

9 The Court didn't, the Court did not,
10 approve and institute a methodology for the
11 computation of the amounts due Wilson.
12 That's where the heart of this dispute is,
13 Your Honor.

14 What the Court did was the Court set a
15 finite number for entitlement and said if

16 Mr. Scruggs has paid it, then that is not an
17 issue in the case. So all that is left
18 relative to III(2)(a), III(2)(b) and
19 III(2)(d) is for Mr. Scruggs to prove he paid
20 it.

21 Plaintiffs don't get a chance now to go
22 back and criticize the methodology or
23 criticize the calculations or the math.
24 Plaintiffs asked for and received a
25 quantification from this Court on that issue.

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1 So back to the instant motion, to the
2 extent that Ms. Smith did or did not follow
3 Mr. Ellingburg's directions on how she
4 arrived at her figures is of no justiciable
5 issue anymore before this Court because
6 Mr. Wilson -- it has already been determined
7 what his entitlement is under the contract
8 under those provisions. It's a dead issue,
9 and it's a dead issue because the plaintiffs
10 asked for it, and they got it.

11 BY THE COURT: The Court is going to

12 grant the motion not because I'm making any
13 decision as to whether or not the proffer, so
14 to speak, brought to the attention of the
15 Court for the purpose would be -- the Court
16 is not determining at this point that it is
17 or is not relevant, but assuming that it's
18 relevant, then the report of Ms. Smith
19 itself, which would include the instructions
20 received, will accomplish that purpose, and
21 whether or not she followed those
22 instructions, if the Court deems that to be
23 relevant, can be accomplished without the
24 attendance of Mr. Ellingburg to testify at
25 trial concerning that.

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1 So to the extent the motion simply seeks
2 to quash the subpoena for Mr. Ellingburg's
3 appearance it will be granted.

4 All right. I'm going to take about a
5 five minute break. When we come back, we'll
6 take up the defendants' motion to strike
7 supplemental expert report.

8 (FOLLOWING THE BRIEF RECESS, THE HEARING CONTINUED AS
9 FOLLOWS:)

10 BY THE COURT: Whenever you're ready.

11 BY MR. BALDUCCI: May it please the
12 Court. Turning to the motion to strike the
13 report of Sol Solomon, just a couple of days
14 ago on August the 14th Mr. Wilson filed what
15 he termed a supplemental expert report by
16 Mr. Sol Solomon and included with that a two
17 page report by Chad Chambliss.

18 And the fact of the matter is these are
19 not supplemental reports at all. These are,
20 in fact, new reports on new issues.

21 The Court would recall and the law is
22 that parties are required to seasonably
23 supplement reports like these up to trial,
24 and plaintiffs represented that they needed
25 to do that given the Court's rulings on

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1 certain dispositive matters and the
2 quantification issue and others.

3 And in response to that, they've

4 tendered these new reports, but the fact is
5 that they're neither supplements nor are they
6 in compliance with any of the Court's rulings
7 as I'm going to try to set out here.

8 The fact is they're inconsistent, and
9 they ignore the clear rulings of this Court
10 on all of these issues that they intend to
11 supplement.

12 They include new and additional
13 information in these reports, all of which
14 has been available for a long time in this
15 case. If that information was going to be
16 part of an expert opinion, it was certainly
17 available long before now and hasn't been
18 tendered.

19 I'd like, if I can, to take them one at
20 a time. I would just like to ask has the
21 Court seen the new report by Mr. Solomon?

22 BY THE COURT: Yes, sir.

23 BY MR. BALDUCCI: The Court has a copy
24 of it. All right. Then the Court knows that
25 it goes in linear form, column form, and

1 gives about eight different potential, as I
2 appreciate it, about eight different
3 potential opinions.

4 And it's the result of a variance of
5 subsets of differing calculations, and it's
6 those subsets of calculations I would like to
7 address one at a time.

8 The first one is what Mr. Solomon terms
9 the payments to Mr. Wilson which relate to
10 settlements prior to the agreement.

11 In an effort to create a dispute over
12 what Mr. Wilson has been paid, I guess, we
13 now receive an opinion from Mr. Solomon that
14 says that \$463,000.00 of what has been paid
15 to Mr. Wilson was, in fact, not paid under
16 the terms of the 1992 agreement but somehow
17 reflects payments for settlements that
18 predate the 1992 agreement and reflect
19 entitlement that he had prior to that time.

20 Well, as a matter of law the Court has
21 already ruled that the 1992 agreement
22 superseded any prior duties and
23 responsibilities between the parties.

24 As I mentioned earlier in one of the
25 other motions, the 1992 agreement served as

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1 the document that severed the professional
2 relationship between Mr. Wilson and
3 Mr. Scruggs, and it defined the entitlements
4 that Mr. Wilson had and his corresponding
5 obligations to any payment.

6 It is the only document and it's the
7 only thing that this Court can rely on that
8 articulates those entitlements and
9 obligations.

10 Now we get a new opinion from
11 Mr. Solomon saying that there were payments
12 that should be considered prior to that as
13 payments that Mr. Wilson was entitled to.

14 Well, the fact is that under the present
15 posture of the case that's a legal
16 impossibility. On August 7, 1992 Mr. Wilson
17 executed the agreement, and the Court has
18 already ruled that by executing that
19 agreement what he did was he exchanged any

20 interest that he had in Asbestos Group for
21 his continuing rights and obligations under
22 the terms of the 1992 agreement; i.e., any
23 interest that he had in AG only can rise now
24 from the terms of the August '92 agreement.

25 Again, the Court has already addressed

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1 these issues, and the Court has already ruled
2 upon that, and I'm just regurgitating for the
3 Court what that language has been.

4 So to put on proof at this time beyond
5 the terms of the 1992 agreement, to go back
6 and try to reach back before that time not
7 only is inconsistent with what the Court has
8 already ruled, it's in violation of what the
9 Court has already ruled.

10 It's not supported by any evidence in
11 the case, and it is clearly arguments that
12 had the plaintiffs intended to make, they had
13 these arguments available to them long before
14 four or five days before trial.

15 And because of those prior rulings of

16 the Court, Your Honor, that's an issue that
17 we would submit to the Court is not ripe for
18 this trial and is not something that should
19 be considered by this Court as the Court has
20 already ruled that all the claims that
21 Mr. Wilson has must arise out of the contract
22 and from conduct post 1992, August 7.

23 The next issue -- if I may, I'll just go
24 through these if the Court has any questions
25 about our argument -- settlement of account

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1 in full on June 1st.

2 What it appears that Mr. Solomon has
3 done here, Your Honor, is he's inserting what
4 he is submitting is a new calculation based
5 upon Mr. Chambliss's report.

6 And if the Court has looked at
7 Mr. Chambliss's report, both that report and
8 this portion of Mr. Solomon's report
9 completely ignore the Court's order on
10 quantifications of sums due Mr. Wilson under
11 III(2)(b).

12 What Mr. Chambliss's new opinion and new
13 report does is he essentially takes a
14 preference of numbers. What Mr. Chambliss is
15 in essence saying is that he went back, and
16 he looked at the source data, and he looked
17 again at Ms. Smith's calculations, and he
18 thinks that under III(2)(b) a better outcome
19 for Mr. Wilson is \$228,000.00 in his favor.

20 Well, as I said just a few moments ago
21 before we took the break, Your Honor, that's
22 really the central issue throughout these
23 motions today is the plaintiffs' failure to
24 recognize and accept that issue as a dead
25 issue before this Court.

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1 And I hate to keep saying it over and
2 over again, but I want to make the point
3 clearly. Plaintiffs asked for and received a
4 quantification of their entitlement under
5 III(2)(a), III(2)(b) and III(2)(d).

6 Not only did they ask for it and get it,
7 they then later asked the Court to reconsider

8 it, and the Court addressed that issue again.
9 And in readdressing that issue after they
10 didn't like the result they got on the motion
11 they asked for, the Court said that the
12 entitlement had been adjudicated prior to
13 trial, and the jury would be so instructed.

14 We're not talking about methodology
15 anymore. The Court knows and the Court has
16 been burdened with the labor of trying to
17 establish the methodology that needs to be
18 employed here for Mr. Wilson's entitlement.

19 It has been the series of years worth of
20 litigation. It has been the subject of a
21 series of motions and briefs before this
22 Court, and the Court finally resolved that
23 issue for the parties so that the parties
24 could move forward and prepare this case for
25 trial with some certainty.

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1 Now, not liking that result, what the
2 plaintiffs have done now is they're taking a
3 new approach and attacking the methodology of

4 III(2)(b). They're attacking the result of
5 III(2)(b).

6 And, in fact, they ignore that that's
7 not what the Court said. What the Court said
8 was in response to the motion for
9 quantification that there was an amount,
10 there was a sum certain, a value that
11 Mr. Wilson was entitled to under those
12 contract provisions, and the Court
13 adjudicated those amounts.

14 It is no longer an issue as to how the
15 methodology of those calculations came about.
16 It's no longer a justiciable issue for the
17 jury or the Court at this point. That is a
18 dead issue.

19 So to the extent that under this portion
20 of Mr. Solomon's report a settlement of
21 account in full where he attempts to
22 interject a new opinion of \$228,000.00 as a
23 product of a recalculation by Mr. Chambliss
24 of III(2)(b), it simply is not proper at this
25 time, Your Honor, to go back and try to

1 replow that same ground.

2 Likewise, the next section is a dispute
3 that has been created now relative to the
4 Manville personal injury settlement trust.

5 Inexplicably, we stand here again before
6 the Court for at least the fourth time now
7 that the plaintiffs have made an argument to
8 the Court relative to entitlement under the
9 Manville personal injury settlement trust.

10 The Court has passed on this three times
11 in clear language that it could not
12 reasonably be interpreted in any other way.
13 But, nevertheless, we now have an opinion, a
14 new opinion, based on new calculation, new
15 methodology by Mr. Solomon that Mr. Wilson is
16 entitled to almost \$895,000.00 from the
17 Manville settlement.

18 Well, the Court knows and the Court is
19 aware that the Court has already adjudicated
20 what Mr. Wilson's entitlement is under
21 Manville.

22 And despite what Mr. Solomon would like
23 for the Court to entertain here, what the

24 Court said in establishing his entitlement
25 the Court ruled that Mr. Wilson only has a

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1 fee interest in the Manville settlements
2 under the terms of the '92 agreement that
3 were reached on behalf of Exhibit A clients
4 that were secured as of August 7, 1992 under
5 the Chapter 11 reorganization bankruptcy plan
6 of Manville.

7 Now, those discreet individuals were
8 before the Court on the separate motion at
9 the same time of the quantification of the
10 separate motion regarding Manville
11 entitlement, and all of that was before the
12 Court at that time, and the Court has ruled
13 upon that and has adjudicated that issue.

14 Now Mr. Solomon, again in an attempt of
15 what can only be considered as a back door
16 attempt to get the Court to reconsider again
17 its opinions on Manville, has produced an
18 expert opinion of almost \$900,000.00 of
19 entitlement for Mr. Wilson after the Court

20 has already passed upon this very issue.
21 It's erroneous in its premise. It's
22 without proof. There is no proof that the
23 individuals to which Mr. Solomon argues
24 Mr. Wilson has entitlement either were on
25 Exhibit A or that they were part of the

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1 people who could even take a settlement or
2 were qualified for a settlement under the
3 Chapter 11 reorganization plan, contrary to
4 the rulings of the Court, Your Honor,
5 particularly those articulated by this Court
6 in ruling upon the plaintiffs' -- again the
7 plaintiffs' -- motion, alternative 60 motion,
8 on Manville wherein they asked the Court to
9 resolve the issue of Mr. Wilson's entitlement
10 under Manville.

11 This makes the fourth time that they've
12 presented this issue to the Court, and,
13 respectfully, Mr. Scruggs would submit to the
14 Court, enough is enough. At some point
15 you've got to give up on another bite at the

16 apple.

17 The next issue, Your Honor, in

18 Mr. Solomon's report concerns overhead.

19 Again, this is a completely new opinion by

20 Mr. Solomon on overhead. In fact, it's a new

21 opinion that doesn't even logically relate to

22 his prior opinion.

23 It's a different opinion than what he

24 said the overhead obligation of Mr. Wilson

25 was in his last opinion, and he does not in

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1 this opinion even explain why his numbers are

2 different. He just offers a criticism of

3 Ms. Smith's numbers on her overhead

4 calculations.

5 Now, I have to bleed over into the other

6 motion for just a moment to make this

7 argument, Your Honor. But if the Court will

8 put this into context, at the last time

9 before this new report of Mr. Solomon

10 occurred the two experts had given opinions

11 on what they believe the overhead calculation

12 was relative to what Mr. Wilson should be
13 charged with.

14 And when you distilled it down, there
15 was about \$42,000.00 difference between what
16 Ms. Smith, Mr. Scruggs' expert, said could be
17 rightfully charged against Mr. Wilson and
18 what Mr. Solomon, Mr. Wilson's expert, said
19 could be rightly charged against Mr. Wilson
20 for overhead. There was about a \$42,000.00
21 difference at that time.

22 In response to that, in preparing our
23 motion in limine, the next one that we
24 probably will talk about, the defendants made
25 a decision at that time to for the purposes

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1 of the motion concede that issue and take
2 Mr. Solomon's number.

3 And they tendered the difference between
4 the two experts' value there. Not giving up
5 the legitimacy, not waiving the legitimacy of
6 their position and their calculations, but
7 just saying for the purposes of trying to

8 resolve this issue without the necessity of a
9 jury having to resolve it, we'll accept that
10 number, and we paid the difference. So
11 essentially what we did was accept his
12 number.

13 Now what he has done is he's brought
14 forward a whole new number criticizing --
15 only criticizing Ms. Smith's calculation of
16 overhead and not explaining at all why his
17 opinion has varied now on his own numbers
18 because they don't match.

19 In fact, if you subtract what
20 Mr. Solomon now criticizes from Ms. Smith's
21 report, if you subtract that amount, then the
22 remaining balance that figure is less than
23 Mr. Solomon's previous calculation. So I
24 guess that means we've overpaid now.

25 It's inexplicable. It's a new argument.

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1 It's not based on any evidence. It certainly
2 is opinions and evidence that was long ago
3 available to the plaintiffs to make, and it's

4 not supplementation.

5 It's a new and different opinion, and
6 it's not even in any way consistent, much
7 less supplemental, to his previous opinion.
8 For that reason, Your Honor, there's no
9 really even arguable way for Mr. Scruggs to
10 respond to it.

11 The next section regards a dispute
12 between the parties on the III(2)(b)
13 settlements. Your Honor, I think I have
14 adequately addressed that in that any issue
15 regarding III(2)(b) settlements has been
16 adjudicated as a matter of law already in
17 this case by the Court at the plaintiffs'
18 request.

19 In the order for quantification the
20 Court said the total due Mr. Wilson under
21 III(2)(a), the total due under III(2)(b), the
22 total due under III(2)(d). The Court didn't
23 say here is the methodology. Here is the
24 formula you use to calculate that. The Court
25 said here's the number.

1 Plaintiffs have already tried once to
2 get the Court to go back and reconsider that.
3 The Court refused to do that rightfully, and
4 this again is nothing more than an attempt to
5 get the Court to go back and revisit that
6 issue by way of presenting it under a
7 different format for the Court, and, as such,
8 the Court ought to strike that portion of
9 Mr. Solomon's report as well.

10 The next to the last thing -- well, no,
11 it's not actually. Along the report he says
12 or gives an opinion now on a new issue
13 completely, the time value of money.

14 This has never even been addressed in
15 any report before by Mr. Solomon. But the
16 time value of money argument he makes a very
17 calculation of that --

18 BY THE COURT: -- isn't this the same
19 thing as interest?

20 BY MR. BALDUCCI: That's exactly what it
21 is, Your Honor. Time value of money is
22 interest, and if the Court has read our brief
23 on this point, we supplied the Court with a

24 number of cases that say that time value of
25 money is prejudgment interest. The Court has

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1 already ruled.

2 BY THE COURT: Didn't his earlier report
3 in May of this year include interest?

4 BY MR. BALDUCCI: I'm not certain of
5 that, Your Honor. I'm not certain. I'm not
6 certain.

7 Regardless, if it does or doesn't, to
8 that extent the Court has already ruled that
9 prejudgment interest is a matter that the
10 Court will take up. It's a matter of law.
11 It's a matter that is not going to be
12 considered by the jury during phase one of
13 this trial.

14 The Court in its memorandum opinion
15 relative to Mr. Scruggs' motion on
16 prejudgment interest and punitive damages
17 recognized that prejudgment interest will be
18 determined by the Court and not the jury.

19 Thus, to the extent that Mr. Solomon

20 would try to interject that information or
21 that opinion into his testimony during phase
22 one of the trial, if it occurs, that would be
23 manifestly improper, and it would be in
24 complete violation of the Court's previous
25 orders on that point.

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1 The next point that Mr. Solomon's new
2 report talks about is the advanced litigation
3 costs, and he makes just really a judgment
4 and an opinion statement that in his opinion
5 the advanced costs consider nothing more than
6 a loan.

7 Well, frankly, that's new. That's a new
8 opinion, but it's completely unsupported by
9 any fact, and it's completely contrary to the
10 plain language of the 1992 agreement.

11 Here again, I'm touching on issues that
12 are in our other motion in limine, Your
13 Honor, but the \$100,000.00 advanced
14 litigation cost is specifically set out in
15 paragraph ten of the 1992 agreement.

16 And what it says is that that is a
17 liability. That is a debt and obligation, if
18 you will, that Mr. Wilson owes up to
19 \$100,000.00 of advanced litigation costs.
20 And he was rightfully charged that under
21 Ms. Smith's calculations.

22 It doesn't say that it's a loan. It
23 doesn't say that he'll get that back. The
24 1992 agreement clearly states what the
25 rights, responsibilities, obligations,

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1 benefits are to the parties.

2 And paragraph ten sets out an obligation
3 of Mr. Wilson. It doesn't say that that's a
4 loan that he's going to get back. That says
5 that he's going to pay up to \$100,000.00.

6 So to that extent the Court, because
7 this issue has arisen and they have
8 interjected this into this trial at this
9 point, the Court is and should be now
10 required to make a legal determination of the
11 effect of that paragraph, the clear and

12 unambiguous language of paragraph ten under
13 the agreement, and make a legal determination
14 as to whether or not the application of that
15 \$100,000.00 of advanced litigation costs can
16 be charged against Mr. Wilson's entitlement.

17 That's not an issue for a jury. That's a
18 legal interpretation for the Court under this
19 agreement.

20 Finally, Your Honor, there's an issue
21 about expenses paid to Mr. Wilson for other
22 litigation expenses, the Kaplan expenses of
23 almost \$8,000.00.

24 I'll ask. I think maybe that's conceded
25 at this point. That was another issue of a

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1 variance of a difference between the two
2 experts, much like the overhead that
3 Mr. Scruggs recently tendered a check to, and
4 just for purposes of the motion in limine
5 accepted that Mr. Wilson's accountants didn't
6 include that as a chargeable expense.

7 So what Mr. Scruggs did was just say,

8 okay, I'll accept that and your position on
9 that without waiving my position. For
10 purposes of this motion I'll pay that,
11 reimburse that. And he did.

12 I know just from talking with
13 plaintiffs' counsel before the hearing today
14 there was some issue about whether or not
15 they received it timely in their office or
16 whether or not they appreciated, I think,
17 what it was at the time.

18 And I suspect that that's probably why
19 this is still here in Mr. Solomon's report
20 because they didn't timely appreciate that
21 issue of what it was, but I'll let them
22 explain that.

23 But I don't think that's still an issue.
24 I think if he had it probably to do over, he
25 would probably exclude that now.

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1 But to the extent that he doesn't or
2 wouldn't, it would be our position that,
3 again, that's been paid. That's not an issue

4 that should be before the Court or the jury
5 in this case.

6 So in conclusion, Your Honor, just
7 relative to that, when the Court examines the
8 report by Mr. Chambliss, it is nothing more
9 than a recalculation of the III(2)(b) issue.

10 Mr. Solomon looks at and relies upon
11 that in making many of the opinions that he's
12 given in this new expert report here that is
13 clearly not a supplement of any existing
14 opinions.

15 We would submit to the Court that there
16 is nothing here for the jury to hear relative
17 to that, and we would ask the Court to strike
18 that portion of his report.

19 Finally, if the Court allows any of this
20 new testimony by Mr. Solomon or
21 Mr. Chambliss, it comes at a time based on
22 this new report where Mr. Scruggs has not had
23 any opportunity to challenge the veracity of
24 those calculations.

25 And it would be manifestly unjust to him

1 at this point and time to be subjected to a
2 trial on Monday about these new opinions for
3 which he hasn't had the opportunity to do any
4 discovery on, hasn't had an opportunity to
5 vet that expert's reports and calculations or
6 in some instances even get the backup
7 documentation, like the new overhead figure.

8 So to that extent it is with great
9 regret that we include in an alternative
10 request for relief a continuance on that
11 issue, Your Honor.

12 I want to be very clear we don't think
13 that it should even reach that. We think
14 that the report should be stricken in its
15 entirety, and we should go back to the issue
16 of the old report and the subject of our
17 motion in limine regarding it.

18 But to the extent that any of these new
19 opinions are allowed by the Court,
20 regrettably, it would be unjust, and it would
21 be an imposition beyond anything of reason to
22 ask Mr. Scruggs to defend that, and we would
23 not be doing our job as his lawyers if we

24 didn't adequately prepare to meet those new
25 opinions.

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1 And so we would ask the Court,
2 alternatively, for a continuance on that
3 issue strictly for that, strictly for that
4 matter, to go back and to try to figure out
5 the basis of these new opinions.

6 BY THE COURT: Response.

7 BY MR. MERKEL: Your Honor, I would
8 like, first, to seize on the last thing that
9 Mr. Balducci said, and that was that they
10 have had no opportunity to challenge the
11 veracity of Mr. Solomon's calculations and
12 would urge the Court to keep that phrase and
13 that statement in mind as we recount how we
14 got to where we are today.

15 The defendant, as it likes to do, seizes
16 an order of the Court's to some extent and
17 then modifies it and amplifies it to the
18 power of ten in arguing now that there's no
19 issue left for a jury to consider in this

20 case.
21 If we go back chronologically and take
22 how we got here today, the plaintiff filed
23 motions to quantify as to III(2)(a),
24 III(2)(b) and III(2)(d). It attached to
25 those motions an affidavit of Sol Solomon.

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1 It attached his methodology, and it attached
2 the amounts that he had come up with and had
3 sworn were correct.

4 The issue, with all deference to
5 counsel's argument, was not about the dollar
6 amount. It was about the methodology.

7 Your Honor had taken the special master
8 Bobby Sneed's report and rejected portions of
9 it and issued rulings on III(2)(a) and
10 III(2)(b) which the parties took different
11 interpretations not of the contract but of
12 your order.

13 Ms. Smith was told by Mike Ellingburg
14 how to interpret your order and how to
15 deliver an opinion, and Mr. Solomon was told

16 by Ms. Slater the same thing.

17 You were asked to determine which of the
18 two methodologies was correct, and without
19 question you sided with the defendants'
20 interpretation and said that Ms. Smith's
21 instructions as to methodology had been
22 correct. You said that Mr. Solomon's was not
23 correct.

24 In phrasing or placing this before Your
25 Honor, the opposition of the defendant to the

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1 plaintiffs' motions to quantify contained
2 nothing.

3 Did not contain the report of Stephanie
4 Smith. It was not attached. Had no
5 affidavit from Stephanie Smith. Had no
6 evidence whatsoever. All they did was argue
7 to Your Honor methodology.

8 And they then argued what the difference
9 in our expert and Mr. Solomon's figures with
10 regard to certain of these defendants is.
11 And they would say Ms. Smith found

12 \$100,000.00, and Mr. Solomon found
13 \$101,000.00. We don't think the difference
14 is material. In other cases they would say
15 Ms. Smith found \$100,000.00, and Mr. Solomon
16 found \$1,000,000.00, and it's because he's
17 got the wrong methodology.

18 Your Honor has never seen any
19 justification for Ms. Smith's calculations.
20 Your Honor, nor the plaintiff, has ever had
21 an opportunity to consider, let alone
22 challenge, the veracity of Ms. Smith's
23 calculations.

24 Your Honor's order in this instance that
25 was issued on the 7th day of July with regard

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1 to sixteen of these defendants adopted
2 Ms. Smith's number and said, I find that
3 \$19,573.00 is due under the settlement from
4 H. K. Porter, \$42,000.00 from Babcock and
5 Wilcox.

6 That same order, Your Honor, clearly
7 says, Wilson specifically excludes from his

8 motion fees allegedly due him under the
9 Fiberboard and Manville contracts. You
10 didn't go there. You weren't asked to go
11 there, and you didn't.

12 No one asked the Court to go towards
13 overhead. No one asked the Court to go
14 towards fees or payments that had been made,
15 and no one asked you to approve the
16 mathematical veracity or correctness of
17 anyone's contract or calculation.

18 Now, in fact, when you totaled up on
19 this order, you gave the total due Wilson
20 under III(2)(a) as being \$4,943,000.00
21 roughly, which was the amount of Ms. Smith's
22 calculation for eighteen defendants. That
23 included Manville and it included Fiberboard
24 that you had specifically excluded from your
25 consideration on this motion.

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1 Now, on subsequent orders you approved
2 Ms. Smith's methodology again with regard to
3 Fiberboard, but you did not quantify an

4 amount.

5 You gave a narrative opinion as to the
6 proper methodology to be used by anybody
7 calculating the Manville personal injury
8 trust; i.e., that if it was settled, you
9 found that the 1996 order of the bankruptcy
10 court was a new settlement and that
11 Mr. Luckey or Mr. Smith -- I mean Mr. Wilson
12 should get nothing pursuant to that 1996
13 order but that if the funds were paid
14 pursuant to a prior order that came out of
15 the bankruptcy, not out of the class action
16 in federal court, but out of the bankruptcy
17 proceedings that Mr. Wilson was entitled to
18 40 percent of those fees.

19 Again, you didn't quantify those fees.
20 We don't know how Ms. Smith quantified those
21 fees. We've never been furnished with any
22 backup data from Ms. Smith. We've asked for
23 it and been told that they don't have to
24 furnish it to us. She simply comes up with a
25 figure of \$113,000.00.

1 What Mr. Solomon has done, Your Honor,
2 is take your methodology -- and Mr. Kirksey
3 will explain the Manville situation in detail
4 in a moment. But he took your specific order
5 as to Manville and calculated what should
6 result from a calculation based on the
7 Court's exact order the last time around.

8 What Ms. Smith has done we can only
9 guess or wonder, but she will certainly be
10 subject to cross-examination of it because
11 Manville is not a quantified amount.

12 No one has asked the Court to do this,
13 and without waiving a jury trial as to this,
14 this is not something for the Court's
15 consideration. The correctness of the
16 calculations given the Court's methodology is
17 followed is for the jury.

18 Now, taking the substances of
19 Mr. Solomon's report -- and Mr. Solomon's
20 report, again, was not characterized as
21 Mr. Balducci would name it. It was a
22 supplemental expert report in rebuttal.

23 It goes specifically and, in fact,

24 everything about it is dovetailed to
25 Ms. Smith's report. If Your Honor will look

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1 at the eight columns on it, it starts with a
2 line at the top which says Ms. Smith's result
3 because what Ms. Smith does is say Mr. Wilson
4 is owed zero, and the straight line indicates
5 zero.

6 What Mr. Solomon has done then is add to
7 what she calculated hers as a starting point,
8 and he has either added or taken away based
9 on his differences with what Ms. Smith has
10 done in her report.

11 As far as the payments to Wilson, what
12 Ms. Smith has done, Your Honor, is calculate
13 Mr. Wilson's fee entitlements beginning on
14 August the 11th of 1992, but she has
15 calculated his payments beginning with
16 October 1, 1991.

17 She has taken an entire fiscal year's
18 payments to Mr. Wilson for ten and a half
19 months before the settlement was ever reached

20 and applied all of those monies against the
21 one and a half month entitlement that she
22 calculated from that period.

23 And by contrast, he was paid about a
24 million and six on her calculation. He only
25 earned under her calculation a little more

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1 than \$700,000.00.

2 The extra amount was paid with respect
3 to fees that he had earned while he was still
4 in partnership or in corporate ownership
5 during the first nine and a half, ten and a
6 half months of that fiscal year.

7 And that is clearly reflected, Your
8 Honor, by Exhibit 405 and 537, which are
9 calculations prepared by Mr. Scruggs'
10 accountants which show the exact amount of
11 Mr. Wilson's entitlement for the fiscal year,
12 not for the settlement period but for the
13 fiscal year, and the amounts of the payments
14 made pursuant to this. \$401,707.00 and
15 \$297,294.00 are two of the figures that

16 Ms. Smith includes in her calculation of
17 payments received.

18 So Mr. Solomon is not changing anything
19 regarding Mr. Wilson's entitlement. He is
20 saying that she has misapplied payments that
21 were made to Wilson for his nine and a half,
22 ten and a half month interest in Asbestos
23 Group, P.A., not to the calculated fees he
24 was due in the first six weeks after the
25 contract was signed.

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1 They're apples and oranges completely,
2 and Ms. Smith has simply given all of the
3 benefit of every payment made for that entire
4 year to Mr. Scruggs and only given Mr. Wilson
5 six weeks of entitlement to fees.

6 As far as III(2)(b), Your Honor, you
7 have indeed said that you find Ms. Smith is
8 correct to the tune of \$1,823,000.00. The
9 Court's appointed auditor, using exactly the
10 same methodology that you have directed is
11 appropriate, comes up with \$2,050,000.00,

12 Your Honor.

13 Ms. Smith has simply left out not

14 hundreds of thousands but millions of dollars

15 of gross settlements from her fee -- from her

16 calculation. They're on Mr. Solomon's list.

17 They're on Mr. Chambliss's list. They're on

18 the court appointed auditor's list.

19 But Ms. Smith for whatever reason --

20 again, she's never been cross-examined.

21 She's never been put under oath. You have

22 nothing from her to rely on the accuracy of

23 her calculation, but she's \$230,000.00

24 roughly wrong in her calculation.

25 Now, if the Court -- you've ruled.

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1 And if the Court feels that you have to go

2 forward that way, then we'll simply proffer

3 this for purposes of appeal.

4 But your ruling is not final, Your

5 Honor. It's not had an appeal taken from it.

6 It was not certified as final. And I don't

7 believe Your Honor intended to adopt figures

8 that had mathematical errors in them and
9 errors of omission.

10 What you were dealing with was your
11 interpretation of the clause of the contract
12 III(2)(b). You approved a methodology.
13 Mr. Chambliss has used that, and Ms. Smith
14 has used that. You have affidavits from
15 Mr. Solomon. You have affidavits from
16 Mr. Chambliss saying that theirs is correct.

17 You have nothing to this date from
18 Ms. Smith. In fact, you have not even been
19 given Ms. Smith's report. You have had it
20 characterized to you or paraphrased to you in
21 argument of counsel in their brief, and that
22 certainly is not an ample opportunity to
23 challenge or test or approve the veracity and
24 correctness of her report.

25 As far as overhead is concerned, Your

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1 Honor, Mr. Solomon has calculated overhead
2 based on the terms of the contract.

3 He did this and differed with Ms. Smith

4 from the beginning in that he says after the
5 files were all transferred to Scott Taylor
6 and after Mr. Scruggs no longer had any
7 obligation for a penny's worth of overhead
8 that Mr. Wilson should not be charged ten
9 percent of this.

10 That's still \$82,000.00 or \$83,000.00 of
11 the difference. There's \$113,000.00 of
12 difference between Mr. Solomon's overhead and
13 Ms. Smith's overhead.

14 She charges Mr. Wilson somewhere in the
15 neighborhood of \$20,000.00 -- \$20,000.00,
16 \$21,000.00, \$22,000.00 -- for four years
17 after the files were turned over to
18 Mr. Taylor.

19 Mr. Solomon challenged that in his
20 initial report. He challenges it in this
21 report, and he says zero should have been the
22 overhead for those four years. That alone
23 accounts for approximately \$80,000.00.

24 In the last year that any overhead was
25 charged correctly to Mr. Wilson the salaries

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1 of the employees that were measured to
2 determine the amount of his overhead; in
3 other words, there were a list of supposedly
4 dedicated asbestos employees whose salaries
5 were added up, and Mr. Wilson was to pay 40
6 percent of that total up until the Owens
7 Corning credit was resolved, and then he was
8 to pay 10 percent of it after that date.

9 In the last year those salaries at a
10 time when asbestos had virtually ceased to be
11 a major item -- it was dribbling in. If you
12 look at the calculations, there were very few
13 fees coming in at that time. Yet, the
14 so-called salaries of these asbestos
15 employees doubled in that year.

16 And the result of that or the reason for
17 that was that they were paid tobacco bonuses,
18 and the records and books that Mr. Solomon
19 looked at clearly reflect the amounts of
20 so-called tobacco bonuses that were paid to
21 these so-called dedicated asbestos employees.

22 And he simply revised the figures and
23 took the bonuses out. Did not allow 10
24 percent of the bonuses but only 10 percent of
25 their regular salaries. That's what the

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1 overhead issue is about. It's the same
2 overhead everybody has been discussing and
3 arguing about.

4 And after Mr. Solomon's report was
5 finished, Your Honor, they delivered to
6 Ms. Slater in an envelope that said "Vicki"
7 two checks, and one of them was for this
8 overhead difference that they perceived to
9 exist, some \$41,000.00. So the 41 would come
10 off of the 113 difference now.

11 Of course, they carefully said in their
12 letter and they've carefully said in front of
13 you today that they conditionally conceded
14 this issue still reserving their rights to
15 contend otherwise, we haven't cashed the
16 checks or I don't know where we are on the
17 \$41,000.00.

18 But if they concede it and pay it, then
19 we've got an issue over about seventy odd
20 thousand that remains. If they haven't
21 really conceded it, I don't know where they
22 are on that, but if they haven't and the
23 check goes back, then there's \$113,000.00 in
24 dispute on the issue of overhead.
25 And as far as the \$100,000.00 so-called

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1 pre-litigation expense or prepayment of
2 litigation expense, the contract says it's an
3 advance of that. An advance, by definition,
4 is it's going to be advanced against the
5 cost, and it will be recovered either from
6 the client or from the settlement itself when
7 the litigation was over with.

8 The litigation has been over, Your
9 Honor, since 1993. It was successful. They
10 collected. Whatever expenses were advanced
11 on behalf of the clients were collected from
12 the clients.

13 What Mr. Wilson was supposed to do was

14 advance 40 percent of whatever the Scruggs
15 firm advanced towards those joint litigation
16 costs, and when they were recouped, he should
17 recoup his just like everybody else.

18 But the burden would be on them to show
19 what expenses were incurred, what net
20 expenses he's out. And, again, Ms. Smith has
21 never shown us any calculation of whether
22 Mr. Scruggs' firm advanced \$160,000.00 or
23 \$150,000.00 or \$200,000.00 or any other
24 amount.

25 There's no justification for charging

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1 Mr. Wilson with the maximum amount he could
2 ever have been charged as an advance when all
3 of it has been recouped. Yet, that's what
4 this is about. And Mr. Solomon has simply
5 said that shouldn't be. That's not a correct
6 charge. It shouldn't be on the account.

7 And it's a jury issue. If Ms. Smith
8 wants to come in and show us what Mr. Scruggs
9 has indeed paid and what 40 percent of that

10 would be and that he indeed never recovered
11 it from his co-counsel or from the clients,
12 then that would be a jury issue.

13 But there's nothing new here. We're
14 still dealing with III(2)(b) calculated
15 exactly as Your Honor said it should be
16 calculated.

17 Ms. Smith made errors. She ought to
18 know what her errors are or she shouldn't
19 have made them in the first place. But to
20 say they don't know what she did or how to
21 handle that, she's already handled it. You
22 have adopted her number. We're just
23 challenging the correctness of it.

24 The same thing with the payments. They
25 are the payments that she put down, and we're

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1 saying \$463,000.00 of them don't apply.
2 Overhead, we're saying overhead that she
3 charged should be reduced. It doesn't apply.

4 And Mr. Kirksey is going to handle the
5 Manville issue, which is a bit more detailed

6 and involved and is a specific new
7 calculation, Your Honor, that you authorized
8 in your Manville order.

9 BY MR. KIRKSEY: Your Honor, I would
10 like to first say, Judge, I guess we paid a
11 nickel, and we took a ride, and enough is
12 enough.

13 And I agree with what counsel opposite
14 has said, Judge. In your order on the Rule
15 60 order you said that Mr. Scruggs was
16 correct, Your Honor, in that the settlement
17 of the class action that went into effect in
18 June of '96 that Mr. Wilson should not share
19 in those fees whatsoever because that was in
20 effect a new agreement under the August 7,
21 1992 contract.

22 But the Court did say that, however,
23 Wilson is entitled to 40 percent of the
24 attorney fees of those settlements under
25 Exhibit A clients pre-August of 1992 under

1 the Manville personal injury trust.

2 Judge, the payment orders in this case,
3 the Manville case, there was a payment -- the
4 people settled in, I believe, August of '90,
5 Your Honor. They submitted their settlement
6 forms, their demands, if you will.

7 Mr. Wilson is the one that filled out
8 and tendered the Exhibit A clients'
9 settlements. There's no doubt they had filed
10 these forms for their clients in August of
11 1990.

12 Then the stay order came down to stay
13 any payment under the Manville personal
14 injury trust.

15 In July of 1993, Your Honor, the Court
16 in New York lifted the stay order, and it
17 said in its order that anyone who had filed
18 their claim, settled their case prior to
19 November 19th, 1990 could be paid, that the
20 Manville personal injury trust fund had
21 sufficient amount of money to pay these
22 people, and the balance of the judgments and
23 claims were \$290,000,000.00; that these
24 people, Your Honor, had until the end of

25 January 1994 to file their notice that they

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1 were going to participate, and if they didn't
2 file their opt in, they were automatically
3 out.

4 That's what happened here, Judge. The
5 Exhibit A clients -- and I want to say this
6 while it's on my mind. Mr. Chambliss's
7 documents that he provided to Stephanie Smith
8 as well as to Mr. Solomon are case specific
9 in that every one that's on any one of these
10 pieces of paper is an Exhibit A client.

11 Commencing 6/15/94, Your Honor, through
12 December 15th of '95 there were Exhibit A
13 clients' settlements paid from the Manville
14 personal injury trust fund that totaled the
15 figure that Mr. Solomon says is due, Your
16 Honor.

17 The only place these funds could come
18 from at that point and time was the Manville
19 personal injury trust fund because the
20 settlement of the class action did not take

21 place, Your Honor, until 1996, as this Court
22 has spoken previously. For that reason we
23 believe the calculations of Mr. Solomon to be
24 correct.

25 Judge, I want to address the issue of

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1 payments. First of all, let me back up, Your
2 Honor. All the monies, all the sheets that
3 have got names on them like this, all this
4 paperwork has been generated from one source
5 and one source only, and that's Mr. Scruggs'
6 records.

7 The only place for anyone to ever find
8 out whether a dime has been paid under any of
9 the contractual provisions is to look at
10 Mr. Scruggs' books.

11 This Court in 1997 ordered an audit to
12 be conducted, and that ultimately took place,
13 but it wasn't a true audit, Your Honor,
14 because the Court didn't give whatever the
15 company was at the time subpoena power so
16 that if Mr. Scruggs said we got this much

17 from Flintco, the auditor could go to Flintco
18 and say did you pay this much. So it's not a
19 true audit in those sense of the words.

20 What was turned over to Chad Chambliss
21 and analyzed by him are all the records that
22 Mr. Scruggs' accountant and bookkeeping
23 people gave to him, first originally, I
24 believe, on paper and then compiled by
25 Mr. Detman on computer disk.

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1 So when counsel opposite says I'm
2 surprised, then I say how dare you. He's not
3 surprised, Your Honor. The figures we're
4 talking about are their figures that
5 Stephanie Smith has had for years, that
6 Mr. Solomon has had, that Mr. Chambliss has
7 had.

8 In all candor with the Court, however,
9 Your Honor, once you said, you know, I'm
10 quantifying the amount that's due, but the
11 payments are going to be a question for the
12 jury, then probably at that same time

13 everybody went to look to see what the
14 payments were.

15 And when you start looking at the
16 payments -- and this is what Mr. Merkel was
17 talking about -- it is totally unfair to
18 Mr. Wilson to put down a payment under the
19 agreement, as Ms. Smith has done, when \$1.5
20 million or so of the payments she showed
21 toward the agreements were from Mr. Wilson's
22 participation in Asbestos Group, P.A. from
23 October 1st of 1991 to August 7th of 1992.

24 And as the Court has said, Your Honor, the
25 August 7th agreement wasn't within the realm

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1 of reality in October 1 of 1991.

2 And the figure used by Mr. Solomon is
3 the figures used by Ms. Stephanie Smith,
4 which is the figures used, Your Honor, by
5 Mr. Scruggs' in-house CPA at the time
6 Mr. Kelly Singleton.

7 Now, what we did in an effort to be, I
8 think, totally fair with counsel opposite and

9 with the Court was instead of saying \$1.5
10 million or so has been overpaid -- I mean
11 she's counted \$1.5 million in year end
12 payments toward payments under the contract,
13 we just looked at what would his payments
14 have been on the contract and subtracted the
15 difference, and it comes to the 463.

16 There's also, Your Honor, an error in a
17 calculation of overhead of \$132,000.00 which
18 should technically be on top of that for the
19 year end.

20 Now, I want to correct one thing, and
21 Mr. Merkel didn't know this because he's been
22 in Clarksdale and we have been down here,
23 Judge.

24 When Mr. Solomon computed the
25 spreadsheet that he computed last weekend, he

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1 did not use his spreadsheets. He used
2 Stephanie Smith's spreadsheets that were
3 supplied by Tim last Friday afternoon, which
4 we promptly got to Texas to Mr. Solomon.

5 So when he did this last recalculation,
6 these were Stephanie Smith's spreadsheets he
7 used to arrive at the conclusions he arrived
8 at, Your Honor.

9 And if you look at the Court's auditor
10 -- and I want to go back again, Judge. I
11 stood here in August of 2005 when Jack Dunbar
12 said to this Court let's get rid of the court
13 appointed auditor. Both sides have got their
14 experts. Let's just get rid of him.

15 Well, I've got another proposal for the
16 Court. Fire Ms. Smith. Fire Mr. Solomon.
17 Take Mr. Chambliss as the court appointed
18 expert, and see what he says, Judge. Maybe
19 that's the fairest figures you'll get in this
20 case. I don't know.

21 They now look at this Court and say
22 enough is enough. Your Honor, I hope I don't
23 live long enough to see a court of law that
24 if it's adopted an erroneous calculation --
25 I'm talking about just math -- that the Court

1 would let it stand.

2 \$228,000.00 worth. If she's wrong in
3 her figures, and everybody can make errors,
4 then it's an error, Judge. But they say
5 enough is enough. Sorry. It's too late.
6 You can't do this. I hope we never reach
7 that point in a courtroom, Your Honor.

8 BY THE COURT: Let me make sure I'm
9 clear on one matter you mentioned,
10 Mr. Kirksey.

11 BY MR. KIRKSEY: Yes, sir, Judge.

12 BY THE COURT: Did I understand you to
13 say that there were settlements reached
14 concerning the Johns Manville Chapter 11
15 reorganization plan and bankruptcy that had
16 been reached prior to August 7, 1992 but that
17 were paid from June 15, '94 to December 15 of
18 '95?

19 BY MR. KIRKSEY: Yes, sir, Your Honor.

20 BY THE COURT: And what is it that you
21 contend was Mr. Wilson's share of those fees?

22 BY MR. KIRKSEY: The 894 figure on Sol
23 Solomon's report, Your Honor.

24 BY MS. SLATER: \$894,584.00.

25 BY THE COURT: All right. Thank you.

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1 Let me take a brief break.

2 BY MR. KIRKSEY: Your Honor, one second.

3 Judge, I have a copy of the order from the

4 New York bankruptcy court if the Judge would

5 like to see it.

6 BY THE COURT: Just make sure they have

7 it.

8 BY MS. SLATER: I gave it to them before

9 we even started, Your Honor, and here's the

10 letter.

11 BY MR. KIRKSEY: This is the letter that

12 goes with it.

13 (FOLLOWING THE BRIEF RECESS, THE HEARING CONTINUED AS

14 FOLLOWS:)

15 BY THE COURT: I do have one question to

16 the plaintiffs, and either Mr. Kirksey or

17 Mr. Merkel, whichever one wants to, can

18 respond.

19 Concerning the issue of the Johns

20 Manville trust settlements, as I understand
21 the arguments in reading through my previous
22 order, there was no particular sum
23 adjudicated or quantified.
24 However, there were quantifications made
25 which you argue were based on erroneous math

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1 or mistakes of Stephanie Smith, but,
2 nevertheless, there were definite sums
3 quantified on which I trust from the argument
4 that was made alternatively for a continuance
5 that the defendants were relying on on those
6 adjudications.

7 So what I'm asking is what do you say to
8 their alternative motion for a continuance?

9 BY MR. MERKEL: Your Honor, I don't
10 think that -- we don't know what Ms. Smith
11 did. Your order didn't change.

12 The defense in this case has taken the
13 position that we were entitled on III(2)(b)
14 to 40 percent of the net fees from credit
15 portions of the OCF things. They've taken

16 the position from the beginning that we were
17 entitled to 40 percent of III(2)(a) from all
18 new settlements.

19 Now, I don't know what their need for
20 any other time is. Ms. Smith has had the
21 same Chambliss data that we have had from the
22 beginning. How she came up with \$113,000.00
23 when all of those millions of dollars were
24 paid prior to the end of 1995 -- in other
25 words, the new agreement, as you have defined

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1 it, went into effect in January of 1996.

2 So how she accounted or didn't account
3 for that I don't know, but they surely should
4 know. I mean she's their expert, and she's
5 done it.

6 What Mr. Solomon has said is her figure
7 is wrong. If you use all of the Schedule A
8 clients and you use all of the payments that
9 were received before the new settlement went
10 in effect, the total is \$895,000.00.

11 And that's his -- these are the people.

12 I mean that's her data list. He took her
13 list of people, and he simply applied 40
14 percent to the ones that came in before that
15 time. We don't know what she did.

16 BY THE COURT: You're talking about the
17 Johns Manville deal?

18 BY MR. MERKEL: Yes, sir.

19 BY THE COURT: All right. I understand
20 that part of it. I also understood your
21 argument to be that if you look at the sums
22 that were adjudicated by the Court, and the
23 Court didn't adjudicate Johns Manville, so
24 I'm not asking about that \$894,000.00. Of
25 the sums previously adjudicated by the

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1 Court --

2 BY MR. MERKEL: -- that would be
3 III(2)(b).

4 BY THE COURT: If the Court agreed with
5 you that there had been an issue raised a
6 material fact of the accuracy of the figures
7 that those adjudications were based on, I

8 understood it to be two hundred and something
9 thousand.

10 BY MR. MERKEL: Correct, Your Honor.

11 BY THE COURT: All right.

12 BY MR. MERKEL: And that is derived from
13 approximately \$2,000,000.00 worth of omitted
14 packages from her figures.

15 BY THE COURT: I understand, but this is
16 all geared toward me determining your
17 position on the alternative motion for a
18 continuance.

19 In other words, the Court did not
20 specify a sum certain owed under Johns
21 Manville, just set out what's been quoted
22 already. However, rightfully or wrongfully,
23 the Court did adjudicate specific dollar
24 figures concerning these other matters of
25 which the Court assumed that both sides would

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1 be relying on in preparing for trial.

2 So my question is not setting aside the
3 Manville issue but concerning the difference

4 that you've indicated of two hundred plus
5 thousand in the mathematical errors, what is
6 your position concerning a continuance for
7 the defendants to be able to conduct the
8 additional discovery they mentioned
9 concerning where that amount comes from?

10 BY MR. MERKEL: Your Honor, we presented
11 them -- we oppose the continuance.

12 BY THE COURT: That's all I need to
13 know.

14 BY MR. MERKEL: If that's it, and the
15 reason is that they are her figures. If we
16 were to attack her on the stand in
17 cross-examination, they would have no more
18 time to prepare for that than having done it
19 as we've done it.

20 We did it this way to try to make Your
21 Honor aware that we are not talking
22 methodology. We're talking sheer error in
23 her application of what she is supposed to
24 have done.

25 And, again, since they didn't file an

1 affidavit or her report with you, we had no
2 reason at that time to attack her calculation
3 of her methodology. We were supporting
4 Mr. Solomon's methodology. They were
5 supporting her methodology.

6 But they didn't say what sum she had
7 come up with in their answer. I mean they
8 didn't put evidence on. We didn't have a
9 chance to file counter affidavits or anything
10 else. It was simply the lawyers argued in
11 her report she says A, Solomon says B, Court
12 should adopt A, which, in fact, the Court did
13 do.

14 And so she's in the same position with
15 them as though they had put her on the stand
16 at the trial, and we had gone up with the
17 Chambliss list and said, "Where is
18 Mr. Abbott's June 6th payment? Why is it not
19 in your list?" And I don't know what her
20 answer would be, but I mean that's what we've
21 done is attack her calculation.

22 BY MR. KIRKSEY: Judge, if I could add
23 to that, I think it's important also to go

24 back to the spreadsheets that Tim delivered
25 to us last Friday.

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1 Those spreadsheets were given to
2 Mr. Chambliss as well as to Mr. Solomon. The
3 errors that are mentioned in these reports
4 were what they found in Ms. Smith's
5 additions, Your Honor, and so it took them
6 two days to do it -- less than that.

7 BY THE COURT: Rebuttal.

8 BY MR. BALDUCCI: Thank you, Judge. If
9 it please the Court, let me first talk a
10 little bit about the Court's question on
11 III(2)(b) and this alleged \$228,000.00 error.

12 You asked a minute ago what's the source
13 of that, where did it come from. I can tell
14 the Court exactly where it came from. It
15 came from this new report by Chad Chambliss,
16 August 14, 2006.

17 And what it says is that Mr. Chambliss
18 at the request of the plaintiffs went back
19 and looked at all the original source data

20 relative to III(2)(b), and in his opinion
21 what Ms. Smith calculated as Mr. Wilson's
22 entitlement under III(2)(b) is wrong by
23 \$228,000.00.

24 And the reason that he says it's wrong
25 in his comments is because -- I'll read it to

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1 you -- differences and/or errors, differences
2 and/or errors that appear to be present in
3 Stephanie Smith's work papers revolve around
4 the claimant population, settlement amounts
5 and mathematical issues.

6 This is it. There's no attachments.
7 There's no backup data. There's no evidence
8 about his conclusions that there is this
9 alleged \$228,000.00 error.

10 Okay. So what are we to do?
11 Mr. Solomon accepts this. Mr. Solomon,
12 rather than taking the Court's quantified
13 number on III(2)(b), Mr. Solomon says I'm
14 going to rely on what Mr. Chambliss says
15 rather than on what the Court says, rather

16 than on what the Court has ruled and ordered
17 him to do. His report has already been
18 stricken once because he didn't follow the
19 rules that the Court set forward.

20 So now in this alleged supplement what
21 he does is, rather than using the III(2)(b)
22 quantification that the Court has already
23 ruled on, he says I'm going to take
24 Mr. Chambliss's new number that has no
25 support for it at all. I'm going to take

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1 that, and that's what I'm going to base my
2 new supplemental report on.

3 All right. Well, additionally, he says
4 he relied on forming this opinion based on
5 the original source data, the original source
6 data which included claimant population,
7 settlement amounts and mathematical issues.

8 Well, respectfully, Your Honor, all of
9 that has been available to the experts in
10 this case forever, and now to come up four
11 days before trial and say that the Court has

12 adopted an incorrect methodology and
13 incorrect number -- everybody keeps arguing
14 that the Court has adopted an erroneous
15 number. There's no proof of that.

16 There's no proof that the number that
17 the Court quantified under III(2)(b) was
18 erroneous. In fact, the only proof before
19 the Court on III(2)(b) is that the number the
20 Court quantified is exactly correct.

21 BY THE COURT: Let me ask you this.
22 It's been argued that the Court did not have
23 before it an affidavit or a report of
24 Ms. Smith. I have read so many documents in
25 this case. I could have sworn I did, but

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1 they argue that it's not there. What do you
2 say to that?

3 BY MR. BALDUCCI: Your Honor, I would
4 say that I would need, in all candor to the
5 Court, to go back. For the same reason that
6 the Court's memory is not good on this, my
7 memory is not good, and I would need to go

8 back, and I would need to review the file to
9 make sure that I'm not misrepresenting
10 anything to the Court.

11 But I would venture with some certainty
12 to say that Ms. Smith's report has been
13 before this Court. Maybe not by affidavit
14 purposes but certainly as a matter of proof
15 in response to issues raised in this case as
16 exhibits to motions, as positive proof on the
17 issues before this Court.

18 Now, keeping in mind that this is --
19 this whole issue is a result of the
20 plaintiffs asking the Court to quantify these
21 numbers and if there was ever a time that the
22 plaintiffs wanted -- they keep saying we
23 haven't had the chance to attack the veracity
24 of Ms. Smith's conclusions and her
25 methodology. Well, if there was ever a time

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1 to do that, the time was when they put the
2 issue before the Court.

3 When they put the issue before the Court

4 asking this Court to rule as a matter of law
5 what their client was entitled to, what
6 Mr. Wilson's entitlement was under the
7 agreement, the time then to vet that issue,
8 the time to make certain that the Court had
9 the best available evidence to it, was then.

10 Not only have they had the opportunity
11 to do it then, they have subsequently argued
12 at least once on the quantification issue for
13 a do over, for the Court to reconsider that
14 and to readjust its opinions.

15 At no time, at no time, Your Honor, have
16 the plaintiffs ever argued that the numbers
17 were wrong, that the math was wrong, that it
18 didn't include the right claimant population,
19 that it didn't include the things that
20 Mr. Chambliss now says four days before this
21 hearing.

22 To the extent that the plaintiffs didn't
23 make those arguments, they're waived. To the
24 extent that the plaintiffs say they did make
25 those arguments, they have been rejected, and

1 they have been included and considered by the
2 Court in the quantification order.

3 BY THE COURT: What do you say about the
4 \$894,000.00 plus or minus figure on the Johns
5 Manville settlements that they claim were
6 paid between the middle of June of '94 and
7 December of '95 that would fall within the
8 reorganization plan that was in place as of
9 August of 1992?

10 BY MR. BALDUCCI: I say two things, Your
11 Honor. I say the same thing relative to now
12 is not the time. Essentially, all of this
13 argument is a motion for reconsideration as
14 it regards Manville. It's the fourth now
15 motion for reconsideration.

16 As to the merits, as to the merits
17 though of what they're arguing, Your Honor,
18 let me tell you what the proof is before the
19 Court right now on this issue.

20 The proof is that the Court has said
21 that Mr. Wilson is not entitled to any
22 settlements as a result of the class action.
23 Mr. Wilson is only entitled to settlements

24 that are the result of being on clients that
25 are on Exhibit A who met the criteria of the

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1 Chapter 11 reorganization plan.

2 BY THE COURT: And they claim that under
3 that that they're entitled to almost
4 \$900,000.00.

5 BY MR. BALDUCCI: And based on no proof
6 because what the proof on that issue is, Your
7 Honor, is that there was a discreet universe
8 of sixty people that met those criteria that
9 Ms. Smith in her report has delineated and
10 has provided that information on who those
11 sixty people were that were on Exhibit A and
12 who met the criteria of the Chapter 11 plan.

13 Now, in response here for the first time
14 ever now plaintiffs are arguing, well, there
15 were other people who must have gotten paid
16 because there was other money that came in.

17 So Mr. Solomon now makes an assumption,
18 a complete assumption, that any other money
19 paid must have been for people that were on

20 Exhibit A and for people that met the
21 criteria of the bankruptcy reconsideration
22 plan.

23 But the fact is, Your Honor, there is no
24 proof of that. There is no proof. And
25 they're the plaintiffs. They have the burden

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1 on that issue.

2 The best proof before the Court right
3 now is what Ms. Smith -- she is the only
4 person who's vetted that issue. She is the
5 only person who has gone through and
6 determined who the sixty people are that
7 qualified on what the Court has said.

8 In the Court's Manville order the Court
9 said Mr. Wilson only gets a share of the fees
10 for people that meet those two criteria.

11 She's the only person who has gone through
12 and done that analysis.

13 And what Mr. Solomon now is submitting
14 to the Court is saying, well, there is just
15 all this money out there that came in on

16 Manville, so it had to be -- because it came
17 in before 1996 it had to be for these people.
18 There's not even any proof that those
19 people were on Exhibit A, much less that they
20 met the criteria for the Chapter 11
21 reorganization plan. If it is, plaintiffs
22 haven't produced it. They haven't attached
23 it and given it to the Court today for
24 consideration. They sure haven't given it to
25 us to evaluate.

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1 And if the Court allows this to go
2 through at this late hour, certainly we're
3 entitled then to find out from their expert
4 where he's making those assumptions from
5 because they're not in evidence.

6 I want to address one other thing
7 because I think the Court may have a
8 misimpression about this issue about the
9 spreadsheets.

10 Ms. Smith's spreadsheets when they say
11 that they've used that, their experts have

12 used that, to calculate these new numbers and
13 that that was just provided to them last
14 Friday, it was just provided last Friday
15 because it was just asked for.

16 But more importantly than that, it's the
17 same -- all that was provided were the
18 schedules, Your Honor, to Ms. Smith's expert
19 report that's been on file for I don't know
20 how long, but months at least. It was just
21 an electronic version of the hard copy of her
22 report.

23 So to suggest or infer to the Court that
24 they have been under the gun in some way --

25 BY MR. KIRKSEY: -- Your Honor. Excuse

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1 me, Tim. Judge, I wasn't trying to suggest
2 to the Court in any manner that Tim withheld
3 any document at all.

4 BY MR. BALDUCCI: Okay. Thank you. I
5 appreciate that clarification. Thank you.

6 The fact of the matter then is that my
7 substantive point is, Your Honor, that this

8 information has been and remains to be
9 available, has been available forever.

10 And when they say we haven't had the
11 opportunity to test the veracity of
12 Ms. Smith's calculations, that's just simply
13 not true. They've had the benefit of her
14 opinions.

15 Judge, her opinions haven't changed.
16 Her opinions have only been strengthened and
17 validated by the Court's rulings because the
18 Court has addressed these issues, has
19 quantified these sums consistent with her
20 opinions and the work that she did because it
21 was the best evidence available.

22 She used the methodology that the Court
23 recognized was appropriate. The Court has
24 already as a matter of law determined that in
25 the orders and recognized that in the orders

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1 of quantification.

2 Your Honor, if I might just respond
3 briefly to a couple of the other issues

4 brought up that plaintiffs' counsel said,
5 again, the August 7, 1992, they try to couch
6 this reach back argument, as I call it, about
7 entitlement and payments for other
8 settlements by attacking Ms. Smith's
9 calculations on payments.

10 This is just a back door argument to
11 argue entitlement to other settlements that
12 predate the August 7, 1992 agreement, and I
13 think the Court is fully appreciative of the
14 issue that the Court has already ruled upon
15 the fact that the August 7, 1992 agreement is
16 a clear and unambiguous expression of the
17 terms of the parties to sever their ways and
18 that Mr. Wilson's entitlement from this point
19 forward is controlled by that document.

20 So now it is a disingenuous argument to
21 try to go back and reach back for half a
22 million dollars worth of fees couched in
23 terms of calling it a disagreement over the
24 payments that Ms. Smith has calculated.

25 And, furthermore, it's not in evidence

1 before the Court. There's nothing. There's
2 nothing there to demonstrate that before the
3 Court.

4 Overhead. Mr. Merkel came up and
5 addressed the issue of overhead, but
6 noticeably, Your Honor, he did not rebut in
7 any way my earlier contention that
8 Mr. Solomon's new overhead calculation
9 doesn't even explain why he has now
10 divergently moved from his original overhead
11 calculation.

12 It's not a supplement. It's a critique
13 of Ms. Smith's opinion. And, apparently,
14 apparently, all I am left with the conclusion
15 then is from looking at it and listening to
16 the argument is that Mr. Solomon now abandons
17 his previous report on overhead and adopts
18 Ms. Smith's calculations, save these two
19 issues that he says should be deducted.

20 Well, if that's the case, I was not
21 making light of the issue earlier. If that's
22 the case, if you do the math, the result is
23 that Ms. Smith's overhead calculation is now

24 less than what Mr. Solomon said the overhead
25 calculation was in his last report.

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1 So I guess then as a matter of law we've
2 overpaid that. And that argument has not
3 been addressed nor rebutted.

4 The advanced costs, I'll just say one
5 more time, Mr. Merkel qualifies it and argues
6 that it's an advancement, but if the Court
7 looks again to the clear and unambiguous
8 language of paragraph ten of this agreement,
9 it says, quote, it is expected that in
10 addition to the above that Wilson will be
11 liable for the advance of costs for
12 litigation of no more than \$100,000.00. This
13 paragraph sets out all the monies for which
14 Wilson may be liable.

15 It's an obligation paragraph. It
16 doesn't say anything in there about
17 recoupment, reimbursement. Here again, this
18 is an issue that this Court can easily
19 adjudicate as a matter of law in contract

20 interpretation who is right on that point.
21 Does the \$100,000.00 credit against
22 Mr. Wilson's entitlement or not? That's not
23 a jury issue. That's an issue for the Court.
24 And we submit that the clear and unambiguous
25 language of the contract absolutely dictates

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1 that that's a proper deduction.

2 I'm not going to make an argument to the
3 Court that I would reserve for the jury in
4 response to Mr. Kirksey's argument that he
5 hopes he doesn't live to see the day where a
6 Court adopts an erroneous number, but I will
7 say this.

8 There's no proof that the Court has done
9 that. What the Court has done is at the
10 plaintiffs' request the Court has quantified
11 the amounts due Mr. Wilson.

12 If there was ever a question about the
13 validity and the veracity of those numbers,
14 then it should have been raised at the time.
15 It's been waived. There's no proof anyway

16 that they're wrong, Your Honor.

17 Finally, Your Honor, I hope I don't live

18 long enough to see a court that faces an

19 issue like this and a defendant that has to

20 fight the same issue, most of the time the

21 issue that a plaintiff has raised, and has to

22 fight it on the same issue over and over

23 again, wins it, only to be confronted again

24 by a motion for reconsideration, only to win

25 it and then have to come again to court and

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1 defend himself again on the same issue.

2 I agree with one thing Mr. Kirksey said,

3 and enough is enough. How many times do you

4 get a bite at the same apple?

5 BY MS. SLATER: Your Honor, could I just

6 explain exactly what happened on the

7 III(2)(b) spreadsheet?

8 I telephoned Mr. Balducci and asked him

9 if he would check with Ms. Smith if I could

10 get an electronic version of it because we

11 only had ten days after the Manville order to

12 get our new report filed. And so he said he
13 would help me and see what he could do.

14 And then he called me back and said that
15 there were some formulas and stuff in there,
16 and Stephanie didn't want to, you know,
17 produce it. And so I said, well, the Court
18 has adopted it. I don't know what else to
19 do.

20 I mean these spreadsheets on III(2)(b)
21 are, like, 500 pages long because it goes
22 client by client on every settlement instead
23 of company by company.

24 And so I went -- so I didn't know what
25 to do because we had to do it client by

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1 client because that's the way Ms. Smith had
2 done it. And so I contacted Mr. Chambliss
3 because I knew he had done it client by
4 client, and I asked him for his spreadsheet,
5 which he sent me.

6 Then I got in touch with Mr. Balducci
7 again by e-mail, and he sent me Ms. Smith's.

8 So Mr. Chambliss just checked whether all the
9 clients were in there and whether the math
10 was correct.

11 And so then that was exactly what was
12 used by Mr. Solomon was their spreadsheets by
13 which we tried to comply as best that we
14 could with the Court's order but just found
15 those errors in there and informed the Court.

16 BY MR. MERKEL: Could we present the
17 Court with some documents for your
18 consideration?

19 You asked about their response to the
20 motion that led to all of that, and there it
21 is. There are three exhibits to it. None of
22 them are a report or an affidavit.

23 They've said that Ms. Smith provided
24 detail for her III(2)(b) calculation. If you
25 had had a report, that is the only page that

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1 refers to it.

2 And she also has, Your Honor, if I could
3 point this out to the Court a one page

4 listing of checks as her basis for her
5 payments.

6 And if you look at the year end Asbestos
7 Group for the fiscal year ended 9/30/92,
8 you'll see \$401,000.00 due. That 401 she's
9 included. So that figure and everything
10 above it was paid to Mr. Wilson during that
11 year by Asbestos Group for his pre-agreement
12 monies.

13 BY THE COURT: Mr. Balducci, do you need
14 to see what they're referring to?

15 BY MR. BALDUCCI: I'm aware of the
16 documents, Your Honor, and I would just call
17 the Court's attention to on this same issue
18 that co-counsel has just informed me or
19 reminded me of here in our response on the
20 motion for quantification relative to the
21 issue that Ms. Smith's opinions were not
22 before the Court.

23 Her report had been filed with the
24 Court. In fact, our response to the motion
25 for quantification states on every issue her

1 report of May 30, 2006 which calculates those
2 amounts, which were referred to in the body
3 of our motion by relation to her report.

4 BY MR. MERKEL: Was referred to, not
5 offered, Your Honor, and certainly not sworn
6 to by affidavit.

7 BY MR. KIRKSEY: Judge --

8 BY MR. BALDUCCI: -- well, the time to
9 attack that -- excuse me. The time to attack
10 that and the veracity of that as legitimate
11 proof on which the Court could base a
12 decision on the motion for quantification
13 that the plaintiffs filed was then.

14 BY MR. MERKEL: We weren't trying at
15 that time, Your Honor, to do that. We were
16 asking the Court to approve Mr. Solomon's
17 methodology. We weren't dealing with
18 Ms. Smith's. They didn't even ask the Court
19 to approve Ms. Smith's methodology. They
20 simply opposed Solomon's.

21 BY MR. BALDUCCI: Judge, I'm sorry to
22 keep doing this, but it's a matter of record.
23 If the Court will look at the motion for

24 quantification filed by the plaintiffs, it
25 doesn't ask for methodology. It asks for

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1 specific amounts to be quantified in their
2 favor. The document speaks for itself.

3 BY MR. KIRKSEY: Judge, I would like to
4 offer the documents that Charlie showed you,
5 as well as -- and I showed that one to Joey
6 -- which is just a list of the Manville
7 clients paid during that period of time. I
8 would like to offer these as an exhibit to
9 this hearing, Your Honor.

10 BY THE COURT: Do you want them as a
11 composite or separate?

12 BY MR. KIRKSEY: I think probably just
13 one, two, three, Your Honor, I think.

14 BY MR. BALDUCCI: No objection to those
15 documents. This document I don't know that
16 we've ever been provided a copy of this, have
17 we?

18 BY MR. KIRKSEY: It's y'all's record.

19 BY MR. BALDUCCI: It's not Bates

20 stamped. I don't believe this is our
21 document. It's not Bates stamped.

22 BY MR. KIRKSEY: It's the Manville
23 settlement.

24 BY MR. BALDUCCI: Where did it come
25 from? Who produced it?

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1 BY MR. KIRKSEY: Vicki gave it to me.

2 BY MR. BALDUCCI: Where did it come
3 from?

4 BY MR. KIRKSEY: Scruggs, Millette.

5 Well, it's got your name on it. It's got
6 your badge number. It's got your disclosure
7 on it. Are you going to object to it? Just
8 say yes or no.

9 BY MR. BALDUCCI: Yes, I'm objecting to
10 it.

11 BY MR. KIRKSEY: Then I offer it and ask
12 that it be sealed. Your Honor, counsel
13 opposite --

14 BY THE COURT REPORTER: -- I need to
15 mark those.

16 BY MR. KIRKSEY: It doesn't have to go
17 on record. When they don't even recognize
18 their own documents, Your Honor, you know
19 what's going on here.

20 BY MR. BALDUCCI: If it please the
21 Court, I don't think there's any need for any
22 of that. As an officer of the Court, I am
23 trying to get to the issue that will help the
24 Court resolve this, and the allegation has
25 been made that that's our document.

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1 Everything we have produced, warehouses full
2 of documents in this case, have been Bates
3 stamped. Those documents appear to be a
4 compilation produced by an expert. They
5 certainly don't have a Bates stamp number of
6 the Scruggs defendants. So all I'm trying to
7 do is cast some light on this issue for the
8 Court to resolve.

9 BY THE COURT: The first two, there
10 being no objection, will be admitted as
11 Exhibits 1 and 2.

12 (AFFIDAVIT OF M. CHAD CHAMBLISS
13 RECEIVED AND MARKED AS EXHIBIT NO. 1 AND IS
14 MADE A PART OF THIS RECORD.)

15 (ASBESTOS GROUP FEES AND PAYMENTS
16 DOCUMENT RECEIVED AND MARKED AS EXHIBIT NO. 2
17 AND IS MADE A PART OF THIS RECORD.)

18 BY THE COURT: The other document if the
19 court reporter would mark it Exhibit 3 for
20 identification.

21 (MANVILLE SETTLEMENT LIST RECEIVED AND
22 MARKED AS EXHIBIT NO. 3 FOR IDENTIFICATION
23 ONLY AND IS MADE A PART OF THIS RECORD.)

24 BY MR. KIRKSEY: Your Honor, I can
25 clarify. That printout is from Stephanie

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1 Smith's spreadsheet furnished by Mr. Balducci
2 concerning the payments on Manville.

3 BY MS. SLATER: What it is, Your Honor,
4 it's the Manville batches from the -- that
5 were gathered by the court's auditor from the
6 computer disk of Dan Detman. And so that's
7 just on Manville, Tim, and that goes by

8 dates, and I think it starts with June 15th
9 all the way through Scott Taylor's data.

10 BY MR. KIRKSEY: Your Honor, since I
11 spoke in ignorance, I withdraw what I said,
12 and specifically withdraw what I said to
13 Mr. Balducci. I don't want a fellow Baldwin
14 Countian jumping on me, Your Honor.

15 BY MR. BALDUCCI: I want the record to
16 reflect that's two today.

17 BY MR. KIRKSEY: What?

18 BY MR. BALDUCCI: That's two. Two times
19 today.

20 BY THE COURT: The Court agrees with the
21 defendant on each point. The motion will be
22 granted with one proviso, and that concerns
23 the portion dealing with what's been referred
24 to as the time value of money or interest.

25 And I am going to allow experts from

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1 each side to submit any revised opinion
2 concerning that, but I'll speak to that in
3 more detail when we get into the next motion.

4 I believe we only have one left, and
5 that's this comprehensive motion in limine.

6 I'll hear you on that.

7 BY MR. BALDUCCI: Thank you. Your
8 Honor, did I understand just for
9 clarification that the Court is granting the
10 motion in limine with the exception to strike
11 Solomon's -- excuse me -- motion to strike
12 Solomon's supplemental report with the
13 exception of the interest calculation?

14 BY THE COURT: That's included in what
15 is being stricken as well, but I'm going to
16 allow Mr. Solomon and your expert to submit a
17 revision concerning interest, and I'll
18 expound on that, so I don't repeat myself,
19 when we get into this next motion.

20 BY MR. BALDUCCI: Thank you, Your Honor.

21 BY MR. MERKEL: What was Your Honor's
22 ruling on Manville, Your Honor, since it had
23 never been ruled on before?

24 BY THE COURT: I'm granting their
25 motion.

1 BY MR. BALDUCCI: May I proceed, Your
2 Honor?

3 BY THE COURT: Go ahead.

4 BY MR. BALDUCCI: The remaining motion
5 in limine, Your Honor, now having some
6 context from the Court's ruling just now,
7 there are --

8 BY MR. KIRKSEY: -- one second, Judge.
9 Judge, you granted the motion in limine.
10 Does that mean you're also saying there's no
11 money due under Manville?

12 BY THE COURT: That's what I'm saying.

13 BY MR. KIRKSEY: Then what are we doing
14 here, Judge? Do you want to go ahead and
15 hold a bench trial on everything else?

16 BY THE COURT: Mr. Kirksey, I think you
17 need to have a seat.

18 BY MR. KIRKSEY: Well, you've been doing
19 pretty good.

20 BY THE COURT: Mr. Kirksey, I wouldn't
21 push it.

22 BY MR. KIRKSEY: I'm not going to push
23 it. I said what I wanted to say.

24 BY THE COURT: All right. Go ahead.

25 BY MR. BALDUCCI: Your Honor, there in

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1 the remaining motion there are four discreet
2 issues that we would ask the Court to
3 consider. Some of this has already been
4 provided in argument to the Court, but I
5 would like to --

6 BY MR. KIRKSEY: -- may I be excused,
7 Your Honor?

8 BY THE COURT: Go ahead.

9 BY MR. BALDUCCI: I'd like to go ahead
10 and go back to those, if I might.

11 First of all is the difference in the
12 overhead calculations. Now, giving context
13 to the Court's most recent ruling, we have to
14 go back to Mr. Solomon's previous report
15 dealing with overhead and how that compares
16 to Ms. Smith's overhead calculation.

17 And if the Court has -- does the Court
18 have the benefit of a copy of our motion in
19 front of it?

20 BY THE COURT: Yes, sir.

21 BY MR. BALDUCCI: There are two charts,
22 if you will, that kind of lay this out for
23 the Court. And without belaboring the point,
24 it's just math at that point that Ms. Smith
25 says the calculation for overhead is

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1 \$934,433.00, and Mr. Solomon says the
2 calculation for overhead is \$892,971.00.
3 That left a difference, an appreciable
4 difference, between the two opinions of
5 \$41,462.00.

6 As I submitted to the Court earlier, the
7 Scruggs defendants tendered a check, I don't
8 know now, a couple of days or a week or so
9 ago at the time that this motion was filed
10 for that amount, conceding for purposes of
11 the motion Mr. Solomon's number on overhead
12 and just paying that difference and amount.

13 The net effect of that, Your Honor, we
14 submit to the Court is that there is no
15 longer any justiciable triable issue before

16 the jury or before the Court relative to
17 overhead.

18 We have accepted that number, paid that
19 number. There's nothing for a fact finder to
20 determine relative to that. So we would ask
21 the Court to in that regard order in limine
22 no proof on that matter during phase one.

23 The second one is the other litigation
24 expenses. The same type argument. The
25 almost \$8,000.00 that Ms. Smith had charged

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1 against Mr. Wilson's entitlement Mr. Solomon
2 in his previous report didn't account for
3 those.

4 The Scruggs defendants conceded for
5 purposes of the motion in limine
6 Mr. Solomon's position on that. Sent a check
7 for the \$7,925.00.

8 We submit to the Court that since we've
9 taken Mr. Solomon's opinion on that, paid the
10 money for purposes of this motion, there's no
11 justiciable fact that a jury or the Court

12 would be called upon to make in the case
13 relative to that, and so the proof on that
14 issue ought to be ordered in limine out.

15 The next issue, Your Honor, is the
16 inclusion by Mr. Wilson's expert Solomon of
17 \$100,000.00 that's allegedly due Mr. Wilson
18 for a loan commitment pursuant to the 1992
19 agreement.

20 Now, to put this into context, I know
21 the Court has looked at and read numerous
22 times the 1992 agreement. At the end of the
23 agreement there is a commitment to make loan
24 document that says that Mr. Scruggs and
25 Mr. Luckey would loan Mr. Wilson \$500,000.00

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1 at six percent interest. We've quoted the
2 exact language in there of how that was to be
3 paid back.

4 Now, unlike the provision in paragraph
5 ten for advanced litigation costs, this is,
6 in fact, a loan. This is clearly a loan that
7 all the parties agreed was a loan. No one
8 disputes that Mr. Wilson received in
9 actuality in payment \$400,000.00 of the
10 \$500,000.00.

11 Now, assuming just for the sake of
12 argument that the \$100,000.00 loan wasn't
13 made, which it's not relevant to the motion
14 in limine, but Mr. Scruggs certainly has
15 viable arguments and viable defenses on that
16 issue that the \$100,000.00 was paid or was
17 credited to what Mr. Wilson was owed and due,
18 but assuming for the sake of argument for
19 purpose of the motion that Mr. Wilson's
20 position is right and he didn't get the extra
21 \$100,000.00 to which he says he was entitled,

22 it is a loan.
23 And the fact that if he didn't get it he
24 would have had to pay it back is a sum net
25 zero transaction, much like what Mr. Solomon

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1 was arguing most recently in this last new
2 report he made about the advanced litigation
3 costs. He said in that report that it was a
4 loan, and, therefore, the failure to account
5 for it was a sum net zero transaction.

6 The same logic applies here. This is
7 truly a loan. Assuming he didn't get the
8 money, if he had he would have had to pay it
9 back, there is no damage as a result of not
10 having that \$100,000.00 loan payment made
11 because in ten months he was going to have to
12 pay it back anyway. So there's no actual
13 damage that he suffered as a result of that.

14 Now, finally, the Court has before it
15 the issue about the paragraph ten \$100,000.00
16 advanced litigation costs. We've already
17 argued that, Judge, and I don't know what
18 else to say on that point other than the 1992

19 agreement is clear and unambiguous in
20 paragraph ten.

21 It styles that payment as a liability
22 that Mr. Wilson is obligated to pay, and,
23 thus, Ms. Smith has appropriately calculated
24 that in Wilson's entitlement. Mr. Solomon in
25 his report doesn't do that.

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1 That's a failure to comply with the
2 specific terms of the agreement to include
3 those. The methodology in that point is not
4 proper, and he ought to be required to do
5 that. He ought to be required to recognize
6 that, and the Court ought to endorse the fact
7 that Ms. Smith has properly included that as
8 a calculation for Mr. Wilson's entitlement.

9 Now, if the Court, having heard argument
10 on those four discreet issues, Your Honor, if
11 the Court were inclined to grant the motion
12 in limine on those issues, then what the
13 Court would be left with would be a
14 calculation pursuant to Ms. Smith's

15 methodology that Mr. Wilson is left with a
16 net zero of actual compensatory damages due
17 him.

18 We would submit to the Court that that's
19 the proper calculation here, that there is no
20 recoverable damages that the plaintiffs ought
21 to be able to put on in front of a jury in
22 phase one of this trial.

23 BY THE COURT: What about interest?

24 BY MR. BALDUCCI: Your Honor, I think
25 that the interest -- that the Court was right

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1 when the Court in responding to our motion
2 for summary judgment on prejudgment interest
3 recognized that prejudgment interest is a
4 matter of law for the Court to determine.

5 Prejudgment interest, Your Honor, is a
6 phase two consideration for the Court to make
7 that determination. It's not an issue for
8 the jury. The Court has already ruled on
9 that in the summary judgment motion.

10 BY THE COURT: That was within the

11 context of addressing what was raised by the
12 defendants in the motion, and that is
13 concerning the statute, which I believe was
14 section 75-17-7, and as I indicated in my
15 order, that statute specifically states that
16 that interest may not predate the filing of
17 the complaint.

18 So my hypothetical to you is you have a
19 situation where a party -- and I know you're
20 contesting liability. This is a
21 hypothetical.

22 BY MR. BALDUCCI: Sure.

23 BY THE COURT: You have a situation
24 where a party willfully and intentionally
25 withholds payment of a debt for a decade and

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1 then pays off the principal of that debt ten
2 or twelve years later just before a jury is
3 to decide the case. Is it really your
4 position that the plaintiff is made whole by
5 paying what should have been paid ten years
6 earlier?

7 BY MR. BALDUCCI: No, sir. No, sir. I
8 think under the hypothetical that you've just
9 given us, Your Honor, that if a party, as you
10 said, withheld payment wrongfully and in bad
11 faith for ten years, then when that issue --
12 and then at the eleventh hour paid the
13 contract damages, then I think at that point
14 then on the bad faith issue then the
15 plaintiff ought to be able to put on evidence
16 to the Court that they should be able to
17 present punitive damages to a jury, if they
18 can present that and if they can prove that.
19 Now --

20 BY THE COURT: -- wait a minute. Now,
21 as you've pointed out in one or more of your
22 motions, a jury may not consider any evidence
23 concerning punitive damages unless and until
24 there is a verdict for compensatory damages.

25 BY MR. BALDUCCI: Right.

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1 BY THE COURT: And to accept your theory
2 here, there are no compensatory damages

3 because what should have been paid has been
4 paid. And if there is a zero compensatory
5 damage verdict, if there is such a thing,
6 then there is no punitive damage stage. So
7 where is the relief for the plaintiff in that
8 situation?

9 BY MR. BALDUCCI: The relief for the
10 plaintiff, Your Honor, in the hypothetical
11 situation that you've just given me is that
12 there are other available means for being
13 made whole, like the consideration in phase
14 two by the Court of the issues of attorney's
15 fees under the contract, accounting fees,
16 special master fees, and prejudgment
17 interest.

18 BY THE COURT: The plaintiffs have in
19 their response to your motion they have
20 directed the Court to several cases that
21 indicate that whether you call it interest or
22 time value of money that in a breach of
23 contract case that that is an element of
24 compensatory damages for the jury to
25 consider, and that would run from the time of

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1 the breach as opposed to the timing of the
2 lawsuit.

3 BY MR. BALDUCCI: This is a case, Your
4 Honor, that the contract does not provide for
5 prejudgment interest. Doesn't provide for
6 interest at all. The contract doesn't.

7 So in the absence of a contractual
8 provision relating to interest, you default
9 to the statute, exactly what the Court said
10 in ruling upon the motion for summary
11 judgment.

12 And what the statute says is that in the
13 absence of a contractual provision for
14 interest, then it is in the discretion of the
15 judge at that point, of the Court, to make a
16 determination on prejudgment interest.

17 So I guess, Your Honor, I ask you to
18 think of it like this. The difference
19 between time value of money as a compensable
20 recovery in phase one for a jury or
21 prejudgment interest, then if it's not

22 interest, what is it? If it's not interest,
23 what is it? If time value of money, the
24 measure of the damages --

25 BY THE COURT: -- I think the decisions

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1 that were cited referred to it as interest,
2 but it indicates it's compensatory damage
3 interest.

4 BY MR. BALDUCCI: If it's in the
5 contract, Your Honor. If it's in the
6 contract. This is a case where there's no
7 contemplation for interest in the contract.

8 And as the statute says, in the absence
9 of prejudgment interest being or any interest
10 being provided for in the contract, you
11 default to the statute, and the statute says
12 that the Court makes that determination.

13 And, also, it says that the Court only
14 awards prejudgment interest in its discretion
15 under two circumstances, if the sum was
16 liquidated at the time of the filing or if
17 the refusal to pay was in bad faith. That's

18 the analysis that the Court went through in
19 addressing the motion for summary judgment on
20 prejudgment interest --

21 BY THE COURT: -- on the statutory
22 interest.

23 BY MR. BALDUCCI: On the statutory
24 interest. And the Court was right in doing
25 that because this is a case where there is an

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1 absence of a contractual provision for
2 interest. You don't get to the other
3 analysis about whether it's an issue of
4 compensatory damages or not because it's not
5 provided for in the contract.

6 BY THE COURT: It seems to me that one
7 of those cases didn't even have a written
8 contract. It was an oral contract. I'm
9 going to double-check. I'm just thinking out
10 loud here.

11 BY MR. BALDUCCI: And I'll be glad to
12 address that with the Court supplemental as
13 well. It's not my recollection. My

14 understanding and my interpretation of the
15 law is that in the absence of a contractual
16 provision for any interest, as we have here,
17 you default to the statute, and the statute
18 says that that is an issue for the Court in
19 its discretion.

20 And there is a litany of cases. I could
21 give you thirty cases that I have that
22 address the issue of the time value of money
23 is interest.

24 BY THE COURT: I don't think there's any
25 question about that.

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1 BY MR. LANGSTON: Your Honor, may I have
2 one moment?

3 (PAUSE IN PROCEEDINGS)

4 BY MR. BALDUCCI: Thank you for your
5 indulgence, Your Honor. I'm going to try to
6 remember everything that I've been told to
7 say now.

8 In supplementation to that argument, you
9 recall that phase one of this bifurcated

10 proceeding is about compensatory damages and
11 what Mr. Wilson is entitled to under the
12 terms of the contract to be made whole under
13 the contract.

14 And there is no provision under the
15 contract for interest here. So there would
16 be no avenue to make him whole under the
17 terms of the contract with no provision for
18 interest.

19 It only follows then that you would
20 default to the statute, as the Court has
21 already recognized in the motion for summary
22 judgment on punitive damages that then you go
23 to the statute, as we've talked about, in the
24 absence of that, and it's an issue for the
25 Court to decide.

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1 The other aspect of that, Your Honor,
2 that I would just say is the Court has
3 already quantified the amounts due
4 Mr. Wilson, and at that point it's just a
5 function of math.

6 If the Court chose in its discretion to
7 award prejudgment interest, then it's just a
8 function of math because, as the Court is
9 aware, the Court is to set, if it makes an
10 award of prejudgment interest, is to set what
11 that amount will be, and it's just a function
12 of math at that point, so it would not be any
13 issue for the jury that would be justiciable
14 for the jury to address in phase one either.
15 I think I was done unless the Court has any
16 more questions

17 BY THE COURT: Not right now.

18 BY MR. BALDUCCI: Thank you.

19 BY MS. SLATER: Your Honor, I wanted to
20 -- I'm just trying to get straight. Is the
21 Court saying that the issue of payments is no
22 longer going to the jury or it is still going
23 to the jury?

24 BY MR. MERKEL: That's what we're
25 arguing now, Vicki. This is the motion in

1 limine now.

2 BY MS. SLATER: Okay.

3 BY MR. MERKEL: That's what this is.

4 BY THE COURT: I'm hearing arguments on
5 this motion in limine.

6 BY MS. SLATER: Okay. All right. Well,
7 I'll let Mr. Merkel take it then. Go ahead,
8 Charlie.

9 BY MR. MERKEL: Your Honor, I have the
10 Court's order quantifying monies due where
11 you say the Court understands Wilson
12 specifically excludes from his motion fees
13 due him under Fiberboard and Manville
14 personal injury settlement trust.

15 Wilson simply seeks quantification of
16 all net fees retained from settlements with
17 the named companies on behalf of Schedule E
18 clients.

19 The defendant is the one that asked the
20 Court to compare those to sums paid, not
21 Wilson. The Court agrees Wilson does not
22 waive his right to a jury determination
23 concerning Scruggs' payments. The Court
24 makes no finding here concerning such

25 payments.

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1 In any quantification or any
2 determination of the amount Mr. Wilson is due
3 as he's sitting here today there are four
4 components.

5 There is how much is he entitled to from
6 the various asbestos paying defendants. You
7 have quantified that as to sixteen. You have
8 specifically not quantified it as to two.
9 That's a matter for the jury to determine one
10 way or another.

11 Whether Sol Solomon's report initially
12 comes in or whether his amended one comes in,
13 Ms. Smith has got to be put under oath and
14 some evidence given to somebody to determine
15 whether her calculations of Manville and
16 Fiberboard are correct or are not correct.

17 Nobody has done that. We still don't
18 have anything on either one of them. They've
19 still not given you an affidavit. They've
20 still not given you any sworn testimony, and

21 there's still no way of anybody checking
22 whether her determinations of those two
23 particular paying defendants were right or
24 wrong.
25 So that's still open, whether Solomon's

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1 985 can come in or whether we simply get to
2 cross-examine her on what she did and put on
3 proof to the jury through her that she's made
4 errors.

5 BY MR. BALDUCCI: If I may, is this in
6 response to the motion in limine or is this
7 rearguing the --

8 BY MR. MERKEL: -- it's in response to
9 the motion in limine which you've just said
10 there's nothing left. It ought to be a nice
11 zero. In order to get to his nice zero --

12 BY THE COURT: -- one at a time. What?

13 BY MR. BALDUCCI: My understanding of
14 the Court's ruling just now was that the
15 Court has resolved those issues. The Court
16 has resolved the Johns Manville issue. The

17 Court has resolved by the quantification
18 order. It's stricken those arguments and
19 that evidence by Mr. Solomon.

20 BY MR. MERKEL: I thought we were going
21 to get to argue the motion in limine.

22 BY THE COURT: Yes, sir. I'm going to
23 hear what you have to say. Go ahead.

24 BY MR. MERKEL: The second thing that
25 they've got to come up with, Your Honor, is a

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1 calculation of overhead to charge to
2 Mr. Wilson.

3 That's their burden. You haven't done
4 it. You haven't been asked to do it, and you
5 have no basis to do it. Again, Ms. Smith is
6 going to have to take the stand in front of a
7 jury and say this is how much overhead we
8 have. And we don't agree with it. We've got
9 an expert that says she's wrong to the tune
10 of \$113,000.00.

11 The third thing they've got to do is
12 come up with how much has been paid to her

13 that applies or is applicable to this
14 agreement.

15 She hasn't put on any evidence of that.

16 We don't have anything that you can rule as a
17 matter of law or grant a summary judgment on
18 payment. And, in fact, you specifically said
19 that you're not going to do that. That's a
20 matter for the jury.

21 So, again, Ms. Smith can come in, and
22 whether it's by cross-examination or whether
23 it's by evidence of the records or whatever,
24 that can be attacked. That hasn't been
25 established.

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1 And all of those things have to be done
2 in order to say whether Mr. Wilson has been
3 paid or not. And the entire premise of their
4 motion in limine to not have any evidence at
5 phase one is that their nice tight little
6 zero is somehow based on fact and can be
7 adopted by you with a jury being avoided.

8 And there's simply not any way, Your

9 Honor. We haven't waived a jury trial, and
10 there's no evidence that there's not a
11 factual issue on any of these three items.

12 You don't know how Ms. Smith calculated
13 overhead. You can't tell from what she's got
14 there. You don't know how she calculated
15 payments. You can't tell from what little is
16 in her report, and they haven't supplemented
17 it. So there is no zero that we're dealing
18 with.

19 But whatever the amount is, Your Honor,
20 as you've pointed out in the cases, they have
21 breached a contract. They have deliberately
22 willfully breached it. They wrote the man a
23 letter in July of 1995 and said I am not
24 paying you another dime until a judge makes
25 me pay you.

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1 They breached without question their
2 duty of accounting. After that date they
3 never furnished an accounting.

4 The \$900,000.00 of accounting

5 expenditures that Mr. Wilson has incurred are
6 simply a damage, a damage resulting in
7 flowing from the breach of the duty to
8 account.

9 Has nothing to do with the Court
10 awarding costs or fees or anything else.

11 That's Mr. Wilson's damage. Under the
12 contract he was entitled to a free accounting
13 of all of the fees that were collected and a
14 calculation of the amount he was entitled to.

15 They didn't furnish that, and either
16 through court orders that he had to pay the
17 Court's appointed auditor or through his own
18 obligations he has spent over \$900,000.00 of
19 damage getting the very thing he was entitled
20 to under the contract. That's damage.
21 Damage for breach of a duty to account.

22 Likewise, they come in now and tell Your
23 Honor, oh, wonderful, we've paid him a
24 million three, eleven years late, no harm no
25 foul. And they have the audacity to quote

1 the purpose of breach of contract law, which
2 is to put the injured party in the same
3 condition he would be had the contract been
4 performed.

5 And the time value of money is the
6 damage for that, Your Honor. This is not
7 prejudgment interest. This is if they want
8 to claim a credit in 2005 for a payment they
9 made, all that is is a credit against the
10 obligation that they've owed since 1994 with
11 always accruing interest or time value of
12 money on that.

13 So what you do is you calculate how much
14 was owed across a time line. You add
15 interest to it. And then when they finally
16 get around to making a payment eleven years
17 later, they get a credit against the interest
18 portion of that. And what is remaining is
19 for the jury to determine an award.

20 So this is what's left for a jury to
21 determine in phase one, the damages that come
22 from the admitted breaches of contract.

23 They don't even make any bones about it.

24 They owed him according to them and they've
25 won everything they've ever alleged through

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1 every change of position they've taken, and
2 they still owe him \$1,350,000.00.

3 So there's no argument that they've owed
4 him money from day one. In fact, every one
5 of the settlements that came in he was
6 entitled to some portion of it, and since
7 June of 1994 they didn't pay him a dime until
8 2005.

9 So we've got a willful breach of
10 contract. We've got a willful breach of
11 fiduciary duty. We've got a willful breach
12 of contract to account, and whatever damages
13 flow from those are the amount of fees he has
14 still not been paid, and that must include
15 somebody's calculation of Manville and
16 Fiberboard.

17 It must include somebody's calculation
18 of overhead to be charged to him and what
19 credits are going to be given for payments

20 made to him.

21 And then the damages are his amount of
22 accounting fees he picked up and the time
23 value of money for the whole period that they
24 waited to pay him what they admit they owed
25 him.

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1 And beyond that, of course, then would
2 be the Court's consideration of prejudgment
3 interest and attorney's fees. And all of
4 that then goes and gives rise to an action in
5 phase two for punitive damages.

6 We would like to give the Court the case
7 of the Supreme Court case of Dynasteel
8 Corporation versus Aztec Industries,
9 Mississippi Supreme Court 1992 decision, that
10 deals with exactly what we are doing.

11 This one was six months belated payment
12 of admitted debts, and the court approved an
13 award of punitive damages and interest and
14 attorney's fees on that amount.

15 BY THE COURT: Rebuttal.

16 BY MR. BALDUCCI: I must have been gone
17 the day that Mr. Scruggs admitted that he
18 owed Mr. Wilson this money. I must not have
19 been here because as far as I know for the
20 last twelve years Mr. Scruggs has been
21 vehemently denying that he owed Mr. Wilson
22 anything other than what these experts that
23 he has hired has told him that he's owed him.
24 So the suggestion to the Court and, in
25 fact, the statement of fact that was made to

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1 the Court that Mr. Scruggs hasn't paid what
2 he's admittedly owed is not accurate. It's a
3 misrepresentation of facts.

4 Let me try to put this into some context
5 for the Court. What's the issue here? The
6 issue is what's left, what's left for a jury
7 to hear.

8 Mr. Funderburg provided me, Judge, just
9 so the record will be clear on May 30, 2006 a
10 notice of filing of expert report of
11 Ms. Smith, so it is on file with the Court.

12 The Court asked that question of me earlier,
13 and it has been on file, like her previous
14 report was filed as well.

15 So it's a matter of record before the
16 Court, and the Court has certainly seen it
17 and looked at it and reviewed it, and it's in
18 evidence.

19 So what's the issue? What's left?

20 Well, the issue is what's left that
21 Mr. Wilson can claim for damages from these
22 breaches. It's great to talk about these
23 alleged breaches of contract and breaches of
24 accounting and breaches of fiduciary duties
25 and all of these claims, but at the end of

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1 the day you've still got to prove your
2 damages.

3 And the Court has essentially now taken
4 care of that. The Court has essentially by
5 its rulings eliminated that proof on damages.

6 Now, I understand the plaintiffs don't
7 like it. I understand they don't like the

8 Court's rulings. But the fact is that is the
9 landscape of this case. That is the law of
10 this case.

11 And these continued repeated attempts in
12 contravention of the Court's rulings to put
13 this evidence in front of a jury are simply
14 wrong when the Court has excluded them.

15 The Court just now excluded
16 Mr. Solomon's report on the very issues that
17 Mr. Merkel is now arguing about. The Court
18 just ruled on that.

19 So I submit to the Court that if you
20 look -- I mean the only way to put into
21 context what the damages are is to look at
22 what the two experts say, what do the two
23 experts say the damages that Mr. Wilson has
24 suffered are, and you exclude those things
25 that they agree on, and you look to what the

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1 differences in their opinions are.

2 And when you do that, there are four and
3 only four discreet issues left. We've

4 submitted that in our brief, Your Honor. The
5 overhead issue and the other litigation
6 expenses we've conceded and paid per
7 Mr. Solomon's number.

8 That only leaves \$100,000.00 under
9 paragraph ten and this \$100,000.00 loan
10 issue. You can talk all day long and argue
11 all day long about the alleged breaches and
12 not paying the money that he admits he owes,
13 but at the end of the day what's left.
14 What's the damage. What's the proof on that
15 issue.

16 And the Court has been mired in that for
17 the last year at least trying to determine
18 what that is and has fought through the
19 forest of those arguments and has given us
20 the roadmap to get out. And here we are on
21 the verge on the eve of the trial now to
22 crystalize what those remaining issues are.

23 And the only two remaining issues that
24 are of dispute, legitimate dispute,
25 legitimate dispute, of legal dispute, Your

1 Honor, are the \$100,000.00 in advanced
2 litigation costs, which is an issue of
3 contract interpretation for this Court, and
4 the \$100,000.00 loan issue, which again is an
5 interpretation of law for this Court.

6 Now, we've submitted to the Court that
7 that is a net zero. It's just math. It's
8 just math.

9 If you follow logically the rulings that
10 this Court after being confronted with these
11 issues, after having heard argument,
12 briefing, received all of the evidence and
13 issued rulings, if you follow that roadmap of
14 where it takes you to the remaining damages,
15 if you follow that roadmap out of the woods,
16 that's where you wind up.

17 You wind up with \$200,000.00 in dispute
18 on the two issues that I've just told you.

19 Those are legal interpretations for the
20 Court. Everything else at that point would
21 be a phase two consideration. The Court has
22 already ruled that attorney's fees, special
23 master's fees, accounting fees, prejudgment

24 interest are all legal issues for the Court
25 to resolve.

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1 Respectfully, Your Honor, all of the
2 impassioned arguments, all of the accusatory
3 statements to the contrary, it's just math at
4 this point. The Court has spoken. The Court
5 has ruled. It's just math. And there is
6 nothing in that math calculation for a jury
7 to do in phase one.

8 BY THE COURT: All right. I'm going to
9 recheck these cases real quick.

10 (FOLLOWING THE BRIEF RECESS, THE HEARING CONTINUED AS
11 FOLLOWS:)

12 BY THE COURT: Considering the matters
13 presented, as well as the previous orders of
14 the Court in the case, including the Court's
15 ruling earlier today striking the August 14,
16 2006 report of Mr. Solomon, and considering I
17 have ruled on Manville and Fiberboard, and
18 that in this motion payments reflected in
19 Mr. Solomon's May 2006 report, plus what has

20 been brought forward in this motion by way of
21 being tendered by the defendants since that
22 time, the Court agrees with the defendants on
23 all issues here with the exception the Court
24 agrees with the plaintiffs that the
25 defendants are simply mistaken in the belief

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1 that if all principal amounts due under the
2 contract have now been paid that there's
3 nothing left for the jury to determine.

4 There's a matter of interest on the fees
5 that the plaintiff may show to the jury were
6 due but withheld.

7 As I've mentioned in some of my
8 questions to the attorneys during the
9 argument, the defendants previously sought
10 partial summary judgment on Wilson's claim
11 for prejudgment interest relying on the
12 provisions of section 75-17-7.

13 However, as the plaintiff has cited in
14 his response and as the Court has found in
15 its independent research that the Mississippi

16 Supreme Court has recognized that interest
17 may separate and apart from the provisions of
18 that statute constitute an element of
19 compensatory damages.

20 Section 75-17-7 states all judgments
21 founded on any contract shall bear interest
22 at the same rate as the contract evidencing
23 the debt on which the judgment was rendered.

24 All other judgments shall bear interest at a
25 per annum rate set by the judge hearing the

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1 complaint from a date determined by such
2 judge to be fair but in no event prior to the
3 filing of the complaint.

4 So the statute pertains to interest on
5 judgments. Thus, if the jury awards
6 compensatory damages in this case or finds a
7 breach of contract and the Court awards
8 interest on that, that interest may not
9 precede the date that Wilson filed his
10 initial cross claim.

11 That award would rest in the discretion

12 of the Court, and the Court has already in
13 its earlier order indicated what it would
14 consider in exercising that discretion.

15 But separate and apart from that, the
16 Supreme Court of Mississippi has held -- and
17 I quote from the case of New South
18 Corporation versus Godly, 301 So.2d at 307,
19 and specifically page 310 in 1974 -- on a
20 contract for the mere payment of money the
21 unpaid principal together with the stipulated
22 or after maturity the lawful rate of interest
23 is the measure of damages, close quote.

24 So that quote indicates to me that it's
25 not limited to just those cases in which

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1 there is a written contract and that the
2 contract specifies interest. It says
3 together with the stipulated or after
4 maturity the lawful rate.

5 And to remove any doubt -- and this is
6 what I double-checked and what I thought I
7 had remembered from reading the case earlier

8 today, and I double-checked during the break
9 -- Godly involved an oral contract. It
10 wasn't even a written contract, much less a
11 written contract in which it was specified
12 that interest would be paid.

13 In the case of Mississippi State Highway
14 Commission versus Wunderlich, cited at 11
15 So.2d 437, in 1943 the Supreme Court
16 specifically held that interest may be
17 chargeable, quote, as additional recompense
18 for a detention of a debt, not as a matter of
19 course but as a proper element of
20 compensatory damages.

21 The court went on to state in that
22 decision, and I'm quoting, interest may be of
23 two kinds, that which is charged or
24 contracted for, such as rental or
25 compensation for the use of money, and that

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1 which is chargeable as additional recompense
2 for detention of a debt.

3 The former is usually provided for and

4 fixed by contract or statute. The latter may
5 be included as a factor in estimating the
6 extent of damages in breach of contract.

7 This court has always recognized the
8 right in proper cases to allow interest and
9 claims for unliquidated damages on the amount
10 of damages established upon breach of
11 contract.

12 Section 75-17-7 is of the first type of
13 interest referred to in that case. It's
14 statutory, and it runs from the date the
15 complaint was filed.

16 However, if money was determined by a
17 jury to have been wrongfully detained before
18 that time, then the plaintiff in the court's
19 opinion is not to be deprived of the interest
20 thereon from the breach to the date that the
21 complaint was filed.

22 So this second type of interest, unlike
23 the statutory interest, runs from the date of
24 the contractual breach. That was made clear
25 in the case of Heath versus Williams, cited

1 at 25 So.2d at 706, a 1946 decision, and thus
2 may predate the filing of the complaint.

3 Also, unlike the statutory interest, it
4 may apply to unliquidated damages as well as
5 liquidated damages. And the quoted portion
6 that I read from Wunderlich makes that clear.

7 So the most significant difference is
8 that while the statutory prejudgment interest
9 is assessed by the court in its discretion as
10 part of cost and post verdict proceedings,
11 the second type of interest is to be
12 determined by the jury as part of
13 compensatory damages.

14 Plaintiffs have taken the position
15 previously in this case that the amounts due
16 to them are, in fact, liquidated or
17 ascertainable by a set formula, and there
18 cannot be in the Court's opinion any overlap
19 of the two types of interest awarded or else
20 there would be a double recovery.

21 So what this Court is finding and
22 ordering is that the jury will be allowed to
23 hear evidence and consider claims of breach

24 of contract, breach of the contracts, implied
25 covenants of good faith and fair dealing,

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1 breach of fiduciary duty and conversion and
2 to hear and consider evidence as an element
3 of compensatory damages interest at the rate
4 fixed by Mr. Solomon, which was 4.96 percent,
5 on sums that the jury may find were due, and
6 in the event that they make such a finding,
7 to return a verdict solely for the interest
8 thereon at that rate from the date of any
9 wrongful detention to the date that
10 Mr. Wilson filed the initial cross claim
11 against Mr. Scruggs.

12 Any interest after the plaintiffs
13 availed themselves of the processes of the
14 court; that is, after filing the cross claim,
15 then interest from that point on will fall
16 under the statute and will be determined by
17 the Court in post verdict proceedings along
18 with the issues of attorney's fees,
19 accounting fees and fees to the special

20 master in accordance with the cases that the
21 Court previously cited on those three points.

22 So that will be the order of the Court.

23 Anything further?

24 BY MS. SLATER: Your Honor, did you -- I
25 did not hear the Court, and I might just not

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1 have heard it. Are bad faith breach of
2 contract still viable?

3 BY THE COURT: It's still viable at this
4 point, yes. In other words, as I indicated
5 earlier, there must be first a verdict of
6 compensatory damage, but assuming that
7 happens, then we'll move into that phase of
8 the trial. I'm not excluding that at this
9 point. Any other clarification needed?

10 BY MR. BALDUCCI: Your Honor, the only
11 other pending motion, I think, that's
12 outstanding at this time is the Court had
13 under consideration our motion on the merits
14 on summary judgment, partial summary
15 judgment, prejudgment interest and punitive,

16 taking that under advisement.
17 BY THE COURT: I think I just ruled on
18 the portion dealing with prejudgment
19 interest, and following up to my answer to
20 Ms. Slater's question, at this time the
21 motion for summary judgment is denied as to
22 punitive damages. I'll make that final call
23 after the plaintiff rests their case and
24 after the jury returns a verdict on that
25 first part of the trial.

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1 BY MR. BALDUCCI: Thank you.
2 BY MR. MERKEL: For purposes of
3 planning, how would Your Honor prefer to take
4 care of proffers of evidence that we would
5 make for record and appellate purposes? I
6 mean while we've got witnesses coming in, how
7 would you prefer to handle that?
8 BY THE COURT: I don't want to be
9 sending the jury out any more than necessary.
10 If it's something that you feel that needs to
11 be proffered and made of record at a

12 particular time in the trial, then we'll deal
13 with it. Anything that you feel that you can
14 make a proffer after the trial without
15 waiving any position that you may have, then
16 I would prefer to take it up then.

17 BY MR. MERKEL: I think if the Court so
18 rules that we're not waiving anything by
19 waiting until then, I think we can certainly
20 entertain that.

21 Like we're going to probably need to
22 bring Mr. Solomon in here at some point to
23 testify in detail about what he did and why
24 he did it and how he did it and so forth,
25 but, obviously, we don't want to have the

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1 jury sitting out in the jury room while we're
2 doing that.

3 BY THE COURT: Right. I'll certainly
4 make it clear, if it's not clear now, that
5 you're not going to be waiving any rights,
6 position or argument by making a proffer at a
7 later time. That obviously would

8 administratively be the smoothest way to do
9 it, and I'll be certainly glad to make that
10 clear now and as many times as you need me to
11 later.

12 BY MR. MERKEL: To the extent, I
13 suppose, Your Honor, that we have a witness
14 on the stand and we finish him at the end of
15 a day, maybe we could hold him over for
16 another 30 minutes or something if there was
17 something that you were not going to permit
18 him to testify that he otherwise would?

19 BY THE COURT: I have no problem with
20 that. And the only thing I was going to add
21 is I assume in the event of a plaintiffs'
22 verdict, there's going to have to be post
23 verdict hearings concerning attorney's fees,
24 accounting fees and special master fees.

25 I don't mind taking up any other

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1 proffers that you want to make at that time
2 either. So however you feel that you need to
3 do it, certainly the Court will make every

4 accommodation. What were you going to say,
5 Mr. Kirksey?

6 BY MR. KIRKSEY: Your Honor, I would ask
7 the Court, if the Court is going to be here
8 for about ten minutes more, if we can have a
9 short conference, and if counsel opposite
10 would stay and Mr. Scruggs, we would
11 appreciate it.

12 BY THE COURT: Certainly.

13 BY MR. KIRKSEY: Thank you, Your Honor.

14 (FOLLOWING THE BRIEF RECESS, THE HEARING CONTINUED AS
15 FOLLOWS:)

16 BY MR. MERKEL: Your Honor, in view of
17 the Court's ruling and the relatively
18 negligible amount of money that would be at
19 stake in a phase one phase of the trial, we
20 would in purposes of economy and judicial
21 efficiency ask the Court to stay the
22 proceeding and let us take an interlocutory
23 appeal of the Court's orders on all these
24 items.

25 And then if we're successful on any of

1 that, we'll have it all before one jury one
2 time. If we're not successful, we'll be
3 where we are today anyway and not go through
4 all of this twice and two appeals.

5 BY THE COURT: What's the defense
6 position?

7 BY MR. BALDUCCI: Clearly, Your Honor,
8 we would object and resist any interlocutory
9 appeal at this time.

10 The plaintiffs at every turn have argued
11 and demanded for their day in court.

12 Mr. Scruggs is prepared to defend himself.
13 We're ready to go. We're on the eve of
14 trial. We've got a jury coming in Monday.

15 I understand the plaintiffs don't like
16 the Court's rulings, but interlocutory appeal
17 is not the issue at this time.

18 They're right. We do have a small issue
19 to try at this point. Judicial economy would
20 be promoted by the resolution of this case
21 and having all issues at that time go up in a
22 post trial appellate posture to the Supreme
23 Court, not piecemeal like this.

24 The time to resolve this case is now.

25 We're on the eve of it. Let's send a record

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1 to the Supreme Court of a complete
2 proceeding. Let's not hold these parties in
3 any more suspension on those issues.

4 It's a simple case. It's a simple trial
5 at this point, and we can prepare a good
6 record for the Supreme Court to take a look
7 at if that's what the plaintiffs want to do.

8 BY THE COURT: Rebuttal.

9 BY MR. MERKEL: Your Honor, there is no
10 -- as far as a simple trial, it will be the
11 same trial this time as far as the breach of
12 contract, the breach of fiduciary duty, the
13 willful breaches. All of that evidence,
14 everything that will come in, will go to this
15 one narrow little scope of time that you have
16 left in the case.

17 So as far as the trial, it's going to be
18 the same both times. If there's a single
19 item of damage which you have ruled out that

20 we would later get to present to a jury,
21 we're going to be right back to do the same
22 thing in its entirety all over.
23 If you certify these rulings that you've
24 made, we would come back at whatever date.
25 We're going to have to try that at one time

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1 sooner or later, but there's no sense in
2 knowing we're going to probably have to do it
3 twice.
4 If they ruled on it and you're right
5 about everything you're doing, then we'll be
6 no worse off than we are here today. And if
7 they reverse any part of it, the summary
8 judgments, the interpretations of the
9 contract, the quantification without any of
10 the record, without any evidence being
11 tendered to you to base that on, then we'll
12 save doing this all over again.
13 Otherwise, I mean we're going to have a
14 week trial or seven or eight day trial on
15 this issue of interest for a period of from

16 August of '92 through July of '94. A year
17 and a half period of interest is what they're
18 going to consider. Then Your Honor is going
19 to have to calculate interest on the rest,
20 fees, the whole bit. And then phase two
21 would start against the backdrop of whatever
22 the jury awarded plus whatever you add to it.
23 And I just don't see any reason to do
24 it. When 98 percent of the fish has been
25 taken out of the pan already, why go do this

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1 twice. That's our feeling on it.
2 BY THE COURT: There are a number of
3 issues that would have to be necessarily
4 involved in making the determination that you
5 would seek on an interlocutory appeal, and I
6 would just as soon the Supreme Court or Court
7 of Appeals, whichever one ends up with this
8 case eventually, to look at the evidentiary
9 rulings that are made during the course of
10 the trial at the same time rather than to
11 look at multiple appeals in the event that

12 there are errors.
13 So the motion for a stay and
14 interlocutory appeal will be overruled.
15 Anything else? If not, we're adjourned.

16 (HEARING CONCLUDED)

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1 COURT REPORTER'S CERTIFICATE
2
3 STATE OF MISSISSIPPI
4 COUNTY OF HINDS

5

6 I, Fran Askew, CSR, Official Court Reporter for
7 Hinds County Circuit Court, do hereby certify that the
8 foregoing 162 pages, and including this page, constitute
9 a true and correct transcript to the best of my ability
10 of the proceedings had upon the motion hearing in the
11 above entitled and numbered cause before the Honorable
12 Bobby B. DeLaughter, Circuit Court Judge, on the 18th
13 day of August, 2006.

14 I do further certify that my certificate annexed
15 hereto applies only to the original and certified
16 transcript signed in blue ink. The undersigned assumes
17 no responsibility for the accuracy of any reproduced
18 copies not made under my control or direction.

19 Witness my signature, this the 19th day of August,
20 2006.

21

22

23 FRAN ASKEW, CSR
24 Official Court Reporter
CSR NO. 1145

25