

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN THE MATTER OF:) Bankruptcy No. 08-12229
) Chapter 11
)
)
)
 WASHINGTON MUTUAL, INC.,)
 et al,) Wilmington, DE
) October 30, 2008
 Debtors.) 2:03 p.m.

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

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1 (The following was heard in open court at 2:03
2 p.m.)

3 THE COURT: Good morning -- excuse me -- good
4 afternoon.

5 MR. JANG: Good afternoon, Your Honor. On behalf
6 of the debtors, Chun Jang of Richards, Layton, Finger. With
7 me today is -- from Weil, Gotshal and Manges, Brian Rosen,
8 and he'll be handling the bulk of the matters today.

9 THE COURT: All right. Thank you. Could the
10 parties who are on the phone please mute their phones. All
11 right. I think that's done.

12 MR. ROSEN: We'll do our best. Good afternoon,
13 Your Honor. Brian Rosen, Weil, Gotshal and Manges on behalf
14 of WMI and WMI Investment.

15 We have several items on this afternoon's
16 calendar, and what I'd like to do, Your Honor, is go through
17 them, and to the extent that there is no objection, and
18 based upon the Court's preference, we would then either hand
19 up and order if the Court so approves them, or hold those
20 until the end, whatever the Court would prefer.

21 THE COURT: You can either hold them till the end
22 or hand them up now, and I'll have them either way. Are
23 there some with black line changes?

24 MR. ROSEN: Your Honor, based upon the discussion
25 with Mr. McMahon, we'll do it as we go along here.

1 THE COURT: All right. That's fine.

2 MR. ROSEN: Thank you. Your Honor, the first item
3 on the agenda was the debtors' motion for approval of
4 interim compensation and reimbursement of expenses for
5 professionals in the case. We have not received any
6 objections to that. We had spoken with the U.S. Trustee
7 with respect to that motion, and I believe that the U.S.
8 Trustee is -- has okayed the entry of that particular order.

9 THE COURT: Okay.

10 MR. ROSEN: Your Honor, the second -- I'm sorry.

11 THE COURT: Now that we have two microphones, you
12 can share the podium if you'd like.

13 MR. McMAHON: Your Honor, good afternoon. Joseph
14 McMahan for the acting U.S. Trustee.

15 In the form of order as filed, there was that auto
16 apply provision to subsequently file cases, and the debtors
17 have agreed to remove that.

18 MR. ROSEN: I apologize, Your Honor. Yes, that
19 change was made and then it was -- we have a black line for
20 that one, Your Honor.

21 THE COURT: Okay.

22 MR. ROSEN: The second item on the calendar, Your
23 Honor, is the debtors' motion to establish a date for the
24 filing of schedules and a statement of financial affairs.
25 We have spoken about this issue with the United States

1 Trustee. We have explained to the United States Trustee and
2 we actually explained it today at the 341 meeting that we
3 had, the issues associated with getting information and
4 compiling the schedules and the statements of financial
5 affairs.

6 Based upon that, Your Honor, as the Court will
7 recall, we had asked for an extension through the end of the
8 year. We had a discussion with the United States Trustee,
9 and the debtors believe that they can accomplish that,
10 providing, of course, that we get all of the access that we
11 hope to get from JPMorgan Chase which has these materials by
12 December 15th. I do understand, however, that the United
13 States still has an issue with respect to this and may
14 request it to be an earlier date.

15 MR. McMAHON: Your Honor, good afternoon again.
16 Joseph McMahon for the acting U.S. Trustee.

17 While we recognize that the debtors are in a bit
18 of an unusual posture with respect to obtaining records, my
19 understanding is that the debtors are obtaining the records
20 on a continuing basis with respect to preparing the
21 schedules and statements. And from our perspective, while
22 we talk about these extended time frames in the context of
23 big cases where there are lots of assets to be inventoried
24 and the like, we're talking about the holding company and a
25 subsidiary with -- my understanding is not much to do with

1 it.

2 In light of the fact that we are dealing with the
3 holding company and another entity, just two debtors, we
4 think that the more prudent approach at this point, instead
5 of going to I think December 29th was -- or the end of the
6 year as was requested in the motion, and I don't know if the
7 debtors have modified that request formally, we would
8 request that the date be set in December -- an early date in
9 December, December 1st or some time around there where we
10 could revisit this issue if the circumstance warranted it.

11 And to complete the record on this point, Your
12 Honor, we did hold an initial meeting of creditors today.
13 That meeting is being held and continued to an open date
14 pending the filing of those documents.

15 MR. ROSEN: Your Honor, the statement that it is
16 merely a holding company, while it is, in fact, a holding
17 company, it is a lot more than that. And as the United
18 States Trustee is aware and as all the parties who attended
19 the 341 meeting today are aware, the information that was
20 used by the holding company and the bank's subsidiary was
21 all integrated on one computerized system.

22 And while we do have access from time to time, the
23 access to that is really at the graces of the people who are
24 in control of that computerized system at this point in
25 time. So while requests are made, we don't know the

1 timeliness of the response to it nor the breadth of the
2 response that we are going to get.

3 As a result, Your Honor, we understand Mr.
4 McMahan's position, but we do believe that 45 days from what
5 is conceivably this week to the middle of December, it would
6 be an appropriate time frame. We hope very much that it
7 will be accomplished in that time, and if not, of course, we
8 would come back to the Court for appropriate relief. But by
9 -- we don't want to come back, Your Honor, because we
10 believe firmly that December 1st is not going to be
11 sufficient time, and we don't want to waste the assets of
12 the estate in filing a motion at this point in time that we
13 know we will have to ask for more relief.

14 THE COURT: Well, I'm reluctant to give such a
15 long extension without revisiting it. I'm going to give to
16 December 1. We'll continue the hearing and continue the
17 pending request, to have it till the end of December. But
18 I'd like more information before December 1 on where we are
19 on this.

20 MR. ROSEN: That's fine, Your Honor.

21 THE COURT: And whether partial schedules can be
22 filed, I don't know if that's possible, with amendments
23 later.

24 MR. ROSEN: Well, we can certainly do that, Your
25 Honor, to the extent that the information is available.

1 Would the Court, in making that ruling, ma'am, would you
2 believe that we would have to file another application if,
3 in fact, December 1 wouldn't work or present that in a
4 status conference?

5 THE COURT: Just present in a status conference.
6 I'll continue the pending motion. I think the pending
7 motion asks till December 29.

8 MR. ROSEN: Yes.

9 THE COURT: So we'll continue that.

10 MR. ROSEN: Thank you.

11 THE COURT: I don't know when your omnibus is,
12 towards the end of November?

13 MR. ROSEN: It's actually November 14th, so it's a
14 little bit early in the process, but perhaps we could get --
15 oh, 25th, okay. We have another one on the 25th, so --

16 THE COURT: All right.

17 MR. ROSEN: -- we could revisit it at that point
18 in time.

19 THE COURT: All right.

20 MR. ROSEN: Your Honor, based upon that, we'll
21 make revisions to that proposed order.

22 THE COURT: All right. Thank you.

23 MR. ROSEN: The next application that is on is for
24 the retention of Richards, Layton, Finger, and I will hand
25 the podium over.

1 MR. JANG: Good afternoon again, Your Honor.
2 Again for the record, Chun Jang of Richards, Layton, Finger.

3 With regard to our retention application, Your
4 Honor, the United States Trustee made a few informal
5 comments and to accommodate the U.S. Trustee's request, we
6 had filed a supplement affidavit of Mark Collins and made a
7 couple of revisions to the order so if you wouldn't mind,
8 I'd hand up the blackline --

9 THE COURT: You may. Thank you.

10 MR. JANG: The major change to the order relates
11 to whether or not the retainer received by Richards, Layton
12 & Finger would be considered an evergreen retainer, and we
13 had agreed that it would be just a general security
14 retainer.

15 THE COURT: Okay. And the supplemental affidavit
16 satisfied the U.S. Trustee on the issue regarding
17 representation of the clients?

18 MR. McMAHON: Your Honor, it does.

19 THE COURT: Okay. I'll enter the order as revised
20 then.

21 MR. JANG: Thank you, Your Honor.

22 MR. ROSEN: Your Honor, the next item on the
23 agenda is the debtors' application to retain Kurtzman Carson
24 Consultants, LLC, as claims and noticing agent to the
25 debtors and to appoint them as agent to the Bankruptcy

1 Court.

2 We received slight comments to that application
3 from the United States Trustee. Revisions have been made to
4 the order to incorporate those changes, and it is my
5 understanding that with those changes, there are no
6 objections to the application.

7 May I approach, Your Honor?

8 THE COURT: You may. Thank you. All right. The
9 changes look fine to me. I'll enter that order.

10 MR. ROSEN: Your Honor, the next item on the
11 agenda is the debtors' motions for the employment of Alvarez
12 and Marsal pursuant to Section 363 of the Bankruptcy Code
13 and designating Mr. Kosturos as the chief restructuring
14 officer nunc pro tunc to October 2nd, 2008.

15 There have been some communication between us and
16 the United States Trustee with respect to this application,
17 and I hope, but I cannot promise that all of those issues
18 have been resolved. So I think I have to let Mr. McMahon
19 speak at this time.

20 THE COURT: Okay.

21 MR. McMAHON: Your Honor, good afternoon. Joseph
22 McMahon for the acting United States Trustee. I did speak
23 with Mr. Kosturos from Alvarez who's present in the
24 courtroom today. We had a final tie-up issue with respect
25 to time records and another detail point on the order.

1 What I would suggest is that we -- we clean the
2 order up and submit that under certification of counsel
3 after the hearing. Mr. Kosturos is okay with the changes
4 that we propose.

5 THE COURT: All right. Then I'll look for that
6 under certification of counsel.

7 MR. ROSEN: Thank you.

8 Your Honor, the next -- I'm sorry.

9 MR. HODARA: Your Honor, good afternoon. Fred
10 Hodara of Akin, Gump, Strauss, Hauer and Feld for the
11 Official Committee of Unsecured Creditors.

12 The Creditors Committee also engaged in
13 conversations with Weil Gotshal with respect to the Alvarez
14 engagement, and I just want to confirm on the record, and
15 I'll ask Mr. Rosen to confirm two things: One, that the
16 fees of Alvarez and Marsal will be subject to a traditional
17 reasonableness standard. And the second item that the
18 Creditors Committee will be provided with detailed monthly
19 statements over the course of the engagement.

20 MR. ROSEN: Your Honor, I apologize for not making
21 that representation. Yes, we did agree to all of that. We
22 have, in fact, made those changes to an order which we will
23 now further modify and we will include that so that
24 everybody can see it.

25 THE COURT: Okay.

1 MR. ROSEN: But that is correct.

2 MR. HODARA: Thank you.

3 MR. ROSEN: Your Honor, the next item on the
4 agenda is the application to retain Weil, Gotshal and Manges
5 as attorneys for the debtors.

6 In this regard, Your Honor, we have not received
7 any objections, although we have engaged in conversation
8 with the United States Trustee on certain issues. As a
9 result of those conversations, we submitted a supplemental
10 affidavit yesterday which addressed hopefully the concerns
11 of the United States Trustee. But then I found out there
12 was still one outstanding item, and so I am going to
13 represent on the record and hopefully clarify the issue for
14 the United States Trustee.

15 Specifically, Your Honor, the United States
16 Trustee has asked with respect to what was contained in the
17 initial Rosen affidavit a comment with respect to JPMorgan
18 Chase. And based upon that, Your Honor, I can represent on
19 the record that Weil, Gotshal and Manges is able to commence
20 litigation against JPMorgan Chase including a turnover
21 action for moneys which may be held by JPMorgan Chase. The
22 only thing that we are not permitted to do, Your Honor, is
23 bring a lender liability action against JPMorgan Chase or an
24 avoidance action. But even in those circumstances, that may
25 be done on consent of JPMorgan Chase.

1 As we indicated in the initial Rosen affidavit,
2 if, in fact, either a lender liability action or an
3 avoidance action would have to be commenced, we would
4 utilize conflicts counsel in those instances.

5 THE COURT: Okay. Do you have a copy of the
6 supplemental affidavit? It was not provided to me.

7 MR. ROSEN: I am sorry. I could hand one up right
8 now.

9 THE COURT: All right. Thank you. Any further
10 comments, Mr. McMahon?

11 MR. McMAHON: Well, Your Honor, very briefly.
12 Joseph McMahon for the acting U.S. Trustee, a couple points
13 here.

14 First, the supplemental affidavit which Mr. Rosen
15 filed addresses an issue in one paragraph relating to a
16 supplemental search that Weil, Gotshal is going to be
17 conducting. In the initial affidavit, we discovered that
18 the horizon for the connection search which Weil, Gotshal
19 and Manges conducted was two years prior to the bankruptcy
20 filing.

21 And we had some discussion regarding whether -- I
22 guess, what appropriate disclosure would be in the context
23 of a bankruptcy proceeding. Weil, Gotshal has voluntarily
24 agreed to supplement that disclosure with, I guess, a more
25 extensive search which -- the results of which are going to

1 be filed with this Court. And ultimately our rights with
2 respect to that supplemental disclosure will be reserved as
3 well as to take, you know, I guess, whatever action we would
4 deem appropriate in light of the disclosure.

5 With respect to, Your Honor, the -- the JPMorgan
6 Chase issue, counsel has made the statement on the record.
7 We have requested a copy of the -- of the actual waiver
8 letter. We'll continue those discussions with counsel, and
9 our rights are likewise reserved on that point. But I did
10 want to identify that issue specifically for the Court.

11 THE COURT: All right.

12 MR. ROSEN: Your Honor, with respect to
13 supplemental inquiries, specifically, Mr. McMahon has asked
14 us to go beyond the horizon under the theory that there
15 would be an extended statute of limitations that might be
16 applicable here, and, therefore, there might be a conflict
17 that -- that could be created. Obviously, the greatest
18 statute of limitations that we're aware of are six years,
19 and those are obviously for certain situations like
20 fraudulent transfers, none of which we think would be
21 applicable in this circumstance.

22 But, nevertheless, Your Honor, we will do a
23 supplemental search as requested by Mr. McMahon, as we
24 always do with every representation of a debtor, we will
25 file supplemental affidavits to the extent that there is

1 something worthy of further disclosure, subject to Mr.
2 McMahon's rights with respect to that subsequent
3 disclosure.

4 THE COURT: All right. With respect to the
5 JPMorgan Chase issue, however, is there currently -- I don't
6 know if Richards, Layton is able to be conflicts counsel in
7 that event. What --

8 MR. ROSEN: Well, Your Honor, with respect to
9 lender liability issues, we certainly don't see anything at
10 this point in time since they just came to the party by way
11 of the FDIC receivership and the acquisition, so there's
12 nothing that would predate other than one day this Chapter
13 11 case. Although there may be another relationship out
14 there that we will ultimately determine, but we don't see it
15 at this point in time.

16 Likewise, Your Honor, to the extent that they have
17 assets that belong to the debtors and we are able -- or we
18 are required to seek a turnover of those, we are committed
19 to do so. It is not as if there is an avoidance action.
20 Again, as there was no long-term relationship, we don't see
21 the need for the avoidance action at this time. But I know
22 that doesn't answer your question as to whether or not there
23 is conflicts counsel available, and I don't think counsel is
24 able to answer that right now either.

25 MR. JANG: That's correct, Your Honor.

1 MR. HODARA: May I?

2 THE COURT: Yes.

3 MR. HODARA: Just very briefly on that one
4 question of the JPMorgan relationship.

5 From the Creditors Committee perspective, it would
6 seem, as Mr. Rosen indicated, that the only likelihood in
7 the near term -- likelihood may not be the right word -- the
8 only prospect in the near term for litigation with JPMorgan
9 would be on turnover rather than the bad acts, lender
10 liability, fraudulent transfer type matters, and the
11 turnover could pertain not just to the cash account of which
12 everybody is aware but to documents which is in some ways a
13 more immediate and pressing issue, particularly in light of
14 what the United States Trustee has had to say today on that
15 subject with respect to schedules and other matters.

16 THE COURT: Okay.

17 MR. McMAHON: Very briefly again, Your Honor, in
18 light of our discussions with counsel, I think we were, I
19 guess, agreeable to proceed with the reservation of rights
20 under Section 328(c) or otherwise in the event that the --
21 the issue does come up with respect to counsel that's being
22 employed.

23 THE COURT: Well, I would be willing to grant the
24 application with the caveat that to the extent there is any
25 information that debtors' counsel becomes aware of regarding

1 any possible claims against JPMorgan, that they advise the
2 U.S. Trustee and the Creditors Committee.

3 MR. ROSEN: Certainly, Your Honor.

4 THE COURT: Then in that event, I can leave it to
5 the Committee and the U.S. Trustee to take the appropriate
6 action, if necessary.

7 MR. ROSEN: Fine.

8 THE COURT: Okay.

9 MR. ROSEN: Thank you, Your Honor. And we'll --
10 we will revise the Weil, Gotshal order consistent with some
11 of the discussions that we've had today, and then present
12 the Court with a certification.

13 THE COURT: All right.

14 MR. ROSEN: Thank you.

15 Your Honor, the next item on the Court's calendar
16 is the debtors' motion for entry of an order for interim and
17 final orders establishing notification procedures and
18 approving restrictions on certain transfers of interests in
19 the debtors and scheduling a final hearing for that.

20 Your Honor, we have received a few responses with
21 respect to the relief that is requested there, I don't think
22 any of which create any issues for the -- for the debtors
23 and for the Court, specifically, they are more reservation
24 of rights and certainly in some instances, with respect to
25 reservation of rights to a final hearing. But, Your Honor,

1 I can go through those.

2 I also have in the courtroom today, Your Honor,
3 Mr. James Carreon. Mr. Carreon is with Alvarez and Marsal
4 and he is a managing director and he is primarily involved
5 in the tax aspects of this Chapter 11 case. And I can at
6 some point, Your Honor, if the Court desires, proffer his
7 testimony or we can save that for the final hearing if the
8 Court desires.

9 Your Honor, the responses that we have received
10 are several. One was a reservation of rights of Fir Tree
11 Value Master Fund and Fir Tree Capital Opportunity Master
12 Fund, LP, and, Your Honor, that merely was a reservation to
13 establish -- excuse me -- Fir Tree reserves its right to
14 object or respond merely to the -- at the final hearing.

15 JPMorgan sought confirmation that it would have no
16 effect, that the relief being requested would have no effect
17 on the NOL, carry-forwards or other tax attributes, and a
18 reservation with respect to whose property the NOLs and the
19 attributes really belong -- or where they rest.

20 Your Honor, we did, in fact, include a footnote in
21 the proposed orders that the debtors did not intend the
22 relief in the motion to affect the rights, titles and
23 interests, if any, of WMB or WMBfsb which are the bank and
24 its subsidiary, the fsb. So, Your Honor, we believe that
25 that issue has already been taken care of.

1 The FDIC has also filed a pleading, and it does
2 not object, once again, to the procedures or the
3 restrictions that we set forth in the motion. They
4 objected, however, to the blanket assertion that the NOLs
5 are property of the debtors' estates. And once again, Your
6 Honor, I don't believe that is an issue for today or even at
7 a final hearing with respect to that. That is again, Your
8 Honor, something that we are happy to reserve all rights to
9 because what we are trying to do pursuant to the relief
10 requested is merely preserve those NOLs and those attributes
11 for whoever is entitled to receive those.

12 The IRS also sent an email saying that they do not
13 object to the motion and that they will be taking the
14 position that the NOLs are not property of the estate, once
15 again, Your Honor, not something that we have to deal with
16 today.

17 Lastly, Your Honor, we also were in communication
18 with a group of lenders that is -- excuse me -- by White and
19 Case and Mr. Lauria who has asked us to include in the
20 proposed order that they receive notice with respect to a
21 sale as we set forth in the procedures. Specifically, Your
22 Honor, in addition to the debtors and the Committee, that
23 Mr. Lauria's group and Mr. Lauria specifically as counsel
24 for that group, receive the notice. And we are prepared to
25 make that agreement as well, Your Honor.

1 And I would also represent on the record that in
2 the event that there are notices that are filed by a party
3 wishing to buy or wishing to sell, that we would also,
4 besides giving that notice to the parties, we would also
5 consult with them so that they would give us their
6 perspective whether or not the debtors, in response to those
7 notices being filed, should take a position pro or con,
8 whether they should allow that transaction to go through.

9 With that, Your Honor, I think I have disposed of
10 each of the responses or the reservations that have been
11 filed. I don't know if there are any more out there, if
12 someone wants to stand up in court, but I believe that those
13 are all the pieces of paper that we have received with
14 respect to the relief requested.

15 THE COURT: All right. Any other party wish to be
16 heard?

17 MR. LAURIA: Your Honor, if I may, just to
18 clarify, comments of counsel were correct, I think I just
19 wanted to make sure that there are a variety of different
20 notices that they may get including dispositions, et cetera,
21 and we're to be included in all of those.

22 THE COURT: Okay.

23 MR. ROSEN: Yes, Your Honor, we are happy to do
24 so, and we will -- it was our thought, Your Honor, that if
25 the Court grants relief, we'll revise the order and again

1 present it to the Court subsequently.

2 THE COURT: Okay.

3 MR. LANDIS: For the record, Adam Landis from
4 Landis, Rath and Cobb here on behalf of JPMorgan Chase.

5 We are satisfied with Mr. Rosen's representation
6 on the record. We did file a response for the limited
7 purpose of making sure that any tax attributes or NOLs that
8 were not properly allocable to the debtors were not being
9 affected by the motion. That is the case. The footnote is
10 the footnote in the order, and we're satisfied, so thank
11 you, Your Honor.

12 THE COURT: Okay.

13 MR. McMAHON: Your Honor, Joseph McMahon for the
14 acting U.S. Trustee, and we basically have two very brief
15 comments on the motion.

16 The first is the findings with respect to any
17 acquisition or action taken in violation of the procedures
18 being action null and void, ab initio, in violation of the
19 automatic stay. While we appreciate the fact that the
20 debtors have their position with respect to that issue, we
21 question whether it's a -- it's appropriate to have language
22 to that effect even in an interim order where the counter
23 party who is to be affected by the procedures who is not
24 before the Court is not here to, I guess, present its view
25 or its position with respect to that point.

1 With respect to the procedures themselves, Your
2 Honor, the last paragraph, numbered seven of paragraph 13 of
3 the motion, indicates that the debtors, in consultation with
4 the Committee, can effectively waive in writing the
5 restrictions, stays and notification procedures contained in
6 the motion.

7 And I don't know if other parties in interest have
8 considered this, but in light of some of the responses that
9 have been received, we wonder whether it's appropriate for
10 that subject to be the sole and exclusive province of this
11 Court on notice rather than kind of like being done on a
12 more limited basis.

13 MR. ROSEN: Your Honor, with respect to the first
14 item, it's -- the reason we filed the motion and the reason
15 we sought expedited consideration of it, was because of the
16 fear that there might be subsequent trading as soon as that
17 motion was filed, and the results of that trading -- that
18 trading -- excuse me -- would actually cause a loss of
19 attributes to the debtors' estates before the entry of an
20 interim order.

21 It is -- that is why we included a specific relief
22 that was set forth in the motion and the fact that we
23 noticed it as broadly as we could as soon as we did file
24 that motion. I understand Mr. McMahon's concerns, but if,
25 in fact, there is that now gap that could be out there, we

1 have the problem of the potential loss of attributes which
2 would certainly harm the interests of all parties to the
3 estate.

4 With respect to the paragraph seven, I actually
5 believe, Your Honor, that that would be counter. The
6 parties here are concerned not with respect to us waiving
7 anything, but they're concerned rather with respect to the
8 preservation of their rights to the extent that they may
9 exist in the NOLs or the attributes. I believe we're going
10 to be doing that with respect to Mr. Lauria's clients on
11 notice or in consultation with them on that point, and so I
12 don't understand Mr. McMahon's point.

13 THE COURT: I guess his point is that, should you
14 be consulting with the FDIC and JPMorgan Chase before
15 allowing someone to -- to sell.

16 MR. McMAHON: That's precisely our point, Your
17 Honor.

18 MR. ROSEN: Well, Your Honor, I'm --

19 THE COURT: Or don't -- or don't permit the debtor
20 to waive the restriction.

21 MR. ROSEN: -- I'd rather go that route.

22 THE COURT: Okay.

23 MR. ROSEN: We won't waive it, because I don't
24 want to be in a position of us going out there and -- and
25 canvassing. So that's fine, Your Honor. We'll take that

1 provision out

2 Your Honor, based upon that, and I don't know if
3 the Court would like me to go through a proffer --

4 THE COURT: I would like to hear a proffer.

5 MR. ROSEN: Okay. Your Honor, as I indicated, I
6 have in the courtroom with me here today Mr. James Carreon.
7 He is a managing director of Alvarez and Marsal Taxand, LLC,
8 which is an affiliate of Alvarez and Marsal, North America,
9 LLC. And as the Court is aware, based upon the application
10 that was just approved by the Court, Alvarez is going to be
11 serving as the restructuring adviser to Washington Mutual,
12 Inc., and its affiliated debtor, WMI Investment Corp.

13 If called to testify, Mr. Carreon would testify
14 that he holds Bachelor's Degrees in business administration
15 and communications from the University of Southern
16 California, a law degree from Southwestern University School
17 of Law and an LL.M. from Golden Gate University of Law.

18 He would also testify that he is an adjunct
19 professor at Golden Gate University and the co-author of the
20 BNA portfolio on related party transactions.

21 He would testify that prior to joining A&M,
22 Alvarez and Marsal, he worked with FTI Consulting where he
23 provided transaction tax services.

24 He worked at Sheppard, Mullin, Richter and
25 Hampton, LLP, where he provided legal advice with respect to

1 general tax matters, including mergers and acquisitions;
2 Ernst and Young's National Office West where he served as
3 the technical resource for the West Coast E&Y offices,
4 advising on merger and acquisition transactions; and was a
5 member of the Camp 382 sub practice dedicated to tax
6 attribute projects where he performed over 100 tax attribute
7 studies for various clients; and also at Deloitte and Touche
8 where he provided general corporate tax advice with an
9 emphasis on structured transactions.

10 Mr. Carreon would testify that A&M's involvement
11 with the debtors commenced on October 2nd. He would testify
12 that on October 10th of 2008, A&M filed its application to
13 be retained, and as the Court is aware, we have worked with
14 the retention here today.

15 He would state that since joining A&M, he has
16 personally overseen the day-to-day operations of the
17 debtors' tax department in light of the displacement of that
18 department in connection with the receivership and the
19 subsequent sale of Washington Mutual Bank to JPMorgan Chase.

20 Mr. Carreon would testify that to date the debtors
21 estimate that WaMu has net operating loss carried forward
22 amounts and/or built-in or unrecognized losses in excess of
23 \$20 billion in addition to certain other tax attributes. He
24 would testify that the tax attributes may be valuable assets
25 because Title 26 of the United States Code, the tax code,

1 generally permits corporations to carry over their losses
2 and tax credits to offset income.

3 He would further state that the NOLs can be
4 generally carried back two years and carried forward 20
5 years. He would testify that the debtors may recognize gain
6 or other income in connection with, among other things, the
7 ownership of its assets and the sale of a significant
8 portion, if not substantially all, of their assets during
9 the pendency of these bankruptcy cases.

10 Mr. Carreon would state that absent any
11 intervening limitations, the tax attributes could
12 substantially reduce the debtor's future Federal, State and
13 local income tax liability with respect to such amounts. He
14 would state that the debtors also expect to carry back a
15 significant portion of their NOLs and built-in unrecognized
16 losses in an attempt to obtain a refund of prior year taxes.
17 He would state that any reduction in the debtors' tax
18 liability would enhance the debtors' cash position for the
19 benefit of all parties in interest.

20 Mr. Carreon would further state that the ability
21 of the debtors to use the attributes to offset future
22 taxable income and in certain cases prior years' income is
23 subject to certain statutory limitations. He would say that
24 Sections 382 and 383 of the tax code limit a corporation's
25 use of its NOLs, tax credits and other tax attributes to

1 offset future taxable income to the extent that the
2 corporation has experienced an ownership change, and in the
3 case of certain losses, unrecognized, following an ownership
4 change may preclude the carry-back of such losses.

5 Mr. Carreon would testify that for purposes of
6 Section 382 of the tax code, an ownership change generally
7 occurs when the aggregate percentage of a company's equity
8 held by one or more persons or entities holding five percent
9 or more of that company's stock and certain groups of less
10 than five percent shareholders increases by more than 50
11 percentage points above the lowest percentage of ownership
12 owned by such shareholders at any time during the relevant
13 three-year testing period.

14 He would state that the proposed restrictions on
15 trading in the motion are crucial because once an interest
16 is acquired, the acquisition might not be reversible for tax
17 purposes absent such restrictions.

18 Mr. Carreon would testify that once a transfer
19 acts to limit the debtors' ability to use the tax attributes
20 under Sections 382 or 383, such ability may be permanently
21 lost. He would state that the relief requested is therefore
22 necessary to prevent an irrevocable loss of the debtors' use
23 of the tax attributes.

24 Mr. Carreon would testify that the debtors are
25 uncertain as to whether a 382 exchange has already occurred

1 with respect to the tax attributes. He would state that
2 whether or not an exchange has already occurred prior to the
3 date today, there could remain available a multi-billion
4 dollar net operating loss that would be adversely affected
5 and could be eliminated by a subsequent ownership change
6 thereby resulting in a potential loss of value to the
7 estates.

8 In fact, Mr. Carreon would state that an ownership
9 change even as late as October 30th could deprive the
10 debtors of the use of at least an estimated \$2 billion in
11 NOLs because of the method in which such tax attributes are
12 prorated under the tax code.

13 Mr. Carreon would testify that the proposed
14 restrictions and notice procedures are necessary to preserve
15 the debtors' potential ability to use the attributes which
16 may be valuable to the estates. He would state that the
17 debtors' ability to meet the requirements of the tax laws to
18 preserve the attributes would be seriously jeopardized
19 unless the procedures and restrictions are established
20 immediately to ensure that trading and WMI stock is either
21 curtailed or closely monitored.

22 He would testify that some trading in the stock
23 may not pose a serious risk to the tax attributes unless the
24 debtors generally seek to impose only an advance notice and
25 objection procedure and limit the relief sought to

1 transactions implicating a holder of WMI stock that is or
2 seeks to become or cease to be a "substantial equity holder"
3 as we defined in the motion.

4 Mr. Carreon would state that the relief requested
5 is narrowly tailored to permit certain stock trading to
6 continue subject to applicable securities, corporate and
7 other laws. He would seek that the debtors are seeking only
8 to enforce the provisions of the automatic stay in
9 connection with certain types of stock trading that pose a
10 serious risk under the ownership change test and to monitor
11 other types of trading that potentially pose a serious risk.

12 He would state -- he would state that it is in the
13 best interest of the debtors and their stakeholders to
14 restrict stock trading that could result in an ownership
15 change under Section 382 of the code during the pendency of
16 these Chapter 11 cases.

17 He would state that the required substantial
18 ownership notice, equity transaction notice and equity
19 disposition notice coupled with the equity objection
20 deadline will enable the debtors to best monitor trading of
21 the WMI stock and ensure that no ownership change is
22 occurred pursuant to the tax code.

23 Finally, Mr. Carreon would state that if the
24 debtors filed the NOL motion in accordance with the usual
25 notice procedures set forth by the Bankruptcy Rules and the

1 Local Rules of this Court, it was possible that a flurry of
2 equity trading would immediately follow as parties holding
3 the stock would rush to transfer or may rush to transfer
4 such stock and lock in any losses related thereto, or others
5 may rush to acquire stock before any prohibition on trading
6 is approved by the Court.

7 Mr. Carreon would testify that this possibility
8 necessitates the interim relief requested by the debtors and
9 the proposed nunc pro tunc relief to account for any
10 applicable trading of the stock after the filing of the
11 motion but before entry of either the interim or final
12 orders.

13 That would be his testimony today, Your Honor.

14 THE COURT: All right. Does anybody wish to
15 cross-examine Mr. Carreon? All right. I'll accept the
16 proffered testimony.

17 MR. ROSEN: Thank you, Your Honor.

18 Your Honor, with that, we would submit that we
19 have established sufficient cause to approve the interim
20 relief as requested and ask the Court to enter the order
21 that -- with the changes that we are going to make based
22 upon the conversations that we have had, we will submit to
23 the Court subsequently.

24 MR. McMAHON: Your Honor, very briefly, we address
25 the point with respect to the debtors' ability to waive

1 certain requirements. We have raised, I guess, two points,
2 and the first point -- the ones I'm coming back to, whether,
3 I guess, findings are in the order with respect to the
4 applicability of the automatic stay. I would just ask the
5 Court for clarification on that point.

6 THE COURT: All right. Well, let me state first,
7 based on the testimony presented by the debtor, I'm
8 satisfied that the debtor has met the requirement that there
9 be a finding of immediate and irreparable harm if the relief
10 is not granted.

11 I do find the findings set forth in the proposed
12 form of order to be appropriate. I think it is necessary to
13 make that finding in order to grant their relief nunc pro
14 tunc to the filing of the motion, and I can do so based on
15 the testimony. I think it's essential that the trading not
16 affect the value of the NOL to the extent it's property of
17 the estate.

18 So I will grant the order subject to the
19 modifications you stated you'll make.

20 MR. ROSEN: Thank you, Your Honor. We will make
21 those.

22 Your Honor, the last item on the calendar this
23 morning is actually a motion of Siemens -- Siemens IT
24 Solutions and Services, Inc., and counsel is here for that.

25 THE COURT: All right.

1 MR. MINUTI: Good afternoon, Your Honor.

2 THE COURT: Good afternoon.

3 MR. MINUTI: Mark Minuti from Saul Ewing. I'm
4 here today for Siemens IT Solutions and Services, Inc. I
5 rise only to introduce the Court to my outside counsel, Doug
6 Lipke from the Vedder Price firm. He will handle the
7 hearing today. Your Honor has already entered an order
8 admitting him pro hac vice.

9 THE COURT: All right. Thank you.

10 MR. MINUTI: Thank you, Your Honor.

11 MR. LIPKE: Thank you, Mr. Minuti. Good
12 afternoon, Your Honor.

13 THE COURT: Good afternoon.

14 MR. LIPKE: Douglas Lipke on behalf of Siemens IT
15 Solutions.

16 Your Honor, we come before Your Honor in an
17 unusual contract, executory contract with a holding company
18 that the sole purpose is to provide services to a bank
19 that's been taken over by the FDIC and sold to JPMorgan.
20 Neither the bank, WaMu Bank, or JPMorgan having privity with
21 Siemens, with the subject contract.

22 The subject agreement provides -- for Siemens to
23 provide IT support services to all 50,000 WaMu Bank, now
24 JPMorgan end users at 2,500 locations and branches of the
25 bank around the country, and to provide those services, they

1 have 300 -- Siemens has retained and has 350 dedicated
2 employees that spend 100 percent of their time on the
3 contract.

4 JPMorgan, I'm pleased to report to the Court, that
5 JPMorgan personnel and Siemens' personnel and the WaMu
6 personnel that are still on board have been meeting
7 diligently over the last 30 days to try to come up with a
8 resolution as to how to continue these services or to have a
9 transition of the services going forward but yet no
10 commitment.

11 This agreement is a five-year agreement whose term
12 expires on October 7th, the first week of October of 2009.
13 So it still has approximately another 11 -- 11 to 12 months
14 left on the contract.

15 Siemens was then backed into a corner here without
16 much of an option as to what to do during this limbo period,
17 not having received the \$10 million but being forced to
18 provide the services on a daily basis, come out of pocket on
19 a daily basis and provide the services to a party that's not
20 privy to the contract who has committed verbally to continue
21 to pay going forward but not to provide any of the payment
22 of the \$10 million that was owed prepetition.

23 Those payments by the way, Your Honor, prior to
24 the filing of the Chapter 11, were paid on a regular basis,
25 on a monthly basis, pursuant to the contract where Siemens

1 would provide an invoice, and within a few days, then the
2 payment would be made. Two of those payments got caught up
3 -- they're approximately \$5 million a month -- two of those
4 payments got caught up with the bad timing. One was ready
5 to come right before the filing.

6 The agreement -- and this is an important part, an
7 important fact, I think, for Your Honor to know, is that
8 this agreement provides for a 30-day notice of an early
9 termination. So if it was assumed, if the debtor wasn't in
10 a Chapter 11, the debtor would be able to provide a 30-day
11 notice at which time there would be a four-month wind-down
12 period to which Siemens would be given a four-month wind-
13 down period and paid wind-down fees to give them the
14 opportunity to transition out the 350 employees that produce
15 on a daily basis under the contract and to recover some of
16 the costs, the out of pocket costs that are set forth in the
17 reply that they've incurred and that they will lose.

18 Yet here, they're in a situation where there's no
19 termination date, the parties aren't able to tell them how
20 long their services will be needed. On any seven-day notice
21 of a motion to reject which Your Honor is likely to -- in
22 typical circumstances and situations -- approve, the
23 contract would be rejected and -- and JPMorgan would be able
24 to take over and we'd be left with the 350 employees and all
25 the other out of pocket expenses without being paid.

1 The debtor in those circumstances would be left
2 with a big unsecured rejection damages claim. JPMorgan
3 would be free of the contract because it's not privy to it,
4 and it could transition all these services into their own IT
5 services, and Siemens would be left with a significant
6 unsecured claim for damages and 350 employees with nowhere
7 to go.

8 Another important fact, Your Honor, is that we
9 have third-party vendors that help support these agreements.
10 In the event that, on short day notice, the agreement would
11 be rejected, Siemens would be prejudiced by having early
12 termination clauses under those contracts. We're not even
13 sure, Your Honor, if the confidentiality provisions and the
14 proprietary information provisions set forth in this
15 agreement would even apply to JPMorgan, the purchaser of the
16 bank, because they're not a party to the agreement.

17 It's clear that what JPMorgan would like, and it's
18 actually set forth in the debtors' objection at paragraph
19 five, that what they would like is to maintain status quo,
20 offer to pay the post-petition five million a month until
21 they indicate that it is no longer -- that they no longer
22 wish to avail themselves of the contractual liabilities.

23 So at any particular time when they feel that
24 they're ready to take over, they can push a button, ask the
25 debtor to file a motion to reject within seven days, Siemens

1 would be left naked at that point, again at which time the
2 debtor would receive rejection damages. Siemens is left
3 with the 350 employees.

4 The case law that's been cited by both the debtor
5 and Siemens suggests that this Court should balance the
6 burdens in this unusual circumstance where a party files a
7 motion to ask for an early rejection or assumption date, and
8 here it appears that all the burdens are borne by Siemens
9 and all the burdens are borne by the debtor. Based on
10 information and belief, we don't believe the debtor gets any
11 economic benefit from allowing JPMorgan to use the services
12 of this particular contract.

13 I have with me today, Your Honor, the -- an
14 individual by the name of Joseph Fabrizio who is the vice
15 president of service delivery on large enterprise accounts,
16 prepared to testify as to the prejudice resulting from a
17 short seven-day notice of rejection. He is the party -- he
18 is the vice president in charge of this particular account,
19 and he's also in charge -- excuse me -- of 12 other similar
20 accounts. So he's very familiar with the issues, the
21 problems, the services and --

22 THE COURT: Well, are we going to hear testimony
23 or do you want to proffer his testimony?

24 MR. LIPKE: It's your choice, Your Honor. I'm
25 willing to put him on the stand. I'm also willing to

1 proffer.

2 THE COURT: Well, let's go by proffer unless
3 counsel for the debtor has any objection.

4 MR. ROSEN: No, Your Honor. I'm happy to hear the
5 proffer and cross-examine if necessary.

6 THE COURT: All right.

7 MR. LIPKE: Thank you, Your Honor.

8 Your Honor, with me today is, again, Mr. Joseph
9 Fabrizio who is the vice president of service delivery on
10 large enterprise accounts for Siemens IT Solutions and
11 Services.

12 If called to testify, Mr. Fabrizio would testify
13 that he's been with Siemens for ten years and four years
14 he's been the vice president in the position that he's in
15 today providing the oversight on 12 contracts similar to the
16 one we're involved with JPMorgan and the debtor today.

17 Mr. Fabrizio would testify that he's very familiar
18 with the subject agreement, a copy of which I have with me
19 today, Your Honor. We did not file along with the motion
20 because it's voluminous with multiple schedules and provides
21 very sensitive and confidential pricing information, but we
22 have copies to submit to Your Honor today and to counsel for
23 the debtor and the Committee, if for some reason, it's
24 deemed necessary.

25 Mr. Fabrizio would testify that in the event that

1 a rejection order would be entered within short notice and
2 without the transition period that the -- that Siemens would
3 be prejudiced as follows: First, there's 350 Siemens' full-
4 time dedicated employees, dedicated to this contract alone
5 in three different countries. In the event that there would
6 be a short term termination, inability to redeploy these
7 employees, the cost to Siemens of severance would be \$2.4
8 million.

9 Mr. Fabrizio would testify that he holds weekly
10 conference calls with the 350 WaMu dedicated employees in
11 order to keep them on board. They are very concerned, he
12 would testify, based on discussions with them, of losing
13 their jobs before the holiday. He's lost up to ten to 12 --
14 he would testify that he has lost up to ten to 12 of the
15 employees that have worked on -- of the 350 -- that have
16 gone on and found other jobs elsewhere, and in order to
17 maintain the service required under the contract, he's had
18 to hurry around and try to find other employees to replace
19 these employees who were providing 100 percent of their time
20 to the services of this contract.

21 He would testify that the JPMorgan WaMu site for
22 the current WaMu employees provides that they will be
23 notified by December 1 that -- whether or not they will be
24 retained by JPMorgan going forward. He would testify that
25 he cannot give his employees a similar notice because he has

1 no idea when this contract will end, when it will be
2 rejected, how far and how long it will go forward.

3 He will further testify that if he had a
4 transition period as required under the agreement, he would
5 be able, over a period of time, to redeploy these employees
6 and that the current agreement provides for -- for a four-
7 month wind-down period in order to do so.

8 He would testify that, in addition to having the
9 350 Siemens' employees on the job, that they were required
10 to purchase network equipment and software, laptops,
11 computers, desktops for the 350 employees and that the
12 contract provides for the depreciation and amortization of
13 that over the period of the contract through October of
14 2009, and that \$1.9 million of that cost is still on the
15 books.

16 He would testify that in addition to the network
17 equipment and software, that Siemens was required to
18 purchase \$690,000 -- or at this time, the balance of
19 \$690,000 of specific parts, inventory and parts to service
20 the WaMu, now JPMorgan equipment for repairs on this IT
21 support system, and that in the event of a short notice of a
22 rejection, they would have no choice for this specific
23 equipment to sell it to some liquidator at -- at a very
24 minor cost.

25 He would testify that at the beginning of this

1 contract that they advanced \$4 million to Washington Mutual
2 to pay a termination fee to the previous IT third-party
3 contract that -- that was taken over by Siemens and that
4 \$770,000 of that cost still remains to be amortized over the
5 rest of the contract, that in the event that Siemens was
6 terminated on an early termination here, not only would it
7 not recover that cost but it wouldn't recover any of the
8 other early termination fees that are provided for in the
9 subject contract.

10 He would further provide that, as a part of this
11 contract, that Siemens was provided -- was required to put
12 \$126,000 -- actually, in excess of that, into a Mason, Ohio
13 facility which is a central network operations center, and
14 that in the event of a short rejection period, they would
15 not be able to transition out any of the investment in that
16 facility and that the full remaining balance of 126,000
17 would be lost.

18 He would further testify that they have several
19 third-party contracts including with IBM and Sun
20 Microsystems that provide subcontracting support to provide
21 the services now required by JPMorgan and formerly WaMu,
22 that in the event of a short rejection motion and order
23 entered by the Judge, that Siemens would be burdened with
24 early termination fees on those particular contracts.

25 He would further testify that in -- over the last

1 30 days, he and his colleagues of the Siemens IT group, have
2 met with JPMorgan IT group personnel as well as the former
3 WaMu personnel that are still there on a regular basis
4 including over the last two weeks on a daily basis to
5 provide how the services are provided and how they would be
6 provided going forward.

7 And during those discussions he learned that --
8 that the -- he has been told, and based on his experience
9 with all the other 12 contracts, that it's his belief that
10 JPMorgan should be in a position to decide whether or not it
11 needs to reject or assume and assign the particular contract
12 or direct the debtor to either assume or -- assume and
13 assign or reject within ten days, although earlier, JPMorgan
14 had advised them that they needed 90 days of due diligence
15 to figure out what to do, 30 days of which has already
16 occurred.

17 Your Honor, that concludes the proffer --

18 THE COURT: All right. Does any --

19 MR. LIPKE: -- other than, Your Honor, if -- if
20 necessary, I do have the contract here, submit it as an
21 exhibit, ask that it be admitted into evidence. It is
22 not --

23 THE COURT: Well, if you don't want it -- do you
24 want it redacted or sealed?

25 MR. LIPKE: Well, we've taken off -- I'm not sure

1 that we need it except if -- if Your Honor needs it to make
2 the decision. If we do submit it, I've taken off the
3 exhibits that are the sensitive pricing. The form of the
4 contract that I have right here that has the form on wind-
5 down period, the 30-day termination and the like is
6 contained in here, and I've gotten permission from Siemens
7 to make this a matter of public record.

8 THE COURT: All right. Then you may hand it up.
9 We'll mark it as M-1.

10 MR. LIPKE: May I approach?

11 THE COURT: You may.

12 MR. LIPKE: Thank you.

13 THE COURT: You can give it to me.

14 MR. LIPKE: Thank you.

15 THE COURT: Thank you.

16 MR. ROSEN: Could we have a copy?

17 MR. LIPKE: Yes.

18 MR. ROSEN: Thanks.

19 MR. LIPKE: Your Honor, I would ask that it be
20 admitted.

21 THE COURT: All right. Any cross-examination of
22 the witness first?

23 MR. ROSEN: Your Honor, first I'd like to object
24 certainly to the last aspect of the proffer where counsel
25 said that, Mr. Fabrizio was told, and he then proceeds to go

1 into a -- a launch of some hearsay evidence. And so I would
2 ask that that be stricken from the proffer about the ten
3 days versus 90 days and anything thereafter.

4 THE COURT: Why is that not hearsay?

5 MR. LIPKE: I think it's an admission, Your Honor.
6 In any event, Your Honor, what he can testify to is that
7 based on those discussions and his experience with these
8 types of contracts over the last ten years and as vice
9 president of all of these contracts, that it's his belief
10 that it would take no more than ten days after the 30 days
11 that they've had in order for them to make a decision as to
12 whether or not to assume or reject.

13 THE COURT: Well, with that caveat, this is based
14 on his experience, I'll -- I'll allow it --

15 MR. LIPKE: Thank you, Your Honor.

16 THE COURT: -- and overrule the objection. Do you
17 want to cross-examine the witness, though?

18 MR. ROSEN: Your Honor, I think it would be
19 appropriate, although in order not to burden the Court with
20 some burdensome and duplicative cross-examination, I would
21 like to get together with Mr. Landis for just a few moments,
22 perhaps five minutes, Your Honor, and then cross-examine the
23 witness at that time.

24 THE COURT: All right. Let's take a five-minute
25 break then.

1 MR. ROSEN: Thank you, Your Honor.

2 (Recess taken, 3:01 p.m. to 3:08 p.m.)

3 THE COURT: All right. Let's have Mr. Fabrizio
4 sworn.

5 MR. LIPKE: If I may, Your Honor, he's there and I
6 wanted to ask him to take the stand. Thank you.

7 THE COURT: All right. Remain standing so you can
8 be sworn.

9 COURTROOM DEPUTY: Please raise your right hand.

10 JOSEPH FABRIZIO, SIEMENS' WITNESS, SWORN

11 COURTROOM DEPUTY: Please state and spell your
12 name for the record.

13 THE WITNESS: Joseph Fabrizio, F like Frank-A-B-R-
14 I-Z-I-O.

15 COURTROOM DEPUTY: Thank you. You may be seated.

16 THE COURT: Just for the record, can you confirm
17 that the proffer made by your counsel is what you would have
18 testified to on direct had you been called.

19 THE WITNESS: Yes, Your Honor, it was.

20 THE COURT: Okay. You may cross.

21 MR. LANDIS: Thank you, Your Honor. For the
22 record, Adam Landis from JPMorgan -- from Landis, Rath and
23 Cobb on behalf of JPMorgan Chase.

24 CROSS-EXAMINATION

25 BY MR. LANDIS:

1 Q Mr. Fabrizio, I don't have very much, but I'm going to
2 ask you a couple of questions.

3 The IT support agreement to which you testified by
4 proffer is a complex agreement, isn't it?

5 A I would say so, yes.

6 Q Okay. And it includes, does it not, services that are
7 provided both to WMI, the debtors in this case, and WMB, the
8 operating bank company that was sold to JPMorgan Chase?

9 A Mr. Landis, we were never made aware of that. I have no
10 idea on who provides what service. We provide services to
11 all WaMu employees. Where their employment resides, I have
12 no -- no knowledge of that.

13 Q Well, that's not really what I asked you, sir.

14 A Sure.

15 Q What I asked you is that under the agreement, services
16 are provided not only to WMI, who's the contract party, but
17 also to WMB?

18 A Again, counselor, I have no recollection -- I have no
19 knowledge of that. We provide services to everyone that
20 contains a WaMu ID irregardless of, you know, what holding
21 company or what bank they belong to.

22 Q Well, sir, I want to -- I want to back up a little bit.
23 You're -- you're very familiar with the agreement, according
24 to your proffered testimony, correct?

25 A That is correct.

1 Q Okay. And you're aware, are you not, that there was a
2 sale of operating assets to JPMorgan Chase?

3 A That is correct.

4 Q Okay. And are you aware that JPMorgan Chase is
5 receiving some of the benefits of the IT services agreement?

6 A Yes, they are.

7 Q Okay. And are you aware that the holding company, WMI,
8 also has information and employees that it would be
9 receiving -- excuse me, let me strike that and rephrase it.

10 Are you also aware that -- that WMI has employees?

11 A Again, counselor, I have no knowledge of who's WMI and
12 who's WaMu Bank. I only service everyone that has a WaMu --
13 WaMu UID.

14 Q Okay. If there is a WMI employee who needs information,
15 would that -- that WaMu -- that WMI employee would receive
16 that information pursuant to the IT support services
17 agreement, wouldn't he?

18 A Provided he has a WaMu UID.

19 Q Okay. So -- and the way the IT services agreement is
20 structured, there is no differentiation, is there, between
21 services provided to WMI or WMB, correct?

22 A Counselor, I'm not trying to be funny here, but if they
23 have a WaMu ID, they're entitled to service delivery under
24 this agreement, and we do not differentiate nor have they
25 told us to differentiate.

1 Q Right. That's really what I was getting at. There is
2 no differentiation to -- to use your term. And there -- in
3 terms of the billing, there's no differentiation between WMI
4 and WMB, correct?

5 A We -- you're correct. We only submit one invoice to
6 WMI.

7 Q Okay. And that one invoice to WMI is a general invoice,
8 correct for all services provided?

9 A That is correct.

10 Q Not broken out for WMB; not broken out for WMI, correct?

11 A The only breakout would be that we -- we break out the
12 services that are delivered to the WaMu Card Services Group.

13 Q Okay. So under the agreement then -- let me -- let me
14 strike that, too. Let me go back.

15 You testified in your proffered examination about
16 a number of different potential claims that Siemens would
17 have were the contract rejected. Do you recall that
18 testimony, sir?

19 A Yes, I do.

20 Q Okay. And if the contract were rejected today, those
21 claims would be quantifiable, you'd be able to figure out
22 what the number is on those claims, correct?

23 A That is correct.

24 Q And you would file a claim against WMI in connection
25 with the rejection of the contract, correct?

1 A That would be one way, yes.

2 Q Okay. Well, would there be another way?

3 A Well, if we had more time, the claim would be reduced
4 significantly. It would give us an opportunity to mitigate
5 some of those claims.

6 Q Well, in all events, though, you would have a claim
7 against WMI if WMI were to reject the contract today? Now,
8 without regard to mitigation and what your obligations are
9 or your abilities are to mitigate, all I'm asking is, you
10 would have a claim for the damages in connection with the
11 rejection of that contract, correct?

12 A That would be correct.

13 Q Okay. And if the contract ultimately were assumed by
14 the debtor and assigned, any claim for prepetition amounts
15 owing would have to be cured as either they're quantified or
16 agreed to by the parties, correct?

17 A Again, that's correct, but the amount would be
18 significantly different depending on the time frame we had
19 to remediate it.

20 Q Well, again, I wasn't speaking to mitigation. I'm just
21 -- I'm just suggesting and I want to get your understanding
22 of it, that if the contract were to be assumed, those
23 prepetition amounts would have to be cured?

24 A Correct.

25 Q Okay. You are aware, are you not, of a stipulation

1 between the debtors and JPMorgan Chase with respect to the
2 payment of certain post-petition amounts in connection with
3 contracts that are in the name of WMI?

4 A So -- just in -- could you rephrase that -- a little bit
5 more English so?

6 Q Well -- sorry about that. It got a little long. I
7 believe in your proffered testimony there were statements
8 with respect to your knowledge of an agreement that JPMorgan
9 Chase would pay for, post-petition amounts, where it was a
10 beneficiary of a contract?

11 A Correct, that is correct.

12 Q Okay. So you're aware of an agreement whereby JPMorgan
13 Chase would -- would pay for post-petition amounts?

14 A For services that are delivered.

15 Q To it?

16 A Correct.

17 Q Okay. And you've spoken with representatives of
18 JPMorgan Chase, have you not?

19 A Yes, I have.

20 Q Okay. And you believe that JPMorgan Chase will pay
21 post-petition amounts that are owing under the services
22 agreement, of the IT services agreement as they come due,
23 correct?

24 A Again, we have not received any payment from them, but
25 they're the claims that they have made.

1 Q Well, you've seen a written agreement, haven't you?

2 A Counselor, I have, but they've also put our payments on
3 hold currently pending their review.

4 Q Well, we can get to that.

5 A Okay.

6 Q But you've seen a written agreement whereby JPMorgan
7 Chase has obligated to pay post-petition amounts to you?

8 MR. LIPKE: Objection, Your Honor. Foundation.

9 THE COURT: Overruled. Can you answer?

10 THE WITNESS: Would you repeat the question,
11 please.

12 MR. LANDIS: Yes.

13 BY MR. LANDIS:

14 Q You've seen a written agreement between JPMorgan Chase
15 and the debtors, have you not?

16 A Yes, I have.

17 Q Okay. And you understand -- you've read that written
18 agreement, have you not?

19 A Yes, I have.

20 Q Okay. And you understand that in that written
21 agreement, JPMorgan Chase has obligated itself to pay post-
22 petition amounts owing under the IT services agreement, do
23 you not?

24 A Yes, I do.

25 Q Okay. And you don't, as you sit there today, have any

1 reason to believe JPMorgan Chase is not going to pay those
2 amounts, do you?

3 A Other than the fact that they have put the invoices for
4 post-petition work on hold pending their review of the
5 contract.

6 Q Well, have any amounts been paid to Siemens?

7 A Not from JPMorgan Chase.

8 Q Siemens -- it's your testimony that Siemens has not
9 received any payments from JPMorgan Chase on account of
10 either prepetition or post-petition amounts owing under the
11 IT services agreement?

12 A To be honest with you, I do not know prepetition where
13 the payment came from. Post-petition, payments are due
14 actually tomorrow, the end of the month for the first
15 payment.

16 Q So as you sit there today then, no post-petition payment
17 is due --

18 A Well --

19 Q -- right now?

20 A -- it's not due till tomorrow, but we have confirmation,
21 okay, from the accounts payable department, that they're on
22 hold.

23 Q Okay. I really don't want to know about your
24 confirmation --

25 A Okay.

1 Q -- from -- from the AP department.

2 A Yes.

3 Q But your testimony, just to be crystal clear, nothing is
4 due today?

5 A Nothing is due today.

6 Q And to back up just a little bit, you have received some
7 payments on account of prepetition claims -- amounts that
8 are owing under the IT services agreement, correct?

9 A I can't really answer that because I don't know, sitting
10 here today, what payments, the moneys we received, were
11 applied to, whether they were post or prepetition.

12 Q Well, payments were made, correct?

13 A Payments were made, but I'd be guessing if I -- if I
14 told you which ones they were applied to.

15 Q Well, and they would have been applied not by the payor?

16 A I would be guessing, counselor.

17 Q Well, when you receive a payment, I would imagine it
18 comes into your accounts payable department, and they apply
19 it to amounts that are outstanding under contracts, correct?

20 A Which ones is -- is depending on which invoices are paid
21 against it, and I don't have a record of that or knowledge
22 of it.

23 Q Okay. No record and no knowledge, but payments have
24 been made, we know that, correct?

25 A They've been made for the last four years, yes.

1 Q I didn't ask you about -- okay, for the last four years.
2 But payments have been made since the filing of the
3 bankruptcy case, have they not?

4 A They have been, yes.

5 Q Okay. And no amounts are due for post-petition, as you
6 sit there today?

7 A They're due tomorrow, correct.

8 Q Based on those two facts, the payments have -- that have
9 been made only could be on account of prepetition amounts,
10 isn't that correct?

11 A I -- I would be guessing if I answered that.

12 (Pause in proceedings.)

13 MR. LANDIS: That's all I have for this witness.

14 MR. ROSEN: I just have a few questions, Your
15 Honor.

16 THE COURT: Okay.

17 CROSS-EXAMINATION

18 BY MR. ROSEN:

19 Q Sir, how much was paid?

20 A Approximately \$5 million.

21 Q And the amount under the contract that is supposed to be
22 paid is \$5 million a month, is that correct?

23 A No. It's not a set amount. It's a variable amount each
24 month depending on what services are delivered.

25 Q Counsel represented before it was approximately five

1 million a month?

2 A It's approximately five million.

3 Q Okay. And -- and if you got a payment of \$5 million and
4 you applied it to a prepetition amount that you might not
5 have otherwise been permitted to do by the Bankruptcy Code,
6 that would have been a prepayment then on a post-petition
7 amount, is that correct?

8 A I would be guessing if I answered that.

9 Q Okay. Do you know if you're allowed to take money from
10 a debtor's estate and apply it to a prepetition claim?

11 A I do not know. That's out of my area of expertise.

12 Q Okay. Mr. Landis talked to you for a little bit about
13 filing of a claim, and before your counsel had launched into
14 a lot of amounts that he thought you would be "out of
15 pocket" for. Would you include the amount of undepreciated
16 amounts in a proof of claim as your prospective proof of
17 claim?

18 A Yes.

19 Q Would you include in the amounts any severance that you
20 have paid to any employees in your prepetition claim?

21 A I don't understand the difference between prepetition,
22 why that would --

23 Q Any -- any claims for rejection damages, would you
24 include the so-called \$2.4 million in severance obligations
25 in a proof of claim?

1 MR. LIPKE: Objection, Your Honor. Foundation. I
2 think there -- he's asking legal conclusions as to what
3 would be put into a proof of claim, what would be damages
4 for a proof --

5 THE COURT: Yes, isn't that a legal --

6 MR. LIPKE: -- for a proof of claim.

7 THE COURT: -- isn't that a legal conclusion?

8 MR. ROSEN: Well, Your Honor, I actually don't
9 think it is. I mean, he has stated that he is going to be
10 -- or counsel -- and then through the proffer -- has stated
11 that these amounts would be outstanding, and I'm just asking
12 if all --

13 THE COURT: No, he's saying these are his damages.

14 MR. ROSEN: -- his damages, and I'm asking if he
15 would include these damages in his proof of claim, that's
16 all.

17 THE COURT: But is it relevant?

18 MR. ROSEN: Well, Your Honor, I'm just trying to
19 get to the point, and I think the same point that Mr. Landis
20 is making is, this is all just doing business. This is a
21 prepetition claim.

22 THE COURT: Well, that's -- that's argument. I
23 don't know that this is relevant to ask him whether he would
24 include it on a proof of claim form.

25 BY MR. ROSEN:

1 Q Mr. Fabrizio, have you ever been involved or -- in a
2 contract that was rejected as part of a bankruptcy case?

3 A No, sir.

4 Q Has Siemens ever had a contract rejected as part of a
5 bankruptcy case?

6 A I would be guessing. I have no idea.

7 Q Okay. Have you been in court the entire afternoon since
8 the calendar began?

9 A Yes, sir.

10 Q And did you hear the statements made with respect to the
11 preparation of schedules and the statements of financial
12 affairs?

13 A As much as I can understand of it, yes.

14 Q And did you understand how long it was going to take the
15 debtors to complete the process of those, the amount that
16 they had been requested and the amount that the Court had
17 granted as far as time to complete those schedules and
18 statements?

19 A I would say basically.

20 Q And do you remember what that time frame was?

21 A Sometime in -- in December, I believe it was.

22 Q And you were asked before about the -- the integration
23 of the computer system of Washington Mutual, and I believe
24 it was your testimony -- is that you don't really know who's
25 using what as long as they have a WaMu ID, is that correct?

1 A That's correct.

2 Q And so would it surprise you that the debtors would need
3 access to the computerized systems therefore to complete the
4 schedules and the statement of financial affairs if, in
5 fact, they were on the computer system and using the
6 Siemens' software?

7 A Since the filing, we have not refused service to anyone
8 and we don't intend to going forward.

9 Q Well, I -- I appreciate that very much.

10 A Okay.

11 Q But would it surprise you if the debtors would need that
12 in order to do what they have to do to complete the
13 schedules and the statement of financial affairs?

14 A That wouldn't surprise me.

15 Q Okay.

16 MR. ROSEN: That's all I have, Your Honor.

17 THE COURT: Okay. Any other party? All right.

18 Any redirect?

19 MR. LIPKE: No, Your Honor. Thank you.

20 THE COURT: All right. Thank you. You may step
21 down.

22 Any further testimony by the movant?

23 MR. LIPKE: No, Your Honor.

24 THE COURT: All right. And does the debtor wish
25 to present any testimony?

1 MR. ROSEN: No, Your Honor. I just wanted to
2 respond. Counsel made some comments in opening statements
3 and at the appropriate time, I would just like to respond to
4 those.

5 THE COURT: All right. Well, I'll hear argument
6 then. I've heard the opening by the movant. Let me hear
7 from the objectors.

8 MR. ROSEN: Thank you, Your Honor.

9 Actually, Your Honor, our position is quite
10 simple. These payments -- and as you heard the testimony,
11 they have received \$5 million or approximately \$5 million.
12 It is our view, Your Honor, that this is, based upon the
13 bankruptcy law, something that would have had to have been
14 applied on a post-petition basis. So not only is something
15 not even due because it wouldn't be due until the earliest
16 tomorrow, we believe, Your Honor, that JPMorgan Chase has
17 already prepaid that month, and we're -- we're looking
18 forward to the next month at this point in time.

19 We have worked very diligently here, Your Honor,
20 to maintain a relationship --

21 THE COURT: Well, let -- let me question you on
22 that. What day did you file bankruptcy?

23 MR. ROSEN: September 26th, Your Honor.

24 THE COURT: Okay. The payment was due the last
25 day of the month?

1 MR. ROSEN: According to the testimony, yes.

2 THE COURT: Okay.

3 MR. ROSEN: Your Honor, we've worked very hard
4 since the outset of this case to work with JPMorgan Chase to
5 mitigate any damages that might arise from any executory
6 contract that might be out there. We have signed an
7 agreement that's been written about in our pleadings that
8 Mr. Fabrizio has seen whereby JPMorgan Chase is going to
9 commit to make payments.

10 And, in fact, in this particular --

11 THE COURT: Am I ever going to see that agreement?

12 MR. ROSEN: The answer, Your Honor, is yes, we are
13 preparing the motion to file with the Court.

14 THE COURT: All right.

15 MR. ROSEN: JPMorgan has, in fact, gone forward
16 and made payments. We heard that today, and we hope that
17 they continue to do that so that, in fact, there are fewer
18 rejection damage claims against the estate. We see no
19 benefit here to the debtors' estates in allowing this relief
20 to be provided.

21 I'm not sure what was actually being asked for.
22 First, I thought it was a motion to compel the assumption or
23 rejection. Then I thought, based upon the arguments
24 presented by counsel that he was saying, I don't want you to
25 follow the Bankruptcy Rules. I want a four-month runoff so

1 that I can mitigate my claim.

2 The Code provides, Your Honor, that we can reject
3 any executory contract. The rules provide for notice and we
4 can reject it and we can have an effective date as of that
5 rejection. All that counsel's really asking for is to
6 change the rules, change the contract to which they signed.
7 And, Your Honor, we think that that is inappropriate. The
8 debtors are going to do whatever the debtors have to do to
9 reduce the claims for the benefit of all creditors.

10 And by allowing this -- as I said, I'm still not
11 sure what the relief is based upon the argument here today,
12 but by allowing the relief that's requested here, if, in
13 fact, just taking it at face value, the Court establishes a
14 date that is very short, we might be prejudiced, Your Honor,
15 because we may not have -- we may not have the wherewithal
16 to assume this, and we certainly wouldn't want to assume
17 this generating 11 months worth of administrative expenses,
18 or based upon counsel's representation, \$55 million worth of
19 claims.

20 Your Honor, it would have to be rejected, and as a
21 result, it would be an expeditious rejection, and we
22 wouldn't have the benefit of going forward and completing
23 the schedules and the statements of financial affairs. We
24 see no harm to Siemens here. They're getting paid on an
25 ongoing basis. That is the bottom line. That is what the

1 Courts look to.

2 If, in fact, there is no prejudice because they
3 are getting paid, that is what should be the determinative
4 factor, not looking four months out, based upon their
5 transition services or what would be included in their proof
6 of claim. That is not relevant at all, Your Honor. Solely
7 relevant is, are they getting paid? Are they current? The
8 answer is, they are.

9 THE COURT: Well, it's safe to say that you're not
10 going to reject it until your schedules are completed,
11 though. Is that safe to say?

12 MR. ROSEN: Your Honor, to the extent that we need
13 to -- that little piece of software, and I say the little
14 piece, because the bulk of this, Your Honor, services things
15 that are not relevant at all to our estate. They are
16 relevant to the entire Washington Bank system. And to the
17 extent that the computers run and we need that data, you are
18 correct.

19 THE COURT: Okay.

20 MR. LANDIS: Your Honor, I'm going to approach the
21 podium this way around rather than do it from counsel table.
22 Again for the record, Adam Landis from Landis, Rath and Cobb
23 on behalf of JPMorgan Chase.

24 We -- we fundamentally agree with the debtors
25 here. And what you've heard in testimony and in the

1 debtors' papers and you'll hear it from me as well, is that
2 JPMorgan is committed to satisfying post-petition
3 obligations under this Siemens' contract as and to the
4 extent they benefit JPMorgan Chase and as they come due.
5 We've heard in testimony that nothing is due post-petition
6 today.

7 That doesn't go to the fact that you've also heard
8 in testimony that amounts have been paid. Mr. Fabrizio
9 testified that he didn't know how they were applied, he
10 didn't know who paid them, and all of that can wait for
11 later. But we can say assuredly today that amounts have
12 already been paid regardless of the fact of their absolute
13 requirement to be paid on a post-petition basis.

14 Your Honor, in terms of the balancing of the
15 prejudice that's well known to this Court in terms of the
16 legal standards here, you also heard testimony that this is
17 a complex contract. You heard Mr. Fabrizio testify that
18 there is no breaking out of the costs that would be
19 allocable to WMI or to WMB. You've heard Mr. Fabrizio
20 testify that there are negotiations ongoing between the
21 parties, between the debtors, JPMorgan Chase and Siemens.
22 Those negotiations need to continue.

23 And I would not ever seek to negotiate in front of
24 the Court, but, frankly, Your Honor, were you to order the
25 debtors to assume or reject on a shorter time table than

1 what is allowed under the Bankruptcy Code, they will be
2 prejudiced in any negotiations that go on, and they are
3 ongoing, because these contracts, as you heard from Mr.
4 Rosen, the contract is -- is needed. It's required for the
5 debtors in connection with what it needs to do in this case.
6 And to the extent it's required for JPMorgan Chase and to
7 the extent that the contract is not rejected, I reiterate,
8 that JPMorgan Chase is going to pay on a post-petition basis
9 as those amounts are presented to it.

10 THE COURT: Well, see my problem is, I don't know
11 what the contract says, and listening to you, I'm not
12 getting from you that you're going to pay the full amount.

13 MR. LANDIS: Well, Your Honor, let me -- let me be
14 quite clear, and there is a stipulation, and Your Honor does
15 need to see the stipulation --

16 THE COURT: Well --

17 MR. LANDIS: -- and it will be filed with the
18 Court. And it will be subject to notice and be approved by
19 parties. But we have agreed to pay --

20 THE COURT: Well, this motion's been pending since
21 October 7th, so --

22 MR. LANDIS: Well, Your Honor, I know there's --
23 there's an awful lot that goes on outside --

24 THE COURT: I do, too.

25 MR. LANDIS: -- of the courtroom, and, you know,

1 part of that is getting things prepared in an appropriate
2 way so agreements are made. But JPMorgan Chase is prepared
3 to pay, and we have talked -- talked and discussed it with
4 debtors, and the stipulation provides that we will pay for
5 the benefits that we receive under the contract. So to the
6 extent that the debtors --

7 THE COURT: But something different from what the
8 -- I think, the debtors suggested in their papers?

9 MR. LANDIS: Well, Your Honor, to the extent that
10 there are amounts that are owing post-petition, Siemens will
11 be paid. That is clear. And JPMorgan --

12 THE COURT: How is that clear? By whom?

13 MR. LANDIS: What's that?

14 THE COURT: How is it clear that Siemens is going
15 to be paid all post-petition amounts?

16 MR. LANDIS: Your Honor, I believe that Siemens
17 knows that from having seen the stipulation, and I believe
18 that, you know, I've been very clear on the record that --
19 that we're going to pay.

20 THE COURT: You're going to pay to the extent you
21 get the service -- you get services.

22 MR. LANDIS: And what -- and what --

23 THE COURT: I mean, is this going to be parsed
24 out?

25 MR. LANDIS: -- what -- well --

1 THE COURT: To the extent you didn't get
2 something, maybe you're not going to pay for it? To the
3 extent it benefitted the debtor, not you, you're not going
4 to pay for it?

5 MR. LANDIS: Well, Your Honor, I think that that's
6 precisely the reason that more time is needed, because the
7 contract is complex. And as I stand here today, and it was
8 handed up to Your Honor, it's not entirely clear who's
9 getting what. If JPMorgan is getting and is responsible for
10 all the benefits because they cannot be broken out, JPMorgan
11 is going to pay.

12 I mean, it's -- we are well familiar with the pay-
13 to-play rule during the pendency of an assumption or
14 rejection, and the debtors are familiar with that as well.
15 And what you have heard is that JPMorgan Chase will pay. So
16 that I think eliminates the prejudice argument.

17 To get to one final point, Your Honor, all the
18 testimony from Mr. Fabrizio in connection with the potential
19 claims, those are all prepetition claims, those are damage
20 claims. It would be wonderful if those claims could be
21 mitigated, and the fact that the contract has a runoff
22 period that would otherwise allow certain things to happen
23 in bankruptcy in some respects is an unfortunate fact.

24 The debtors do have a right to assume or reject.
25 They're going to do so reasonably. They're going to do so

1 in a way that makes sense for the estate and working to
2 minimize claims, and JPMorgan is working with the debtors,
3 committed to working with the debtors, and we'll get
4 something done, you know, as quickly as possible. So that's
5 all I have, Your Honor.

6 THE COURT: All right. Does movant wish to
7 respond?

8 MR. LIPKE: If I may, Your Honor, very brief.

9 First, I start out with a clarification that I did
10 not state and the testimony is not that we asked for a four-
11 month wind-down period. The testimony was that the contract
12 provides for a four-month wind-down period, and the reason
13 that it's in there to show the basis of a prejudice if we're
14 given a seven-day motion notice for purposes of rejection.

15 THE COURT: Well, isn't that exactly what you're
16 asking for? You're asking me today to order them to assume
17 or reject this contract in ten days.

18 MR. LIPKE: Yes.

19 THE COURT: They're not going to assume it.
20 They're going to reject that contract.

21 MR. LIPKE: That's what my conclusion in the reply
22 provides --

23 THE COURT: So --

24 MR. LIPKE: -- I believe that. So, Your Honor --

25 THE COURT: -- you're asking for exactly what you

1 say you don't want to happen.

2 MR. LIPKE: Well, Your Honor, then we'll know.
3 Then we'll be able to tell the employees, if it's rejected
4 in ten days, we'll be able to go out, we'll know exactly,
5 you know, what -- what we have.

6 THE COURT: You won't be mitigating any of these
7 damages you say you're going to suffer.

8 MR. LIPKE: We'll attempt to, we'll attempt to.
9 But we're -- but we're willing to do that because then we'll
10 know. Right now, Mr. Fabrizio testified that he has weekly
11 calls with the employees. He's lost ten of them. And that
12 he has to explain to them that he cannot tell them when
13 they'll be retained, if they'll be retained, how long the
14 contract will be in place. There was no rebuttal to the
15 testimony.

16 THE COURT: Isn't that better than knowing that in
17 ten days they're going to be fired, because that's the
18 alternative?

19 MR. LIPKE: Your Honor, you're not being asked to
20 give them time to assume the contract. You're being asked
21 to give them time to reject it. And the only -- the only
22 detriment to the -- to the debtor that I heard testimony on
23 was that they might not have sufficient IT services to
24 complete the schedules and statement of financial affairs.

25 And I can stand here before Your Honor today and

1 tell you that even if the contract is rejected as it relates
2 to the bank, that JPMorgan is using the services, that
3 they'll continue to provide the services to the debtor for
4 purposes of completing the schedules and statement of
5 financial affairs, which I believe has very little, if
6 anything, to do with the bank, where the majority, if not
7 essentially all of the services, are provided. It's the
8 bank where these services are provided.

9 The only testimony before Your Honor is that the
10 contract was intended to service all of the employees in the
11 2,500 locations which are the branches. And we don't
12 believe it's fair to leave us in limbo in not knowing when
13 this contract is going to terminate. The only testimony
14 before Your Honor is that -- that they could make this
15 decision in ten days based on his experience in this
16 industry.

17 And all we're asking Your Honor to do is have them
18 make the decision and then we'll deal with it. And the only
19 real detriment to the debtor in having that done, if it is,
20 is the schedules and statement of financial affairs, and
21 I'll commit today, Your Honor, that we'll provide the debtor
22 with whatever IT services are necessary to complete the --
23 the schedules and statement of financial affairs by
24 December.

25 Your Honor, again, Your Honor can shorten the time

1 on a balance of burdens, and you've heard --

2 THE COURT: Yes, but shortening the time isn't
3 going to help you. It's going to give you exactly what you
4 don't want me to give you.

5 MR. LIPKE: Your Honor, if we didn't want it, we
6 wouldn't ask for it.

7 THE COURT: Well --

8 MR. LIPKE: I mean, I've been --

9 THE COURT: -- I think you wanted to compel the
10 debtor to assume your contract, but the debtor's not going
11 to assume your contract.

12 MR. LIPKE: We can't ask you to compel the debtors
13 to assume the contract.

14 THE COURT: Correct.

15 MR. LIPKE: My conclusion in my reply suggests
16 that it becomes clear that the debtor's not going to assume
17 the contract and pay the ten million. And -- and,
18 therefore, what Your Honor is being asked by them to do is
19 wait until confirmation is what I've heard them say to allow
20 them to reject the contract.

21 THE COURT: Well, the plan may not be confirmed
22 before October of '09.

23 MR. LIPKE: That may be. But we don't know. But
24 if Your Honor says I'm going to give you 90 days to decide
25 whether or not to assume or reject the contract, on seven-

1 days' notice, they can give us a notice and reject it, and
2 we're -- we're standing there holding all of the damages
3 that are set forth in there that prejudice us.

4 THE COURT: But isn't 90 days from now better than
5 ten days from now?

6 MR. LIPKE: Not for us if we don't know what --

7 THE COURT: Why?

8 MR. LIPKE: -- not for us, Your Honor, if we don't
9 know. We would rather get rid of the contract and move on
10 and reemploy these people if we can and -- and move on. And
11 that's why we're asking for this relief. And the only
12 testimony before Your Honor is that they could make that
13 decision in ten days. They've already had 30. We've met
14 with them for 30 days on a daily basis. Your Honor has a
15 copy of the contract. The contract -- it may be complex,
16 but it's 68 pages long.

17 And they -- and they -- we've met with them for 30
18 days, and I've talked to counsel for at least the last
19 several days. A week before we filed the motion, we emailed
20 looking for discussions with counsel which we -- we didn't
21 get. Understood, they're busy, a lot of balls in the air.
22 As soon as we filed the motion, we got discussions going
23 with JPMorgan counsel. Had one call --

24 THE COURT: Okay.

25 MR. LIPKE: -- with Weil, Gotshal, but it -- the

1 point is, Your Honor, that they could figure out within the
2 last 30 days --

3 THE COURT: They know what they're going to do.

4 MR. LIPKE: They do.

5 THE COURT: They're going to reject the contract.
6 The question is when they're going to reject the contract.

7 MR. LIPKE: And I'm asking you to -- to ask them
8 to do it in two weeks -- ten days.

9 THE COURT: How will that help, making them reject
10 it in two -- how will that help you versus them waiting till
11 the end of the year after their schedules are performed --

12 MR. LIPKE: I think -- I can go --

13 THE COURT: -- are completed?

14 MR. LIPKE: I'm sorry, I interrupted you, and I
15 apologize. I apologize.

16 THE COURT: I mean -- well, why isn't getting two
17 more months out -- of payment out of them and giving your
18 employees 60 days' notice of termination better than ten
19 days?

20 MR. LIPKE: Then I can go back and I can advise
21 them that this contract is likely to be rejected in ten
22 days, start doing your job.

23 THE COURT: Yes, but why is that better?

24 MR. LIPKE: It's better for us on a --

25 THE COURT: The employees -- well, how is it

1 better?

2 MR. LIPKE: -- we just --

3 THE COURT: After all that you've put in your
4 papers and testimony?

5 MR. LIPKE: We've decided on a business basis that
6 it's better for us, because then we'll know and we're not
7 left in limbo.

8 THE COURT: Well, let me hear from the debtor.
9 Anything further?

10 MR. ROSEN: Your Honor, counsel stood up and said,
11 you know, if you tell me in seven days that I -- that you're
12 going to reject, I'm going to know, and my point is, I'll
13 give you that notice seven days -- 60, 90, whatever days
14 from now, you'll get that same notice. But you're going to
15 get your \$5 million a month in the interim.

16 He hasn't met his burden under the applicable law,
17 Your Honor. He's getting paid currently, and the debtor
18 should have the opportunity to make the decision at the
19 appropriate time as long as there is no prejudice to them.

20 MR. HODARA: Thank you, Your Honor. Fred Hodara
21 for the Official Committee of Unsecured Creditors.

22 Your Honor, the Committee fully supports the
23 arguments made by the debtor, and for that matter, by
24 JPMorgan, and, in fact, we are pleased in many respects that
25 this hearing has pulled out some of the statements and

1 recognition by JPMorgan of its obligations.

2 I think that, as Mr. Rosen has said, with respect
3 to the burden here on this motion under the Bankruptcy Code
4 and the standard for the debtor having the right to deal
5 with contracts of this sort, that a further reason why it's
6 important to the estate and to the estate's creditors that
7 the debtor get the normal allotment of time to consider what
8 to do is that it may well be that in the course of working
9 through this complex contract, that there are ways that the
10 rejection damages claims can be ameliorated rather than a
11 rejection occur, as Your Honor indicates, in ten days and
12 damages flow from that rejection.

13 So we think for that reason as well, it's in the
14 interest of the estate to allow this to take its normal
15 course under the Bankruptcy Code and -- and permits the
16 parties what is best to do with this contract.

17 Thank you.

18 THE COURT: Thank you.

19 MR. LANDIS: I have --

20 THE COURT: I know you have a reply.

21 MR. LANDIS: One point to add -- it may not be the
22 point Your Honor thinks I'm going to add.

23 There were statements with respect to what
24 JPMorgan told Mr. Fabrizio or others in connection with how
25 long it would take them. You heard 90 days. You heard

1 maybe ten days. You heard other things. All that, Your
2 Honor, I believe is hearsay. We don't have real testimony
3 on what it will take to make a decision for JPMorgan Chase.
4 We have Mr. Fabrizio saying what he thinks JPMorgan should
5 be able to do to make the decision in what period of time,
6 and so I wanted -- I want to highlight that one fact.

7 And I also want to say that yes, JPMorgan has said
8 a number of times in a number of ways and we'll stand by it,
9 that we will pay our obligations pursuant to the stipulation
10 which will be filed with the Court and approved, we hope,
11 and we already have made payments and continue to do so.

12 THE COURT: Well, let me rule on the motion. I'm
13 compelled to deny the motion. The Bankruptcy Code does give
14 the debtor until confirmation time to decide whether to
15 assume or reject an executory contract.

16 In the interim, the debtor's compelled to make the
17 post-petition payments that are required. Although I
18 haven't seen it, I'm advised that the debtor and JPMorgan
19 have a stipulation by which JPMorgan has committed to pay
20 under that contract to the extent it is receiving the
21 services under that contract.

22 Siemens' -- Siemens' motion asks me to require the
23 debtor to decide in ten days whether to assume or reject the
24 contract, but it's clear based on the alleged prejudice that
25 Siemens has articulated, that is, its severance payments for

1 employees, its prepayment penalties for its vendors, the
2 fact that it has not fully depreciated the costs or expenses
3 of this contract because approximately another year remains
4 on the contract, all of those types of damages are damages
5 that would be alleviated only if the debtor were to assume
6 the contract.

7 It is clear the debtor will not be assuming this
8 contract because, as Siemens has established, most of the
9 services, it appears, under the contract are being provided
10 to the Washington Mutual Bank or non-debtor subsidiaries.
11 The debtor has stated that it will not be assuming this
12 contract.

13 Since I cannot compel the debtor to assume the
14 contract, as Siemens acknowledges, it's clear that the only
15 alternative I would have would be to compel the debtor to
16 decide to reject the contract early. That will not
17 alleviate any of the rejection damages that Siemens says it
18 seeks to eliminate.

19 In fact, by allowing the debtor further time to
20 determine whether and when to reject the contract, Siemens
21 will, in fact, be -- continue to get paid the post-petition
22 price and that will reduce its rejection damages. So I
23 believe that it is in everybody's best interest not to
24 require the debtor to determine early whether to reject that
25 contract and when to reject it. So I'll deny the motion at

1 this time.

2 With respect to the adequate assurance of timely
3 payment, it appears that payments are being made, and I
4 don't think that any relief is required on that at this
5 point. Obviously, to the extent payments are not received,
6 a new motion can be filed.

7 MR. ROSEN: Your Honor, would you like us to
8 prepare a short order just with respect to the denial or --

9 THE COURT: Yes.

10 MR. ROSEN: Thank you.

11 THE COURT: That's fine.

12 MR. ROSEN: Your Honor, I think that concludes
13 this afternoon's calendar.

14 THE COURT: All right. Just for the record, the
15 other motions that were on the agenda are continued.

16 MR. ROSEN: Yes. I'm sorry, I think -- I thought
17 the agenda reflected to November 14th.

18 THE COURT: Okay.

19 MR. ROSEN: Thank you very much. Your Honor, we
20 do have that order on the interim compensation for --

21 THE COURT: All right. Do you want to hand that
22 up? Thank you. And I'll enter that.

23 All right. We'll stand adjourned.

24 (Proceedings concluded at 3:47 p.m.)

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I, Lois A. Vitarelli, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in
the above-entitled matter.

November 7, 2008

LOIS A. VITARELLI

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