A. 2 (B)

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 were less significant.
3 **Q. In the weekend, that's the Saturday**
4 **the 20th and Sunday the 21st, were there**
5 **significant changes made in the terms over the**
6 **weekend leading to the Monday?**
7 A. Not that I recall.
8 **Q. Just to pick an example, and I'm going**
9 **to go through a couple of these, but to pick an**
10 **example of changes affected by the clarification**
11 **letter, would you take a look please at**
12 **paragraph 9 entitled Deletion of Purchase Price**
13 **Adjustment Provisions. Okay?**
14 **And you probably, Mr. Berkenfeld, may**
15 **as well reach into the pile of exhibits and pull**
16 **out the Asset Purchase Agreement itself because**
17 **we're going to be doing some comparisons.**
18 **Now, Section 3.3, you see that**
19 **paragraph 9 of the clarification letter deletes**
20 **in its entirety -- well, says, in full, "Section**
21 **3.3 of the Original Agreement is hereby deleted**
22 **in its entirety and shall be of no effect ab**
23 **initio." See that?**
24 A. Yes.
25 **Q. And for context, if you take a look at**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **3.3 of the Asset Purchase Agreement, that's that**
3 **adjustment to cash amount provision we talked**
4 **about before with the $750 million cap?**
5 A. Yes.
6 **Q. Right? Why did that come out?**
7 A. I don't know.
8 **Q. Any clue at all?**
9 A. No.
10 **Q. Did you have an idea at the time as to**
11 **why that came out?**
12 A. No.
13 **Q. Would you consider a $750 million, the**
14 **possibility of a $750 million benefit to Lehman**
15 **to be significant in the context of this overall**
16 **deal?**
17 A. It's just an opinion. I don't know
18 that I'm in a position to answer that.
19 **Q. I'll take that. We'll worry**
20 **admissibility later. What's your opinion?**
21 A. It really depends on likelihood of
22 whether that amount was ever going to be paid.
23 **Q. Okay. Would you have been in a**
24 **position to assess that likelihood on the 20th**
25 **of September, four days after the Asset Purchase**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **Agreement?**
3 A. I don't think anyone in the world
4 would be.
5 **Q. Okay. So you have a letter dated as**
6 **of September 20 that eliminates that provision**
7 **from an agreement made four days before. With**
8 **that as context, can you recall when you signed**
9 **this agreement you had a sense of whether this**
10 **was a material or significant change?**
11 A. I don't recall.
12 **Q. Do you know when that -- I'll show**
13 **them to you, but we talked about drafts of the**
14 **clarification letter. Do you know when in the**
15 **sequence of events between the 17th and the 22nd**
16 **that provision was added to the clarification**
17 **letter?**
18 A. I don't.
19 **Q. Do you know at whose behest it was**
20 **added?**
21 A. I don't.
22 **Q. Do you know which side of the table at**
23 **whose behest was it? Was it a Lehman**
24 **requirement or a Barclays requirement?**
25 A. I don't.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. Do you know why the letter is dated as**
3 **of September 20?**
4 A. No.
5 **Q. Do you have a recollection of any**
6 **discussion of dating it as of September 20 as**
7 **opposed to the date on which it was signed?**
8 A. No recollection.
9 **Q. Do you recall seeing a draft dated**
10 **September 21?**
11 A. I don't recall.
12 **Q. Were you party to any discussion about**
13 **whether or not the terms of the clarification**
14 **letter should be submitted for approval by the**
15 **court?**
16 A. I was not part of any of those
17 discussions.
18 **Q. Did you hear any discussion along**
19 **those lines?**
20 A. No.
21 **Q. Is that an issue that occurred to you**
22 **when you signed the agreement?**
23 A. Not that I recall, no.
24 **Q. Do you know what was done by way of**
25 **bringing the clarification letter to the court's**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **attention?**
3 A. I don't.
4 MR. STERN: To the extent that you ask
5 questions that may call for disclosure of
6 privileged conversations, that's your call
7 as to whether you ask those questions.
8 MR. BYMAN: Could you speak up just a
9 little bit?
10 MR. STERN: Yeah. Sure. To the
11 extent that you ask questions that may call
12 for disclosure of privileged conversations,
13 that's your call as counsel for Lehman. I
14 just want to put on the record that we will
15 take the position that that constitutes a
16 subject matter waiver and we'll reserve our
17 rights in that regard.
18 MR. GAFFEY: I think you're reserving
19 rights about an event that hasn't happened
20 yet. I'll deal with it if it happens, okay?
21 I get the point. I know that's an
22 issue. I'm not trying to be glibly about
23 this, but let's deal with it when it occurs.
24 MR. STERN: Well, you asked a question
25 about any discussions about whether

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 something should be presented to the court
3 of a Lehman executive pre-acquisition.
4 That's all I'm saying. I'm just alerting
5 you to it.
6 MR. GAFFEY: Okay. And all I'm saying
7 is I neither agree or disagree with you.
8 I'm not taking a position yet. I'll deal
9 with it when we have an issue.
10 MR. STERN: Fair enough.
11 (Exhibit 26, Notice of Filing of
12 Purchase Agreement, marked for
13 identification, as of this date.)
14 **Q. Mr. Berkenfeld, I have put before you**
15 **a document entitled "Notice of Filing of**
16 **Purchase Agreement Approved by Order Under 11**
17 **U.S.C.," et cetera, et cetera, et cetera.**
18 **Have you seen that document before?**
19 A. I don't think I have.
20 **Q. Do you know when it was filed?**
21 A. I don't know when it was filed.
22 **Q. Nothing further about that.**
23 **Now, back into the purchase -- I'm**
24 **sorry, the clarification letter, sir. There's,**
25 **and again, in paragraph 1(A) subsection 2,**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **concerning the definition of "purchased assets,"**
3 **when the agreement speaks -- when the**
4 **clarification letter speaks in terms of**
5 **securities owned by LBI and transferred,**
6 **transferred to purchaser or its affiliates under**
7 **the Barclays Repurchase Agreement, do you know**
8 **if that verb was selected deliberately?**
9 A. This is in, I'm sorry, which section
10 again?
11 **Q. We're in 1(A)(ii)?**
12 A. (A)(ii).
13 **Q. On the first page concerning purchased**
14 **assets,**
15 A. "Transferred," the word "transferred"
16 in which section?
17 **Q. 1(A)(ii).**
18 A. But in which sub clause? Right in the
19 third line?
20 **Q. Sub clause capital A.**
21 A. Okay.
22 **Q. Which refers to securities owned by**
23 **LBI and, quote/unquote, transferred?**
24 A. No, I don't. I don't know why that
25 word was chosen.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. And there's a reference in that same**
3 **paragraph to a Schedule A and a Schedule B. Do**
4 **you see that?**
5 A. Yes.
6 **Q. Okay. Do you know what those are**
7 **references to?**
8 A. No.
9 **Q. Have you any understanding of what --**
10 **either with or without regard to the**
11 **clarification letter, do you have any**
12 **understanding of what Schedule A and Schedule B**
13 **were in connection with the assets transferred**
14 **from Lehman to Barclays?**
15 A. All I know is what I'm reading in the
16 agreement.
17 **Q. Okay. Did you have any involvement in**
18 **or knowledge of the assembly of schedules of**
19 **assets that were -- Schedule A, which were**
20 **assets that were contained within the Repurchase**
21 **Agreement, and Schedule B, which were additional**
22 **assets, to show what was transferred from Lehman**
23 **to Barclays?**
24 A. No, I did not.
25 **Q. Is that an event or an activity or an**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **issue that has crossed your screen, that has**
3 **come to your attention at any point since?**
4 A. Not that I recall.
5 **Q. So would you know who I would ask, who**
6 **would -- who would know about the assembly and**
7 **the contents of Schedule A and Schedule B?**
8 A. I think that Jim Seery. John Coughlin
9 might know.
10 **Q. Uh-huh.**
11 A. Bart may know. I don't know.
12 **Q. When you signed the agreement, did you**
13 **know what Schedule A and Schedule B were that**
14 **were described in but not attached to the**
15 **clarification letter?**
16 A. Just as it represented in the section.
17 Nothing more than what's in the agreement.
18 **Q. Nothing more than the language of the**
19 **agreement?**
20 A. Yes.
21 **Q. You know, with respect to both the --**
22 **actually, all three of the Asset Purchase**
23 **Agreement, the First Amendment, which we marked**
24 **as Exhibit 24, and the clarification letter,**
25 **which is marked as Exhibit 25, why did you sign**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **them? Why are you the guy who signs them?**
3 A. I signed the Asset Purchase Agreement
4 because at the time there was nobody else who
5 was an authorized officer of Lehman Brothers
6 Holdings available to sign it there present who
7 could sign it, and to some extent, I think the
8 amendments and the clarification letter were
9 brought to me by the counsel just for
10 consistency after that.
11 **Q. Now, you said there was no other one**
12 **authorized to sign on behalf of LBHI present who**
13 **could sign it. I note the distinction there.**
14 **Was from someone on behalf of LBI**
15 **present who could sign it? Withdrawn.**
16 A. Yes.
17 **Q. Actually, that question is misleading**
18 **as it stands. Let me withdraw it.**
19 **On the 16th, that is, before Lehman**
20 **Brothers, Inc. files for bankruptcy protection,**
21 **so on the 16th --**
22 A. That wasn't before we filed.
23 **Q. Let me be -- I've confused this record**
24 **and this is entirely my fault. Let me give you**
25 **two dates to deal with. One is Lehman Brothers**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Holdings, Inc. files on the 15th. Lehman**
3 **Brothers, Inc., the broker-dealer, files on the**
4 **19th, okay? So I want to just be on the 16th**
5 **where the state of play is LBHI is filed, but**
6 **LBI is not.**
7 **The negotiators included Mr. McDade.**
8 **Was he not authorized to sign on behalf of LBHI?**
9 A. He was.
10 **Q. Was he not present?**
11 A. He wasn't present at the time the
12 document was ready to be signed.
13 **Q. Let me back this up a little bit.**
14 **This is -- I'm sort of curious about this.**
15 **Where are you when you sign this? Who is in the**
16 **room?**
17 A. We are --
18 MR. STERN: "This" is?
19 **Q. Good point. "This" is the Asset**
20 **Purchase Agreement.**
21 A. We're in that conference room that I
22 had described earlier.
23 **Q. Okay.**
24 A. In the corner of the 32nd floor.
25 **Q. Right.**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 A. And day goes into night and night goes
3 into day, but at the time when the agreement had
4 been finalized by the lawyers and ready for
5 signature, Bart McDade and other potential
6 signatories for Lehman Brothers Holdings were
7 not still there as the lawyers were finishing up
8 the drafting of the document.
9 **Q. Okay.**
10 A. Just to make this easier for you,
11 there are not a lot of authorized signatures of
12 Lehman Brothers Holdings, Inc.
13 **Q. Okay.**
14 A. I don't know who was employees and
15 what payroll they were on that had other reasons
16 for that, but the employees of Lehman were not
17 technically, not from necessarily a tax
18 standpoint, but they were officers of Lehman
19 Brothers, Inc. So anyone who was a managing
20 director of Lehman Brothers was a managing
21 director of Lehman Brothers, Inc.
22 **Q. Right. But not necessarily Holdings?**
23 A. Lehman Brothers Holdings was our
24 public company, so it included Dick Fuld, it
25 included Bart McDade, it included Ian Lowitt,

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 and then others who you would see as potential
3 16 files. But there is a relatively small group
4 of officers of Holdings who could sign for the
5 parent company.
6 **Q. Okay. So --**
7 A. So Skip McGee, for instance, was not
8 an officer of Lehman Brothers Holdings.
9 **Q. I gotcha. And you sign it on the**
10 **16th, early morning of the 16th? "It" being the**
11 **Asset Purchase Agreement.**
12 A. 16th is Tuesday?
13 **Q. Yes.**
14 A. I don't recall if it was early morning
15 or later in the day after an all-nigher. I
16 don't remember the exact time.
17 **Q. I'm going to give you something I**
18 **never go anywhere without. It's a blank**
19 **calendar of the week. It's of the month of**
20 **September 2008. I'll show you which are the**
21 **Tuesdays and which are the Wednesdays.**
22 A. All right. I don't remember what
23 point of the day on the 16th, but it needed to
24 be signed --
25 **Q. Right.**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 A. -- so that it was signed for the
3 hearing, the bankruptcy court hearing on that
4 day.
5 **Q. Okay. Okay.**
6 A. So we were under some time pressure to
7 actually have a signed document to go into court
8 with.
9 **Q. All right. Now, and then when the**
10 **time comes during the week for the First**
11 **Amendment to be signed and either on the Sunday**
12 **or Monday the clarification letter to be signed,**
13 **the reason you signed it is consistency; you**
14 **signed the first one?**
15 A. Weil Gotshal brings, you signed the
16 first one, here's the amendment, here's the
17 clarification. To clarify, there were some
18 elements of the clarification that I had more
19 involvement in, but I was much -- and not the
20 part you were asking about, not the financings
21 and the repo and the assets that are going over,
22 but things along the lines of should this
23 subsidiary go in or be out, what businesses are
24 transferring.
25 **Q. Right.**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 A. I spent a lot more time, my time,
3 during that week with things that, you know, in
4 hindsight, might seem not all that significant,
5 but were the South American retail businesses
6 going, was Eagle Energy going, was the Israeli
7 office going.
8 **Q. Canada was another issue?**
9 A. IMD, Canada. So there was a lot of my
10 time on what were the, not the securities
11 position, but what were the businesses that were
12 being brought into the deal.
13 **Q. Now, when IMD was an issue, whether or**
14 **not IMD was going over, there was an issue as to**
15 **whether additional employees from IMD should be**
16 **included in the preexisting bonus pool that was**
17 **referred to or whether additional funds would be**
18 **set aside; is that right?**
19 A. I don't recall that. I was not part
20 of those discussions.
21 **Q. Well, let's go through some changes --**
22 **some provisions in the clarification letter.**
23 **Let me get a sense of what your knowledge is of**
24 **both the reason for these and the history of**
25 **them, okay?**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **We dealt with paragraph 9. Let's take**
3 **a look at paragraph 13, please. It's at page 5.**
4 **Let me know when you've had a chance to read**
5 **that page.**
6 **(Document review.)**
7 A. Okay.
8 **Q. Okay. You've had chance to look that**
9 **through?**
10 A. Yes.
11 **Q. You see in there the following**
12 **language: "Effective at closing, all" -- let me**
13 **start that again. "Effective at closing (i) all**
14 **securities and other assets held by Purchaser**
15 **under the September 18, 2008 Repurchase**
16 **Agreement among Purchaser and/or its Affiliates**
17 **and LBI and/or its Affiliates and Bank of New**
18 **York as Collateral Agent, defined as the**
19 **Barclays Repurchase Agreement, shall be deemed**
20 **to constitute part of the Purchased Assets in**
21 **accordance with paragraph 1(A)(ii) above." And**
22 **that's only part of the paragraph.**
23 **Any knowledge, sir, as to why the**
24 **assets that were with the collateral agent for**
25 **the Barclays Repurchase Agreement were deemed to**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **constitute part of the purchased assets?**
3 A. No.
4 **Q. None at all? You're pausing a little**
5 **bit there.**
6 A. No, not really. I mean, the provision
7 seemed to fit, but I'm reading the agreement the
8 same as you are. I don't have any other
9 knowledge of it.
10 **Q. Okay. And further down, there is the**
11 **following quote: "Additionally, the Notice of**
12 **Termination relating to the Barclays Repurchase**
13 **Agreement dated September 19, 2008, is hereby**
14 **deemed rescinded and void ab initio in all**
15 **respects." You see that language?**
16 A. Yes.
17 **Q. Do you have any understanding as to**
18 **why the Notice of Termination needed to be**
19 **rescinded and void ab initio in all respects?**
20 A. No.
21 (Exhibit 27, a document bearing Bates
22 Nos. BCI-EX-00109164 through 109165, marked
23 for identification, as of this date.)
24 **Q. I have marked as Exhibit 27, Mr.**
25 **Berkenfeld, a two-page document bearing Bates**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **number BCI-EX-00109164 through 65.**
3 **Take a look at it, please, and tell me**
4 **if you've ever seen this document before.**
5 A. I've never seen it before.
6 **Q. You can put it aside. Nothing further**
7 **on that.**
8 **Do you have any recollection of when,**
9 **if at all, during the -- I keep calling it a**
10 **week, but during the six days between Tuesday,**
11 **the 16th, and Monday, the 22nd, at the closing,**
12 **when during that week a concept of terminating**
13 **or otherwise adjusting the parties' rights under**
14 **a Repurchase Agreement was an issue?**
15 A. I don't recall at all. I really had
16 very little -- no involvement in the whole
17 financing, repo arrangement.
18 **Q. Do you have any knowledge of whether**
19 **the repo arrangement was used as a mechanism to**
20 **transfer to Barclays Lehman assets at a**
21 **discount?**
22 A. I have no knowledge.
23 **Q. Would you take a look at Exhibit 21,**
24 **which is in the pile in front of you.**
25 A. Oh, Exhibit 21?

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. Yes. That's the September 18 e-mail**
3 **from Reilly to Lowitt, and again, I'm directing**
4 **your attention down to its paragraph 3. We**
5 **talked about this before. It had the language**
6 **about a block discount. You see where I am?**
7 A. Uh-huh.
8 **Q. And there's this sentence -- well,**
9 **let's me read the first two sentences of that**
10 **paragraph. "Not clear on the amount of block**
11 **discount or how we make it happen. Defaulting**
12 **on repo could be the best, as discount could be**
13 **taken from the haircut."**
14 **Any understanding of what that**
15 **sentence means?**
16 A. None.
17 **Q. I might be able to give you what my**
18 **partner calls the gift of time with the**
19 **following question.**
20 **Do you know how repo works?**
21 A. Generally.
22 **Q. Okay. Was that within your area of**
23 **responsibility?**
24 A. No.
25 **Q. And so I'm clear, was it within your**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **area of responsibility back in the days before**
3 **the bankruptcy, or the responsibilities that you**
4 **had in connection with the bankruptcy and the**
5 **making of these agreements?**
6 A. In the 21 years I was at Lehman, it
7 was never in the area of my responsibility. It
8 was an area, a specialized area, that I really
9 had very little familiarity with.
10 MR. STERN: Bob, at some point if you
11 want to take a break to sort through notes.
12 MR. GAFFEY: Now might not be a bad
13 time, because I think, based on the last
14 couple of minutes, I may be able to cut some
15 stuff out.
16 (Recess; Time Noted: 1:48 P.M.)
17 (Time Noted: 1:54 P.M.)
18 BY MR. GAFFEY:
19 **Q. I think you made a reference earlier**
20 **today, Mr. Berkenfeld, and if not, let me**
21 **introduce the topic: Was there a point in**
22 **between the 16th and the 22nd where it became**
23 **evident or known to you or told to you that**
24 **Lehman would not be able to deliver to Barclays**
25 **all of the assets that had been considered for**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **transfer as part of the Asset Purchase**
3 **Agreement, that they couldn't get their hand on**
4 **what was supposed to go over to Barclays?**
5 A. I really wasn't a part of all of those
6 discussions --
7 **Q. Uh-huh.**
8 A. -- resolving those issues.
9 **Q. Right.**
10 A. So I don't recall really being in the
11 loop on that.
12 **Q. What we talked about a bit before is**
13 **you discovered in court on the 19th the change**
14 **from 70 to what you thought was about 42, right?**
15 **And I think I asked you, and rather than go look**
16 **for it, I think I asked you if you had a sense**
17 **of that was a diminution in value of the**
18 **existing classes of assets or a reduction in the**
19 **total number of assets being transferred, and**
20 **you didn't know one way or the other?**
21 A. I wouldn't know one way or the other.
22 **Q. There were -- and again, for the sake**
23 **of efficiency, I'll set a factual basis here so**
24 **you'll understand the topic that I want to ask**
25 **you about.**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **We've seen some documents that discuss**
3 **efforts to find additional collateral,**
4 **additional securities to send over to Barclays.**
5 **Is that a topic that hit your screen that you**
6 **were involved with in any way?**
7 A. I wasn't involved with it.
8 **Q. Do you have any knowledge about, for**
9 **example, looking for what are called 15c3**
10 **securities?**
11 A. I wasn't involved in any of that. I
12 was not involved in any of that.
13 **Q. Did you hear anything about that?**
14 A. Nothing that I can recall
15 specifically.
16 **Q. Similarly, were you involved or did**
17 **you come to have any knowledge about an effort**
18 **to find securities in clearance boxes that could**
19 **be turned over from Lehman to Barclays?**
20 A. I wasn't involved in any of those
21 discussions.
22 **Q. So, back to the clarification letter,**
23 **in paragraph 1(A)(ii), where the definition of**
24 **"purchased assets" is changed to include, and**
25 **now I'm quoting, "(B) such securities and other**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **assets held in LBI's clearance boxes as of the**
3 **time of closing, which at the close of business**
4 **on September 21, 2008 were as specified on**
5 **Schedule B, previously delivered by Seller and**
6 **accepted by Purchaser," blah, blah, blah.**
7 **When you signed the letter, did you**
8 **have an understanding of what was meant by the**
9 **"assets held in LBI's clearing boxes"?**
10 A. No more so than it's described in the
11 agreement.
12 **Q. And the agreement itself says "no**
13 **extraneous knowledge of it"?**
14 A. No. That's a good way to put it.
15 Thank you.
16 **Q. As you sit here today, do you know**
17 **what clearance boxes are being referred to**
18 **there?**
19 A. I do not.
20 **Q. As you sit here today, have you ever**
21 **seen the Schedule B to which the letter you**
22 **signed referred?**
23 A. Not that I recall.
24 **Q. And as you sit here today, have you**
25 **ever seen the Schedule A that the clarification**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **letter you signed refers to?**
3 A. I don't recall.
4 **Q. Take a look, if you would -- I'm over**
5 **on page 2 at subsection 3 of paragraph 1(A),**
6 **referring to the equity of Lehman Brothers**
7 **Canada, Lehman Brothers South America, Lehman**
8 **Brothers Uruguay, S.A., you see that?**
9 A. Yes.
10 **Q. That's one of the issues you were**
11 **involved in, what's going, what's not going?**
12 A. Yes.
13 **Q. But when you were involved in what's**
14 **going and what's not going, it was not with**
15 **respect to the securities that were transferred,**
16 **it was respect to other things, which parts of**
17 **the business that were going?**
18 A. It was, when I was involved, the
19 business points of this clarification letter
20 that I was involved in had more to do with what
21 businesses were going.
22 **Q. Okay.**
23 A. Meaning was the Canadian business
24 going, was the South American business going.
25 That happened to be housed in these

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 subsidiaries. Like, in order to transfer the
3 business, you needed to transfer the
4 subsidiaries.
5 I didn't really have -- I didn't have
6 involvement in the securities that were being
7 transferred and the financing of it and what was
8 happening with the Fed and JPMorgan and
9 Barclays. I didn't have any involvement in
10 that.
11 **Q. During the weekend of the 20th and the**
12 **21st, did it come -- withdrawn. At any time in**
13 **between the signing and the closing, did it come**
14 **to your attention that there were -- there was**
15 **an issue with respect to -- just answer this yes**
16 **or no, please -- that there was an issue with**
17 **respect to JPMorgan that could be an obstacle to**
18 **completing the closing?**
19 A. Yes.
20 **Q. And describe for me, if you would,**
21 **what the issue was, as you understood it?**
22 A. That's difficult to do because it's a
23 while ago and I wasn't directly involved, but I
24 was at Weil Gotshal on Sunday and there were
25 three-way negotiations going on between the Fed,

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 JPMorgan and Barclays that to some extent it
3 would be fairly characterized as Lehman not
4 really being at the table on those.
5 But, as a matter of fact, there were
6 negotiations going on in separate rooms between
7 Barclays and JPMorgan to sort that out that no
8 representative of Lehman Brothers was included
9 in. So I don't know what the nature of the
10 issue really was.
11 MR. STERN: When your questions ask
12 about the time period between the signing
13 and the closing --
14 MR. GAFFEY: Between the 16th and
15 22nd.
16 MR. STERN: Okay.
17 **Q. Were there also separate discussions,**
18 **not involving Lehman, between Barclays and DTC?**
19 A. I wouldn't know firsthand. I believe
20 there were, but I don't know what they were and
21 when they were.
22 **Q. Why do you believe there were?**
23 A. I just believe there were. I don't
24 know why.
25 **Q. Totally apart from anything else I**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **have asked you up till now, I should have asked**
3 **you this before, since you went over to**
4 **Barclays, and other than in conversations with**
5 **Barclays' counsel, which I don't want to know**
6 **about, have you had discussions with Barclays**
7 **personnel, Barclays legacy personnel that didn't**
8 **transfer over from Lehman, about the deal and**
9 **the events of that week and how the deal went**
10 **and whether Barclays got what it paid for and**
11 **other similar topics?**
12 A. No. No, I have not. I can't recall
13 any conversations like that.
14 **Q. And again, you're being a little**
15 **emphatic with your answer on that. Is that**
16 **because -- have you deliberately not had those**
17 **conversations or it just hasn't happened?**
18 A. It's not because I deliberately
19 haven't had it. I just was never -- no one on
20 the other side ever had those conversations with
21 me.
22 **Q. And in the initial period of your**
23 **employ by Barclays, let's call it the first week**
24 **or two after you go over to Barclays, are you**
25 **drawn into or involved in any discussions about**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **implementation issues: Did the assets make it**
3 **over here? Did the right people get over here?**
4 A. I spent a lot of my time initially
5 after the closing on continuing Lehman issues,
6 for instance, negotiating the Neuberger
7 transaction. Again, this was a situation where
8 there was no one else that was interested in
9 doing it or willing to do it, so I spent another
10 week at Weil Gotshal on that transaction.
11 Later on, a few weeks later, I was
12 involved to some extent, and for a limited
13 period of time, on the issue of clients'
14 securities getting moved over and the issue with
15 the DTC there. It was really about -- it was
16 really about client issues.
17 **Q. Right.**
18 A. Client accounts that might not have
19 gotten whatever, the munis or the treasuries,
20 that were supposed to go over and where were
21 those securities and how were we going to deal
22 with that particular issue.
23 **Q. Generally put, so I can maybe move**
24 **this off the table of things I need to ask you**
25 **about, when you say that, you're talking about**

the segregated assets that are in client accounts, making sure they were safely ACATed other otherwise moved over to Barclays?

A. There was issues with the S.E.C., with Hughes Hubbard, with DTC, you know, all that, were the clients' assets in their accounts being made whole. So I was involved in that part of it, but if I understand your question correctly, it's not what you were asking about.

I really wasn't involved at all on whether -- I didn't switch hats and become part of Barclays and say where are those assets that should have come from Lehman? I wasn't involved in anything like that.

Q. I don't mean taking Barclays' side of anything.

A. No, I mean I wasn't involved in that on either side.

Q. I'm going to give you a series of drafts of the clarification letter and ask you to look through them and then, in one form or another, let's go through them and you can just tell me if you've seen them before and if it refreshes your recollection about some stuff.

That's what I want to do for the next sort of sequence here, but I want all the documents in front of you at once, okay?

A. Okay.

(Exhibit 28, a document bearing Bates Nos. BCI-CG00011047 through 11050, marked for identification, as of this date.)

(Exhibit 29, a document bearing Bates Nos. 10284821 through 10279830, marked for identification, as of this date.)

(Exhibit 30, an e-mail string, the first of which from P. Dowd to A. Keller, et al., marked for identification, as of this date.)

(Exhibit 31, a document bearing Bates Nos. 10279029 through 10279862, marked for identification, as of this date.)

(Exhibit 32, a document bearing Bates Nos. BCI-EX-00059913 through 59929, marked for identification, as of this date.)

(Exhibit 33, a document bearing Bates Nos. 10284801 through 10286514, marked for identification, as of this date.)

(Exhibit 34, a document bearing Bates

Nos. 10279028 through 10279851, marked for identification, as of this date.)

(Exhibit 35, a document bearing Bates Nos. 10284822 and 10279863 through 10279864, marked for identification, as of this date.)

(Exhibit 36, a document bearing Bates Nos. BCI-CG00024252 through 24271, marked for identification, as of this date.)

(Exhibit 37, a document bearing Bates Nos. BCI-CG00024954 through 24973, marked for identification, as of this date.)

(Exhibit 38, a document bearing Bates Nos. 10283756 with attachments, marked for identification, as of this date.)

A. Okay.

Q. Okay.

A. Certainly got a lot longer.

Q. The letter?

A. Yes.

Q. Well, somebody's shown you my outline.

The first one that I have put before you which we have marked as Exhibit 28 is a draft of the clarification letter under an e-mail from a Lillian Raben dated September 17,

2008 to Archie Cox, Steven Berkenfeld and others from Victor Lewkow. Bears Bates numbers BCI-CG00011047 through 11050.

Any independent recollection of seeing that document before, Mr. Berkenfeld?

A. It's e-mailed to me, but I don't know that I spent any time substantively with it.

Q. Okay. And two things I wanted to ask you about that. One is compared to the final that you signed on either the Sunday night or the Monday, it's a much shorter clarification letter, correct?

A. Yes.

Q. And I take note of the fact that a clarification letter of any kind is being prepared as early as September 17. Is there a reason a clarification letter started to be prepared that soon after the signing of the Asset Purchase Agreement?

A. I don't recall. I don't recall why it was started that early.

Q. Okay. And I will tell you, although, you know, we're all sort of still looking for and at documents, this is the earliest version I

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **have found, and it is a Cleary Gottlieb draft,**
3 **as denoted by its header.**
4 **Does that refresh -- well, do you have**
5 **any knowledge, sir, of whose idea it was that a**
6 **clarification letter would need to be done? Did**
7 **it emanate with Cleary?**
8 A. I don't recall.
9 **Q. Now, the next exhibit, number 29, is a**
10 **draft of the clarification letter under an**
11 **e-mail from David Murgio at Weil to Berkenfeld,**
12 **Steven, and then a distribution list. And it**
13 **attaches in the bottom e-mail, there's a**
14 **redaction of a communication from Mr. Murgio to**
15 **you, but in the e-mail at the bottom, he simply**
16 **is forwarding an e-mail that he also sent to**
17 **Lillian with their Weil comments on that letter.**
18 **Again, any independent recollection of**
19 **seeing this?**
20 A. Independent recollection as I sit here
21 now, no.
22 **Q. Other than the fact that it reflects**
23 **it was sent to you as an e-mail?**
24 A. Yes. And I do have recollection over
25 the course of that week about the back and forth

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 about is Canada included, is IMD included, and
3 that's reflected in some of these letters.
4 **Q. In the drafts?**
5 A. Yes.
6 **Q. Now, the next document you have should**
7 **be marked as Exhibit 30, and it should be a**
8 **draft dated -- or an e-mail dated September 18,**
9 **2008 at 6:43 P.M. from Andy Keller to Steve**
10 **Berkenfeld entitled Revised Clarification**
11 **Letter?**
12 A. Uh-huh.
13 **Q. And it transmits an e-mail that was**
14 **sent both to Weil and to personnel at Barclays**
15 **with further revisions of the letter. Same**
16 **question: Any independent recollection apart**
17 **from the fact that it reflects it was an e-mail**
18 **sent to you?**
19 A. No, no independent recollection, and I
20 don't recall whether I was staying current with
21 the drafts as they were coming through.
22 **Q. Okay. And if you would, please, take**
23 **a look at Exhibit 31, which should be an e-mail**
24 **from David Murgio at Weil to Victor Lewkow at**
25 **Cleary and others, including you in the CCs,**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **with a document number of 10279029 and an**
3 **attachment entitled WGM Comments, September 18,**
4 **7:30.**
5 **Same questions: Any independent**
6 **recollection apart from the fact that it**
7 **reflects it was sent to you as an e-mail?**
8 A. No independent recollection of this
9 draft.
10 **Q. Now, take a look, please, at what we**
11 **have marked as Exhibit 32, which is an e-mail**
12 **containing a draft of a clarification letter,**
13 **bearing Bates Nos. BCI-EX00059913 through 929.**
14 **It's an e-mail from Jonathan Hughes to Rich**
15 **Ricci and others at Barclays, and there's an**
16 **e-mail chain below that.**
17 **Now, you're not on this chain, so --**
18 **I'm going to ask you anyway, have you seen this**
19 **before?**
20 A. Not this e-mail, no.
21 **Q. Okay. During that time period, now**
22 **we're on the 19th, we're at the Friday, is there**
23 **a point where you ceased -- where you're not**
24 **getting each draft, where you're sort of out of**
25 **that loop?**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 A. These are all Barclays people on this
3 list. So this is a draft that's sent from David
4 Murgio --
5 **Q. Right.**
6 A. -- to Victor Lewkow, Cleary Gottlieb,
7 counsel for Barclays. He forwards it to
8 Barclays' attorneys, Richard Smith in
9 particular. Richard Smith focuses it to other
10 attorneys and Jonathan Hughes gets it and gives
11 it over to the, I guess, in his view, the key
12 business people.
13 **Q. Right. The reason I asked the**
14 **question, go to the last e-mail in the sequence,**
15 **which would be at the end of it at page 59914.**
16 A. Uh-huh.
17 **Q. Okay, you've got Murgio to Lewkow at**
18 **Cleary, copy a bunch of people at Cleary? See**
19 **where I am?**
20 A. Yep.
21 **Q. And you're not in that list, and it**
22 **says, "Please find the redraft of the clarifying**
23 **letter," right?**
24 A. I don't know why I'm not on the list.
25 **Q. This is sort of a more general**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **question that springs out of this document, at**
3 **least in my mind. Is there a point where you're**
4 **no longer seeing drafts? As opposed to, you**
5 **know, maybe not seeing a draft here and there,**
6 **is there a point where the drafts stop coming to**
7 **you?**
8 A. I don't recall.
9 **Q. Okay. Do you have any recollection of**
10 **that occurring to you at the time?**
11 A. I don't recall any deliberate event or
12 demarcation that said don't send me drafts
13 anymore. I don't know why.
14 **Q. Actually, that's a better question**
15 **than the one I'm asking. Did you ever say I**
16 **don't want to see drafts of this any more?**
17 A. No, I did not.
18 **Q. Exhibit 33 should be an e-mail dated**
19 **September 19, 2008 from Andy Keller to**
20 **Berkenfeld and Emma Bailey regarding CGSH**
21 **comments on the clarifying letter, and it simply**
22 **forwards an e-mail from Robert Davis to Robert**
23 **Murgio and others, including people at both**
24 **Barclays and Lehman.**
25 **This has got attached to it a**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **handwritten CGSH markup of 9:19 A.M. Do you see**
3 **that?**
4 A. I do.
5 **Q. This one at least looks different than**
6 **the others. Any recollection of seeing that**
7 **document?**
8 A. No, no recollection.
9 At this point, also, at 1:20 on
10 Friday, I'm not sure when things started at
11 bankruptcy court.
12 **Q. Okay. That's a good point. I mean, I**
13 **guess you're in bankruptcy court from the**
14 **beginning to the end of the hearing. We**
15 **established that before, right?**
16 A. Yes.
17 **Q. And the hearing I think started at**
18 **least midmorning. It's not an afternoon**
19 **hearing?**
20 A. I don't remember when it started.
21 **Q. Okay.**
22 MR. STERN: I'm sorry. Let's go off
23 the record for a second.
24 (Discussion off the record.)
25 A. I left earlier to get down there. It

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 was all the way down on Bowling Green, and
3 people were there pretty far ahead of the actual
4 commencement of the proceeding.
5 **Q. When you're down there, are you -- did**
6 **you ask anybody where are we on the**
7 **clarification letter?**
8 A. Not that I recall. I also had my
9 BlackBerry checked with security.
10 **Q. You had one with a phone?**
11 A. Uh-huh.
12 **Q. Okay. If you take a look, Mr.**
13 **Berkenfeld, at Exhibit 34, it should be an**
14 **e-mail from Keller to Berkenfeld forwarding an**
15 **e-mail from Messineo to Lewkow and a**
16 **distribution list. The text of that e-mail**
17 **says, quote --**
18 **Well, actually, the same question.**
19 **Seen it before? Any independent recollection?**
20 A. No independent recollection.
21 **Q. The text of the e-mail that Mr. Keller**
22 **is forwarding says, "Please see the current**
23 **draft. The exhibit must be revised to reflect**
24 **the latest deal with DTC. This is being**
25 **distributed separately. A copy marked to show**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **the changes made from the last draft we**
3 **distributed is attached."**
4 **Do you know what is meant by a**
5 **reference to the latest deal with DTC?**
6 A. I don't.
7 **Q. Any clue at all what that's a**
8 **reference to?**
9 A. No.
10 **Q. I take it from your answers about**
11 **these that you would not have any idea at what**
12 **point in the sequence it was determined to take**
13 **the price adjustment provision out, right,**
14 **whether it was the Wednesday or the Thursday or**
15 **the Saturday or the Sunday?**
16 A. I have no recollection of that.
17 **Q. And if you would look, please -- we're**
18 **up to Exhibit 35, yes?**
19 A. Yes.
20 **Q. Exhibit 35 should be an e-mail from**
21 **Murgio dated September 19, 2008, 9:15 P.M.,**
22 **Greenwich Mean Time, to Dowd, P. Martelli,**
23 **Steven Berkenfeld, Victor Lewkow at Cleary, and**
24 **others.**
25 **Same questions: Any independent**

recollection of seeing it?

A. No independent recollection.

Q. And the text of that e-mail refers to, "A revised version of the clarification letter reflecting our conversation this afternoon."

Were you part of any such conversation on the afternoon of Friday, September 19?

A. Not that I recall. This is an e-mail that went to both Lehman and Barclays personnel and counsel for both sides, so I don't know what conversation he's referring to.

Q. Okay. Take a look at Exhibit 36, an e-mail from Robert Messineo to Victor Lewkow, bearing Bates No. BCI-CG00024252 through 24271.

Again, sir, you're not reflected as a recipient of this e-mail, but my question is have you ever seen this version of it before?

A. I don't know. I don't have independent memory of it.

Q. Okay. Now we're into Saturday, however. The hearing is over. It's 2:39 P.M. on Saturday.

Are you in any way back involved in reviewing drafts of the clarification letter now

that the hearing is over?

A. I don't recall at this point whether I was involved on Saturday or whether I didn't get involved again until Sunday.

Q. Okay.

A. I just don't recall.

Q. All right. And would you take a look at Exhibit 37.

A. Yes.

Q. 37 is an e-mail from David -- I can't pronounce that -- Leinwand, Linewand, to Andy Keller, David Murgio, some folks at Sullivan and Cromwell, some folks at Barclays, and some folks at Cleary, but again, you're not shown as having seen this e-mail bearing a date of Saturday, September 20, at 11:13 P.M. Any recollection of seeing it?

A. No recollection.

Q. Any recollection of activity going on with respect to changes in the -- with respect to the clarification letter as late as September 20th, 11:13 P.M.?

A. I don't know what it would have been covering.

Q. Now, Exhibit 38, Mr. Berkenfeld, before you is an e-mail from Steven Berkenfeld at Lehman.com to berkenf@optonline.com, and attaches a draft of the clarification letter entitled WGM Draft, September 19, 2008, 7:30 P.M.

And the e-mail reflects your -- I take it this is you sending a copy to your personal e-mail address?

A. My home address, correct.

Q. And this reflects that that was sent on Sunday, September 21, at 11:19 A.M. Do you have any recollection of sending a copy of the clarification letter to yourself?

A. I don't recall, but I would do this so I could print it out. From my work e-mail to my home so I could print it out and read it.

Q. I assume at some point you got to get some sleep and you got to head home every once in a while. Do you recall leaving on the Sunday at about 11:19, sending stuff to yourself at home in preparation for leaving and being at home?

A. No, I think it was -- my recollection

is it was the other way around. I was printing stuff out in anticipation of going back in to Weil Gotshal.

Q. Okay. So you're home, you sign onto your Lehman e-mail, you send it to your optonline and print it out?

A. My BlackBerry, but, yeah, I sent it to my memo, print it out, and was expecting to go in later that day.

Q. Physically, it's most likely you're at home when you do this?

A. That's most likely right.

Q. The draft that you have sent to yourself here on Sunday, September 21, at 11:19 is the Weil Gotshal draft from September 19, 2008. The last couple of exhibits that we have looked at have been sent over the Saturday and the Sunday. The 19th is the Friday.

Does that -- I would say "refresh," but does that refresh or freshen your view about whether you saw copies of the clarification letter over the weekend?

A. It's speculation.

Q. Uh-huh.

A. I don't remember, but it would have been most likely to have sent to myself the last draft I had.

Q. That you had, okay.

Now, tell me what happens-tow lowing is on the Monday, the day the 22?

A. As I recall, yes, very early in the morning.

Q. And where was the closing?

A. At Weil Gotshal.

Q. Did you go to the closing?

A. Yes.

Q. When you got to the closing, when you got to the closing, do you recall if you signed the clarification letter there? We talked before about whether you might have signed it Sunday night. But now having gone through this sequence, do you have a better recollection of when you signed it?

A. Both Sunday night and Monday morning were at Weil Gotshal.

Q. Uh-huh.

A. Then it changed locations. So I went in to Weil Gotshal on Sunday and stayed there

through the night until the closing Monday morning.

Q. Okay. When you put your signature to the clarification letter, is there a point at which you say to someone, what changes does this make to the deal I signed on the 16th?

A. I don't recall having a conversation. I recall having read that the -- a letter and going through it with counsel from Simpson and Weil Gotshal.

Q. Uh-huh. Just answer this yes or no. Did you ask about each and every section of the letter before you signed it?

A. Just yes or no?

Q. Yes.

A. No.

Q. Do you know a Beth Rudofker?

A. Yes. Rudofker.

Q. Who's Beth Rudofker?

A. Beth Rudofker was the head of Audit at Lehman Brothers.

Q. Right.

A. And is now in the Compliance Department at Barclays.

Q. Is Beth Rudofker a lawyer?

A. No, she's not.

(Exhibit 39, e-mail from S. Berkenfeld to Beth Rudofker dated Saturday, September 20, at 1:07 P.M., marked for identification, as of this date.)

Q. Mr. Berkenfeld, I've shown you what we have marked as Exhibit 39. It's a two-page e-mail and it, at the top of the first page, it reflects an e-mail from you to Beth Rudofker dated Saturday, September 20, at 1:07 P.M., and there follows an e-mail chain below that. Have you had a chance to look through that?

A. Yes.

Q. Do you recall this e-mail exchange with Ms. Rudofker?

A. I don't recall the e-mail exchange.

Q. I note that the earliest of the e-mails, which of course would be the last one on the last page, sent Friday, September 19, at 4:46, that is, 16:46, simply says in the subject line, "The whole structure of what we were planning has changed and there is huge confusion." Do you recall receiving that

message from Ms. Rudofker?

A. I don't, but reading this, I guess I didn't get it till -- it's done in European time. I didn't respond until 2:28 in the morning.

Q. Okay. Now, at 2:28 on the morning of Saturday, September 20, the hearing has ended, right? It ended shortly after midnight. And presumably because this is a response from you to Ms. Rudofker, you're back in front of a screen of some kind, a BlackBerry or you're in front of a computer screen somewhere. You're no longer in court, right?

A. I think that's a fair assumption, yes.

Q. And you respond to Ms. Rudofker in response to her note, "The whole structure of what we were planning has changed and there is huge confusion," you write only, "Still," question mark. What are you referring to when you write to her?

A. I don't recall.

Q. Okay.

A. I just didn't understand what the issue was.

Q. Well, "still" suggests to me there was a point of confusion that you had some earlier knowledge of?

A. I wouldn't interpret it that way.

Q. How would you interpret it?

A. Just, you know, at this point we still have issues. Not that there was an issue before, just at this point there's still an issue.

Q. Well, as a man who had been working virtually nonstop on this deal since the 15th, doing all-nighters, and you get a message after you've come out of the bankruptcy court that says only, "The whole structure of what we were planning has changed and there is huge confusion," that would have been a matter of some significant concern to you, would it not?

MR. STERN: Objection to the form.

A. Not necessarily.

Q. So, as you sit here today, do you have any recollection of learning sometime late Friday, early the Saturday that the whole structure of what you were planning had changed and there was huge confusion?

A. I don't have any recollection on late Friday. I don't have any recollection early in the morning Saturday. To some extent, you asked me if I know Beth, and I do know Beth, and I would have not necessarily thought that this was a significant issue, knowing Beth.

Q. Okay. Does Beth tend to write -- do you tend to discount a note like that from Beth until you get details; is that what you're telling me?

A. I would characterize Beth as sometimes being somewhat of an alarmist over the many years I've known her, and that a note like this could easily be exaggerated because she might not have been in the loop on something that was being done somewhere else or away from her.

So I would not have taken a note from Beth at face value that if she said there's huge confusion, that there truly was huge confusion, that there just might have been confusion in her mind. So that's why I said not necessarily.

Q. All right. Now, let me just focus your attention. If you turn to the first page of the exhibit, which is the last two e-mail

exchanges in the sequence, you write to Beth, "How to reach you?" And she responds with a telephone number, correct?

A. Correct.

Q. Do you recall having a telephone conversation with her on the afternoon of Saturday?

A. I don't recall having it. I would expect that I did because I would have called her, but I don't recall the conversation.

Q. Thanks.

(Exhibit 40, a document bearing Bates Nos. STB-LEH0000272 through 277, marked for identification, as of this date.)

Q. We've marked as Exhibit 40, Mr. Berkenfeld, a multi-page document bearing Bates numbers STB-LEH0000272 through 277.

Take a look through that and tell me whether you have seen that before. It is, for the record, an e-mail at the top of the -- on the first page it reflects an e-mail from Robert Davis at Cleary Gottlieb to David Murgio at Weil, CC, Alvin Brown, A. Kohn, Archie Cox, others, and sberkenfeld@lehmanbrothers.com?

MR. STERN: This is a fairly lengthy series of e-mails and it's a little difficult to read. Is there a particular section you want to focus on or do you want -- should he just read the whole thing and then --

MR. GAFFEY: Actually, most of --

Q. What I would like you to do, Mr. Berkenfeld, is do whatever you need to do to answer the question which you know I'm going to ask, which is have you seen this before. You don't need to study each part of it.

MR. GAFFEY: And then I have some questions about the last e-mail in the sequence, Jack. That's the last one at the top of the first page.

A. I don't have any recollection of this independently.

Q. You see there are four numbered items in Mr. Davis' e-mail to Murgio and the people who received copies of this?

A. Yes.

Q. And one of them is an issue you mentioned before, the PIM business. That's an

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **issue you were -- whether the PIM business was**
3 **going or not going is an issue that you were**
4 **addressing in some fashion at this time, right?**
5 A. It was an issue I was involved in.
6 **Q. And there's a reference in Mr. Davis'**
7 **e-mail to Mr. Murgio about the PIM business**
8 **including an additional nine real estate leases.**
9 **Did you get at that level of detail in what or**
10 **who in the PIM business was moving over?**
11 A. Not to the extent of how many leases
12 were going, but on kind of a broader basis.
13 Were they taking the whole PIM business.
14 **Q. The same question I'll ask you with**
15 **respect to paragraph 2 that refers to IRA**
16 **accounts of PIM employees, but no preclosing IRA**
17 **liabilities?**
18 A. Yeah, I don't recall that issue.
19 **Q. And then there's a reference on the**
20 **signed contracts, but what I really want to ask**
21 **you about is paragraph 4: "The business people**
22 **at Barclays have yet to confirm to me anything**
23 **about the new deal," and that's in quotes, "on**
24 **the tri-party repo you described before."**
25 **Does that refresh your recollection**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **about what whether anybody talked about the**
3 **Barclays/Lehman tri-party Repurchase Agreement**
4 **to you?**
5 A. It does not. This is an e-mail to
6 lots of people who would not have no involvement
7 with that. Alvin Brown's an employee benefit
8 lawyer, for instance. That was just, again, not
9 an issue that I was directly involved in.
10 **Q. One of the CCs on this is Archie Cox,**
11 **who you had described as one of the main**
12 **Barclays negotiators, correct?**
13 A. Yes.
14 **Q. And you're on there as well. Who is**
15 **Richard Smith? He's on there as well.**
16 A. Richard Smith is a lawyer at Barclays,
17 in-house lawyer.
18 **Q. And you're on this list of several**
19 **people as well, correct?**
20 A. Yes.
21 **Q. Had you seen this document at or**
22 **around the time it was sent, September 19, 9:56**
23 **P.M., and there was a reference to a new deal on**
24 **a tri-party repo, would that have been an issue**
25 **that would have caught your attention?**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 A. I -- I don't know. Again, this was at
3 9:56 that Friday, so I don't know when I would
4 have seen it.
5 **Q. And --**
6 A. I never focused on it.
7 **Q. -- at 9:56 on Friday, you would have**
8 **still been in court?**
9 A. I was still in court.
10 **Q. And when you come out of court, you**
11 **would review your e-mails?**
12 A. Yes.
13 **Q. And any recollection on seeing an**
14 **e-mail when you came out of court that night**
15 **that referred to a new deal?**
16 A. I don't even have a recollection of
17 how I got home that night.
18 **Q. Okay.**
19 **(Exhibit 41, a document bearing Bates**
20 **Nos. 10266839 with attachment, marked for**
21 **identification, as of this date.)**
22 **Q. Mr. Berkenfeld, I have put before you**
23 **what we have marked as Exhibit 41, an e-mail**
24 **from Anthony Collerton to Steven Berkenfeld**
25 **entitled "Retention Est.xls," and it's got a**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **spreadsheet attached to it, sent on Monday,**
3 **September 15th, at 4:26 P.M. GMT, which I'm told**
4 **would put it at about 26 minutes past noon.**
5 **There's a four-hour forward time difference, I'm**
6 **just telling you.**
7 A. This is when our e-mail switched over
8 to Barclays or something?
9 **Q. You know, it's either that or -- yeah,**
10 **I don't know. I don't know. I just know it's**
11 **GMT.**
12 A. Okay.
13 **Q. And what Mr. Collerton appears -- do**
14 **you recall communicating with Mr. Collerton at**
15 **that time very early on on September 15 about**
16 **retention issues?**
17 A. I do.
18 **Q. And Mr. Collerton had some HR function**
19 **at Lehman; is that correct?**
20 A. Yes, he was one of the senior HR
21 people.
22 **Q. And he's sharing what he calls here**
23 **some really rough thoughts on retention payments**
24 **and severance. Do you see that?**
25 A. Yes.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. Do you recall this particular e-mail**
3 **or the spreadsheet?**
4 A. Not specifically.
5 **Q. Do you have a more general**
6 **recollection of communicating with Mr. Collerton**
7 **about such issues as retention and severance?**
8 A. Yes.
9 **Q. Okay. I can see from his title why**
10 **he's in that conversation. Why are you in it?**
11 A. After the bankruptcy and, as I
12 mentioned earlier, a lot of issues that were
13 going on included how to deal with employees --
14 **Q. Uh-huh.**
15 A. -- and how to manage Lehman if we were
16 really just going to be in bankruptcy and trying
17 to do -- I'll put this in quotes, please -- an
18 orderly wind-down is being requested of us from
19 the regulators. We didn't have any idea what
20 that meant, how we could possibly do an orderly
21 wind-down, but we were trying to do the best we
22 could.
23 What we needed to try to calculate is
24 how you get people to stick around and be part
25 of an orderly wind-down. So some of the

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2 discussions I had over those couple of days is
3 what's our, you know, biweekly payroll that
4 we're paying out, how much cash would you need
5 to be able to keep people employed over two-week
6 periods so that you could keep them in their
7 seats, engaged in whatever was necessary for us
8 to do as we were sort of figuring it out.
9 So this would have been an analysis
10 that was done assuming that we were in
11 bankruptcy and we had all these positions and we
12 needed to wind them down and what would it take
13 to keep people from, without trying to be overly
14 dramatic, taking their stuff, putting it in
15 boxes, and walking out of the building at
16 midnight Sunday night.
17 **Q. If you would take a look at the**
18 **schedule that is annexed to Mr. Collerton's**
19 **e-mail to you, I guess the issue you're talking**
20 **about, keeping people in their seats for the**
21 **next couple of weeks for an orderly wind-down,**
22 **but this document appears to be talking in terms**
23 **of bonus amounts and calculation of 50 percent**
24 **of prior year bonus, that type of thing, if**
25 **you'll look across the headings at the top, you**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **see that?**
3 A. Yes.
4 **Q. And it's divided between two**
5 **categories of entities. There would be entities**
6 **under Holdings. I take it that's LBIH, right?**
7 **And the LBI categories, Lehman Brothers, Inc.**
8 **categories, yes?**
9 A. Yes.
10 **Q. And as you look at this, this e-mail**
11 **that -- I'm sorry, this spreadsheet that Mr.**
12 **Collerton sent to you, do you see that there's,**
13 **in column E, there's a calculation called bonus?**
14 A. Yes.
15 **Q. All right. And the entities that are**
16 **listed in column B, "CORP," "EQ," "FID," that's**
17 **corporate equities, fixed income, investment**
18 **banking, investment management, those are**
19 **different divisions of Holdings and LBI,**
20 **correct?**
21 A. Yes.
22 **Q. And the bonuses that are set out in**
23 **Exhibit E for LBI appear to total $2.163**
24 **billion, do you see that?**
25 A. No, I don't. I'm sorry. I lost you.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. Column E?**
3 A. Yeah.
4 **Q. Grand total at the bottom of the LBI**
5 **box, $2,163,511,000?**
6 A. 2,163,000,000.
7 **Q. You with me?**
8 A. Yes.
9 **Q. And the total as between both Holdings**
10 **and LBI comes to 2.4 billion in comp, correct?**
11 A. Yes.
12 **Q. Now, to your knowledge, is this broken**
13 **down at all by the categories of employees who**
14 **would transfer to Barclays? I mean, did all**
15 **these business units go over to Barclays?**
16 A. I don't think this had anything at all
17 to do with Barclays in terms of transfers. I
18 don't even know if this was -- that just the
19 U.S. or global or how many businesses it
20 included that weren't going to be moving over.
21 I don't know.
22 **Q. Right. Well, what I think it does**
23 **indicate, or tell me if you agree or disagree**
24 **with me, is whatever it is this spreadsheet is**
25 **about, it's not about paying people for the next**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **two weeks, right?**
3 A. No.
4 **Q. So --**
5 A. But I was not answering specifically
6 around the schedule when I answered that
7 question. It was specifically about some of the
8 issues we were trying to resolve.
9 **Q. Okay. Okay. And the reason I wanted**
10 **to move you into the schedule is because I want**
11 **to ask were you talking to Mr. Collerton at or**
12 **around September 15 about what the bonus number**
13 **would need to be for employees that Barclays**
14 **wanted to retain?**
15 A. No, I was not.
16 **Q. Do you have any knowledge as to why**
17 **Mr. Collerton was sending you a spreadsheet**
18 **entitled "Potential Retention and Severance**
19 **Estimates" that calculated bonus and then such**
20 **things as one-third of population get 50 percent**
21 **of prior year's bonus?**
22 A. I don't know for sure. I'm
23 speculating that we were thinking that we needed
24 one-third of the staff to manage the bankrupt
25 entity and you had to pay them a bonus to get

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 them to stay.
3 **Q. Would you pay them 50 percent of their**
4 **prior year's bonus to stay for a couple of weeks**
5 **for an orderly wind-down?**
6 A. I don't think we were making an
7 assessment about what it would take. We were
8 just trying to plug some numbers and see what it
9 would look like. No one had made a decision
10 that anyone was going to be paying 50 percent.
11 As time went by, which we didn't have
12 as of Monday, we had the benefit of A & M coming
13 in here and taking on a significant role and
14 deciding who they needed and who they didn't
15 need to. And I have no idea how many people
16 they actually have employed.
17 But as of Monday, in conversations
18 with Anthony, it's like, we're bankrupt, what do
19 we do and how do we manage this thing? And so a
20 lot of my time over the first few days was spent
21 trying to figure these things out.
22 **Q. Okay. Was any of your time, though,**
23 **spent on trying to come up with a calculation of**
24 **how much would have to be set aside for bonuses**
25 **for transferred employees in respect of their**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **service at Lehman?**
3 A. No, it was not.
4 **Q. At all? Ever?**
5 A. I don't recall any involvement in any
6 discussion like that.
7 **Q. You give that answer with a degree of**
8 **certitude. The document suggests that Mr.**
9 **Collerton seems to think you're interested in**
10 **calculating what the bonuses would be for all**
11 **the employees, and I say it that way just to see**
12 **if it refreshes your recollection about whether**
13 **you were having any discussion with Mr.**
14 **Collerton about coming up with a way to**
15 **calculate what would be needed for bonuses for**
16 **transferred employees once they were at**
17 **Barclays?**
18 A. I did not have the conversation with
19 Anthony that I recall about any bonuses for
20 transferred employees. Just by way of specific
21 example, I believe LBB stands for Lehman
22 Brothers Bank, which was never part of the
23 transaction at all with Barclays.
24 **Q. So it's possible when you see "LBB" on**
25 **here that these calculations that -- let's talk**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **about the LBI section of that spreadsheet. LBI**
3 **begins with "CORP," ends with "PS," and comes to**
4 **the $2,163,000,000 number?**
5 A. Uh-huh. Yes.
6 **Q. And LBB is included in there, so**
7 **that's 6 billion of it, or closer to 7 billion**
8 **of it, right?**
9 A. No, that's 6 million.
10 **Q. 6 million, okay.**
11 A. 7 million.
12 **Q. Let's just use that as an example.**
13 **That's an entity that was not contemplated as**
14 **going over to Barclays and did not go over to**
15 **Barclays in the deal that was discussed**
16 **post-bankruptcy, correct?**
17 A. I believe that the bank could not move
18 over for regulatory reasons and was never
19 contemplated that it would.
20 **Q. Okay. And in the week prior to the**
21 **bankruptcy filing, there had been discussions**
22 **between Barclays and Lehman. I think you said**
23 **they were merger discussions, but they**
24 **contemplated a combination of all of Lehman**
25 **globally with Barclays, correct?**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 A. Well, I do not recall what would have
3 been done with some of the assets that created
4 regulatory issues. There might have been
5 provisions in there of divestitures and things
6 like that. I don't know.
7 **Q. But at a more general level, the**
8 **discussion is going on before the bankruptcy is**
9 **a global combination and the discussion going on**
10 **after the bankruptcy is North American**
11 **operations only, correct?**
12 A. On a global basis, before the
13 bankruptcy, it was a merger and an acquisition
14 of the holding company.
15 **Q. Okay.**
16 A. And after the bankruptcy, and that
17 might have taken many complicated forms,
18 depending on what assistance was going to be
19 provided by the federal government or the rest
20 of Wall Street, so it's hard to say this is what
21 the structure would have been before. But
22 afterwards, it was a discussion about
23 principally about buying U.S. investment banking
24 and capital markets businesses.
25 **Q. In the period before the bankruptcy,**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **when the more worldwide, the global discussions**
3 **were on the table, was there, to your knowledge,**
4 **any calculation of what the global bonus accrual**
5 **might be?**
6 A. Not that I know of.
7 **Q. To your knowledge, is the schedule**
8 **that's attached to this exhibit a calculation of**
9 **what the global bonus liability was for LBI and**
10 **put to the 2,163,000,000?**
11 A. Repeat the question. I'm sorry.
12 **Q. The 2,163,000,000 number that we**
13 **focused on before for LBI, is that a, to your**
14 **knowledge, is that a calculation of the global**
15 **accrual, the accrual for employees around the**
16 **world, not just North America?**
17 A. I have no knowledge of what that
18 number is.
19 **Q. Do you have any recollection of any**
20 **conversations with Mr. Collerton about this**
21 **potential retention and severance estimates**
22 **spreadsheet that he sent to you on September 15?**
23 A. I don't specifically recall the
24 conversation. I do recall having conversations
25 with Anthony about how we would manage as a

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 bankrupt entity and how we would deal with the
3 employee issue.
4 **Q. Okay. Did you have discussions with**
5 **Anthony about which employees would transfer**
6 **from Lehman to Barclays as part of the**
7 **post-bankruptcy transaction?**
8 A. I don't know if the discussions were
9 with Anthony. As I mentioned earlier, I had
10 discussions with HR, could have been Ros Coffey,
11 who was our HR representative, I don't know,
12 about which employees from Legal, Compliance and
13 Audit would transfer over, but did not have a
14 conversation about transfer of employees
15 generally, other than, again, throughout this
16 week there were specific discussions around
17 things like Eagle Energy, the Israeli office,
18 Canada.
19 **Q. Right.**
20 A. Kind of one-off discussions. And
21 those discussions did not, in my recollection,
22 include the issue of accrued bonus or comp.
23 **Q. The reason I'm showing you this**
24 **document and maybe a couple others that I will**
25 **show you is to see if it refreshes your view,**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **your recollection about whether any of the work**
3 **you did played a role in the calculation of that**
4 **$2 billion comp number we saw on the September**
5 **16 financial schedule that you signed.**
6 A. To my knowledge, it did not.
7 (Exhibit 42, a document bearing Bates
8 Nos. 10283125 with attachment, marked for
9 identification, as of this date.)
10 **Q. Now, I have put before you, Mr.**
11 **Berkenfeld, a document marked Exhibit 42, an**
12 **e-mail from Eric Umlauf to Steven Berkenfeld and**
13 **others at Lehman entitled "LB Cash Flow**
14 **Forecast_150908.xls - for our discussion," and**
15 **there's an attachment, which is also reproduced**
16 **here.**
17 **Have you seen this document before?**
18 A. I don't specifically recall it.
19 **Q. Do you have a general recollection of**
20 **seeing it?**
21 A. General recollection I think I do
22 have.
23 **Q. And what's your general recollection**
24 **of the circumstances under which you were sent**
25 **this document and why it was sent to you?**

A. I think that this document, again, was to help us calculate what cash we were going to have available to continue to operate in bankruptcy.

Q. When Mr. Umlauf refers to "for our discussion" in the subject, does that trigger your recollection as to whether there was a discussion with him or others in which you were involved about the spreadsheet?

A. No, it doesn't trigger a special recollection.

Q. Could you take a look at the spreadsheet, if you would, and the first page of it, in particular. Now, down under -- in line number 12, where it says Payroll, September 2008, local employees only, and you have got a $4,267,000 number there. You with me?

A. Which number?

Q. 12.

A. A 12, yes.

Q. Now, is that the type of thing you were talking about, what's my payroll for the next couple of weeks while we get this, quote/unquote, orderly wind-down done?

A. Generally, yes. I don't remember discussion on things like travel and entertainment and whatnot. So I don't remember any specific conversation on this. Just looking at these items, some of it just doesn't make sense to me, so I don't recall discussion actually working through these items. I'm not sure who we were entertaining then.

Q. Who you were, I'm sorry?

A. Who we were entertaining then.

Q. Other than the world at large, perhaps, but I take it the golf stuff had all stopped and the --

A. Yes. So I don't know what we ever did with this and what the conclusion that came from it, and I don't recall specific discussions among this group about it.

Q. So I take it you're not the guy I should ask about why Charles Tyrwhitt Shirtmakers are on the list of contracts?

A. Were they listed as a -- what's the expression here? Critical unpaid vendor or non-critical?

Q. That I don't know. I'm done with

that.

(Exhibit 43, a document bearing Bates Nos. 10270558, marked for identification, as of this date.)

Q. Marked as Exhibit 43, Mr. Berkenfeld, is an e-mail from you to Tracy Binkley. It's a one-page document bearing document number 10270558, and it reflects an e-mail exchange starting with an e-mail from Ms. Binkley to you and your response to her. Would you read through that, please?

A. You want me to read -- what do you want me to read?

Q. Just read it enough to tell me whether you remember seeing the document.

A. Yes. I have.

Q. You do remember seeing it?

A. Do I remember this document? No, I don't have a specific recollection of this document.

Q. In the bottom e-mail, Ms. Binkley writes to you on the night of -- at about 11 minutes after 5 P.M. on September 18, an e-mail entitled "A schedule referred to in the Purchase

Agreement," and she writes, "The HR director at Barclays called to try to get a schedule that was supposed to be initialed by the parties and is a financial schedule related to bonuses (accrued '09 FY liability). It sounds like his team is concerned about getting that document before closing. Do you know what he's referring to and where to get his hands on it?" And then you respond to Ms. Binkley, "I don't. Check with Bart and Skip."

Do you recall her asking you for a copy of the 9/16/08 financial schedule?

A. I don't specifically recall.

Q. Do you recall the financial schedule going missing for a while and a lot of people asking for it?

A. No.

Q. Why, as best you can tell, would you have told Ms. Binkley to check with Bart and Skip?

A. I think that I would probably characterize this as a misunderstanding or miscommunication.

Q. Okay.

A. Coming from Tracy Binkley, who was one of the co-heads of HR, I don't know -- I don't remember exactly whether Anthony reported to her or vice-versa, but they were the two senior people in human resources, so she was looking for a financial schedule related to bonuses.

I didn't consider that schedule, the exhibit that we were referring to before, remember, Exhibit 19, I would never have described that as a financial schedule related to bonuses. To me that sounded like an actual human resource produced document about what bonuses were going to be paid out to who.

Q. Uh-huh.

A. So I thought she was asking for actually a schedule of bonuses as opposed to a financial schedule related to bonuses because there would be no reason for her to have that whole schedule just for that one item or for the director, HR director at Barclays, to need that whole schedule of assets and liabilities to know what the, quote/unquote, accrued '08 FY liability was.

So I thought she was asking for some

sort of actual schedule of bonuses that might have been part of this discussion between the business people about how you were going to compensate and retain employees, and that was not anything that I was aware of.

Q. Okay. You didn't understand that to mean the one-sheet financial schedule we were talking about before?

A. It wouldn't have made sense to me that Tracy would be asking for that schedule just for that information. It seemed, again, within the context of knowing Tracy, I read it to understand that she was looking for actually some sort of schedule of bonuses.

(Exhibit 44, a document bearing Bates Nos. 459686, marked for identification, as of this date.)

Q. You have before you what we've marked as Exhibit 44, a one-page document bearing number 459686, an e-mail from Beth Rudofker to you, Ian Lowitt, Alastair Blackwell, Bridget O'Connor, with a copy to Bart McDade.

Take a look through it and tell me whether you remember seeing this document

before.

A. I don't specifically recall this document.

Q. Do you have a general recollection of it?

A. Not of this document, no.

Q. Can you tell me who Bridget O'Connor is?

A. Bridget O'Connor was the head of technology at Lehman.

Q. And in this e-mail Ms. Rudofker writes to you, "Here's what I think we are around -- here's where I think we are around big issues," and then lists three of them with some subheadings, right? The first one, complete purchase agreement, refers to a Barclays assessment of mortgage TBA risk in a DTC box, et cetera, et cetera.

Do you have any idea what that's referring to?

A. I do not.

Q. At all?

A. At all.

Q. The second with regard to "Day 1

business," the second item below there says, "Resolve 15c3 lockup. Meetings happening now." Do you see that?

A. Uh-huh.

Q. Do you know what --

A. Yes, I do.

Q. -- that's a reference to?

A. To the 15c3 issue mentioned before, but I don't have any specifics around what the issue was.

Q. Does this refresh your recollection as to what the 15c3 issue was?

A. No, it does not.

Q. As you sit here today, do you have any idea, any clue what the 15c3 issue was?

A. No, I do not.

(Exhibit 45, a one-page e-mail from Ian Lowitt to Steven Berkenfeld, Bart McDade, Alex Kirk, Paolo Tonucci, CC to James Seery, dated 9/22/08 at 7:23 A.M. entitled "Looks Like We're All Set," marked for identification, as of this date.)

Q. Mr. Berkenfeld, Exhibit 45, which is before you, is a one-page e-mail from Ian Lowitt

to Steven Berkenfeld, Bart McDade, Alex Kirk, Paolo Tonucci, CC to James Seery, dated 9/22/08 at 7:23 A.M. entitled "Looks Like We're All Set."

Do you recall this e-mail?

A. I do.

Q. Okay. There's two e-mails in there. There's the one from you to McDade, Lowitt, et al., to which Mr. Lowitt responds, "Hooray!!! Ian." It's the original one I want to ask you about: "JPMorgan blinked. They agreed to cancel the $7.4 billion collateral purchase. We are starting the closing."

What did you mean when you wrote "JPMorgan blinked"?

A. A few things about this. One, if Bart and Ian were no longer at Weil, which this implied, I'm e-mailing it to them, they had gone home, might have again meant I was the only one available to sign anything when the closing came around, if the clarification was signed at Monday morning. I don't remember when it was, but one more reason why I would have been forced to sign it.

I have also mentioned before that there was this negotiation going on away from us between JPMorgan and Barclays that Lehman was not a part of and we were wondering whether it was going to disrupt the transaction and prevent the closing.

At 7:19 in the morning, or thereabouts, we finally had a resolution between JPMorgan and Barclays on that issue. The details of it I don't remember much more than what this says, I just don't have a recollection, but it was to tell them what was holding up the closing, which was the dispute with JPMorgan, there had been a concession, there had been an agreement, and we're starting the closing process.

Q. Your e-mail refers to JPMorgan saying, "They agreed to cancel the $7.4 billion collateral purchase." Do you know anything more about what the JPMorgan issue was than it involved $7.4 billion collateral purchase?

A. Sorry. I don't recall at this point.

Q. Any recollection at all of a $7.4 billion issue holding up your closing?

A. I remember that the collateral issue between JPMorgan and Barclays was holding up the closing, but we were kept out of the discussion, so I didn't know much about the details then and I don't recall much more about it now.

Q. When you learned that it had been resolved, did you learn any information other than it was resolved?

A. Not that I recall.

Q. Did you learn any details of any agreement between Barclays and JPMorgan?

A. No, I don't believe that I have.

Q. Even if as you sit here now yet you don't have a firm recollection of what it was, do you remember if you did have a firm recollection, you know, a better, a more detailed grasp of what the issue was at the time?

A. I'm confident I had a better recollection of the issue at the time.

Q. Uh-huh.

A. Had been around there in a lot of dead time all night and had been an observer of some bigger conference calls that had happened, but I

couldn't provide any more insight at this point, and there were many people who were much, much closer to the issues than I was who could give you more.

(Exhibit 46, a document bearing Bates Nos. BCI-CG00034704 through 34707, marked for identification, as of this date.)

Q. I've given you, Mr. Berkenfeld, what we have marked as Exhibit 46, a document bearing Bates Nos. BCI-CG00034704 through 707, which on its first page reflects an e-mail from Harvey Miller at Weil.com to Lindsee Grandfield at CGSH.com, entitled "Barclays/Lehman (JPMorgan)," and below that you'll see an e-mail from Lindsee Grandfield to Harvey Miller, copy to Bart McDade, Joanne Pflaum, Lori Fife, Michael Lubowitz, Richard Krasnow, Rod Miller, sberkenfeld@lehman.com, and some others.

Would you take a look through that e-mail, Mr. Berkenfeld, and tell me if it refreshes your recollection about what the nature of the issue was with JPMorgan in light of an e-mail, you know, in light of the e-mail that Cleary Gottlieb is spending to you and

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **others about the issue?**
3 A. Okay.
4 **Q. Does that refresh your recollection**
5 **about what the JPMorgan issue may have been?**
6 A. Somewhat.
7 **Q. Okay. How does it refresh your**
8 **recollection?**
9 A. I just remember more that some of the
10 impediment to the original transaction that we
11 had come up with and we agreed to in the Asset
12 Purchase Agreement was perhaps best put more
13 conceptual than practical and that we didn't
14 really have a time to figure out how it was
15 going to work to transfer all these assets and
16 liabilities and how the clearing bank's role
17 would be affected and what -- if it had liens on
18 the assets and all the complications around
19 JPMorgan being our clearing agent for our
20 securities transactions.
21 **Q. Did Lehman have to make any concession**
22 **or change with respect to what it was giving**
23 **Barclays as a result of the JPMorgan piece that**
24 **we're talking about now?**
25 A. I don't know.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. Have any recollection of Lehman having**
3 **to agree to give 7 billion in cash to Barclays?**
4 MR. STERN: I'll object to the form.
5 A. Between bankruptcy and the closing?
6 **Q. Yes.**
7 A. I don't recall whether we had to give
8 additional cash to JPMorgan during that time
9 period.
10 **Q. Not JPMorgan. To Barclays.**
11 A. I think you asked JPMorgan.
12 **Q. Then I got it wrong. That's okay.**
13 **I'll give you a new question and we'll have a**
14 **question and answer on the transcript.**
15 **Do you recall if Lehman agreed to give**
16 **Barclays 7 billion in cash?**
17 MR. STERN: Objection to the form.
18 A. I don't recall and I would -- wasn't
19 part of the direct participation in these
20 negotiations.
21 (Exhibit 47, a document bearing Bates
22 Nos. BCI-CG00035134 through 35955, marked
23 for identification, as of this date.)
24 MR. STERN: Given the size of this
25 exhibit, are there any particular sections

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 you want to focus his attention?
3 MR. GAFFEY: Yeah, the e-mail. I
4 don't need to go into the -- most of that
5 exhibit is the --
6 MR. STERN: The e-mails start on --
7 MR. GAFFEY: -- attachment.
8 The e-mails start at 35137, Jack.
9 That's the last page.
10 **Q. Mr. Berkenfeld, we've marked as**
11 **Exhibit 47 a quite large document bearing Bates**
12 **Nos. BCI-CG00035134 through 35955, and it**
13 **consists of an e-mail of a couple of pages and**
14 **then a large set of -- a large spreadsheet**
15 **that's attached to it.**
16 **Do you recall receiving this e-mail**
17 **entitled "Delivering other assets to Barclays,"**
18 **which is the name of each of the e-mails in the**
19 **chain?**
20 A. Right, I don't specifically recall
21 this e-mail, no.
22 **Q. These e-mails all are dated on**
23 **Saturday the 20th, with the earliest of them**
24 **being 20 September 2008 at 11:29.**
25 MR. STERN: No. No. No. Wait.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 MR. GAFFEY: Yeah.
3 MR. STERN: 11:22.
4 MR. GAFFEY: I beg your pardon.
5 You're right.
6 **Q. The earliest is from Paolo Tonucci to**
7 **Rod Miller, Azerad, et cetera, et cetera, and**
8 **ultimately this winds up being forwarded to the**
9 **V. Lewkow at Cleary.**
10 **Do you recall generally on the**
11 **Saturday, the 20th, an issue about delivering**
12 **other assets to Barclays?**
13 A. I recall generally an issue of we've
14 got some mechanical issues to deal with on some
15 of this stuff --
16 **Q. Okay.**
17 A. -- and we've got to figure out how to
18 do that. And that was something that, as we
19 worked through our verticals, was going to be in
20 the hands of finance working with Rod Miller.
21 And I actually do recall arranging to have Rod
22 Miller, a lawyer at Weil Gotshal, at the request
23 of finance guys, being kind of a dedicated
24 lawyer for these sort of issues with Finance.
25 **Q. And by "Finance," you mean Paolo**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Tonucci?**
3 A. I mean everyone on this list, Robert
4 Azerad and Lowitt, Dan Fleming. They were all
5 members of the Finance Division. So I do recall
6 them saying we have these mechanical issues,
7 it's complicated, we need help, who can we rely
8 on, and arranging to have Rod Miller be their
9 point person.
10 **Q. Did your understanding at the time go**
11 **any deeper than there were mechanical issues?**
12 **Did you know the nature of the issues?**
13 A. Very superficially.
14 **Q. Now, within the chain of e-mails, and**
15 **I guess I'm on page BCI35135, there's an e-mail**
16 **from Miller to Tonucci, copy Azerad, Fleming,**
17 **Berkenfeld, subject, "Delivering other assets to**
18 **Barclays," and it says, "We still have the 50**
19 **percent of residentials to transfer at closing,**
20 **right? Those were not thrown into the repo,**
21 **right?" Do you see that?**
22 A. Yes.
23 **Q. Any clue what that means?**
24 A. No.
25 **Q. At all?**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 A. Well, I had a clue that we're talking
3 about the resis that were -- excuse me.
4 MR. STERN: Objection to form. The
5 question is whether he has any clue? Object
6 to the form.
7 A. Do I have any clue?
8 **Q. Any idea of what that means?**
9 A. I have no idea. Clue just might be
10 that it refers to the resi provisions that had
11 been in the Asset Purchase Agreement and it was
12 the issue of transferring 50 percent of the
13 resis.
14 **Q. Now, that 50 percent resi provision in**
15 **the Asset Purchase Agreement came out in the**
16 **clarification letter, do you recall that?**
17 A. I do recall that.
18 **Q. Okay. So would you have known the**
19 **answer to this question, "Do we still have the**
20 **50 percent of residentials to transfer at**
21 **closing?"**
22 A. At that point in time I would not have
23 known the answer to that.
24 MR. GAFFEY: Let's take a five-minute
25 break.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 (Recess; Time Noted: 3:23 P.M.)
3 (Time Noted: 3:30 P.M.)
4 MR. GAFFEY: I have no further
5 question.)
6 EXAMINATION BY
7 MR. OXFORD:
8 **Q. Mr. Berkenfeld, we met off the record**
9 **earlier. My name is Neil Oxford. I'm with**
10 **Hughes, Hubbard & Reed and we represent the SIPA**
11 **Trustee.**
12 **As Mr. Gaffey said, he's given you the**
13 **gift of time and he's asked a lot of questions**
14 **that I was going to ask, so I will try and not**
15 **ask any of the questions he's already asked, but**
16 **apologize in advance if I do retread some**
17 **ground.**
18 MR. STERN: He did use the term
19 "gift." It doesn't really feel like a gift,
20 but go ahead.
21 MR. OXFORD: Perhaps not --
22 A. I wasn't sure what he was referring to
23 when he said that.
24 **Q. Perhaps not when he gives it to me,**
25 **it's not.**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Mr. Berkenfeld, you said that you did**
3 **not recall hearing about any changes in the**
4 **terms of the deal between the signing of the APA**
5 **on the 16th and the 19th of September until such**
6 **time as you got into court?**
7 MR. STERN: Objection to the form.
8 **Q. Is that a fair statement of your**
9 **testimony?**
10 MR. STERN: Objection to the form.
11 A. I think it would be fair to say that I
12 wasn't aware of significant financial changes to
13 the deal. I knew and, as I testified, that
14 there were discussions going on around what
15 businesses would be included and some of the
16 other non-financial elements, but I didn't know
17 about specific changes to the financial deal, I
18 think, until court. But I don't recall. I
19 don't recall knowing about it beforehand.
20 **Q. Okay. Tell me what you recall**
21 **learning in court that day on the 19th.**
22 MR. STERN: Objection to the form.
23 **Q. My question is specifically with**
24 **respect to the financial changes to the deal as**
25 **reflected in the APA?**

A. I think I principally learned about the size of the bucket of assets and liabilities that were being transferred over.

Q. What --

A. The amount of them.

Q. What did you learn about the size of the bucket?

A. That it had been -- the overall quantum had changed from the 72 billion or so to the 42 billion or so.

Q. Did you understand that the balance between assets purchased and liabilities assumed were still roughly equal as it was under the APA?

MR. STERN: Objection to the form.

A. I understood that there was rough equivalency in the amounts of assets and liabilities. Not between the signing and what happened at the hearing, but between the assets and the liabilities.

Q. Do you remember which lawyers were in court making those disclosures?

A. I recall Harvey Miller and Lori Fife presenting to the court.

Q. Do you recall anybody else presenting to the court?

A. I vaguely recall that there was another Weil Gotshal lawyer presenting to the court. I don't remember which one. Might have been Shai. I may have that wrong.

There were certainly presentations to the court by a number of lawyers, Mr. Novikoff, he presented to the court. There was lawyers Creditors Committee. There was lawyers for SIPAC. I believe there might have been lawyers for Hughes Hubbard. I don't recall all of them, but there was a lengthy proceeding.

Q. Do you recall at some point that there was a break in proceedings and Judge Peck went off the record to allow the terms of the deal to be explained to the gallery?

A. I don't recall Judge Peck going off the record and him being present.

Q. Do you remember him going off the bench?

A. I recall him leaving the bench at some point and I do recall some meeting between the Weil Gotshal lawyers, and I don't know who else

was involved, but representatives of the creditors.

Q. Were you present for that meeting?

A. I was not.

Q. What were you doing at this time?

A. I was in the courtroom or in the hallways.

Q. Who else from Lehman was present in court? And I'm not talking about outside counsel at the moment. I'm talking about the business people.

A. I will tell you Hillary Clinton -- not Hillary, Chelsea Clinton was there.

From Lehman, Bart McDade, Jim Seery, Mark Shapiro. Mike Konigsberg was there. J.F. Astier was there. Kevin Genirs was there. The last three in more of just an observer role.

Who else was there? I don't recall anyone else specifically.

Q. What role was Mr. McDade there in?

A. Bart was there as a representative of Lehman Brothers and his testimony was being proffered to the court.

Q. What about Mr. Seery, what role was he

there fulfilling?

A. I'm not sure Jim was there in any formal capacity.

Q. Same question for Mr. Shapiro?

A. I don't think Mark was there in any formal capacity either. I think that both of them and myself had been involved in various aspects of the transaction, and frankly, that's where the action was that day and we felt that we wanted to witness it and thought we should be there in case it was necessary for us to be there.

Q. On the Barclays side, do you recall who was in court for Barclays?

A. Barclays' counsel was there from Cleary, and I recall that Archie Cox and Michael Klein were in the courtroom. I don't have a recollection of anyone else from Barclays being there.

Q. And where physically in the courtroom were you? Were you in Judge Peck's courtroom?

A. Yes.

Q. Because I understand there was a number of overflow rooms.

A. Yes, it was a pretty packed courthouse, but I actually went down --

I remember somebody else from Lehman who was there. Chris O'Meara.

-- went down to the courthouse by subway with Chris O'Meara and Brian Marsal from A&M, and I can't remember how, but somehow we were able to get into the courtroom. Somebody there kind of reserved a spot for us or so, because it was already pretty full.

And if you know the courtroom, if you're looking at the bench, there's a -- some seats all the way on the right-hand side against the wall, and we were sitting/standing/leaning over there by the windows.

Q. And were you sitting/standing beside the Lehman people or the Barclays people or both?

A. It was just everybody was standing next to everyone. There were not sections. Actually, I think it was pretty close to the Trustee.

Q. At any point during the court hearing did you recall a discussion about additional

assets being transferred to Barclays from Lehman?

A. Somewhat, yes.

Q. Tell me what you recall about that, please.

A. I recall, and some of this is recollection that might have been refreshed from reading sections of the transcripts in preparation for deposition, but I recall discussions around some of the, for instance, the subsidiaries that were going, Uruguay and Canada, the IMD business being transferred over.

So maybe I should have drawn a distinction between the question on assets and what I recall, which is more around businesses.

Q. Just so I understand your answer, do you have any recollection of a discussion in court about the transfer of additional assets to Barclays?

A. Could you clarify what you mean "assets"? Do you mean businesses or do you mean securities positions?

Q. Securities positions.

A. I don't recall a discussion of

security positions, additional security positions being transferred, I don't recall that.

Q. Do you recall any discussion about the value of the deal to Barclays having fallen and that additional assets of any type being transferred to them to compensate them for that?

A. I don't recall that.

Q. Fair to say you don't recall any discussion of assets in Barclays' clearings box being transferred -- I'm sorry, Lehman's clearings box being transferred to Barclays?

A. My answer again is I don't recall.

Q. Do you recall any discussion about the transfer of any margin at the options clearing corporation?

A. I don't --

I'm sorry.

Q. Or any other exchange being transferred to Barclays?

A. I don't recall discussion of that. Again, I don't know whether it was. I just don't recall it.

MR. OXFORD: Could I have what has

been previously marked as Exhibit 11, please.

(Document placed before the witness.)

Q. You have in front of you, Mr. Berkenfeld, what's previously been marked as Exhibit 11. It's an e-mail from Peter Schellbach to Daniel Kamensky and a number of others at Lehman, and the top e-mail is sent on Saturday, September 20, 12:37 GMT. The e-mail below is an e-mail sent from Daniel Kamensky on September 19 at 6:37 P.M. to Eric Felder and others.

Do you recall seeing this e-mail before?

A. No, I have not seen this e-mail before. Let me read it.

(Document review.)

A. Okay.

Q. Mr. Kamensky did not appear to check his BlackBerry like you did when he got to court?

A. I found that some of the people who are used to going to bankruptcy court knew that you could get around the rules.

Q. Mr. Kamensky says in the third paragraph, "Weil lawyers a bit out of whack, but granted timing here not unexpected. They didn't explain the balance sheet change as well, but then a Barclays lawyer came in and gave a much better explanation."

Does that refresh your recollection about any of the disclosures that were made by either of the Weil lawyers or the Barclays lawyers about the balance sheet changes to the deal?

A. It does not.

Q. Mr. Berkenfeld, you said in response to one of Mr. Gaffey's questions that one of the changes you did remember in the deal between the signing of the APA on September 16th and the 19th was that there would be no cash going to Barclays, do you remember that?

A. Yes.

Q. How is it that you came to understand that that was a change to the business terms of the deal?

A. I should answer the reason I remembered that was reading through the

transcript in preparation for depositions, that that had changed between signing and the hearing. I don't know that I would have had independently remembered whether cash had been pulled out or not.

Q. Do you remember discussing that change to the deal with anybody?

A. I don't recall.

Q. You don't remember having any discussions about the existence of cash in the deal from the date of the bankruptcy hearing through the signing of the clarification letter?

A. My recollection from, again, reading the transcript was that the cash that was included in the Asset Purchase Agreement as one of the purchased assets was pulled out and that was reflected in the clarification letter, and I believe it's disclosed in the transcript to the court. I don't remember any change in that between the hearing and the signing of the clarification letter.

(Exhibit 48, an e-mail from Monty Forrest to Alastair Blackwell and others, marked for identification, as of this date.)

Q. Can you let me know when you've had a chance to read that?

(Document review.)

A. Okay.

Q. Mr. Berkenfeld, you have in front of you what I have marked as Exhibit 48, which is an e-mail from Monty Forrest to Alastair Blackwell and others. You're not on the final chain, but you do appear in the original couple of entries in the chain, and it's those that I would like to ask you about.

For the record, I'll identify this as being sent from Mr. Forrest on Sunday, 21st, and says 1:38 A.M., but that's a GMT time, I'll represent for the record, so it's 9:38 P.M. on Saturday, the 20th.

If you go to the end of the chain, that's what I would like to ask you about.

A. Yes.

Q. Do you see that Mr. Lowitt sent you an e-mail September 20 at 5:53 A.M. and he sends it to you and to Mr. McDade, copying Mr. Tonucci. See that?

A. Yes.

Q. And it says, "Did the court accept the lockup -- the 15c3 lockup and unencumbered box make it through the BarCap?"

Do you know what that question means, Mr. Berkenfeld?

A. Not really. I mean vaguely, but no more so than you would.

Q. Tell me what it means to you.

A. What it means to me is -- well, not much. About transfer of assets over -- which assets could be transferred over to Barclays, but I don't understand the details of it and specifically what Ian was asking.

Q. Do you know why Mr. Lowitt was asking you?

A. He was asking me and Bart, I believe, because we were at the hearing. I mean, I'm assuming 5:53 A.M. is 12 A.M., 1 A.M.

Q. Actually, these are in Eastern Standard Time. It's only the last --

A. Okay. So it would have been early in the morning after the hearing. So he was looking for a report on whether this had been specifically addressed and resolved by the

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 court, and I don't recall whether it happened.
3 **Q. Okay. So you don't know the answer to**
4 **this question sitting here today?**
5 A. No, I delegated it to, at least the
6 second part of it about getting the lawyers
7 working on getting it done, to Beth Rudofker.
8 **Q. Do you know why Mr. Lowitt wanted to**
9 **make sure that the documentation was very tight?**
10 A. No, I do not.
11 **Q. Did you have any conversations with**
12 **Mr. Lowitt about his e-mail?**
13 A. No, not that I recall.
14 **Q. Did you have any conversations with**
15 **Mr. McDade about his e-mail?**
16 A. No, I did not.
17 **Q. You'll see two chains up Beth Rudofker**
18 **sends an e-mail to you, Saturday, September 20,**
19 **at 6:11 P.M., do you see that?**
20 A. Yes.
21 **Q. It says, "Alastair and Neil are**
22 **working on getting it ringfenced/moved if**
23 **needed." Is that Alastair -- is "Alastair"**
24 **Alastair Blackwell?**
25 A. I would presume so since he is CC'd

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 above.
3 **Q. Okay. Who is Neil?**
4 A. I would assume that Neil is Neil
5 Ullman who is CC'd above.
6 **Q. Do you know why they were working on**
7 **getting it ringfenced or moved?**
8 A. I do not.
9 **Q. Beth Rudofker says she's working on --**
10 **withdrawn -- that Mr. Blackwell and Mr. Ullman**
11 **are working on getting it ringfenced/moved, if**
12 **needed, you see that?**
13 A. Yes.
14 **Q. Does that suggest to you that there's**
15 **some uncertainty as to whether or not these**
16 **assets will be moved to BarCap?**
17 A. It doesn't suggest anything to me in
18 particular.
19 **Q. Turning again to the OCC margin just**
20 **briefly, do you recall any discussion with**
21 **anyone at any time about the inclusion of margin**
22 **at the OCC or any other exchanges in the**
23 **transaction with Barclays?**
24 A. I don't recall.
25 **Q. To the best of your knowledge, does**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **the APA that you signed on the 16th transfer**
3 **that margin to Barclays?**
4 A. I don't really have knowledge on that.
5 I'd have to go back and do the same analysis. I
6 don't have any recollection. It just would be
7 my reading of the contract.
8 **Q. And what is your reading of the**
9 **contract, if you have one, on that question of**
10 **whether or not --**
11 A. I don't have one.
12 **Q. If I were to put the APA and the**
13 **definition of "purchased assets" in front of**
14 **you, would you be able to give me a reading?**
15 A. I don't know.
16 MR. STERN: Neil, I just ask the
17 source of Exhibit 48.
18 MR. OXFORD: Whose file it came from?
19 MR. STERN: Well, as in who produced
20 it.
21 MR. OXFORD: I don't believe it's been
22 produced.
23 MR. STERN: What's the source? Is
24 this from Lehman's files?
25 MR. OXFORD: I think it's from an Iron

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 Mountain file.
3 MR. STERN: Well, I just want to point
4 out that you have marked a Lehman document
5 that arguably contains communications that
6 would be considered attorney work product
7 and potentially attorney-client
8 communications, and I'll state again our
9 position that, to the extent that either LBI
10 or LBHI asks about or discloses partially
11 such communications, it's our position that
12 constitutes a subject matter waiver.
13 MR. OXFORD: Your position is noted,
14 Jack. I don't agree that we have waived
15 anything by showing this document to this
16 witness, but we can address the matter if it
17 becomes an issue later on.
18 MR. GAFFEY: I should say Lehman
19 Brothers Holdings, Inc. does not waive any
20 privilege.
21 MR. STERN: Well, Lehman Brothers
22 Holdings may have through your questions.
23 That's not something we can resolve sitting
24 here today, but I just want to state our
25 position on the record.

(Exhibit 49, a document bearing Bates Nos. BCI-CG00024954 through 24972, marked for identification, as of this date.)

Q. Mr. Berkenfeld, you have in front of you what I have marked as Exhibit 49, which is a document produced to me by Barclays bearing the Bates range BCI-CG00024954 through 24973.

If you would take a moment to read that document and let me know when you're done, please.

A. Okay.

MR. OXFORD: I have marked a different version that's a black-lined version, which is why I marked it again.

A. Okay.

Q. I'd like to direct your attention to page number 4 of the black line, which has the Bates range 24967.

Mr. Gaffey, as I mentioned, marked a clean running version of this document and you said that you had no recollection of seeing it before. Do you have any recollection of seeing the black lined version of this?

A. I have no specific recollection of any

particular draft of any of the clarification letters.

Q. Understood. Just one question on this, and I presume that you don't have any recollection of subparagraph 2 of clause 8 that reads, "In connection therewith, Purchaser shall receive cash, cash equivalence, bank deposits or similar cash items maintained (A) by or on behalf of LBI pursuant to Rule 15c3 of the Securities Exchange Act of 1934 or otherwise, or by or on behalf of any clearing agency or clearing organization to collateralize, guarantee, secure (whether as margin, guarantee fund, deposit or in any other form) the obligations of LBI or any other person in an account maintained by or on behalf of LBI."

MR. STERN: The question is, "I presume you don't have any recollection of that subparagraph"?

Q. The question is, is my presumption correct? Does this refresh your recollection that you have seen this draft?

A. It does not.

Q. Do you have any idea why this language

was inserted in this draft?

A. I do not.

Q. Did you have any discussions with anyone at any time about the insertion of this language into this draft?

A. Not that I recall.

MR. STERN: Let me just note that that calls for privileged communications.

MR. OXFORD: It calls for a yes --

MR. STERN: No, it calls for privileged communications so I'm just noting for the record that you're asking questions about privilege communications.

MR. OXFORD: I disagree with your interpretation, but we can have that argument at a later stage.

A. Not that I recall.

(Exhibit 50, a document bearing Bates Nos. BCI-CG00027138 through 27148, marked for identification, as of this date.)

Q. You have in front of you, Mr. Berkenfeld, Exhibit 50, which is -- I think actually Bob did previously mark -- BCI-CG0027138 through 148, and it's a version of

the clarification letter that was circulated by -- is circulated by Michael Mazzuchi to Isaac Montal with a list of CCs at 6:03 A.M. on Monday, September 22.

This is approximately two hours before you signed the clarification letter; is that right?

A. I don't recall when I signed the clarification letter precisely.

Q. Do you recall whether it was sometime early in the morning before the markets closed -- before the markets opened, rather, on Monday, the 22nd?

A. I believe that the latest I would have signed it would have been at closing. I don't remember the exact time of closing.

Q. If you turn to page 4 and to the same paragraph, "Transfer of Customer Accounts," do you see paragraph 8?

A. Yes.

Q. And do you see that the language about margin that I read into the record from the previous draft, Exhibit 49, has been deleted?

A. I'm not comparing this word-for-word

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 of the last one -- the last one I read, excuse
3 me.
4 **Q. Would you have Exhibit 49 in front of**
5 **you and just put them side-by-side, please.**
6 A. Yes.
7 **Q. And do you see that the language about**
8 **margin has been deleted from the 6:03 A.M.**
9 **draft?**
10 MR. STERN: Which specific phrase are
11 you referring to?
12 MR. OXFORD: I'm referring to the
13 deletion of the language "or buy or on
14 behalf of any clearing agency or clearing
15 organization to collateralize, guarantee,"
16 et cetera.
17 MR. STERN: You're looking at the
18 redline of Exhibit 49?
19 MR. OXFORD: Yes. I'm looking at the
20 language that was redlined in Exhibit 49 and
21 does not appear in Exhibit 50. It's a
22 clumsy way to do it, but I don't have a
23 redline, unfortunately.
24 MR. STERN: And again, for my benefit,
25 the precise phrase you're saying was

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 deleted?
3 MR. OXFORD: Is the language that
4 appears five lines up in the draft that I
5 marked as Exhibit 49: "Or by or on behalf
6 of any clearing agency or clearing
7 organization to collateralize, guarantee,
8 secure (whether as margin, guarantee fund,
9 deposit, or in any other form) the
10 obligations of LBI or any other person in an
11 account maintained by or on behalf of LBI."
12 MR. STERN: Okay. Thanks.
13 **Q. I apologize for the painful**
14 **questioning, Mr. Berkenfeld, but you see that**
15 **the language has been deleted between the draft**
16 **that's marked as 49 and the draft that's marked**
17 **as Exhibit 50?**
18 A. Yes.
19 **Q. Staying with Exhibit 50, I'll direct**
20 **you to paragraph 1(a)(ii), which appears on the**
21 **page 1 and goes over to page 2 of the document.**
22 A. Yes.
23 **Q. And do you see that that clause reads,**
24 **"with respect to clauses (a), (d) and (e) of the**
25 **definition of 'Purchased Assets' in the Original**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **Agreement, instead of items referred to in such**
3 **clauses," and then it goes on to say, "(A) the**
4 **securities owned by LBI." Mr. Gaffey asked you**
5 **about that language.**
6 A. Yes.
7 **Q. I'm just interested in the language at**
8 **over the page at subsection C. Purchased assets**
9 **shall include "exchanged-traded derivatives and**
10 **collateralized short-term agreements." Do you**
11 **see that phrase?**
12 A. Yes.
13 **Q. Do you understand what the business**
14 **deal was that is reflected in that agreement?**
15 A. I do not.
16 **Q. If you could just keep that version,**
17 **number 50, in front of you, there's one more**
18 **question and then I'll move on. Could you have**
19 **in front of you what's previously been marked as**
20 **Exhibit 25, please?**
21 MR. STERN: The final clarification
22 letter?
23 MR. OXFORD: The final version of the
24 clarification letter, Jack.
25 A. Yes.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. If you could turn to page 2 and read**
3 **just to yourself for the moment subparagraph C**
4 **that we just read in Exhibit 50.**
5 A. Yes.
6 **Q. And do you see between the draft**
7 **that's marked as Exhibit 50 and the final**
8 **version that you signed that was marked as**
9 **Exhibit 25, you'll see a parenthetical has been**
10 **added?**
11 A. Yes.
12 **Q. You see that instead of reading in**
13 **Exhibit 50 "exchange-traded derivatives and**
14 **collateralized short-term agreements," it now**
15 **reads, "exchange-traded derivatives (and any**
16 **property that may be held to secure obligations**
17 **under such derivatives) and collateralized**
18 **short-term agreements."**
19 A. I see that, yes.
20 **Q. Do you see that change? Do you have**
21 **any understanding of the business deal that is**
22 **reflected in that change?**
23 A. I do not.
24 **Q. I think I'm done with the**
25 **clarification letter, I'm sure you'll be pleased**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **to know.**
3 **Have you ever heard of a document**
4 **called a Transfer and Assumption Agreement, Mr.**
5 **Berkenfeld, that was signed between the OCC,**
6 **Barclays and the SIPA Trustee in connection with**
7 **this transaction?**
8 A. I was very briefly shown that
9 document, I believe, in preparation for
10 deposition, but I had not seen it before then
11 that I could recall.
12 **Q. I'm just going to mark it and then**
13 **move on.**
14 **(Exhibit 51, Transfer and Assumption**
15 **Agreement, marked for identification, as of**
16 **this date.)**
17 **Q. Okay. Mr. Berkenfeld, I have marked**
18 **as Exhibit 51 what I'll represent to you is the**
19 **final version of the Transfer and Assumption**
20 **Agreement between Barclays Capital, the OCC and**
21 **the SIPA Trustee. Is this a document that you**
22 **saw in preparation for your deposition?**
23 A. I believe it is.
24 **Q. Have you seen it at any time prior to**
25 **that?**

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2 A. Not that I recall.
3 **Q. Do you recall discussing this document**
4 **with anybody prior to your deposition**
5 **preparation?**
6 A. I do not.
7 **Q. That's all I have on that document.**
8 **Can you tell me, please, what your**
9 **role was, if any, with respect to the**
10 **involvement of DTC in the closing of the**
11 **transaction between Lehman and Barclays?**
12 MR. STERN: Objection to the form.
13 A. As I testified earlier, I had some
14 involvement with DTC after the closing of the
15 transaction around the issue of client accounts,
16 customer accounts in transferring positions in
17 that, but prior to the closing, I don't recall
18 any involvement with DTC and DTC -- well, any
19 involvement with the DTC. I don't recall any.
20 **Q. Did you at any point come to**
21 **understand that DTC wanted Barclays to step into**
22 **Lehman's shoes at the DTC?**
23 A. I have a vague recollection of that.
24 **Q. Can you tell me what you recall?**
25 A. Not that much more than that, other

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2 than just conversation that had come up that
3 that's what -- and it might have been after --
4 it might have been post-closing conversation,
5 too. It might have been around the issue of
6 customer accounts.
7 **Q. To the best of your recollection, you**
8 **don't recall having any discussions with anyone**
9 **about DTC over the weekend of September 20 and**
10 **September 21?**
11 A. I do not recall that.
12 **Q. Do you recall discussing with anybody**
13 **a letter agreement between DTC, the Trustee, and**
14 **Barclays?**
15 A. I don't recall that.
16 **Q. I'm just going mark it and we can move**
17 **on.**
18 **(Exhibit 52, a letter dated September**
19 **22, 2008, from DTC, marked for**
20 **identification, as of this date.)**
21 A. Yes.
22 **Q. Did you ever see that letter before?**
23 A. Not that I recall.
24 **Q. Do you ever recall discussing the**
25 **subject matter of this letter with anybody?**

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2 A. I do not.
3 **Q. Did you understand that there was a**
4 **different team negotiating this letter than was**
5 **negotiating the clarification letter that you**
6 **signed?**
7 A. A different team from?
8 **Q. A different team of personnel,**
9 **different lawyers?**
10 A. I don't know. There could have been
11 some overlap on who was involved in it. I don't
12 know --
13 **Q. You just have no idea?**
14 A. I don't know.
15 (Exhibit 53, a document bearing Bates
16 Nos. BCI-EX-(S)-00007181, marked for
17 identification, as of this date.)
18 **Q. Mr. Berkenfeld, I have put in front of**
19 **you a one-page document produced to me by**
20 **Barclays, Bates No. BCI-EX-(S)00007181. If you**
21 **could take a look at it and let me know when**
22 **you've had a chance to read through it.**
23 **(Document review.)**
24 A. I've read through it, yes.
25 **Q. Who is Scott Willoughby?**

A. Scott Willoughby is a -- he was an attorney at Lehman Brothers who ran our Capital Markets Contracts Group, or previously known as Transaction Execution Group. So this was a documentation effort, and he transferred over to Barclays and left the Legal Department there and I believe he's working in the Prime Brokerage Department, I believe.

Q. And Marlisa -- I'm going to murder this -- Vinciguerra?

A. Exactly. She was a lawyer at Lehman Brothers that was head of the Equities Division legal effort, legal coverage effort, the general counsel of Equities, and she is now employed by Barclays and is an attorney for Barclays.

MR. STERN: I just want to note for the record this may be a document that we produced inadvertently. It may be privileged communication. I'll just need to consult with one of my partners on whether we produced this inadvertently and, if so, whether it's something we need to claw back.

MR. OXFORD: Okay.

MR. STERN: I'll look into that.

MR. OXFORD: Once you've done that, Jack, we can have the appropriate discussion.

MR. STERN: Right.

Q. But, meantime, I'll note for the record, this is an e-mail sent to you, Mr. Berkenfeld, by Mr. Willoughby on Tuesday, September 30, 2008, at 3:49 in the afternoon. I guess that's Greenwich Mean Time, so that's 11:49 Eastern Standard Time.

Mr. Willoughby writes to you, "Steven, I have spoken to Paolo Tonucci and Alan Kaplan, an attorney at BarCap, regarding the transfer of OCC positions and required margin from LEH's account at JPMorgan to BarCap. The main open question from Paolo's perspective is whether BarCap is entitled only to the minimum margin necessary to carry the position and as of when that amount is calculated."

He goes on, "He feels that we will need to discuss it with an 'expert' on the APA. Please let me know if there's someone I should liaise with in Legal with respect to this issue. Paolo is waiting on data from Vincent Chiaravino

from BarCap, so we don't have adequate specifics yet. Thanks."

MR. STERN: What's the question?

Q. Do you recall receiving this e-mail?

A. I don't recall.

Q. Do you know why Mr. Willoughby would e-mail this question to you?

A. I'm speculating, but he had reported to me when he was at Lehman and was looking for guidance on who might have been closest to these issues that he can get some interpretation from.

Q. Do you agree with Mr. Willoughby's interpretation of what Mr. Tonucci says, that it's an open question whether BarCap is entitled --

A. I have --

Q. -- to the minimum margin?

A. I have no view on that. I'm sorry.

Q. Do you think Mr. Willoughby is asking you because he considers you an expert on the APA?

A. No, I think --

MR. STERN: Objection. Objection to the form.

A. I think he's asking me to direct him to an expert. That's exactly what it says. Otherwise, he just would have asked me the question.

Q. You don't recall discussing this e-mail with anybody?

A. I don't recall discussing it.

Q. You don't know what happened to his request?

A. I don't know what happened to his request.

Q. As best you know, the trail ended cold?

MR. STERN: Objection to the form.

A. No, I just don't recall. I would imagine we had a conversation, but I don't recall what it was.

(Exhibit 54, a document bearing Bates Nos. BCI-EX-(S)-00007197 through 7201, marked for identification, as of this date.)

Q. This is the last document I have, Mr. Berkenfeld, marked Exhibit 54, Bates range BCI-EX-(S)-00007197 through 7201.

Could you take a look at it and let me

know when you've had a chance to review it, please.

(Document review.)

A. Yes.

Q. Do you recall seeing this document before?

A. I recall the base document. I don't precisely recall the handwritten markup to the document, but I do recall sending this document over to David for his comments.

Q. Was the base document, as you describe it, which appears to be a one-page section of prose entitled "General Information Regarding the Lehman Transaction" followed by three pages of a chart? That's the base document you referred to?

A. Yes.

Q. Was the base document something you created?

A. It was not.

Q. Was it something that was created for you?

A. It was not created for me at my request. It was -- it wasn't created -- I

didn't request it. It was created by someone in Barclays Legal, I don't recall who, who then circulated it for comments. It was meant to be a relatively simple and summary version of what was transferred in the transaction.

Q. Okay. For what purpose was it sent to you, if you know?

A. It was sent to me for my comments.

Q. And did you have comments on it?

A. Yes, I did.

Q. Did you review it?

A. Yes.

Q. Did you mark it up?

A. Yes.

Q. These are not your markups, correct?

A. No, they are not.

Q. These appear to be Mr. Murgio's markup, right?

A. They appear to be that way.

Q. Did you mark it up by hand or in some electronic form?

A. By hand.

Q. And what did you do with it when you marked it up?

A. I sent it back to whoever originally prepared it.

Q. To Barclays' attorney, whose name you don't recall?

A. It's not the name I don't recall. I just don't remember who was doing the document back then. It's not that I have forgotten their names. I just don't remember who was the author of it. And when I did it, since I marked it up by hand, I would have faxed it back to someone, but I didn't keep the fax cover page. So I didn't do it electronically in an e-mail, as far as I know.

I just don't remember who was the original author. I know that I marked it up. I don't recall whether David's markup was of the original document or the document after I had already submitted my modifications to it.

Q. That's my next two questions. Do you recall discussing this document with anyone?

A. Not specifically, other than saying to someone my markup's coming over.

Q. Did you forward it to Mr. Murgio for his comments?

A. Yes.

Q. Why did you do that?

A. Because he was our -- Lehman's counsel on the transaction, and I thought a document that would be used as a summary of the transaction for internal purposes would benefit from an outside counsel's review of it and outside counsel who have been involved in the preparation of the basic transaction documents.

Q. It appears from the e-mail that you are sending it to yourself at your home account, is that an accurate statement?

A. Yes.

Q. Do you remember why you sent it to yourself at home?

A. This is GMT.

Q. That's what it says.

A. So it would have been at -- so it would have been at the middle in the afternoon, right?

Q. Yes, 2:34 Eastern.

A. Yeah, I don't know why I would have sent it to my home at that time. I can't explain, unless I wasn't in the office that day.

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2 MR. OXFORD: I don't have any further
3 questions for you at this time, Mr.
4 Berkenfeld.
5 EXAMINATION BY
6 MS. TAGGART:
7 **Q. Hi again. I'm Erica Taggart and I**
8 **represent the Committee. I want to ask you a**
9 **couple questions about the definition of**
10 **"purchased assets" and it might help if you get**
11 **in front of you Exhibit 1, which is the APA.**
12 A. Exhibit 1 or Exhibit 11?
13 **Q. I think it's originally Exhibit 1.**
14 **Then the schedule at Exhibit 19 and**
15 **the clarification letter at Exhibit 25.**
16 **So on the APA, which is Exhibit 1, in**
17 **particular, in the definition of "purchased**
18 **assets," I think you answered a lot of questions**
19 **about Section D, which is about the approximate**
20 **$70 billion of government securities, commercial**
21 **paper, et cetera, and I think that you said that**
22 **that valuation was an estimate that was**
23 **reflected on the schedule at Exhibit 19, but**
24 **that Exhibit 19 was merely guidance and it**
25 **didn't define the assets or the value that would**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **be transferred; is that right?**
3 MR. STERN: Objection to the form.
4 A. Substantially correct, yes.
5 **Q. And I think you also said there was --**
6 **it was an estimate of the value of assets that**
7 **would be transferred as guidance for what was**
8 **meant in the APA when it referred to purchased**
9 **assets; does that sound about right?**
10 MR. STERN: Objection to the form.
11 A. That one I didn't follow as carefully.
12 **Q. Well, let me ask this: At the time**
13 **that you signed the APA, was it your**
14 **understanding that there had been any selection**
15 **of assets that were going to be transferred?**
16 MR. STERN: Objection to the form.
17 A. It was my understanding at the time of
18 signing the APA that there was a sense of the
19 bucket of assets would be transferred, the
20 estimated amount and estimated allocation. I
21 don't know if anyone had figured out specific
22 Cusip numbers at that point.
23 **Q. What was your understanding of what**
24 **was the sense of the bucket of assets that would**
25 **be transferred when you signed the APA?**

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2 A. It was along the lines as set forth on
3 Exhibit 19. Just by way of example, 40 billion
4 of government securities, 1.1 of commercial
5 paper.
6 **Q. Well, was it your understanding that**
7 **the sense was that the value of those assets**
8 **would be as described in the value, or that**
9 **there were assets that were actually picked out**
10 **that at that time had that value?**
11 MR. STERN: Objection to the form.
12 Can we have that reread?
13 (Record read.)
14 A. My sense was that it wasn't
15 necessarily that precise; that someone could
16 create a specific schedule by Cusip and by
17 specific attributable value. I think that there
18 was a good idea of the assets that would
19 comprise the 70 billion, and that there was
20 probably more specificity in some of these
21 categories than others, but I didn't get the
22 sense that anyone was in a position at that
23 point to say here are the specific securities.
24 **Q. Where did your sense come from?**
25 A. Came from the discussions around the

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 table.
3 **Q. Do you remember what anyone said in**
4 **particular about the bucket of assets that had**
5 **been considered at that time?**
6 MR. STERN: Objection to the form.
7 A. I don't remember anything specific.
8 **Q. And do you remember anything specific**
9 **that was said about the value of the assets**
10 **beyond what we see in just Exhibit 19?**
11 A. No, I don't remember anything
12 specific.
13 **Q. Was there a determination when you**
14 **signed the APA that the assets would be roughly**
15 **equal to the liabilities that Barclays was**
16 **assuming?**
17 MR. STERN: Objection to the form.
18 A. When I signed the Asset Purchase
19 Agreement, the understanding was that there
20 would be purchased assets, transferred assets
21 that had a book value as of that date of
22 approximately 70 million, and that there would
23 be liabilities transferred, assumed liabilities,
24 of approximately -- I'm just trying to remember
25 if I put 69 or 68 -- 69 billion, and that there

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2 would be other liabilities that were assumed by
3 Barclays in the transaction. And of course
4 there were other -- there was other
5 consideration that was being paid.
6 **Q. When was the first time that you think**
7 **that assets that were going to be transferred**
8 **were determined?**
9 A. The specific assets that were going to
10 be transferred?
11 **Q. Yes.**
12 A. I don't know.
13 **Q. Do you think that that happened before**
14 **or after the September 19 court sale hearing?**
15 A. Given everything that happened over
16 the weekend, the specific assets I would think
17 might have happened afterwards, but I don't
18 know.
19 **Q. We talked about how you learned at the**
20 **court hearing how the value of assets that would**
21 **be transferred had gone down between the signing**
22 **of the APA and the court hearing, right?**
23 A. I said that that's the first time that
24 I recall knowing that the aggregate value would
25 go down. I think you said the value of the

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2 assets had gone down. I didn't know if the
3 value of the assets had gone down. It was along
4 the lines of a question that had been asked
5 before. You asked the question as though
6 valuation had come down.
7 **Q. What was your understanding of what**
8 **went down from a 70-something billion figure to**
9 **a 40-something billion figure between the**
10 **signing of the APA and the court hearing?**
11 MR. STERN: Objection to the form.
12 A. It was not my understanding that a
13 bucket of assets that on Tuesday were believed
14 to be worth 70 billion were now worth 42 billion
15 or so, whatever the number was. So I think that
16 answers your question.
17 I don't think that there was a loss of
18 value of 28 billion of the same securities. I
19 think that the securities that were being
20 transferred over were a different bucket. Some
21 of it might have been around value. Some of it
22 might have been around what was in the bucket.
23 **Q. What's your understanding based on**
24 **that there was a bucket of securities that had**
25 **changed between the Tuesday signing of the APA**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **and the Friday court hearing?**
3 A. My understanding was based on a number
4 of things, including difference in the value,
5 and not any information or knowledge of any
6 reassessment of the value or a mark of that --
7 of all of those positions.
8 **Q. And between the time that you signed**
9 **the APA and the court hearing, did you discuss**
10 **with anyone about what was the current bucket of**
11 **assets that were going to be transferred in the**
12 **agreement that you signed?**
13 A. I don't recall a conversation along
14 those lines.
15 **Q. I think you also mentioned -- there**
16 **was a lot of discussion about how Exhibit 19 had**
17 **guidance but was not actually part of the APA,**
18 **right?**
19 A. Correct.
20 **Q. And that it was the APA itself that**
21 **was going to govern what was being transferred**
22 **as far as the assets, right?**
23 A. As of the date of the signing of the
24 APA, yes.
25 **Q. What criteria do you believe is in the**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **APA about what assets were agreed to be**
3 **transferred?**
4 MR. STERN: Objection to the form.
5 A. I haven't gone back and read the whole
6 agreement, but as far as I know, it's the
7 definition of "purchased assets" in this
8 particular case, subparagraph D.
9 **Q. Well, do you believe that there was an**
10 **agreement that the assets that would be**
11 **transferred, whatever they were, would**
12 **approximate a value of $70 billion?**
13 A. You want to repeat the question?
14 I can read it off the screen.
15 (LiveNote review.)
16 A. My understanding was that there was an
17 agreement that the purchased assets would have
18 an estimated value at the time of the Asset
19 Purchase Agreement of $70 billion.
20 **Q. So you believe when you were signing**
21 **the APA Lehman was agreeing to transfer assets**
22 **that had a value as of the date of the APA of**
23 **$70 billion?**
24 A. I believe that that was the estimated
25 value of the assets that were going to be

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2 transferred over, yes.
3 **Q. And you believed that was -- that**
4 **actually was the estimated value, but I kind of**
5 **want to know what was agreed to be binding.**
6 **Let me ask it this way: I think**
7 **you're saying there weren't ever schedules or**
8 **there weren't schedules for the APA that said**
9 **exactly what securities were going to be**
10 **transferred, right?**
11 A. No, there were not.
12 **Q. But was there agreement that whatever**
13 **those assets that would be transferred would be**
14 **valued at $70 billion as of the value -- sorry**
15 **as of the date that you signed the APA?**
16 MR. STERN: Objection to the form.
17 I just think, in fairness to the
18 witness, since you're asking him about terms
19 of APA, he should be allowed to refer to the
20 APA.
21 MS. TAGGART: He may refer to the APA.
22 A. I'm sorry, the problem I have with
23 your question is it's a little unclear. So let
24 me restate it. I think the understanding was
25 that there would be assets transferred that had

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 an estimated book value as of the date of the
3 APA of 70 billion. I think you may have asked
4 the question was there an agreement that $70
5 billion worth of assets were transferred -- I'm
6 adding the words "at closing," you didn't say
7 that, and that's not correct.
8 **Q. Right.**
9 A. It was that there was a bucket of
10 assets that were going to be transferred that,
11 as of the date of the Asset Purchase Agreement,
12 had a value of approximately 70 billion. What
13 their value might have been whenever the closing
14 occurred, that was not something that the APA
15 addressed.
16 **Q. So the APA you think does not specify**
17 **what the value of the assets has to be upon**
18 **closing, right?**
19 A. I don't believe it says that there has
20 to be -- that this bucket of assets has to
21 retain its value at 70 billion.
22 **Q. And it's your understanding the APA**
23 **also does not say what particular assets need to**
24 **be transferred by closing, right?**
25 A. The APA does not specify the specific

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 assets to be transferred.
3 **Q. So when you signed it, do you believe**
4 **that there is any limitation in the APA that**
5 **would govern exactly what assets are going to be**
6 **transferred?**
7 A. Any limitation?
8 MR. STERN: Objection to the form.
9 A. Yes, I think there's some limitations
10 on the assets that would be transferred. As I
11 mentioned before, I don't think there was the
12 ability to transfer 70 billion worth of
13 corporate equity or 70 billion worth of
14 derivatives. I think there was a sense that
15 this bucket of 70 billion would approximate the
16 allocations that were set forth on the schedule.
17 By the way, I should just note we
18 talked about 70 in the schedules. It's 72.65.
19 We went through that before. But we'll just for
20 ease of reference make it 70 billion in this
21 subparagraph D.
22 **Q. Yeah, we'll just focus on the**
23 **subparagraph D, which is the 70 billion. And I**
24 **think that you just said that you do believe as**
25 **part of the APA that there would be an**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **approximate allocation that was the same as**
3 **Exhibit 19?**
4 MR. STERN: Objection to the form.
5 A. It was my understanding that there
6 would be a transfer of assets that approximated
7 the allocations on Exhibit 19.
8 **Q. Are there any other criteria that you**
9 **believe were contractual criteria that were**
10 **agreed to in the APA as to what assets would be**
11 **transferred from Lehman to Barclays?**
12 A. When you're referring to assets, you
13 mean assets of the type in D? Not all -- not
14 furniture and equipment and all the other
15 assets, you mean these long positions as
16 defined?
17 **Q. Yes.**
18 A. I have not read through the agreement
19 again. At this point in time, I'm not aware of
20 any other provision, but there could be
21 something in here in the reps and warranties or
22 some other provision that might also be
23 relevant.
24 **Q. Now, for the clarification letter that**
25 **you ultimate signed, you know that there were**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **attached schedules, a Schedule A and B, that is**
3 **referred to in Section 1(ii), right?**
4 A. So I understand, yes.
5 **Q. And I believe you testified you never**
6 **saw those schedules?**
7 A. I don't recall seeing the schedules.
8 **Q. Do you know when they were prepared?**
9 A. I don't know when they were prepared
10 and I did not testify I never saw them. I just
11 don't recall whether I saw them.
12 **Q. Do you know whether they existed**
13 **before you signed the clarification letter?**
14 A. I do not recall.
15 **Q. Did you ever see any schedule that**
16 **actually listed assets that would be**
17 **transferred?**
18 A. I think in one of the exhibits earlier
19 today I saw -- it's probably this big fat one
20 that showed me a bunch of securities. I don't
21 recall whether I had seen lists earlier.
22 **Q. Do you know whether the list, the**
23 **first time there was any list of assets that**
24 **would be transferred, do you know whether that**
25 **was in existence before or after the court**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **hearing on September 19?**
3 A. I don't know.
4 **Q. Do you know whether there was any**
5 **selection of any assets that were being valued**
6 **at the time of the court hearing on September**
7 **19?**
8 MR. STERN: Objection to the form.
9 A. I don't know.
10 **Q. The final deal is reflected with the**
11 **clarification letter. Do you have an**
12 **understanding of what was the value of the**
13 **assets that actually were transferred from**
14 **Lehman to Barclays?**
15 A. I don't think I do have direct
16 knowledge of that.
17 **Q. Did you ask before you signed the**
18 **clarification letter what were the value of the**
19 **assets that Lehman was transferring?**
20 A. I do not recall asking that question.
21 I recall the statement made in court by Weil
22 Gotshal about the value of the assets were being
23 transferred. I do not know the basis for the
24 statement made by Weil, and I do know that I had
25 the confirmation from the attorneys at Weil that

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 this reflected the agreement that had been
3 reached.
4 **Q. Do you know whether the value of the**
5 **assets that were transferred ultimately, as**
6 **reflected in the clarification letter and**
7 **schedules, was more or less than what was told**
8 **to the court on the 19th?**
9 A. I have no idea.
10 **Q. Do you know if ultimately the assets**
11 **that were transferred from Lehman had a value**
12 **that was equal to the liabilities that were**
13 **assumed by Barclays in the final deal?**
14 A. Let me just read through the question
15 again.
16 I do not know.
17 **Q. Did you ask anyone whether anything**
18 **about the relationship between the assets that**
19 **would be transferred and the liabilities assumed**
20 **before you agreed to sign the clarification**
21 **letter?**
22 MR. STERN: Objection to the form.
23 A. Not that I recall.
24 **Q. Do you remember asking at any time**
25 **after signing the APA whether the assets that**

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **were contemplated would be transferred to**
3 **Barclays were -- what the relationship was**
4 **between that value and the value of the**
5 **liabilities that Barclays was assuming?**
6 A. I don't recall a conversation with
7 anyone specifically about how the assets
8 measured against the liabilities after the
9 signing of the APA.
10 **Q. And when you signed the clarification**
11 **letter, it's your recollection you never asked**
12 **whether the assets were matching the**
13 **liabilities?**
14 A. I don't recall any conversation about
15 a matched book or whether the assets matched
16 liabilities.
17 **Q. And is it right you've never seen any**
18 **valuation of the assets that were actually**
19 **transferred?**
20 A. I don't recall ever seeing a valuation
21 of the assets that were actually transferred.
22 **Q. Do you know whether there was any**
23 **valuation that happened of the assets being**
24 **transferred following the September 19 hearing?**
25 A. I don't know.

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 **Q. And do you know whether the -- I think**
3 **I asked this, but I'll make sure: Do you know**
4 **whether the assets that were ultimately**
5 **transferred had a value that was greater or less**
6 **than what was represented to the court on the**
7 **19th?**
8 A. I don't know.
9 **Q. Do you know who would know that?**
10 A. I think that Paolo Tonucci and Martin
11 Kelly would be a good place to start. Weil
12 Gotshal may know that.
13 **Q. Do you have any reason to think that**
14 **the value of assets would have changed between a**
15 **Friday hearing and the signing of the**
16 **clarification letter?**
17 MR. STERN: Objection to the form.
18 A. Do I have any reason to think that the
19 value would have changed? Well, there were
20 quite a few discussions over that weekend around
21 the financing and JPMorgan, and so would I have
22 a reason to think there might have been a change
23 in the value? I'd have a reason to think there
24 might have been. I have no knowledge whether
25 there was and how all of those discussions over

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2 the weekend to get to closing actually affected
3 the value of the securities, but I would have
4 reason to think that there may have been some
5 change.
6 **Q. Was there any factors that would have**
7 **changed the market value of an asset between the**
8 **closing of the market on the end of the day on**
9 **Friday and before the market opened in the**
10 **morning of Monday?**
11 A. The market value of the assets? Yeah,
12 I think there probably were some factors,
13 including that the closing of the deal happened
14 before the market opened in New York but not
15 before the market opened in Asia and Europe.
16 So I don't know -- and there may have
17 been other events that happened over the
18 weekend. There were other events that were
19 happening over the weekend politically from a
20 regulatory standpoint that also might have
21 affected the value of things, like U.S.
22 treasuries.
23 **Q. Did Lehman have a pattern and practice**
24 **of marking the value of securities on a daily**
25 **basis when the market was opened?**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 A. Yes, Lehman had that practice.
3 **Q. And did it have any practice of**
4 **changing those marks when the market was closed**
5 **over the weekend?**
6 A. I am not familiar enough to know what
7 the full practice of our marking of our books
8 and records to know the timing of when positions
9 were marked and whether positions were revised
10 over the weekend. I don't know.
11 I would comment that our normal
12 practices did not contemplate the volatility
13 that was in the market during this period of
14 time.
15 **Q. I think you also said when Mr. Gaffey**
16 **was questioning that you had no intention when**
17 **you signed the APA that Barclays was receiving**
18 **an embedded gain in the assets?**
19 MR. STERN: Objection.
20 **Q. Is that correct?**
21 MR. STERN: Objection to the form.
22 A. I don't recall exactly what I said,
23 but I said that it was not my understanding with
24 everyone sitting around the table that there was
25 a common held view that there were assets being

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 transferred to Barclays to create some sort
3 of -- at a discount to create some sort of
4 embedded gain.
5 **Q. Is the same true when you signed the**
6 **clarification letter?**
7 A. As far as I know, when the
8 clarification letter was signed, the -- all of
9 the people around the room, all of the attorneys
10 involved did not have an understanding that
11 there was an intent to transfer a discount, an
12 embedded gain to Barclays.
13 **Q. And you, in particular, as the person**
14 **who signs the clarification letter, did you**
15 **believe that there was any intent to transfer a**
16 **discount for the assets that were going to**
17 **Barclays?**
18 MR. STERN: Objection to the form.
19 A. I did not believe that there was any
20 intent to transfer securities at a discount to
21 create a gain for Barclays.
22 MS. TAGGART: That's all the questions
23 I have. Thank you.
24 THE WITNESS: Thank you.
25 (Discussion off the record.)

1 HIGHLY CONFIDENTIAL - S. BERKENFELD
2 EXAMINATION BY
3 MR. GAFFEY:
4 **Q. Mr. Berkenfeld, Exhibit 50 reflects**
5 **that there were -- there was still drafting**
6 **going on with respect to the clarification**
7 **letter at 6:03 A.M. on Monday, September 22. Do**
8 **you see that? Just based on the date of the**
9 **e-mail.**
10 MR. STERN: I'll object to the form.
11 That's a statement. Are you asking him if
12 he agrees?
13 MR. GAFFEY: Yes.
14 MR. STERN: That there was still
15 drafting going on?
16 A. I don't know enough about what form
17 Michael sent over to this group, which was a
18 group that was a different distribution group,
19 included SIPAC and Hughes Hubbard, so I don't
20 know if he was sending him the latest version of
21 the agreement at the time or if he was
22 sending -- it said current version, but it could
23 have been a draft that was hours old. I don't
24 know.
25 **Q. Does the suggestion of this document**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **that there was a working draft in existence at**
3 **6:03 A.M. on Monday morning refresh your**
4 **recollection as to whether you signed the**
5 **clarification letter on Sunday night or Monday**
6 **at the closing?**
7 A. I don't recall specifically, but if
8 you ask for my best recollection, it would have
9 been at about the time of the closing.
10 **Q. And Ms. Taggart asked you about**
11 **Lehman's pattern and practice with respect to**
12 **marking securities. Do you know whether all**
13 **types of securities were marked every day?**
14 A. I do know that not all types of
15 securities were marked every day. We did not
16 mark our entire book of securities on a daily
17 basis. We owned lots of level 3 securities,
18 esoteric securities, and so we didn't go through
19 a daily process of marking those. Some of those
20 positions would be marked on a monthly or even a
21 quarterly basis.
22 MR. GAFFEY: I have nothing else.
23 EXAMINATION BY
24 MR. STERN:
25 **Q. You were asked some questions about**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 **whether --**
3 A. Are you allowed to ask me questions?
4 **Q. I am, sir.**
5 **You were asked some questions about**
6 **whether there was an intent to transfer an**
7 **embedded gain and an intent to transfer**
8 **securities at a discount, and I believe, correct**
9 **me if I'm wrong, that you testified that you**
10 **were not aware that all the parties around the**
11 **table had any understanding, any common**
12 **understanding, that the values were such that**
13 **there was a discount or an embedded gain. Can**
14 **you explain what you mean by that?**
15 A. In terms of the security positions, it
16 was my understanding that everyone sitting
17 around the table preparing the agreement, the
18 lawyers for the two parties at the time, were
19 not of the common understanding that part of the
20 transaction was to deliver securities at a
21 discount to their then value to Barclays.
22 **Q. And do you have any knowledge**
23 **concerning whether there was any discussion**
24 **among the business term negotiators concerning**
25 **the possibility of such a discount?**

1 **HIGHLY CONFIDENTIAL - S. BERKENFELD**
2 A. I have no knowledge.
3 MR. STERN: I have nothing else.
4 MR. GAFFEY: Thanks for your time.
5 (Time Noted: 4:57 P.M.)
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19
STEVEN BERKENFELD
20
21 Subscribed and sworn to
before me this day
22 of 2009.
23
24
25

CERTIFICATE

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, Kathy S. Klepfer, a Registered Merit Reporter and Notary Public within and for the State of New York, do hereby certify:

That STEVEN BERKENFELD, the witness whose deposition is herein before set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

I further certify that neither the deponent nor a party requested a review of the transcript pursuant to Federal Rule of Civil Procedure 30(e) before the deposition was completed.

In witness whereof, I have hereunto set my hand this 6th day of August, 2009.

KATHY S. KLEPFER, RPR, RMR, CRR, CLR

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