

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
WASHINGTON MUTUAL, INC., .
et al., . Case No. 08-12229 (MFW)
. (Jointly Administered)
. .
. October 20, 2008
. 2:00 p.m.
Debtors. . (Wilmington)
. .

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
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1 THE CLERK: All rise. You may be seated.

2 THE COURT: Good afternoon.

3 MS. GOLDSTEIN: Thank you very much, Your Honor.

4 And we appreciate your putting up with us, if you will, and
5 deferring the hearing so that we could take some time to at
6 least try to work matters out with the various parties.
7 Unfortunately, we cannot report to you at this time that we
8 are finished. As you are probably aware, the FDIC filed a
9 limited objection seeking a reservation of rights. We have
10 reached agreement to preserve the FDIC's rights to their
11 satisfaction. However, as in many situations one thing leads
12 to another, and JP Morgan needs additional time to assess the
13 affect that that reservation would have on their rights. So
14 even though we are in agreement on a form of stipulation and
15 a proposed order with the FDIC and all the creditor
16 constituencies at this time, and would have been prepared to
17 go forward, it was not possible to contact all the necessary
18 parties at JP Morgan to assess what some of the reservations
19 we agreed to with the FDIC would, what impact that would have
20 on them. If the Court would like, I can still go ahead and
21 provide the background on the stipulation and what we were
22 seeking and speak to where we are with the FDIC. I could
23 also go ahead, Your Honor, and address the one other
24 objection that was filed at around noon today by the
25 Washington Mutual Bank bondholders. We do not believe that

1 those parties have standing in this case. They are creditors
2 of the bank in receivership and not of the bank holding
3 company that is in Chapter 11. And we are prepared to make
4 legal argument on that point today, if the Court would like
5 us to. Or not.

6 THE COURT: Well are you seeking to affect any
7 interest they or any other party may have in the deposits?
8 The accounts?

9 MS. GOLDSTEIN: Your Honor, by reserving the rights
10 of the FDIC, which is the representative of those creditors,
11 the FDIC is the receiver with respect to Washington Mutual
12 Bank, we do not believe that we have impaired any of their
13 rights. They are creditors of the bank. The bank has an
14 authorized, the bank is in receivership. The FDIC is the
15 receiver. And we are prepared, at the time when we come,
16 hopefully come back to you with the agreement of JP Morgan as
17 well, to preserve all of the rights that the FDIC has
18 requested that we preserve.

19 THE COURT: I don't think you answered my question.
20 Are you seeking to affect the rights of any party, at all, in
21 those accounts?

22 MS. GOLDSTEIN: Your Honor, without raising my
23 assertion that the creditors of the bank do not have standing
24 here, I don't think we are seeking to affect any party's
25 rights. But - - and my partner's agreeing with me. But I

1 don't believe by saying that that I'm waiving any right to
2 assert that creditors of the bank would not have standing in
3 this court.

4 THE COURT: Well, whether they have standing or not
5 - -

6 MS. GOLDSTEIN: Yeah. I - -

7 THE COURT: - - you're not seeking any order that
8 would affect anybody's, in this court or other where - -

9 MS. GOLDSTEIN: No, Your Honor.

10 THE COURT: - - to those accounts.

11 MS. GOLDSTEIN: I don't, I think that's correct.

12 THE COURT: All right.

13 MS. GOLDSTEIN: And I think the reason we're not
14 prepared to go forward today is that JP Morgan wants to be
15 assured that we're not affecting their rights. Other than
16 what has been agreed in the stipulation, of course.

17 THE COURT: Well when do you want to continue this
18 to? I guess, is the next question.

19 MS. GOLDSTEIN: Your Honor, we recognize - - we'd
20 like to continue this to a date as soon as practicable.
21 We've been told that this may not be able to be fully
22 addressed by JP Morgan before Thursday, but we also do
23 understand that counsel to the FDIC has some travel plans.
24 So I would, as does counsel to JP Morgan, I would request
25 something as soon as practicable for this Court. Probably

1 Monday of next week. But Your Honor, we would like to also
2 be able to settle an order if we can earlier than that. And
3 we'd like to be able to settle the order on notice to the
4 FDIC, JP Morgan, the Creditors Committee, and the large
5 creditor interests in the WMI Chapter 11 case.

6 THE COURT: Let me hear from other counsel.

7 MR. LANDIS: Thank you, Your Honor. For the record,
8 Adam Landis from Landis, Rath & Cobb here on behalf of JP
9 Morgan Chase. Your Honor may have recalled at the last
10 hearing there was a disembodied voice speaking on behalf of
11 JP Morgan Chase. That was my co-counsel, Hydee Feldstein,
12 who's here today - -

13 THE COURT: Um-hum.

14 MR. LANDIS: - - and would like to address the
15 Court. I know that her, an order approving our *pro hac vice*
16 motion has been entered.

17 THE COURT: All right. Thank you. Welcome in
18 person.

19 MS. FELDSTEIN: Good afternoon, Your Honor. And I
20 echo Marcia Goldstein's comments. Thank you for Your Honor's
21 patience with us as we work through what are sometimes simple
22 on their face and often deceptively simple issues. I just
23 simply wanted to stand to talk a little bit about JP Morgan
24 Chase in this matter, and who is my client. In some sense my
25 client is a stranger, or at least a neutral in this

1 bankruptcy proceeding. Less than a month ago, my client was
2 one of several financial institutions that at the request of
3 Federal regulators bid on certain assets of Washington Mutual
4 Bank. A bank that was the principle subsidiary, as I
5 understand it, of Washington Mutual, Inc., one of the Debtors
6 before this Court. Less than a month ago, my client took
7 over the operations of Washington Mutual Bank pursuant to a
8 purchase and assumption agreement with the FDIC. The bank
9 was, at that time, the 6th largest bank in the United States,
10 with 22 hundred branches in over 15 states. And I believe
11 represents the largest bank failure in US history. I can't
12 testify to that personally, but that is certainly my belief.
13 We took over the assets and the branches that we purchased on
14 September 26th.

15 THE COURT: You're going to have to turn that phone
16 off - -

17 UNIDENTIFIED SPEAKER: I'm trying to, Your Honor. I
18 apologize.

19 THE COURT: - - and over to the ECRO per our Local
20 Rule. Go ahead, I'm sorry.

21 MS. FELDSTEIN: We took over on September 26th, and
22 we've really been fully occupied with operational and
23 transition issues since then. We had no visibility into the
24 operations or the books and records before the stepped in on
25 the 26th. We have been dealing with customers and depositors

1 and employees. We were mindful of the Court's concerns at
2 the last hearing. We did cooperate with the Debtor, provide
3 a list of creditors, provide the information that was
4 available to us with respect to the funds that the Debtors
5 believed were on deposit at the bank. We really have no
6 substantive position with respect to the various rights that
7 are alluded to before this Court. We have three principle
8 concerns. One is we don't want to pay twice. Whatever we
9 owe, we don't want to pay it more than once. We don't want
10 to pay it once under Title 11 and once under Title 12. And
11 we want to make certain that we only pay what we owe, if in
12 fact we owe it. And we want to make certain that we do not
13 waive whatever rights we may have in or to funds. People
14 were pretty excited during the beginning of this case about
15 what were the various rights of WMI versus the bank. And we
16 entered into a standstill and worked very cooperatively with
17 Debtors' counsel to try to create some space simply to let
18 each of the parties catch their breath and try to determine
19 what the respective rights of the parties were. We, JP
20 Morgan Chase, my client, did not think that possession of the
21 funds really was outcome determinative in any legal sense of
22 the word. Might involve leverage. Might involve perception.
23 But it was not an issue that ought to distract us from the
24 very real business of integrating the branches, and the
25 employees, and the depositors of the bank into JP Morgan

1 Chase's operations. Possession of those funds, so long as we
2 could preserve our rights, and so long as we could ensure
3 that no other party could lay claim against us to those
4 funds, was really all we cared about. And so in terms of our
5 agreeing to the stipulation, we would acknowledge and agree
6 that it is a lot of money. We would acknowledge and agree
7 that it is something that, assuming it's the funds of the
8 estate, they have every right to be concerned about, and all
9 we tried to do was to ensure that we were not caught in the
10 middle of a difficult situation. And that whatever else
11 would happen, it could be handled by way of stipulation, on
12 notice to parties, and an order of the Court. Counsel for
13 the Debtor said that they weren't trying to affect any rights
14 except those that we had already agreed to in the
15 stipulation, and it was really that comment that prompted me
16 to rise. I think that the first issue, so long as no other
17 party laid claim to the funds, the reservation of our rights,
18 vis a vis the estate, to those funds, was, in fact, handled
19 by the stipulation. I think that the second issue that we're
20 concerned about, the rights of other parties, is no longer
21 handled by the stipulation. To the extent that there are
22 regulatory implications and regulatory powers reserved to the
23 FDIC. And it is really that concern that has prompted us to
24 say to the extent that those are the issues before the Court
25 today, we simply need to regroup and go back on our side of

1 the table and determine what it is that we can agree to,
2 without undue risk. And that's what we're asking for the
3 time to do. We're hoping we can do it fairly quickly. We're
4 not here in an adversarial setting, but we do have a
5 legitimate interest in ensuring that we are not caught in
6 competing jurisdictions. Thank you.

7 MR. STRATTON: Good afternoon, Your Honor. David
8 Stratton of Pepper Hamilton for the Official Committee of
9 Unsecured Creditors. Your Honor, I'd like to introduce to
10 you and move the admission of Fred Hodara of the Akin, Gump,
11 Strauss, Hauer & Feld firm. We filed this morning his *pro*
12 *hac vice* motion, but I don't know that you've seen it yet.

13 THE COURT: I haven't, but - -

14 MR. STRATTON: So we'd ask that you'd hear him
15 today. Thank you.

16 THE COURT: - - it will be granted.

17 MR. HODARA: Thank you, Your Honor. Good afternoon.

18 THE COURT: Good afternoon.

19 MR. HODARA: Fred Hodara of Akin, Gump, Strauss,
20 Hauer & Feld on behalf of the Official Committee of Unsecured
21 Creditors. Your Honor as you have heard, there was and is a
22 stipulation between the Debtor and JP Morgan that was before
23 the Court that would have resolved for the time being, the
24 issues with respect to these accounts. There is, and was, as
25 of mid-day today, an agreement between the Debtors and FDIC

1 and the Creditors Committee. And I should say the Creditors
2 Committee was agreeable as well to the stipulation itself
3 with JP Morgan. So as of noon today there was an agreement
4 between the Debtors, the Creditors Committee, and FDIC with
5 respect to FDIC's interests as they might be implicated by
6 the stipulation. But as Ms. Goldstein indicated, that
7 created a intra-party issue between FDIC and JP Morgan. So
8 if, in fact - - and I say if because I would still hope that
9 today the parties can come back together and resolve this
10 intra-party dispute so that we could go forward. But if that
11 is not possible within working hours today, and we need to be
12 put off to a later date, we would ask that the Court impose a
13 standstill on all parties with respect to these funds.
14 Because ultimately, Your Honor, the reason why we are all so
15 concerned and are here today, and are here with so many
16 people who share, I think, the same concern, is that these
17 funds are sitting at JP Morgan with uncertainty as to
18 whether, for instance, FDIC might take sudden action with
19 respect to the funds, or whether other creditors of the bank
20 might have some theory to attempt to take action with respect
21 to the funds. And it's really that uncertainty that has
22 compelled the parties - - the Debtor and the Creditors
23 Committee when I say "the parties" - - to seek the
24 stipulation so that the funds are no longer sitting in JP
25 Morgan as they currently are. And so Your Honor, if we are

1 not able to put the stipulation to rest today, we would ask
2 that there is a standstill amongst the parties to protect the
3 funds as they currently are.

4 THE COURT: Well are you asking me to issue an
5 injunction, or are you asking the parties to consent to a
6 standstill.

7 MR. HODARA: The latter would clearly be easier, and
8 would be perfectly satisfactory. And if there's some reason
9 why the parties wouldn't, and I don't know why they would not
10 agree to a standstill in this interim period, then we would
11 ask the Court to do that.

12 THE COURT: Well, I think you're going to have to
13 file papers and serve them in accordance with Rule 7000. I,
14 7001. I'm not sure I could enter an injunction if you think
15 the automatic stay is insufficient.

16 MR. HODARA: And Your Honor, we would hope the
17 automatic stay is sufficient. And I appreciate that comment.
18 And it may be possible that the parties today, if requested,
19 will agree to that standstill.

20 THE COURT: Okay.

21 MR. HODARA: Thank you, Your Honor.

22 MS. BROWN-EDWARDS: Good afternoon, Your Honor. For
23 the record, Terry Brown-Edwards of Potter, Anderson & Corroon
24 on behalf of the Washington Mutual Bank note holder group.
25 Your Honor, before I continue, I'd like to introduce to the

1 Court my co-counsel from Bracewell Giuliani Mark Mukasey
2 who's in the courtroom. We have previously, earlier today
3 Your Honor, submitted *pro hac* papers on behalf of Mr.
4 Mukasey, but I would ask in request now that for purposes of
5 today's hearing that those papers be approved at this time.

6 THE COURT: It will be granted.

7 MS. BROWN-EDWARDS: Your Honor, we would disagree
8 with Debtors' response that the stipulation that was
9 originally submitted with the papers and the revised
10 stipulation, as described, don't affect the rights of other
11 parties in interest. And we believe, Your Honor, that we
12 clearly have rights, derivatively, through the FDIC, but we
13 also have standing and a direct claim to, direct rights to be
14 heard before Your Honor because we have a sufficient stake in
15 the proceedings so as to require representation. We would
16 ask, Your Honor, that you would hear our position today, and,
17 before we go forward with any continuance or agreed
18 continuance of the hearing today with respect to the Debtors'
19 revised stipulation.

20 THE COURT: Well I don't know what the revised
21 stipulation is, and I am uncertain whether it might be
22 changed. It appears that based on the comments of counsel
23 for JP Morgan that's a distinct possibility. I think that
24 quite frankly all of us should have, I am, just to respond to
25 Debtors' request that I would, that I enter an order under

1 certification of counsel, I don't think that that's likely.
2 In fact I won't do it. I think that given the interesting
3 issues that are raised by this case, I think full notice and
4 an opportunity to be heard and a hearing on any stipulation
5 is relevant. At this point I'm not prepared to state whether
6 or not the Washington Mutual Bank note holders group has
7 standing on the issue. There appears to be a suggestion or a
8 difference of opinion as to whether the stipulation in its
9 original or current form affects anybody's rights at all,
10 including the Washington Mutual Bank note holders group.

11 MS. BROWN-EDWARDS: Well, we appreciate Your Honor
12 being willing to hear all parties who might have an interest
13 in being heard today. And with that, I'd like to cede the
14 podium to my co-counsel Mr. Mukasey.

15 MS. GOLDSTEIN: Your Honor, before we go forward, if
16 Mr. Mukasey is going to make substantive arguments, I would
17 request that the Court hear argument on standing before that.

18 THE COURT: Well let me hear argument on standing,
19 Mr. Mukasey. Perhaps you can address that.

20 MR. MUKASEY: Your Honor, I think I was prepared to
21 go closer to the merits. I'll allow Ms. Brown-Edwards to
22 speak to standing. And I do think that we have, on behalf of
23 the bank note holders, some important arguments for the Court
24 to hear.

25 THE COURT: Okay.

1 MS. BROWN-EDWARDS: Your Honor, as you may have, and
2 I don't know if you've had an opportunity to read our papers
3 today. We recognize that it was filed at noon, and - -

4 THE COURT: I've read it.

5 MS. BROWN-EDWARDS: Thank you, Your Honor. As you
6 know, then, the WNB note holder group is a group that has
7 roughly \$2 billion of senior and subordinated notes at the
8 bank level. Which, prior to the receivership, was a fully
9 owned subsidiary and thrift of the holdco Debtor bankruptcy.
10 Your Honor as the 3rd Circuit in Ametex has determined that
11 under 1109(b), a party need not be a creditor of the Debtor
12 to have standing, but just have a substantial and practical
13 outcome in the proceedings. In Grand Union, Your Honor, a
14 decision by the Bankruptcy Court that was appealed and went
15 up to the District Court, in that case, Your Honor, in Grand
16 Union, the zero coupon bondholders of a bank, of a non-debtor
17 entity filed an objection to the, to its subsidiary bank's
18 motion for interim and final DIP financing. The Bankruptcy
19 Court determined at that time, that the zero coupon
20 bondholders of the parent company did not have standing
21 because they were not creditors of the Debtor. On appeal,
22 and reversed by the District Court, the District Court,
23 citing to Ametex and the 3rd Circuit's standards there, found
24 that these group of bondholders had a sufficient stake in the
25 proceedings so as to require representation. They made this

1 determination on a case-by-case basis, and they looked to
2 whether a party would have a practical stake in the outcome.
3 Your Honor, it is a step in the right direction here that the
4 FDIC has been invited to the table. At least one other party
5 other than the Debtors and JP Morgan Chase will be able to
6 participate meaningfully in ferreting out what the rights of
7 the various parties in interest might be. But I also might
8 add, Your Honor, that we, today the FDIC asked the Debtors
9 for us to appear at the table, and that was rejected. The
10 FDIC, in their papers that they filed today, we unequivocally
11 and fervently echo the arguments that they raised. But we're
12 appreciative, Your Honor, that the FDIC wears many hats in
13 this case. So although at first blush it may appear that our
14 interests are 100% aligned, and that might be at 9 o'clock on
15 Monday morning, but at other times during the day, it may
16 differ, because the FDIC is at once receiver, at once
17 regulator, insurer in these cases. Our clients have an
18 economic stake, they're one unified group that has an
19 economic stake that we are the only group that are
20 representing that here in these proceedings. Just as in
21 Grand Union, the Court determined that even if it adds more
22 time and length to the process by bringing another party
23 whose rights may be affected to the table, it's worthy of
24 that time and interest because we need an opportunity to
25 ferret out the issues to make sure that our clients' rights

1 aren't eviscerated by this stipulation. Our clients stand
2 to, if this \$4.4 million deposit is not available to our
3 clients, that might be all the recovery that is available for
4 this group of note holders. It is clear based on, at least
5 the stipulation that we've seen that it unequivocally
6 transfers those rights to JP Morgan Chase, and only - - I'm
7 sorry. To the Debtors, and only preserves rights for JP
8 Morgan Chase. Without going further into the merits and
9 stepping on the toes of my co-counsel, Your Honor, I would
10 pose it, and so does our group, that we have direct standing
11 as well as derivative standing through the receiver, FDIC.

12 THE COURT: Let me hear the Debtor on the standing
13 issue, then.

14 MS. GOLDSTEIN: Thank you very much, Your Honor.
15 Standing in a bankruptcy case centers on §1109, which governs
16 the right to be heard in Chapter 11 cases, and provides that
17 a party in interest, including the Debtor, the Trustee, a
18 Creditors Committee, an Equity Security Holders Committee, a
19 Creditor, an Equity Security Holder, or any Indentured
20 Trustee may raise and may appear to be heard on any issue in
21 a case under this chapter. Now admittedly, Your Honor, it
22 does say, Including and whether somebody is a party in
23 interest has been determined by Bankruptcy Courts on a case-
24 by-case basis. To be a party in interest, the proposed
25 intervener must have both a sufficient stake in the outcome

1 of the proceeding to require representation, but also an
2 interest that does not have sufficient representation in the
3 proceeding. The WMB bondholders, Your Honor, are neither a
4 creditor nor an equity security holder of this Debtor, nor
5 any of the type of party listed in 1109. Their only
6 connection to this case is that they are creditors of a
7 potential creditor of the Debtor by virtue of WMB's potential
8 claims against the Debtors. And just so that's clear, Your
9 Honor, the Debtors may have potential claims against WMB or
10 against the receiver. Courts have typically held, and indeed
11 routinely held that such a tenuous relationship to the Debtor
12 would not give the WMB bondholders standing to object to the
13 stipulation under §1109. One of the leading cases is one of
14 your own, Your Honor. In re: ANC Rental Corp. in which you
15 said that Ametex did not alter the general prohibition
16 against one asserting the legal rights of another. And
17 concluding, in that case, that car rental companies do not
18 have standing, because the only interests they had against
19 the Debtors are contractual interests vis a vis another party
20 which could assert claims against the Debtors. Also in this
21 court, a decision by Judge Walsh, in re: Lifeco Investment
22 Group, where the Court found no statutory or judicial support
23 to conclude that a creditor of a creditor has standing in a
24 bankruptcy case. And the FDIC has made very clear that it
25 was reserving any and all claims that it could make against

1 WMI. And we've agreed to that. For the record, Your Honor,
2 just so that we're not working on any misinformation here,
3 the stipulation has not changed from the one that we filed.
4 We were working with the FDIC on the form of order so that
5 they could have a full reservation of rights. Also, before I
6 go further with this, I would like to point out that the
7 Ametex case relied upon by the WMB bondholders is 1984 case
8 in which the 3rd Circuit felt that future asbestos victims,
9 albeit not current creditors of a Debtor could indeed be a
10 party in interest in the case. And I think that's far afield
11 from what we have in this case. And the Grand Union case is
12 also very different, Your Honor, because in that case,
13 holders of the zero coupon bonds issued by the debtors'
14 parent corporation filed objections to the debtors' motion
15 for interim and final financing. The sole significant asset
16 of Grand Union was the capital stock of Grand - - excuse me.
17 Grand Capital's sole significant asset was the capital stock
18 of Grand Union. Now in that case, when the District Court
19 reversed and held that the bondholders did have standing to
20 object to the proposed debtor-in-possession financing, it
21 felt that the bondholder interests were not adequately
22 represented by the parent. Because the parent in that
23 instance was entirely aligned with the Debtor in terms of
24 interests. There was no distinction in terms of interests
25 between the parent and the debtor corporation. Here we have

1 a very different situation. The FDIC is certainly not lined
2 up with Washington Mutual, Inc., and indeed they do represent
3 the interests of the receivership and are an adequate
4 representative of, that could make claims against WMI. In
5 Grand Union it was clear that the, the debtor was not going
6 to be, or it's parent were not going to be making claims
7 against each other. In the papers filed by the WMB bank
8 holder, bondholders this afternoon, they cited no authority
9 that would give them any nexus to force standing. No right
10 to stop a payment by JP Morgan to WMI. No argument that they
11 are not adequately represented by the FDIC. And so many
12 other cases, Your Honor, deal directly with this point. And
13 let me go back to Lifeco. In that case, an ancillary
14 receiver of a life insurance company was found not to be a
15 party in interest under §1109 because its interests in
16 pursuing claims against the insurance company's former
17 holding company was adequately represented with the
18 domiciliary receiver who was charged with pursuing the
19 interests of the constituents of the insurance company. The
20 Ionosphere Clubs case in the 2nd Circuit rejected party in
21 interest standing for an organization claiming to protect
22 consumers. And again, the Court found that the relationship
23 was too tenuous of a connection to the bankruptcy case. And
24 so Your Honor, if the FDIC believes that anything in this
25 stipulation were inappropriate or somehow contrary to its

1 charge as receiver of WMB, it would be the FDIC, and not the
2 bondholders, that would have party in interest standing.
3 Also, frankly, Your Honor, if the WMB bondholders do not
4 believe that the FDIC is adequately representing their
5 interests, then whatever remedies they have would be between
6 them and the FDIC. And not with these estates. Your Honor,
7 I think that as the receiver of the Washington Mutual Bank,
8 it is the FDIC that is obligated to protect the creditors and
9 depositors of that institution. And I can cite for that the
10 Resolution Trust Corp. vs McKenzie. It's a 2nd Circuit
11 decision at 60 F 3d 972. Your Honor, the FDIC in this
12 instances determined that the sale to JP Morgan was the best
13 manner in which to protect the depositors, to protect the,
14 the FDIC insurance fund, and to maximize the value for WMB's
15 stakeholders. If that decision had any discriminatory effect
16 on WMB bondholders then their address lies with the FDIC.
17 But in this case, they are not a direct creditor, they are,
18 at best, a creditor of a potential creditor. And Your Honor,
19 I would submit that there is nothing that they have put
20 forward that distinguishes them from the long line of
21 decisions in this district and in this circuit.

22 MS. BROWN-EDWARDS: Your Honor, if I may. I don't
23 think the Debtors can have it both ways. I don't think they
24 can draw up a stipulation and, with everyone else in the
25 dark, file it on shortened notice, oppose our standing, and

1 then take issue with the fact that we haven't fully briefed
2 the issue in our papers. So I would, we would really take
3 issue with that. And getting back to the distinctions, if
4 you will, between the cases cited and our party's positions.
5 Your Honor, to cite a phrase of the day, you know, we're not
6 Joe Plumber here. We're not an insinuated entity trying to
7 assert that we're a party in interest. We are the
8 bondholders of the thrift co. In their papers, Your Honor,
9 it is clear that they are not clear to whom these deposit
10 accounts belong and to whom the money is owed. As we speak,
11 there is a five-pronged investigation into this transaction.
12 The very sale that the Debtors refer to. The FDIC is in fact
13 one of the parties looking into the transaction. As is the
14 IRS, the SEC, and the United States Attorney's Office for the
15 Western District of Seattle. So although we very much
16 applaud the position that the FDIC has taken today, and we
17 echo those arguments, we recognize that when the dust settles
18 and the fog of uncertainty clears, we don't know who will be
19 pointing fingers at whom. And that's the issue, Your Honor.
20 So although we're not disputing that the FDIC, in certain
21 respects, represents the rights of our, of our constituents,
22 that is not in all respects. And we recognize very clearly
23 that they wear different hats in these cases. So Your Honor,
24 for those reasons, we would say not, that we have a practical
25 stake in the outcome, and for our clients' 100% economic

1 stake to be preserved without it being fettered and vetted
2 against any other issues, we also need a seat at the table.
3 And that's only speaking from our perspective. There
4 certainly could be other parties in interest, which goes back
5 to the question you posed earlier, that, who aren't here
6 today, who haven't gotten up to speed, because of large law
7 firms, who would have a similar position.

8 MR. CLEARY: Good afternoon, Your Honor. Blake
9 Cleary of Young, Conaway, Stargatt & Taylor on behalf of
10 FDIC. With me today is Thomas Califano. If he may be heard,
11 I will follow up with *pro hac* papers. Given the expedited
12 nature, I have not had a chance to file those yet.

13 THE COURT: All right. There will, it will be
14 granted.

15 MR. CLEARY: Thank you, Your Honor.

16 MR. CALIFANO: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. CALIFANO: Thank you. We represent the FDIC,
19 and I just want to echo some of the comments that the other
20 counsel had mentioned. This is the largest bank failure in
21 the United States history. And there is a lot for people to
22 digest. And just how JP Morgan Chase has a lot to digest, so
23 does the FDIC. And we've worked with the Debtor over the
24 last few days, cooperatively, to make sure that nothing that
25 happened today, with respect to the stipulation, interfered

1 with the FDIC's ability to do its job and all its rights and
2 powers. Both as receiver and regulator. But Your Honor, we
3 can't, and we don't want to interfere with the administration
4 of this case, but I think there's a concern when the WMB
5 bondholders are in here trying to insert themselves in the
6 process when their rights are derivative of ours. Now we
7 recognize, the FDIC recognizes that those bondholders we have
8 to answer to on some levels. And those bondholders'
9 interests, at certain levels, need to be brought into
10 account. But my client, having read the objection they filed
11 today, wants us to make it very clear that we believe any
12 rights that they have in this proceeding are derivative of
13 rights of the FDIC. And the FDIC is here to assert the
14 rights of the receiver to the extent any exist. And to, then
15 the rights and claims that may derive from WMB. We have a
16 very important job to do, Your Honor. We don't want to
17 interfere with this case. But we can't have proceedings in
18 this case interfere with our job. So they wanted to make it
19 very clear that we believe that their claim, that their
20 rights are derivative of ours. And also Mr. Hodara said
21 something that I think might have given the Court the wrong
22 impression. We did get changes to the order that made the
23 FDIC more comfortable, but I don't think that put us at odds
24 with JP Morgan Chase. I think that there are some
25 considerations that flow from our preservation of all our

1 rights which need to be digested. But I don't want to,
2 anyone to believe that we are at odds with JP Morgan Chase.
3 And we're not investigating the sale to JP Morgan Chase.
4 That was our sale. We are investigating - - I mean, that
5 would be funny. But we are not investigating the sale, we're
6 investigating the circumstances that led to the sale. Which
7 is our statutory duty. So I just wanted to make sure the
8 record was clear on those points. Thank you, Your Honor.

9 THE COURT: Odder things have happened, but.

10 MR. LAURIA: Good afternoon, Your Honor. My name is
11 Tom Lauria with White & Case. I represent a group of
12 bondholders of WMI. I don't think there's any dispute that
13 we are creditors of this bankruptcy estate and have standing.
14 Our *pro hac* was submitted at the prior hearing and has been
15 granted. I just wanted to make three quick comments. Number
16 one, I think that it is important to add to the comments of
17 the prior counsel here that interestingly in the FDIC
18 receivership the bondholders of the bank have certain limited
19 rights to assert claims and to then seek review of how those
20 claims are disposed of by the FBI, FDIC. I guess that was a
21 Freudian slip calling it the FBI. It would be ironic, and I
22 think would stand things on its head if these same
23 bondholders were to have broader rights in this Chapter 11
24 case where they are not a creditor than the rights that
25 they've been given by statute FERIA (phonetic) in the

1 receivership proceeding where they are direct creditors.
2 Point two, as a practical matter, there are going to be many
3 voices heard here, and there are going to be many complicated
4 issues. I think that adding a voice to represent the same
5 interest, not a similar interest, will not advance the ball,
6 but in fact will retard the ability to make progress. For
7 example, negotiating an order with the FDIC, and then having
8 somebody else come in and purport to represent the same
9 interest and saying that order is not acceptable. Final
10 point I'd like to make, Your Honor, is that the bondholders
11 of the bank have now argued three times, once in the memo
12 they filed, and twice here on the record, and have still
13 failed to state a direct cognizable interest in this
14 litigation or this Chapter 11 case, other than their borrower
15 may be advantaged or disadvantaged by the outcome here.
16 Which would, if it was a basis for standing would make every
17 creditor of the banks - -

18 THE COURT: Um-hum.

19 MR. LAURIA: - - parties in interest in this
20 Chapter 11 case. So we think standing should be denied.

21 MS. BROWN-EDWARDS: Your Honor, if you would indulge
22 me for one more - -

23 THE COURT: Okay.

24 MS. BROWN-EDWARDS: - - go around. We just want to
25 point out, Your Honor, that it doesn't have to be one or the

1 other. And I quite frankly think that the comments made
2 today by Mr. Califano on behalf of the FDIC pretty much point
3 out, illustrate the point that we're trying to make. We can
4 have derivative standing vis a vis the receiver in one
5 regard, because we do have similar claims. However, in their
6 other hat as the, as the insurer, we also have, we could have
7 primary and direct standing, because not all of our interests
8 at all times are aligned.

9 THE COURT: Well explain that to me. I mean, you
10 may have, I think they can be your representative even though
11 you may have a claim against them, a peripheral claim against
12 them. If their, if their, the hat they're wearing is the
13 same hat you would have. As a creditor of this estate. If
14 they are.

15 MS. BROWN-EDWARDS: Well I think, Your Honor, they
16 might be in a position at times, based on the other hats that
17 they wear, to concede and to make concessions about certain
18 things that our clients, who only have one purest objective,
19 is to reserve and preserve whatever rights and claims we have
20 with respect to these accounts, would not take into
21 consideration.

22 THE COURT: But if they are preserving all their
23 rights, even assuming they have several hats, if they are
24 preserving all of their rights under the form of order which
25 would approve the stipulation, aren't all of your rights,

1 which are a subset of their rights, being preserved?

2 MS. BROWN-EDWARDS: Well, I can tell you this. And
3 neither of us have seen the revised stipulation, but we've
4 heard that the language hasn't changed. If a mere
5 reservation or preservation of rights is in the order, but
6 there's no escrow of these monies should they be transferred
7 to the Debtors, or there's no, the money is not frozen and
8 the Debtors can still use the monies to, for example, pay
9 administrative expenses, then our rights haven't been.

10 THE COURT: Well are you asking for a prejudgment,
11 you know, attachment? Is that what you're asking for?

12 MS. BROWN-EDWARDS: No. We would, as we discussed
13 in our papers, and I know this is beyond the standing
14 argument. But we would, if Your Honor were inclined at some
15 later point to transfer the funds in accordance with the
16 stipulation, we absolutely are going to request that Your
17 Honor ask that the Debtors not be able to use these funds
18 without prior Court approval. While not only JP Morgan, the
19 Committee, the FDIC, and whomever figures out to whom those
20 monies belong, but while we also have that opportunity to do
21 the same. And I don't think Mr. Lauria's comment was a
22 Freudian slip. I just forgot to admit that the FBI was also
23 one of the other prongs of the government that's
24 investigating the acts prior to the sale, or. Thank you,
25 Your Honor.

1 THE COURT: Thank you. Let me hear anything further
2 on the standing issue?

3 MS. GOLDSTEIN: Your Honor, I'm not clear that we're
4 still on the standing issue, but I would like to respond to
5 any suggestion that the creditors of Washington Mutual Bank
6 have any rights to request an escrow or a freeze of these
7 funds which we hope will come into the estate by virtue of
8 this stipulation. Even JP Morgan and the FDIC do not object
9 to these funds being used in the ordinary course of business
10 by the Debtors. To the extent that the funds would be used
11 in a manner that is out of the ordinary course, Your Honor,
12 then we of course have to come to Court and parties who have
13 standing will have an opportunity to object. But for
14 creditors of another Debtor in a different proceeding to seek
15 to impose restrictions on these funds is something that we
16 vigorously oppose. We don't think they have the standing to
17 request it, Your Honor, this goes back to my original
18 argument. But I would point out that even JP Morgan and the
19 FDIC, whose rights we are preserving, JPM's rights are set
20 forth in the stipulation, I admit, Your Honor, you haven't
21 seen the new order which reserves rights for the FDIC, but
22 neither of those parties who are parties in this case would
23 seek to impose any kind of freeze on those funds. And Your
24 Honor, I thought it was important to respond to that point at
25 this point in time.

1 THE COURT: Thank you.

2 MS. FELDSTEIN: Good afternoon, Your Honor. Hydee
3 Feldstein of Sullivan & Cromwell again. Just very briefly,
4 and it has nothing to do with the standing issue. One of the
5 rights set forth in the stipulation is entry of an order in
6 form and substance satisfactory to my client. And so changes
7 to the order in fact change the stipulation. And at this
8 point in time, we do not believe that we are bound by the
9 stipulation, just to be clear for the record. Thank you.

10 MR. MUKASEY: Your Honor, if I may, Mark Mukasey,
11 Bracewell Giuliani, on behalf of the bank's noteholders. I
12 don't know how far now we are away from the standing issue.
13 I think we've strayed a little bit far from it. I just want
14 to make a couple of quick comments, if I could. Even with
15 respect to the standing issue, Judge, the playing field here
16 has shifted remarkably from Friday to today, from noon today
17 to 2 o'clock today, and from 2 o'clock today I think to the
18 beginning of this hearing. And it's sort of the point that I
19 think is the salient one, Judge. You know, it's sort of an
20 old, I guess, grandmother's saying that patience is the
21 companion of wisdom. And what we seek to avoid, what the
22 bank noteholders seek to avoid is a premature determination
23 on standing or on the merits at a time, Judge, when people
24 have serious doubt as to who owns these funds, at a time when
25 a stipulation or a proposed stipulation was hurried before

1 the Court, at a time when any premature determination, a
2 definitive determination of standing, a determination of
3 rights would cause irreparable harm. We are not asking for
4 - - and by the way, irrevocable and I think irremediable
5 harm. We are not asking for determinations today as to the
6 merits. And frankly, Judge, if you want us to brief the
7 issue of standing, we'd be happy to brief the issue of
8 standing. We're just asking for the Court not to rush to
9 judgment today, because the status quo, once lifted, is
10 irretrievable. If you want us to brief the issue of
11 standing, Judge, we'll come back and brief the issue of
12 standing, because I think we have arguments on the merits.
13 And by the way, just to speak to the FDIC issue, I think it
14 is in the Court's interest to pay serious attention to the
15 fact that while the FDIC does wear many hats, and some of
16 those hats are hats that we also wish to wear jointly with
17 them, to torture an analogy, there could come a day, Judge,
18 when the FDIC's interests are in direct contradiction to the
19 interests of the bank holders. My co-counsel - - to the
20 bank's noteholders. My co-counsel mentioned that there's an
21 investigation, and Mr. Califano certainly elaborated on that.
22 But the, for the FDIC to be investigating the sale of the
23 bank or the circumstances that surrounded the waning days of
24 the bank only underlies that, or underlines that nobody
25 really knows whose funds these are, nobody really knows, I

1 would submit, who has standing at this point, Judge. And we
2 simply ask that no decision be made today. I'm not sure that
3 the stipulation is on the table now or not - -

4 THE COURT: I don't know if it is either. But even
5 if it were, my reading of the stipulation doesn't ask me to
6 decide whose funds they are. This is a stipulation between
7 JP Morgan and the Debtor that the funds can be withdrawn from
8 the accounts by the Debtor.

9 MR. MUKASEY: Then why not include in the
10 stipulation that the rights of others are preserved? That
11 would seem to make abundantly clear that the FDIC's rights
12 are preserved, and the rights of any other interested parties
13 are preserved. I'm not sure that's a, too much of a request
14 from what I've heard here today. It doesn't sound to me, if
15 I'm understanding counsel's argument correctly, that that
16 would do any damage to the Debtors. That would do any damage
17 to JP Morgan. And it would avoid potentially, as I said,
18 serious and irrevocable harm to folks who, when the dust
19 clears, may have serious claim to these funds.

20 THE COURT: Debtor wish to respond to that?

21 MS. GOLDSTEIN: Your Honor, just to clarify.
22 Because we are not going forward with the stipulation today,
23 I don't think I'm prepared to make a change to something that
24 isn't final. We - -

25 THE COURT: Certainly you've considered it, though,

1 after seeing their objection.

2 MS. GOLDSTEIN: We did, Your Honor, but we, we have
3 reserved the rights of their representative. And we've
4 agreed to do that. We have language that is acceptable to us
5 and to the FDIC. To the extent that the FDIC has claims
6 against WMI, they can assert them. If you decide, Your
7 Honor, that the WMB bondholders have proper standing, and
8 they make a claim against the estate, they can make a claim
9 against the estate. I don't see the irreparable harm. What
10 can we do with \$4.3 billion that Your Honor would not have to
11 approve? If we are going to seek to make distributions on
12 - -

13 THE COURT: Well you've suggested that you can use
14 it in the ordinary course of - -

15 MS. GOLDSTEIN: In the ordinary course, Your Honor.
16 But that's \$4.3 billion. The ordinary course is, you know,
17 paying administrative expenses. And we do have other assets,
18 frankly, Your Honor, as well.

19 THE COURT: Well I haven't seen any operating
20 reports in this case, so I can't comment on what you might be
21 doing with it.

22 MS. GOLDSTEIN: I understand, Your Honor. And we
23 understand, we appreciate that, and we're working hard to
24 iron out all of the matters as between WMI, JP Morgan in
25 particular, and we've been working cooperatively with them,

1 and we expect to work, continue to work cooperatively with JP
2 Morgan on a number of things. And you will be seeing a
3 number of motions, including disposition of pension fund, a
4 stipulation regarding vendors, and other matters regarding
5 the transition. And detailing points that need to be
6 clarified with JP Morgan. Those will be forthcoming. But
7 Your Honor, at this point, I'm not prepared to concede
8 standing to the WMB bondholders. I agree, Your Honor, that
9 this is a stipulation, at least what was filed, and I respect
10 Ms. Feldstein's comment that since JP Morgan has to revisit
11 their position in light of the, what the impact of reserving
12 the FDIC's rights are, we don't really have anything that
13 we're asking you to approve today. But Your Honor, I'm not
14 prepared today to say that we, we would agree to a specific
15 reservation of rights in this case for the WMB bondholders.

16 THE COURT: I don't think you need to reserve
17 rights. You can - -

18 MS. GOLDSTEIN: Okay. Thank you, Your Honor.

19 THE COURT: You can simply state that my order is
20 not affecting any parties in interest.

21 MS. GOLDSTEIN: Yes. And I think I have said that.
22 Yes.

23 THE COURT: Any parties in interest other than JP
24 Morgan.

25 MS. GOLDSTEIN: I - -

1 THE COURT: And to the extent the FDIC is - -

2 MS. GOLDSTEIN: Right. And Your Honor, when we come
3 forward with that, I would confirm your view as to that, as I
4 have already said here today.

5 THE COURT: Well with that, I think we'll continue
6 this until Monday. I think I'm not going to, I'm not
7 prepared to say that so long as the form of order does not
8 affect anybody's rights other than those as between JP Morgan
9 and the Debtor as stated in the stipulation, I don't think
10 that the Washington Mutual Bank noteholders have standing to
11 be heard on that. If in fact that's what it says. But I'll
12 allow you to work out language to that effect, and to the
13 effect that will satisfy both JP Morgan and the FDIC. We'll
14 continue this until Monday. Is 10:30 okay for the parties?

15 MR. LAURIA: Your Honor, if I may just be heard
16 briefly. I had understood that the first time when I came up
17 here that we were just talking about the standing issue. I
18 did have a couple of comments that I wanted to make on the
19 record more generally with respect to the proceedings.

20 UNIDENTIFIED SPEAKER (Telephonic): (Microphone not
21 recording.)

22 THE COURT: Could you make sure you're speaking
23 directly into that mike? Apparently - -

24 MR. LAURIA: I'm sorry, Your Honor.

25 THE COURT: - - those on the phone are not hearing.

1 MR. LAURIA: All right. The first point I wanted to
2 make is that to the extent there is some uncertainty
3 regarding the magnitude of this issue to the estate and the
4 importance of timing. We are talking about \$4.4 billion that
5 today is not accruing a penny of interest. The interest that
6 would be accruing on that money would probably more than
7 cover the administrative expenses of this Chapter 11 case,
8 and we have now been in Chapter 11 going on a month, and
9 we've got to, we've got to change that status. That is not a
10 status quo that is okay, and it is harm to the estate to
11 allow it to continue. Number 2, we have \$4.4 billion that is
12 today sitting in a set of bank accounts that far exceed the
13 Federal Deposit Insurance protection.

14 THE COURT: I think we've heard these in your
15 comments to the prior motion. The standstill. And I'm happy
16 to see that some action was taken sooner rather than later.
17 But I think this can perhaps wait until Monday or be - -

18 MR. LAURIA: We're just concerned - -

19 THE COURT: - - alleviated if the Monday hearing
20 goes as planned.

21 MR. LAURIA: Understood, Your Honor. And we are
22 just concerned, and wanted to emphasize the concern on
23 timing. I think the, the final point that is worthy of note
24 here is really, you know, as a participant in the discussions
25 between the Debtors, the FDIC, JPM and the other

1 stakeholders, we certainly came here with the hopes that we
2 would have a resolution that would more completely clear a
3 path in this case than where we think we are now. But you
4 know, we have recognized the rights of the FDIC. They have
5 certainly made comments in the course of our discussions that
6 have given us comfort that they presently don't have the
7 intention of taking action that would disrupt the ability of
8 this Court to resolve issues regarding, you know, it was
9 obviously today the most valuable asset of the estate. But
10 at the same time, the prolonged nature of these discussions
11 is troubling. We're talking about a, a transaction as
12 between JPM and the FDIC that was negotiated in hours if not
13 days, and we're now at almost a month and we can't get an
14 agreement that these funds should be moved. And what is
15 troubling to me, Your Honor, is that if you look at the
16 stipulation, as I'm sure the Court has, it, there is no
17 requirement or contemplation in that stipulation that the
18 rights of the FDIC somehow be impaired, or restricted in any
19 respect. And yet today we have been told that as a
20 consequence of a full reservation of the FDIC's rights, that
21 that's not the deal that JPM thought they were making. And
22 you know, we've got to watch this carefully because there is
23 harm to the estate, and we need to get these issues cleared
24 away. And I'm just concerned that there may be other agendas
25 that are on the table here. There are, as I think counsel

1 for the Debtor mentioned, there are ongoing business issues
2 and relationships between the estate and JPM that are not the
3 subject of the stipulation. And I would hate to think that
4 the stipulation is now being delayed for the purpose of
5 somehow tying up resolutions on these other issues. So we're
6 extraordinarily concerned, and we hope that the Court can
7 help us get things moving here in some direction so that the
8 ongoing harm to this estate is minimized.

9 THE COURT: Well I'm not sure what I can do other
10 than have a hearing on Monday.

11 MR. LAURIA: I, I don't know, assuming that the
12 Debtor is unwilling, and it sounds like the Debtor is
13 unprepared to go forward at this time, I don't think there's
14 anything else before the Court. You know, I mean, I think
15 we're all to some extent just having a little bit of fun here
16 with oration. But you know, the point is it's not fun, and
17 the stakes are extraordinarily high. And as creditors here,
18 the group we're representing is today over \$1.1 billion.
19 We're just very concerned that - -

20 THE COURT: I understand.

21 MR. LAURIA: - - our recovery is at risk.

22 THE COURT: I understand.

23 MS. BROWN-EDWARDS: Your Honor, I just wanted to ask
24 one clarifying question. Again, on behalf of the bank
25 noteholders. Did you say that you would be looking for the

1 Debtors to answer the question that no other party's interest
2 would be affected by the stipulation at the hearing on
3 Monday?

4 THE COURT: I'm looking for it in the form of order
5 or the stipulation. Yes.

6 MS. BROWN-EDWARDS: Thank you, Your Honor.

7 THE COURT: All right. I think we're done, and I'll
8 see the parties back here Monday at 10:30. We'll stand in
9 recess.

10 (Whereupon at 4:52 p.m. the hearing in this matter was
11 concluded for this date.)

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18 I, Jennifer Ryan Enslin, approved transcriber for
19 the United States Courts, certify that the foregoing is a
20 correct transcript from the electronic sound recording of the
21 proceedings in the above entitled matter.

22

23 /s/Jennifer Ryan Enslin
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10/23/08