

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:) Case No. 08-12229(MFW)
) (Jointly Administered)
) Chapter 11
WASHINGTON MUTUAL, INC.,)
et al.,) Courtroom 4
) 824 Market Street
Debtors.) Wilmington, Delaware 19801
)
) December 16, 2008
) 12:01 P.M.

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

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1 THE COURT: Good morning.

2 MR. ROSEN: Good morning, Your Honor. Brian Rosen,
3 Weil Gotshal and Manges on behalf of Washington Mutual, Inc.

4 Your Honor, if I could just do a little housekeeping
5 before we get started into the regular calendar --

6 THE COURT: Okay.

7 MR. ROSEN: -- and let the Court know what has been
8 resolved, so that we can shift it to uncontested.

9 THE COURT: Okay.

10 MR. ROSEN: Your Honor, there were two items that
11 were listed in the continued item section:

12 One was the stipulation with respect to the deposit.
13 That is going to be continued.

14 There was another -- the second item was the motion
15 of Dell Marketing, LP for allowance and payment of admin
16 expense claim under 11 U.S.C. 503(b)(9). The parties have
17 reached an agreement on that, Your Honor, and we will be
18 presenting a stipulation based upon certification of counsel,
19 Your Honor. But that has been agreed upon, and passed back and
20 forth with the creditors' committee also being in the loop on
21 that.

22 THE COURT: Okay.

23 MR. ROSEN: Your Honor, also under Item Number 6,
24 which is a contested item that's going forward. The first item
25 there is the motion for approval of the rejection of the

1 transfer agent agreement. We saw the letter from the SEC, we
2 are still trying to resolve issues. We will essentially, Your
3 Honor, move that off of today's calendar, continue that. And
4 as a result, essentially, Your Honor, with the termination of
5 that being effective in any event on January 1st, it will
6 become moot. So, in all likelihood, Your Honor, we will then
7 just withdraw that motion.

8 MR. MAZA: Excuse me, Your Honor. Alan Maza from the
9 SEC.

10 THE COURT: Yes. I'm sorry. Could you speak into
11 the microphone?

12 MR. MAZA: I'm sorry. Alan Maza from the SEC in New
13 York.

14 I'm not clear as to what the adjournment of this
15 matter is carried to.

16 MR. ROSEN: Your Honor, as I indicated, we will
17 effectively -- once we do it from today, making it to December
18 30th becomes irrelevant for the one-day rejection. So, we will
19 be withdrawing the motion.

20 MR. MAZA: Okay.

21 THE COURT: Okay.

22 MR. MAZA: Thank you. Your Honor, if I may, that was
23 my only business. Can I leave?

24 THE COURT: You may be excused.

25 MR. MAZA: Okay. Thank you.

1 MR. ROSEN: Your Honor, the last housekeeping item
2 I'd just like to reflect is the last matter on the agenda,
3 which is Item 11, is the motion in connection with modifying
4 the automatic stay to allow advancement under certain insurance
5 policies. That was listed as contested. It will be
6 uncontested, and my partner, Mr. Stochak, will do the
7 presentation when we get to that point on the calendar.

8 THE COURT: All right.

9 MR. ROSEN: Your Honor, with that, I think we then
10 jump to the first matter under uncontested items going forward,
11 and those would be an application of the creditors' committee.

12 THE COURT: All right.

13 MR. HODARA: Good morning, Your Honor. Fred Hodara,
14 Akin Gump Strauss Hauer and Feld for the Official Committee of
15 Unsecured Creditors.

16 The application that Mr. Rosen referred to is the
17 Committee's application to retain FTI Consulting, Inc. as its
18 financial advisor in these cases. The application was served
19 on the notice list.

20 The only inquiry that we received was from the Office
21 of the United States Trustee. We had discussions with Mr.
22 McMahon regarding his inquiries, and we have satisfied all of
23 those questions.

24 And so on that basis, and with there being no other
25 comment received, nor objection filed, we would ask Your Honor

1 to enter the order for retention of FTI.

2 THE COURT: All right. I had no concerns about the
3 application, so I will grant it.

4 Do you have a form of order?

5 MR. HODARA: I do, Your Honor. May I approach?

6 THE COURT: You may. Thank you.

7 MR. HODARA: Thank you.

8 (Pause)

9 THE COURT: Would anybody else wish to be heard on
10 that?

11 (No audible response heard)

12 THE COURT: I'll enter the order as uncontested then.

13 MR. HODARA: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MS. SAPEIKA: Good morning, Your Honor. Tal Sapeika
16 for Washington Mutual.

17 The next item on the agenda is the debtors'
18 application to retain John Wolfe as special counsel to the
19 debtors nunc pro tunc to October 25th. The Wolfe Firm will be
20 retained to Weil Gotshal in the pending criminal investigation
21 being conducted by the United States Attorney for the Western
22 District of Washington, and will also serve as local counsel in
23 certain multi district litigations pending before the Judicial
24 Panel in the Western District of Washington.

25 The debtors believe that Mr. Wolfe is well suited to

1 represent the debtor in connection with these matters because
2 of his experience and location. And there have been no
3 objections to the application. The U.S. Trustee did have a few
4 questions relating to the application, which the debtors
5 addressed, and also set forth in a supplemental declaration,
6 which was filed with the Court yesterday.

7 And I'm happy to answer any questions. Also, Mr.
8 Wolfe is on the line if I'm unable to answer anything.

9 THE COURT: All right. I had no questions about that
10 application either.

11 MS. SAPEIKA: Thank you, Your Honor.

12 THE COURT: Anybody else wish to be heard?

13 (No audible response heard)

14 THE COURT: You may hand up the form of order.

15 MR. WOLFE: This is John Wolfe. May I be excused at
16 this point?

17 THE COURT: Yes, you may.

18 MR. WOLFE: Thank you, Your Honor. Good day.

19 MR. ALBERINO: Good afternoon, Your Honor. Scott
20 Alberino from Akin Gump on behalf of the Creditors' Committee.

21 Item Number 5 on the agenda is the Committee's motion
22 for approval of procedures with respect to our information
23 access requirements under 1102(b)(3). The motion seeks two
24 form of relief:

25 One is to clarify those procedures;

1 And two is to approve the retention of Epiq
2 Bankruptcy Solutions as our web site administration agent.

3 Before we filed, we had received numerous comments
4 from debtors' counsel on the form of Epiq's retention. And
5 there are modifications that have been incorporated into the
6 form of engagement letter attached here.

7 We have also -- since we filed the motion, worked
8 with the U.S. Trustee and the debtors on various comments they
9 have to the form of order. And we've made changes, namely in
10 three categories:

11 One, we've made certain modifications to Epiq's
12 compensation. We've extended the period of time in which
13 parties have to review the fee invoices.

14 And we've also removed extraordinary expenses, or the
15 right to receive those from their engagement letter.

16 We have removed certain meet and confer requirements
17 in the event the disputes concerning confidentiality --
18 confidentiality at the request of the U.S. Trustee's Office.

19 And we have also made some modifications to address,
20 you know, information requests in that confidential information
21 that we receive from third parties, other than the debtor.

22 So, I apologize. I don't have a black line with me
23 today. A black line was circulated last evening, I believe, to
24 Mr. McMahon, as well as to debtors' counsel.

25 I'm happy, if the Court would like, to submit under

1 certification a copy of the proposed order and black line. But
2 if not, I have a copy of the form of order with me.

3 And Mr. McMahon has been nice enough to hand me a
4 copy of the black line.

5 THE COURT: All right.

6 MR. ALBERINO: If you'd like me to approach, Your
7 Honor.

8 THE COURT: You may. Thank you.

9 (Pause)

10 THE COURT: All right. Let me take a quick look at
11 it.

12 MR. ROSEN: Your Honor, on behalf of the debtors, we
13 have reviewed the black line. We have discussed that with Mr.
14 Alberino. And we have no objection to the current form of
15 order.

16 THE COURT: Okay.

17 (Pause)

18 THE COURT: All right. The revisions look fine to
19 me.

20 MR. ALBERINO: Thank you, Your Honor.

21 THE COURT: I'll enter the order.

22 MS. SAPEIKA: Your Honor, Tal Sapeika again for
23 Washington Mutual.

24 The next item on the agenda is the debtors' motion to
25 approve procedures for the sale of the debtors' interest in

1 certain investments. And pursuant to the motion, the debtors
2 propose to liquidate certain investments held by Washington
3 Mutual, Inc. in their strategic capital funds. The investments
4 are comprised of the debtors' interest in 10 venture capital
5 funds, and their equity investments in certain companies which
6 are all set forth and described in the motion.

7 The debtors' proposed sale procedures are also
8 detailed in the motion and proposed orders. To highlight the
9 proposed procedures, the procedures -- the proposed procedures
10 are designed to give notice to the key constituents in the
11 debtors' Chapter 11 cases and to provide those parties with an
12 opportunity to review any proposed sale, and to object to that
13 proposed sale if they have any issues.

14 The goal of the motion is to enable the debtors to
15 liquidate their investment on notice to the most significant
16 parties in interest without taking on the administrative costs
17 associated with preparing a sale motion associated with each
18 proposed sale, and having the hearing with respect thereto.

19 The debtors, to date, have had very open
20 communications with the Creditors' Committee and with the U.S.
21 Trustee and with the various bondholder groups regarding the
22 nature of the investments, the marketing process, and the first
23 proposed sale under the proposed procedures.

24 Your Honor, we would like to represent on the record
25 that we'll continue to work and communicate with and consult

1 with the committee, the noteholders' groups, and the U.S.
2 Trustee regarding the sales process and any capital calls.

3 If the Court doesn't need me to recite the proposed
4 procedures, I'd be happy to move forward and continue to
5 discuss the substance of the motion.

6 THE COURT: Well, have you resolved all the
7 objections?

8 MS. SAPEIKA: Your Honor, I believe that we have
9 substantially resolved the Committee's concerns raised in their
10 objection by increasing the length of the notice period from
11 five to seven business days, and also providing the Committee
12 with five business days' notice of any proposed capital call.

13 THE COURT: Okay.

14 MS. SAPEIKA: And I believe that should resolve the
15 Committee's objection.

16 THE COURT: Okay.

17 MS. SAPEIKA: With respect to the U.S. Trustee's
18 objection, we have not been able to resolve that objection. My
19 understanding is that the U.S. Trustee believes that the --
20 these procedures are not appropriate for assets of this kind.
21 And, again, I would just reiterate that the debtors believe
22 that the procedures are appropriate in light of the very open
23 communication, and the proposal to provide notice of any
24 proposed sale to the most significant parties in interest. And
25 that those parties in interest are really in the best position

1 to evaluate the value of any proposed sale, and to determine
2 whether or not they think the transaction is appropriate.

3 THE COURT: Well, let me hear from the U.S. Trustee.

4 MR. McMAHON: Your Honor, good afternoon. Joseph
5 McMahon for the Acting United States Trustee.

6 Your Honor, in evaluating motions of this type, we
7 generally take a look at the types of assets that are attempted
8 to be sold or addressed, and come to some type of view as to
9 whether or not it's appropriate to do -- to address the relief
10 requested on abbreviated notice. And our view of this is as
11 follows:

12 This isn't the typical type of miscellaneous asset
13 sale or type procedures stuff that we're talking about here.
14 We're talking about multi million dollars investments and
15 limited partnership interests that, frankly, don't even begin
16 to, I guess, approach the types of assets that we typically see
17 with respect to miscellaneous asset sale procedures motions.

18 Additionally, we asked the question of, okay, the
19 procedures are designed to alleviate a burden upon the estate
20 with respect to the cost of getting from Point A to Point B.
21 And as Your Honor might imagine, our view of this is as
22 follows: Each one of these transactions is going to be papered
23 by virtue of the asset purchase agreement or some other type of
24 instrument. We don't consider the incremental cost of
25 preparing a motion on top of that and noticing it out to be

1 material, in light of the fact that this is different than, you
2 know, a bill of sale where you're selling a guy five desks and
3 chairs from a liquidating debtor.

4 So -- and the third point, Your Honor, is we're
5 searching for consistency within the realm of this case. And
6 in light of Your Honor's ruling at the last hearing with
7 respect to the Wimerick (phonetic) matter, we're just trying to
8 keep things square.

9 Those are our points.

10 THE COURT: Thank you. Response?

11 MS. SAPEIKA: Your Honor, in response to the U.S.
12 Trustee's objection, again, I just reiterate that our -- the
13 debtors' belief that the notice provisions and the
14 communication and the procedure -- the formal procedures should
15 be more than adequate to provide the key constituents with the
16 information that they need. And there have been very, very
17 open communications to date regarding sale procedures and the
18 anticipated value of the investments.

19 In addition, you know, the U.S. Trustee mentions that
20 it shouldn't be a significant burden to the debtors to file a
21 motion and come to court with respect to each proposed sale.

22 However, the purchase agreement is not anticipated to
23 be sort of a lengthy or difficult document to negotiate. In
24 fact, in connection with the first proposed sale of certain of
25 the funds, the debtors have already substantially negotiated

1 the document. It's quite short. And they anticipate that that
2 could be even a form for use in connection with the future
3 sales. And, therefore, the debtors do believe that it would be
4 a significant burden to have to file a motion with respect to
5 each proposed sale, some of which may be of fairly minimal
6 value especially in comparison to the overall value of assets
7 in the estates generally.

8 And that's generally why we believe that the
9 procedures set forth are more than adequate and provide
10 everyone with the information that they need to consider the
11 value of any proposed transaction.

12 THE COURT: All right. Well, let me say this. I
13 think one debtors' de minimis is different from another
14 debtors' de minimis. And I agree with the debtor to that
15 extent, these are de minimis or not the principal assets of the
16 debtor. Nonetheless, I think under Section 363, to sell
17 anything out of the ordinary course of business, you need a
18 sale order.

19 I will not require the debtor to file separate sale
20 motions. You filed a sale motion. But I will require that
21 the debtor give and file notice of the sale. It can be limited
22 to the interested parties on the service list, and the
23 Committee, and other interested parties pursuant to Rule 2002.

24 But in the event there is no objection, the debtors
25 should file a certificate of no objection, and I'll enter an

1 order.

2 MS. SAPEIKA: Okay. Thank you, Your Honor. We've
3 actually anticipated that request, and have a form of proposed
4 order which incorporates that modification.

5 THE COURT: I'm more consistent than I think.

6 (Laughter)

7 MS. SAPEIKA: And just one last thing, Your Honor. I
8 just wanted to mention that Mr. Jonathan Goulding from Alvarez,
9 the debtors' restructuring advisors, is present in the
10 courtroom today and is available to testify with respect to
11 this motion, or to answer any questions that anyone may have.
12 And I'm certainly available to proffer his testimony if Your
13 Honor believes that that testimony is necessary or if Your
14 Honor has any questions.

15 THE COURT: I have no questions. Does anybody want
16 a formal proffer?

17 MR. McMAHON: Your Honor, I don't believe it's
18 necessary. Our objection is procedurally legal.

19 THE COURT: Okay. All right.

20 MS. SAPEIKA: Okay.

21 THE COURT: You need not.

22 MS. SAPEIKA: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. ROSEN: Your Honor, with that, what we will do is
25 make that last modification and then present the order to the

1 Court.

2 THE COURT: All right.

3 MR. STROCHAK: Good afternoon, Judge. Adam Strochak,
4 Weil Gotshal and Manges, for the debtors.

5 The next matters on the agenda are the debtors' --
6 Number 8 on the agenda, the debtors' motion for an order
7 seeking approval of an information access agreement with the
8 FDIC. And Number 9, a similar motion with respect to a similar
9 agreement between the debtors and JPMorgan Chase.

10 I'd like to take those two together, if we could,
11 because they're very similar, Your Honor.

12 THE COURT: Yes.

13 MR. STROCHAK: Let me set the table, if I could, with
14 just a little bit of background. We started to work on these
15 agreements less than a week after the seizure of the bank in
16 late September and the commencement of these cases. And the
17 genesis was -- for these agreements was a discussion with the
18 FDIC very early on where the FDIC and the debtors recognized
19 very quickly that we were going to need to take some steps to
20 ensure that the FDIC had access to records that it needed, and
21 the debtors had access to records that they needed.

22 If you can envision, a very large office building in
23 Seattle filled with all types of records, electronic paper, and
24 everything else, with no clear indication on many of those
25 records whether they were holding company debtor records, pure

1 bank only records, or records that might implicate both
2 entities.

3 So, very quickly, the parties realized that there was
4 no really efficient way to deal with this situation other than
5 some type of categorical treatment, and we came up with the
6 very simple Category 1, 2, and 3 records reflecting bank only
7 in Category 1. Mixed records in Category 2. And holding
8 company only in Category 3.

9 And we worked out with the FDIC a series of protocols
10 for how we would handle requests for access to those documents,
11 how we would deal with situations concerning potential
12 privileges that might be applicable where the FDIC as receiver,
13 and the debtors, might share a privilege. And obviously there
14 were concerns about waiver of applicable privileges, so we
15 tried to address those.

16 And we came up with a -- I would call it a framework,
17 which is now incorporated into the FDIC, and then later the JPM
18 information, access agreements.

19 The debtors -- these were very heavily negotiated
20 with multiple parties. The Creditors' Committee participated,
21 we received input from other creditor constituencies, the
22 bondholder groups. Obviously the FDIC was represented,
23 JPMorgan was represented, and we had a very -- I would call
24 these very heavily lawyered agreements with a lot of
25 negotiation over both conceptual and language issues. So, it

1 took us a while to get to it.

2 But what we finally arrived with was two agreements
3 that the debtors are confident will give them the ability to
4 access information they need for purposes of the Chapter 11
5 cases, to provide information to the Creditors' Committee and
6 other creditor constituencies in the case, including the
7 bondholder groups, to be able to obtain information necessary
8 to respond to governmental inquiries, the investigations that
9 are going on, as well, Your Honor, any future litigation,
10 including, you know, the securities litigation in whatever
11 shape or form that may go forward against the debtors as either
12 parties are non-parties, in the future.

13 So, we're comfortable that the agreements do what we
14 need them to do. The -- there is a provision in each of the
15 orders that provides that the Court order is essentially an
16 order under Rule 502(d) of the Federal Rules of Evidence, a new
17 provision recently enacted that allows for a court
18 authorization of what is essentially a non-waiver agreement
19 between the parties.

20 So, what we're saying is it may be necessary for us
21 to share privileged information, and that the Court would be
22 ordering that such sharing between the debtors, and either FDIC
23 or JPMorgan would not be a waiver of that privilege as to any
24 third party.

25 There has been one objection filed to both motions,

1 Your Honor. It's by the lead plaintiff in the Federal
2 securities action in Washington. We have engaged in
3 negotiations with counsel for the lead plaintiff, and I think
4 we may have resolved everything. I'm not quite sure, I'm going
5 to have to defer to them as to whether the last issue is
6 resolved.

7 From our perspective, we think we've resolved
8 everything. We've added language to the order in the -- in a
9 new penultimate paragraph of the order that basically says, you
10 know, except with respect to the 502(d) aspect of this, that,
11 you know, nothing in the agreement or the Court order that
12 might be entered approving them will alter any parties'
13 discovery obligations in the securities litigation. It won't
14 alter any parties' obligations under the existing protective
15 order in that case. It won't preclude the plaintiffs in the
16 litigation from challenging an assertion of privilege, except
17 obviously with respect to, you know, a waiver argument, which
18 is protected under 502(d). And it won't alter any existing
19 document preservation requirements.

20 So, the open issue -- what may be the open issue is
21 the plaintiffs have asked for language that would essentially
22 impose a very broad document preservation requirement on the
23 debtors, on JPMorgan and on FDIC. And I think conceptually,
24 certainly from the debtors' perspective, it is our intention to
25 comply with all document preservation requirements and, in

1 fact, you know, a significant driver of these agreements from
2 our perspective was to be able to get access to what we
3 needed in order to respond to inquiries and discovery requests.
4 So, our intention certainly is to preserve whatever is
5 necessary.

6 The idea, though, of converting this proceeding into
7 a document -- essentially a document -- a request for a
8 document preservation order, we don't think really is tenable
9 at this point. And the reason for that is that there obviously
10 -- again, from a practical perspective, you have literally an
11 office building filled with records, the vast majority of which
12 probably have no relationship to the securities litigation.
13 But certainly no easy way to tell, and we don't think it's
14 appropriate here and now to have a very, very broad
15 preservation order entered. In the event that it ever should
16 be necessary, it could be done as a separate proceeding. It
17 could be done in another context, and we're happy to continue
18 to talk and work with the securities' plaintiffs to give them
19 some comfort and assurance that what we're doing is in
20 accordance with all preservation requirements.

21 But we don't think it's right for this proceeding now
22 to try and adjudicate the scope of any explicit retention
23 order.

24 That's all I have, Your Honor. I suspect that the
25 FDIC and JPMorgan may have some comments, as well.

1 MR. SIMON: Good afternoon, Your Honor. Chris Simon
2 on behalf of the lead plaintiffs.

3 With me today on the phone is Michael Etkin of the
4 firm Lowenstein and Sandler, and he may have some comments with
5 respect to the FDIC.

6 I will take debtors' counsel's representations. We
7 will take that to heart, and I think that should resolve the
8 last remaining objection with respect to the document
9 preservation.

10 It is very important to us, and I believe other
11 creditors, other parties in interest that documents be
12 preserved. And with representations of counsel from the FDIC
13 and Chase, I think we will be okay. I trust we will be okay,
14 but I would just -- we want to make sure that there is nothing
15 on the record that we are consenting to the destruction --

16 THE COURT: To the destruction of documents.

17 MR. SIMON: -- of the documents. And nothing in the
18 record that gives anybody the idea the documents should be
19 disposed of or can be disposed of.

20 In the motions, there was numerous representations
21 made about how this was, I guess, closing the document issue,
22 with a comprehensive agreement. And we want to make sure that
23 certainly we view one of the components of any comprehensive
24 document plan -- we view the destruction of documents as part
25 of that. So, we would accept those representations, and I

1 believe I have nothing further, I don't know if Mr. Etkin has
2 anything he wants to add on the record.

3 MR. ETKIN: Good afternoon, Your Honor. No, I think
4 -- I thank Mr. Simon for deferring to me. But he set forth our
5 position. We are concerned about that issue, but given the
6 modification that's been made, which we appreciate, which takes
7 care of most of our significant concerns, we'll deal with the
8 preservation issue separately, as Mr. Stochak has suggested.
9 And he -- we're confident that given the parties involved that
10 we'll be able to resolve that, should the need arise.

11 MR. SIMON: And with that, Your Honor, I believe that
12 resolves our objection. The language appears to be
13 appropriate, and we will go from there.

14 Thank you.

15 THE COURT: All right. Does any other party wish to
16 be heard then on the -- either motion?

17 MS. FELDSTEIN: Good afternoon, Your Honor. Hyde
18 Feldstein of Sullivan and Cromwell appearing on behalf of
19 JPMorgan Chase.

20 For the clarity of the record, I'd like to read the
21 language that we have agreed to, which I think is self-evident.
22 I don't think anything in the motion would possibly have given
23 rise to a contrary implication, but I'm a little bit concerned
24 about statements regarding representations of counsel. And I
25 think all we've done here is we've agreed to the following

1 language:

2 "Ordered that except as provided in the preceding
3 paragraph with respect to Federal Rule of Evidence 502(d),
4 nothing in the JPM information access agreement or this order
5 shall: A, alter the discovery rights of the plaintiff in the
6 matter of Washington Mutual's securities litigation, lead Case
7 Number C08-387-MJP, the securities litigation; B, alter the
8 rights of any person or entity to the extent bound by the
9 stipulated protective order entered in the securities
10 litigation or obligations of any party to the stipulated
11 protected order entered in this securities litigation; C,
12 preclude plaintiffs in the securities litigation from
13 challenging any assertion of confidentiality or privilege; Or,
14 D, alter any existing obligation to preserve documents. And it
15 is further ordered."

16 So, I think that the language that at least we had
17 agreed to was what we believed was the case in any event, that
18 nothing in this motion or this order alters any rights of any
19 third parties.

20 My client is not a party to the underlying
21 litigation, and I certainly wouldn't want to be in a position
22 where any statements made here today would be taken as implying
23 that my client had agreed to be bound by anything in the
24 underlying litigation or to any obligation that it has not
25 otherwise agreed to with respect to preservation of records.

1 THE COURT: All right.

2 MS. FELDSTEIN: Thank you.

3 MR. CLEARY: Good afternoon, Your Honor. May it
4 please the Court. Blake Cleary of Young Conaway Stargatt and
5 Taylor on behalf of the FDIC.

6 With me today is John Clarke from the law firm of DLA
7 Piper. A pro hac motion has been filed, and it will make its
8 way to your chambers, I'm sure, shortly.

9 THE COURT: All right.

10 MR. CLEARY: If he may be heard?

11 THE COURT: He may be heard.

12 MR. CLARKE: Thank you very much, Your Honor. John
13 Clarke on behalf of the FDIC.

14 Very briefly, I just wanted to make the same
15 clarification. It sounds like we have -- we're on the same
16 page with the lead plaintiffs about the motion. And we just
17 didn't want the record to have any suggestion that the FDIC had
18 agreed to assume any document preservation obligation that it
19 does not already have. But I think Ms. Feldstein's
20 clarification would be the same with respect to the order for
21 the FDIC agreement.

22 THE COURT: Thank you.

23 MR. CLARKE: Thank you, Your Honor.

24 THE COURT: Do I have a form of order that -- I'm
25 sorry.

1 But if I could just address at the outset the limited
2 responses, and I could group them also. There were three that
3 were filed: One by Concur Technologies, Microsoft and ADT
4 Securities Services.

5 Each of those -- and the second one of Microsoft
6 merely joined in the one of Concur. They were looking for
7 reservation of rights language with respect to the
8 counterparties. And I'd like to make clear that the purpose of
9 the stipulation was in no way an attempt to, in any way, affect
10 the rights of any counterparty to an agreement between WMI and
11 that counterparty.

12 The benefit that we were looking to derive from the
13 stipulation was to have JPMorgan have relief from the automatic
14 stay so that it could go out there and actually talk to our
15 counterparties and actually service those contracts on our
16 behalf and actually pay for the services that are being
17 rendered by each of the counterparties.

18 So, we are not, in any way, offended by the request
19 for the reservation of rights, and we are happy to insert
20 language in the proposed order. And we have, in fact,
21 developed language with respect to that. And we have
22 circulated, and I could just read that to the Court now so that
23 the Court understands what we were suggesting to be done:

24 "Ordered that the stipulation in this order, (i) do
25 not impose any obligations on any vendor that do not already

1 exist under any governing contract with the debtors or
2 applicable law; (ii) do not modify the terms of any contract
3 between any vendor and the debtors; and, (iii) are without
4 prejudice to any vendors' rights and remedies pursuant to its
5 contract or contracts with the debtors or any applicable law,
6 including, but not limited to, Sections 362 and 365 of the
7 Bankruptcy Code, and it is further."

8 Your Honor, with that, I believe we resolved the
9 limited responses by Concur, Microsoft, and to a certain
10 extent, ADT. ADT did have some additional concerns that were
11 articulated to us. And, however, we believe that after
12 discussions, they do not have anymore objection to the proposed
13 order.

14 AT&T has also filed an objection. And they had
15 several concerns, Your Honor, one of which was the reservation
16 of rights. And they are -- they are fine with the proposed
17 language that we have included in the proposed order. The
18 second, Your Honor, was with respect to an issue of
19 confidentiality. They were concerned, Your Honor, that because
20 Verizon is a member of the Committee, that somehow if, in fact,
21 contracts were provided to the Creditors' Committee that that
22 would then be disseminated over to Verizon and then, therefore,
23 whatever trade secrets they have might have been passed across
24 the border there.

25 So, we have agreed, Your Honor, and they have asked

1 us to represent on the record, and we're happy to do so, that
2 with respect to their objection relating to providing
3 information to Verizon, the debtors, the Committee and Verizon
4 will agree that no AT&T contracts or other information,
5 including but not limited to rates, pricing services, et
6 cetera, will be provided to Verizon as a member of the
7 Committee and a direct competitor of AT&T. And that, as I
8 said, we will place this on the record.

9 I believe that that has been agreed to by the
10 Creditors' Committee. Mr. Hodara is here, and he can so
11 represent that, as well.

12 MR. HODARA: That's correct, Your Honor. And Verizon
13 has specifically agreed to that as a member of the Committee.

14 THE COURT: All right.

15 MR. ROSEN: Your Honor, IBM also submitted an
16 objection. And they had several concerns, one of which was the
17 reservation of rights. They -- there was a question with
18 respect to getting notice. Specifically when we receive notice
19 from JPMorgan pursuant to the terms of the stipulation, it sets
20 off a 20-day timing mechanism. And they have asked us that we
21 would provide notice to them that if, in fact, IBM would be
22 removed from -- their contracts would be removed from that
23 list, and we are agreeable and will so provide that notice to
24 IBM.

25 Your Honor, there were two other entities that had

1 asked for an extension of time to object: One was something
2 called Tajima Creative, Inc. (phonetic) and the other was with
3 respect to certain noteholders. Neither of those parties --
4 we did provide that extension, Your Honor, and neither of those
5 parties did file an objection.

6 Your Honor, there was also a question concerning
7 Paragraph 2 of the stipulation, and specifically a sentence
8 near the end of Paragraph 2. And it was concerning certain
9 amounts that are going to be paid by JPMorgan. Specifically,
10 Your Honor, the sentence in Paragraph 2 reads, "Amounts paid
11 after the commencement date by JPMorgan Chase pursuant hereto
12 on account of any claim for payment by a counterparty under
13 any," and I'll short form, "contract, including all fees,
14 expenses, liabilities or any other obligations in respect
15 thereof shall be credited on a dollar-for-dollar basis against
16 any amounts owed to the debtors under that certain
17 administrative services contract dated as of the first day of
18 May, 2006, between Washington Mutual Bank and WMI, any other
19 intercompany arrangement or applicable law."

20 As I said, Your Honor, there was some question with
21 respect to what that meant. And we just would like to put on
22 the record that that was inserted to assure JPMorgan that it
23 does not have to pay for such services twice. Once directly to
24 the vendor pursuant to the stipulation, and once to WMI under
25 the admin services agreement.

1 So, this is merely to reflect that they have the
2 ability to get that credit.

3 Lastly, Your Honor, there was an objection interposed
4 by the United States Trustee. And I would say, again, that
5 this might have been a miscommunication as to what we were
6 trying to convey with respect to the stipulation itself, but
7 one of the questions that was raised by Mr. McMahon on behalf
8 of the United States Trustee was whether or not notice was sent
9 to each contract counterparty because it was his view or the
10 U.S. Trustee's view that notice to each party was required.

11 Your Honor, as I indicated at the outset, this is a
12 stipulation between us and JPMorgan Chase. It does not affect
13 in any way the rights of any counterparty to any contract. And
14 we did not provide notice because we don't believe that any
15 notice was required under the Bankruptcy Rules.

16 There was also a suggestion by the United States
17 Trustee with regard to whether or not documents could be filed
18 under seal with the Court. And, Your Honor, we felt that it
19 was appropriate now to have that relief because we need to
20 protect JPMC's proprietary pricing, and other sensitive
21 commercial information. And we think it would be inappropriate
22 to have any such contract, which would only, Your Honor, be
23 entered into or be used in the context of mitigation of future
24 claims by any counterparty. We don't think it would be
25 appropriate to have those open to the public.

1 THE COURT: So, are you going to file any contract at
2 all? And when would they be filed?

3 MR. ROSEN: Your Honor -- oh --

4 (Attorneys conferring off the record)

5 MR. ROSEN: Your Honor, it would only be in the event
6 that we would be assuming a certain contract. And it would be
7 necessary at that point in time to deal with any perhaps
8 mitigation of damages or cure amounts that otherwise might be
9 alleged. That is it.

10 THE COURT: Well, then why am I entering an order
11 now? Why don't we just wait until that time?

12 (Attorneys conferring off the record)

13 MS. FELDSTEIN: Your Honor, Hydee Feldstein of
14 Sullivan and Cromwell on behalf of JPMorgan Chase.

15 I'd like to distinguish for the Court what contracts
16 are at issue:

17 The first kind of contract would be the contract of
18 the estate to which WMI is a party. If it were to be the case
19 that WMI were to assume and assign that contract, that contract
20 would be filed with the Court.

21 THE COURT: Um-hum.

22 MS. FELDSTEIN: If it were the case that WMI were to
23 reject that agreement, presumably that agreement could be filed
24 with the Court.

25 The confidentiality that we have requested has

1 nothing to do with those agreements. The agreements to which
2 WMI is a party are WMI's to file or not file in its sole and
3 absolute discretion.

4 The confidentiality request in this stipulation arose
5 because the debtors asked, and the Committee asked, that in the
6 event that JPMorgan Chase entered into a JPMorgan Chase
7 agreement with the same vendor that had been a party to a
8 contract with WMI, that the committee and the debtor be
9 permitted access to our proprietary agreement with the vendor
10 on a going forward basis for purposes of determining whether
11 there was a defense to an unsecured claim or to a claim filed
12 in this case in mitigation of damages. There was a fair amount
13 of concern on our part. And if the Court will look at the
14 objections that were filed on the issue of confidentiality in
15 connection with this stipulation, I hope that the Court will
16 conclude that we struck the appropriate balance.

17 On the one hand, the U.S. Trustee had requested less
18 confidentiality and AT&T had requested more confidentiality.
19 What we have tried to do is give the debtor and the Committee
20 the access they need to information for legitimate purposes in
21 this case without having proprietary information become a
22 matter of public record.

23 THE COURT: All right.

24 MS. FELDSTEIN: And that's all it is.

25 THE COURT: I understand.

1 MS. FELDSTEIN: Thank you.

2 THE COURT: All right. Well, I am not going to
3 require that that be made -- I will approve the
4 confidentiality. Because as I understand it, that's not being
5 made part of the record.

6 To the extent some issue comes forward in the future,
7 then somebody can ask to -- if they need to be filed of record,
8 they file a motion to file it under seal because there is a
9 confidentiality agreement.

10 MR. McMAHON: Your Honor, good afternoon. Joseph
11 McMahon again.

12 And I'll be very brief. I want to respond to the
13 point raised by debtors' counsel with respect to service on the
14 contract counterparties.

15 THE COURT: All right.

16 MR. McMAHON: If you take a look at Paragraph 14B of
17 the motion, part of the stipulation involves JPMorgan Chase's
18 agreement to provide copies of any new agreements agreed to
19 with the vendors -- with the debtors and the Creditors'
20 Committee the provision we're talking about, subject to the
21 confidentiality provisions set forth in the proposed order.

22 Now, if I'm a contract counterparty to a potential
23 agreement that may not be in existence as of yet, I -- that is
24 precisely the type of obligation being set forth in a court
25 order that I would want to be aware of today before I obligated

1 myself pursuant to an agreement. It very well may be that the
2 confidentiality provisions set forth in the proposed order will
3 impose separate and/or distinction obligations than any
4 provisions that may be agreed to in any contract relating to
5 confidentiality. Certainly the debtors have to agree with me
6 that that is something that the contract counterparties would
7 have a distinct interest in.

8 With respect to the point made by JPMorgan Chase's
9 counsel, and the one, Your Honor, acknowledges. I'm -- our
10 business here today is not to get involved in any information
11 sharing between JPMorgan Chase on the one hand, and the
12 Committee and/or the debtors on the other. That's not our
13 issue.

14 But to the extent that there is going to be a
15 document that's going to be, I guess, lodged with the Court at
16 some future date, I don't know what that information is as of
17 yet. I don't know whether any of it is entitled to be sealed
18 or not. Ergo, I think that the appropriate time to bridge that
19 issue, if I understand Your Honor's comments correctly, is at
20 the time the -- a party seeks to lodge a document with the
21 Court.

22 THE COURT: I think that's correct. I think that
23 there are many documents that parties have subject to
24 confidentiality agreements among themselves. And the issue
25 only comes up when somebody in connection with litigation or a

1 dispute files a motion to seal certain documents because they
2 are subject to a confidentiality agreement. And then if
3 somebody objects to that and thinks that's not appropriate,
4 they can object to that.

5 But at this point, I'm allowing the parties the
6 confidentiality they've agreed to.

7 MR. ROSEN: Thank you. Your Honor, if I could
8 address Mr. McMahon's first point? And perhaps I got a little
9 bit confused on that. He's focused on Paragraph 14B that says,
10 "JPMorgan shall agree to provide copies of any new agreements
11 agreed to with the vendors to the debtors, and the Committee."
12 And he's concerned that the vendor doesn't know that that new
13 agreement is going to be given to us, I think that's what his
14 articulated objection is.

15 THE COURT: As the notice issue, yes.

16 MR. ROSEN: Your Honor, the vendor is going to be
17 having discussions with JPMorgan. They can be well aware, they
18 can sign that agreement, they can not be -- they can not sign
19 that agreement, and they will have notice at that point in time
20 that it's going to be provided to the debtor if, in fact, they
21 do it.

22 MR. McMAHON: Your Honor, if I can just be very clear
23 about what I'm saying here. We're talking about agreements
24 that may not exist or not yet in being. If I'm a contract
25 counterparty, and there is a provision of this stipulation

1 which is going to permit, subject to Court order, JPMorgan to
2 share the agreement with the debtors and the Creditors'
3 Committee subject to the provisions of this order, I think I'm
4 entitled to a copy of service of this motion so that I can
5 understand what it is that I'm going to be obligated to do with
6 respect to a contract that may not even exist yet. That's the
7 simple point we're trying to make. I mean it's --

8 THE COURT: Well, would -- to the extent that -- I
9 mean service of the order approving the stipulation? Or to the
10 extent that require that JPMorgan provide a copy of the -- this
11 paragraph to --

12 MR. ROSEN: Your Honor --

13 THE COURT: -- anybody it negotiates with?

14 MR. ROSEN: JPMorgan is perfectly prepared to live by
15 the terms of the Court order, and they will certainly tell
16 every counterparty they're talking to of its existence.

17 MS. FELDSTEIN: Your Honor, Hydee Feldstein again.
18 Very briefly. I don't want to be subject to a Court order
19 instructing me to deliver a copy of a Court order here to every
20 counterparty.

21 But certainly JPMorgan is aware of its obligations
22 under this order. And it is unlikely to be entering into any
23 new agreements with any vendor that would have a
24 confidentiality provision that would be breached by complying
25 with our obligations to give a copy to the debtor and the

1 Committee.

2 We understood what the need was in this case. We
3 understood the sensitivity of the contracts. We actually agree
4 with the Office of the U.S. Trustee, that the counterparties
5 are likely to be sensitive to the dissemination of their trade
6 terms as AT&T was, which is precisely why we paid as much
7 attention as we did to the confidentiality and the obligation
8 to seek a motion to file anything under seal, should that prove
9 necessary.

10 We're hopeful that this is all a tempest in a teapot.
11 That the parties will, in fact, work it out, and it won't be
12 necessary to come to this Court for mitigation of damages
13 claims, or credits, or offsets with respect to new agreements.
14 But we think the estate derives substantial benefit from this
15 stipulation, as well. Both because we have assumed the
16 administrative expenses, and because we have agreed to
17 cooperate to provide the estate with information that otherwise
18 it would have to seek by way of discovery or subpoena for
19 mitigation of damage claims.

20 This was an effort, Your Honor, to streamline this
21 process with as little court and lawyer involvement as
22 possible. So, I would ask the Court to please enter the order
23 as submitted. I think the counterparties who are not yet
24 parties to agreements not yet in existence, that will not be
25 agreements with this estate, are not proper parties for a

1 servicer notice of this motion. And their interests are
2 protected by their ability to sign or not sign a new agreement
3 with JPMorgan Chase.

4 MR. McMAHON: Your Honor, one point to close this
5 matter out. At the bottom of Page 5, the top of Page 6 of the
6 proposed form of order, there's language which basically makes
7 the sealing issue a matter for today, a matter that's done.
8 The Clerk of the Court -- the --

9 THE COURT: Where is settlement order, by the way?

10 MR. McMAHON: I'm referring to the "notwithstanding
11 anything to the contrary in this order" paragraph at the bottom
12 of Page 5. The debtors and the Creditors' Committee are
13 authorized and directed to file -- well, file and maintain any
14 vendor contract, as well as any other confidentiality
15 information with the, quote, "under seal for in camera review
16 by the Court only," and it goes on to the next page and says
17 that it's only going to be unsealed "unless permitted by
18 further order of the Court."

19 So, basically it's a burden-shifting provision. It's
20 got to be changed.

21 THE COURT: Yes, I think so. I think that has to be
22 changed.

23 MS. FELDSTEIN: Your Honor, I'm sorry. It's Hydee
24 Feldstein again.

25 That was the purpose, in part, of our providing the

1 contracts. At the end of the day, Your Honor, the alternative
2 is that we don't --

3 THE COURT: The alternative is the debtor doesn't
4 file it unless it can be filed under seal, and it files a
5 motion.

6 If the motion is denied, it doesn't file it.

7 MS. FELDSTEIN: Fair enough, Your Honor. That would
8 work for us.

9 THE COURT: And I think that's what our -- that's our
10 Local Rules.

11 MS. FELDSTEIN: Thank you.

12 THE COURT: We'll just -- all right. If you change
13 that. But otherwise, I think -- and I agree that to the extent
14 there is no party to such a contract now, there is no party to
15 be given notice.

16 MR. ROSEN: We'll make the change with respect to the
17 in camera review and the filing subsequently, and then we'll
18 provide that on certification of counsel.

19 THE COURT: All right.

20 MR. KNAPP: Your Honor, this is John Knapp on the
21 phone for Concur Technologies.

22 THE COURT: Yes?

23 MR. KNAPP: I just wanted to let the Court know that
24 I haven't actually seen the proposed order with my own eyes,
25 but based on what debtors' counsel has said about the language

1 in terms of a reservation of rights, it sounds like it tracks
2 the requested language that we had in our response, and that
3 would be acceptable to Concur.

4 THE COURT: All right.

5 MR. KNAPP: Thank you.

6 THE COURT: Well, you'll see the order when it's
7 circulated.

8 MR. ROSEN: Thank you, Your Honor. I believe there
9 is one more item -- I'm sorry.

10 MR. GREY: Excuse me, Your Honor. My name is Joseph
11 Grey, I'm with Stevens and Lee. We filed the limited objection
12 on behalf of IBM.

13 I rise to introduce my colleague, Timothy Barnes from
14 the Curtis Mallet firm.

15 Your Honor, this morning, we filed pro hac papers for
16 his admission. And I'd ask that you hear him now.

17 THE COURT: I will.

18 MR. GREY: Thank you.

19 THE COURT: Thank you.

20 MR. BARNES: Good afternoon, Your Honor. Tim Barnes
21 from the Curtis Mallet Prevost Colt & Mosle on behalf of IBM
22 Corporation.

23 Your Honor, as the debtors' counsel pointed out, IBM
24 filed an objection that had kind of broader reaching provisions
25 in it. And based on the reservation language that counsel to

1 the debtor has read into the record, we haven't seen the order
2 yet, but I think as long as it matches that language that we've
3 heard, I think that handles almost all of our issues. And we,
4 in fact, had some discussions this morning about the procedures
5 under which we would deliver invoices. I think there was
6 confusion whether we were doing business with JPMorgan or WMI
7 going forward. I think we understand to continue to do
8 business with WMI, we would deliver invoices to them.

9 So, based on all of that, I know that our objection
10 sort of reaches further than that. We believe that our
11 objection is resolved.

12 THE COURT: All right.

13 MR. ROSEN: Your Honor, then we have one last item on
14 the calendar, was the one that I referred to as now
15 uncontested.

16 THE COURT: Okay.

17 MR. STROCHAK: Adam Strochak, Weil Gotshal for the
18 debtors.

19 The last item on the agenda, Your Honor, is the
20 debtors' motion pursuant to the Section 362 of the Code for an
21 order modifying the stay to allow advancement of expenses under
22 directors' and officers' insurance policies. It's a relatively
23 straightforward matter, Your Honor. A comfort order, of
24 sorts, to basically provide that the insurers' -- directors'
25 and officers' insurers can advance defense costs and expenses

1 to nondebtor individual director and officer defendants in
2 various litigations pending.

3 There was one objection filed, again, by the lead
4 plaintiff in the securities litigation. In substance, that
5 objection asked for a clarification that nothing in the order
6 was, you know, making any ruling regarding whether or not these
7 insurance policies were or were not property of the estate.
8 And there have been a series of modifications to the order
9 after negotiations with -- between the Creditors' Committee and
10 representatives of the individual defendants which established
11 a -- essentially a framework for communications between the
12 individual defendants and the debtors and the Creditors'
13 Committee to provide period updates on the status of
14 litigation, period updates on expenses that have been incurred
15 so that the parties in interest can monitor the expenditure
16 under these policies and protect themselves in that way.

17 The lead plaintiff's objection was resolved by
18 language essentially providing the reservation that, you know,
19 nothing in the order is going to prejudice anyone's parties
20 with respect to applicability of -- or whether or not insurance
21 policies are or are not property of the estate.

22 I have a red lined and a clean copy of the order I
23 can hand up. I don't know if anyone else wishes to speak on
24 this matter. But that's the extent of my presentation.

25 THE COURT: All right. You may hand it up.

1 MR. ETKIN: Your Honor, it's Michael Etkin on the
2 phone.

3 THE COURT: Yes?

4 MR. ETKIN: Just one thing. Mr. Strochak sent me the
5 revised order, and I read it, or at least attempted to read it
6 off of my Blackberry. It does address the issues that we
7 raised in our objection. Our concern is more the proceeds of
8 the policies and whether the stay is implicated or not, and the
9 language in the order takes care of those issues.

10 One concern that I have is with new language that I
11 just saw immediately prior to the hearing as it relates to the
12 exchange of information between the Committee and the
13 individual defendants.

14 To the extent that they've agreed to retain certain
15 information or exchange information, and have agreed that it's
16 confidential as between them, obviously that's their
17 prerogative.

18 But I just don't want this order to constitute the
19 determination that any of the information is, in fact,
20 confidential. I think, indeed, there's language in the
21 proposed order that talks about it being deemed confidential.
22 And I just don't think that that's appropriate. You know, to
23 the extent that that becomes an issue down the road, I don't
24 want anyone waving an order in my face saying that, well, this
25 was deemed confidential by a prior order of this Court. To the

1 THE COURT: All right. I'll enter the order then by
2 agreement.

3 MR. ETKIN: Thank you, Your Honor.

4 MR. STROCHAK: Thank you, Judge.

5 THE COURT: And we're done for today?

6 MR. ROSEN: Your Honor, that concludes today's
7 agenda.

8 THE COURT: All right. We'll stand adjourned. Thank
9 you.

10 (Whereupon, at 12:58 P.M. the hearing was adjourned.)

11

12 CERTIFICATE

13

14 I certify that the foregoing is a correct transcript from
15 the electronic sound recording of the proceedings in the
16 above-entitled matter.

17

18

19 /s/ Karen Hartmann Date: December 18, 2008

20 TRANSCRIPTS PLUS

21

22

23

24

25

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