UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
WASHINGTON MUTUAL, INC.,	.	Case No. 08-12229(MFW)
et al.,	.	(Jointly Administered)
	.	
Debtors.	.	Jan. 29, 2009 (2:07 p.m.)
	.	(Wilmington)

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

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

THE CLERK: All rise. You may be seated.

THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor.

THE COURT: Could the parties on the phone please mute their phones. Somebody - Would the parties on the phone mute their phones. Thank you.

MR. ROSEN: Good morning, Your Honor. Brian Rosen, Weil, Gotshal & Manges on behalf of the debtors, Washington Mutual, Inc. With me is Mr. Mark Collins from Richards, Layton & Finger. Your Honor, we have several items on the calendar for this morning, and if I could, I'd like to just take them in the order that they are set forth on the agenda.

THE COURT: You may.

MR. ROSEN: The first item, Your Honor, is the debtors' application for retention of Grant Thornton, LLP as tax advisors, *nunc pro tunc*, to October 9th. We have not received any objections. There were certain informal conversations with the United States Trustee who expressed some comments with respect to the form of order. The parties have been working on that, and I believe that we do now have a final form of order, and as I said, Your Honor, there are no objections to the relief requested otherwise.

THE COURT: Alright, you may hand it up then.

MR. ROSEN: Okay.

THE COURT: Thank you. Anybody else wish to be

heard on that application then? Alright, I'll enter the order as revised.

MR. ROSEN: Thank you, Your Honor. The second item on the calendar is the debtors' motion for an order extending the time to assume or reject unexpired leases with respect to non-residential real property. As the Court is aware, the Court entered a bridge order pushing that off but setting today as a hearing or at least a status conference to formally discuss whether it should be pushed all the way to February, the date that we had asked for in the motion. Your Honor, if I could update the Court now as to where we are with respect to the respective leases that are out there, I think it will provide the Court with the reasoning as to why we need the bridge order extended to the period set forth in the motion. With respect to the Seattle lease, Your Honor, which is the lease that WMI has for space at 2nd and Union, which is the main headquarters, we have negotiated the terms of an amendment to the Seattle lease pursuant to which WMI will occupy space in that same office building, and the term of the lease will be reduced from August 31, 2016, which was the original lease, to December 31 of this year with an option to terminate by either party on 60 days' notice. This is the subject of a motion to assume that lease as amended which we filed on January 23. The next are some leases to be rejected, Your Honor. The first is a New York lease and that

is a space that WMI leased from WMB. We have not occupied this space nor has it been charged rent by WMB for the space since 2006. Since April of '06, only WMB or its subs have used the space in the New York office building, and we have in fact filed a motion to reject that lease on January 22nd. There is also a Del Mar lease which is used - WMI subsidiary, HF Ominson (phonetical) was a party to that lease for office space in Del Mar, California, and by an amendment to the lease in April of '08, WMB was identified as the tenant and WMB was incorrectly identified as the successor by merger to HM Ominson. The lease and the property subject to it is currently used by a former officer of HM Ominson, and it is our understanding that he is still currently using it. Post-petition, JP Morgan has paid the rent under this lease through December of '08, however, they apparently do not intend to pay rent beginning this month. The pre-petition rent was paid by WMB. The motion to reject this lease, Your Honor, was filed on January 22nd, also. The other two leases which were the subject of the motion to extend are currently in discussion for assumption and assignment to JP Morgan Chase. Specifically, we are referring to what is known as the Palm Beach lease and the Winter Park lease, and, Your Honor, we have through our discussions with the respective counsel to those landlords obtained the consent of those parties to an extension of the time period to assume or

reject those leases. We are, Your Honor, as I indicated, looking to assume and assign these leases to JP Morgan Chase. We are in the process of finalizing the documentation with respect to that. We intend to file a motion for that assumption and assignment if not this week, by the beginning of next week. Those are the entirety of the leases that would be subject to the motion to extend that we talked about before, Your Honor, and that were the subject of the bridge order.

THE COURT: Alright. With that and there being no - well, there actually being consent with respect to the two for which there are not motions pending, I will grant the further extension until the February omnibus.

MR. ROSEN: Thank you, Your Honor. The next item on the agenda, Your Honor, is the motion of the United States to lift the automatic stay so that it may assert certain setoff rights. So, I will turn the podium over.

THE COURT: Do you have a proposed form of order on the extension of time to assume or reject?

MR. COLLINS: Your Honor, Mark Collins for the debtors. I unfortunately brought over another one of the bridge order, so I’m asking my office to bring over a clean of the order that was attached to the motion. There were no changes to that form of order.

THE COURT: Well, I think I’m just doing a bridge

until the February here, so you can hand that.

MR. COLLINS: Oh, okay, and we do have that, Your Honor.

THE COURT: I just have a two-sided copy.

MR. COLLINS: May I approach, Your Honor?

THE COURT: Yes. Thank you. Alright.

MR. GEHT: Good morning, Your Honor. Jan Geht, Department of Justice, for the United States and the Internal Revenue Service.

THE COURT: Yes.

MR. GEHT: We're here today based on a December 19, 2008 order signed by the Claims Court Director and the United States to pay $55 million to WMI. In the same order, all creditors, including the United States are directed to the Bankruptcy Court to assert any rights to the proceeds, so that the United States are asserting the right of setoff under 31 U.S.C. 3728, the judgment setoff statute and the common law right of setoff. Normally, the way this process would work is, if this were not a bankruptcy, we would assert a right of setoff. WMI, as they have disputed, would dispute it, and then we would bring a similar action in a District Court to determine the merits of our right of setoff. Unfortunately because WMI is in bankruptcy, we can't go to a District Court. At the same time, we can't simply freeze the payment without the automatic stay being lifted, and so,

within 10 business days of the order being issued, we filed a motion to lift the automatic stay to allow the United States the right of setoff. As a preliminary matter, the debtors having objected to that motion, the relief we'll be seeking at this hearing is simply to freeze the payment pending the eventual outcome of the motion and the determination of the claims. I don't think we can realistically hope to resolve our claim and their claim today, but in the meantime, we can't simply unilaterally freeze the payment without at least some kind of a stay - lifting of the stay, I apologize.

THE COURT: Alright.

MR. GEHT: Proceeding to the merits, Your Honor, the service filed a proof of claim in October of 2008. It has since been amended. The proof of claim under the Bankruptcy Code is *prima facie* valid unless objected to and disallowed to by the Court. In this case it's been objected to but has not yet been disallowed, and so, we believe that we have actually met the *prima facie* burden. The debtors made several arguments in their objection to our motion. One of them is that the taxes on the proof of claim are un-assessed. Your Honor, we draw your attention to the Third Circuit's rule in Jersey Shore Bank, which provides that there's no assessment necessary for the collection of taxes. In fact, the Heilig-Meyers Bankruptcy Court decision relied by the debtors' acknowledge that there's a court split on this

issue, and that the Third Circuit rule in fact that assessment is not necessary prior to collection. Their second argument is that our claim is contingent. That is not an accurate statement of the law. A contingent claim is a claim that is based on future events. A tax claim that covers prior periods that have already been concluded are not contingent. They're undetermined, but they're not contingent, and in any event, we submit that under the Bankruptcy Code a contingent claim is still a valid claim for the purposes of setoff because § 553 talks in terms of the debt and the claim. Those are defined terms in the Bankruptcy Code. Debt is a liability and a claim is a right to payment whether or not it's liquidated or unliquidated, and in fact, the Courts that have held that no assessment is necessary have talked about the fact that the priority statute talks about taxes that are assessed and/or assessable, meaning that in fact you could have a right of setoff if the assessment hadn't been made. The contingency in the case decided by the debtors, In Re: Young and - the second case escapes me right now, are the cases where there was a perspective change in the law and so it was truly a contingent claim in the sense that it was unclear what the claim would be. The courts are uniformly clear on this topic that the tax liability accrues at the end of each calendar year and so it is not a contingent claim. Having met our

prima facie case, which has now been rebutted through the Carrion declaration, I think the next step would be either for the debtors and the United States to try to work out, outside of this courtroom, the relative merits and demerits of our respective claims or for the Court to have a substantiation hearing or an estimation hearing which we would be prepared to go forward unless the debtors prefer to continue with their administrative process. That said, I'd like to take a few minutes to address the claims that the United States has somehow misbehaved in its conduct towards Washington Mutual by taking the Court through the history of the underlying American Savings Bank's litigation. It's been a long litigation, and it appears what the debtors are doing is trying to accumulate a series of non-sanctionable litigation tactics into somehow becoming a sanctionable event. The trial lasted until March of 2006. The United States lost and chose to appeal. That is not a bad conduct. The eventual appeal resulted in a reversal of judgment of $345 million in favor of the United States and got sent back to the Claims Court and what was left was the $55 million partial judgment. Once the sur-period expired the debtors moved for the payment of $55 million. The United States opposed that motion because they thought that the entire case had to be decided and since there was the $345 million part that got sent back to Claims Court, they thought that there

should be only one payment. That motion was eventually denied. The judgment became final on October 3rd. The United States from that point had 60 days to decide whether or not to appeal. No decision to appeal was - The decision was taken not to appeal and the Claims Court signed an order directing the United States to make the payment. The United States attempted to raise an argument in front of the Claims Court that it has the rights of setoff, much like JP Morgan's arguments in front of the Claims Court. The Claims Court deferred to Your Honor and sent us here for that purpose. If I may briefly touch on the question of cause. The United States believes that the debtors' plan of the United States turning $55 million over to the debtors will not adequately protect the United States for the simple reason that once we make the payment of $55 million, we no longer have a debt that we can setoff, we'd become an unsecured creditor. We would prefer, and I've discussed this with JP Morgan and they can make their views known as well, that the United States be permitted to freeze the payment for the purposes of JP Morgan and WMI figuring out who's entitled to $55 million first. Then if it is in fact WMI, we can proceed with our claim of setoff at a future date, if it is in fact JP Morgan then we'll proceed through the usual channels of a civil action in District Court, should we have a right of setoff against JP Morgan Chase, which we do not currently know if we do. Thank

you, Your Honor.

THE COURT: Thank you.

MR. ROSEN: Your Honor, Brian Rosen on behalf of the debtors. I find it especially intriguing about some of the things that were said today. First, the debtors are not seeking to have this Court impose any sanctions upon the United States in this proceeding, and in fact, the debtors are not seeking to impose any sanctions upon the United States in the proceeding that is currently pending before the Federal Claims Court. In that regard, Your Honor, there is a Litigation Committee representing the plaintiffs in that action that is a three-person Committee, only one of which is WMI. The other two are appointed to that Committee by the sellers in that transaction where WMI purchased the assets of American Savings. It is that Committee which has sought to move forward in that Court with a motion for sanctions, and it is before that Court that that motion is currently pending. It is my understanding that it is currently scheduled for January 30th, although it is also my understanding that there may have been some effort to adjourn that hearing to a later date. But again, Your Honor, that motion is not before this Court. The fact that there's been a nonpayment has been something that has been discussed at length before that Court, and it that Court that will deal with the nonpayment at that time. With respect to the

government's amendment to their relief requested based upon our objection to the claim, and their statement here, Your Honor, that they would be fine, of course not paying which is the very reason for the motion for contempt, and allowing JP Morgan to assert whatever rights it has with respect to those monies, that is also something that had been heard and disposed of by that Court. As counsel intimated, there was an effort by JP Morgan Chase to get involved in that process, and it was at that time that the Court found that the interested parties were already before that Court, and the Court denied the relief that JP Morgan was asking for at that time. It had subsequently filed a motion to intervene yet again in that litigation, Your Honor, and that motion is the subject of a hearing also to be held in the Federal Claims Court. Again, that is not something that is before the Court here. All that is here, Your Honor, is the United States' motion for relief from the automatic stay so they can attempt to setoff, and as counsel said, he no longer wishes to setoff based upon the objection that we interposed as well as the objection to the claim. Subsequent to the filing of our objection to the claim and subject to our objection to their motion, it is our understanding that the United States did file an amended proof of claim for in excess of $10 billion. It is supposed to be a mirror proof of claim to the claim that the IRS filed in the context of the receivership

proceedings, but, Your Honor, it still suffers from the same infirmities that the previously filed $2.3 billion claim has in the Chapter 11 case. In this case, Your Honor, in either the original proof of claim or the amended proof of claim, the IRS makes it very clear that they have not assessed any taxes against the debtors. Rather, everything is under examination. As we set forth in the Carrion declaration, and we do have Mr. Carrion here in the courtroom, the only thing that is subject of dispute, Your Honor, is not how much the debtors will owe, but the amount of the refund that the debtors will be entitled to based upon the audits that the IRS has completed to date with discussions that the IRS has had with WMI, with Alvarez & Marsal. There is not a discussion that the debtors will be a net debtor to the IRS. Rather, it is only the size of the refund that we will receive as a net creditor from the IRS. So, for the IRS to stand up here and say that we don't know what it's ultimately going to be, we filed it for 2.3, now we're up to 10.whatever, Your Honor, we think it's not fair to represent that to the Court when the parties know that in fact we will be a net creditor. The only issue is the size of that refund. Counsel did talk very briefly there in the end about proposed legislation, and something that the Court needs to be aware of is that the proposed legislation that is now in Congress or will be tendered to Congress deals with whether

or not carry-backs for operating losses will be two or five years. If in fact it's two years, we know what our net position will be. If it's five years, our net position will only increase and the estate will benefit from an increased refund. Again, Your Honor, we will still be a net creditor from the IRS. Counsel talked about also his efforts to freeze the distribution. As we make clear in our pleadings, Your Honor, and we set forth in the declaration of Mr. Kosturos that we filed as an exhibit to our response, we have agreed in the context of the Federal Claims Court litigation that we will deposit the funds that we receive from the IRS, the $55 million plus whatever interest we're entitled to and if in fact the motion for contempt is granted, what additional interest or penalties are locked onto that, but we will deposit those funds into a segregated account, and we will not disburse such funds until or except pursuant to a confirmed Chapter 11 plan or such other order of this Court. Your Honor, we're not trying to do anything other than to gain the money for the benefit of all creditors here. If in fact, based upon what I have just said, the IRS continues to have a claim, they are entitled to come to this Court and seek to get that money. That is all we ever asked for in the Federal Claims Court. That is, in fact, what the Federal Claims Court ordered.

THE COURT: Are you suggesting that they will not

lose their setoff rights if they pay you?

MR. ROSEN: We said that, Your Honor, in that Court, yes.

THE COURT: So, their rights to setoff will be preserved, regardless of where the money is held.

MR. ROSEN: That is what we have said.

THE COURT: And you're saying that now.

MR. ROSEN: Yes, ma'am.

THE COURT: Okay.

MR. ROSEN: We are not changing that position. We're not trying to prejudice the IRS by having the money paid. Our biggest issue, Your Honor, has been getting the federal government to pay us, and it's been that way since the litigation commenced in 1992. It's been that way since the order was entered in '06 and then in the early part of '08. We're just trying to get paid on the judgment in whatever amount it currently is. So, Your Honor, we think that there's no harm to the IRS, no harm to the United States Government for paying what they have been already directed to pay. Other than that, Your Honor, we stand on our papers. We think they clearly set forth that there is no relief that the IRS should be granted at this point in time, but if the Court was considering doing that, we think that the suggestion that we made to both the Claims Court and now that I have reaffirmed here today is more than sufficient to

satisfy and not prejudice the interest of the United States Government. Thank you.

MR. LANDIS: Your Honor, if I might. Adam Landis from Landis Rath & Cobb here on behalf of JP Morgan Chase. You'll note from the agenda that JP Morgan Chase did not file papers in connection with this motion, but sitting here in court today we heard counsel to the IRS and Mr. Rosen have a number of comments with respect to JP Morgan Chase, and I would ask that Your Honor indulge us to be heard. In that regard, I've got Ms. Feldstein here from Sullivan & Cromwell who would like to address the Court.

THE COURT: Okay.

MR. LANDIS: Thank you, Your Honor.

MR. ROSEN: Your Honor, I would like to say that I oppose this. We need to know what people are going to file in cases. There are local rules. We have - or at least "we" try to abide by them. JP Morgan Chase is draped over this entire case. They are throughout it, there's no doubt that they have been involved in every step since the first day of the case, but if they seek to stand up and make a statement, we only ask that they abide by the Local Rules. There is no doubt that they sought to appear in Washington. There is no doubt that the Court threw them out of that courtroom, Your Honor. If in fact they had -

THE COURT: Well, you may suggest that there isn't

any doubt, but I don't have the District Court's orders.

MR. ROSEN: Nor do we have pleadings from JP Morgan.

THE COURT: Yes. I'm going to hear them. They're a party in interest. They can explain to me why they didn't file a formal response.

MS. FELDSTEIN: Thank you, Your Honor. Hydee Feldstein of Sullivan & Cromwell appearing on behalf of JP Morgan Chase. Your Honor, as we understood the issue that was before this Court, it was relatively simple. It was a question of whether the stay ought to be lifted to permit the IRS to setoff its claims against the estate against the funds it had to pay the estate. There was no issue before this Court, and we don't believe that there was an issue before the Court of Claims regarding ownership of this $55 million. The fact that ownership is in fact in dispute can scarcely be questioned given that Mr. Rosen has represented to the Court that the funds are to be paid into an escrow account for the benefit of all interested parties as their interests may appear. That is my understanding. I was not personally present at the Court of Claims. I cannot stand up to the podium and tell the Court from any personal knowledge as to what did occur. I have, however, been informed that the United States Government was paying a partial amount on the judgment, that the United States Government could not make the check jointly payable to the number of plaintiffs. One

of the plaintiffs in the case was in fact Washington Mutual Bank rather than Washington Mutual, Inc., and to the extent that a portion of that judgment is properly the property of Washington Mutual Bank, that is not money that should be available for this estate or its creditors. That issues was not before you today. It was not put at issue by the papers, nor was my client's position with respect to that issue put before you in the papers and, therefore, we didn't see the need to file papers. Our understanding was that the order of the Court of Claims had no substantive determination whatsoever. It was a procedural mechanism by which if the funds were to be paid, the United States would be able to pay them clerically by having a single payee, and that is the only issue determined by the Court of Claims. I would simply ask the Court that in making any ruling on the issues before you on the relief from stay, to make it clear that there's nothing occurring here today that determines any right, title, or interest of the United States Government, of JP Morgan Chase, of the receivership, or of the estate and or to these funds.

THE COURT: Thank you.

MR. HODARA: Good morning, Your Honor. Fred Hodara, Akin Gump Strauss Hauer & Feld on behalf of the Official Committee of Unsecured Creditors. Your Honor what this really boils down to at this stage, given the debtors' very

clear statement that funds taken into the estate in connection with this matter will be held in escrow and will be subject to rights of setoff, is the question of the debtor being able to have some control over its assets, and in that regard, this issue is not dissimilar from the major issue with JP Morgan regarding the $4.3 billion of deposits that sit with JP Morgan to this day. The Creditors Committee agrees emphatically with the debtors that the monies should come into the estate and that we recognize the setoff rights of the IRS that the debtor has mentioned. The Creditors Committee has spent a good bit of time doing diligence with respect to the tax entitlements, and so we can also agree emphatically with the debtors' statements that no matter what else happens here, the debtor will be a net beneficiary of any tax settlements, and the point that Mr. Rosen made regarding the new legislation that is pending only adds to that prospect that the debtor will be a net beneficiary. So we think that all parties' interests are properly protected through the mechanisms described by the debtors, and we strongly support their position.

THE COURT: Thank you.

MS. FELDSTEIN: I'm sorry, Your Honor. Hydee Feldstein of Sullivan & Cromwell. I just want to make the point that ownership - determination of ownership is not limited to right of setoff and that any ruling should not

limit the rights of parties to simple exercise of a setoff claim. If in fact the funds belong to someone other than the estate, that claim needs to be preserved by something other than the setoff rights under 553.

THE COURT: I want to hear from the U.S.

MR. GEHT: Thank you, Your Honor. Jan Geht for the Department of Justice. First, let me just say that the reason we brought up sanctions is there's some debate as to the discussion the Court has with respect to setoff, whether or not that behavior by the United States would warrant the denial of the right of setoff should we otherwise prevail and it is in that context that we thought to explain why our behavior would not be sanctionable. With respect to the assessment, I've reviewed the declarations that Carrion and the United States has a revenue officer in the courtroom who will testify that the Internal Revenue Service's understanding is that declaration is factually incorrect and that in fact just prior to bankruptcy the audit for a couple of the years was almost resolved, and it was going to resolve them by a $200 million underpayment by the debtors. All of that is just - and as far as proposed legislation, Your Honor, I don't think that can merit any type of attention today. So what I would say with respect to assessment is that really goes to the merits of whether or not we have a valid claim. That cannot be decided on the basis of

declaration. With respect to the competing suggestions before the Court, the United States' suggestion of freezing the payment in no way stops the accruing of post-judgment interest, and so to the extent that what is at issue is the interest that might be accruing on the $55 million, that interest accrues pursuant to a statute. Once again, I take offense to the suggestion that the United States has refused to pay since 1992. It is not an obligation of the United States to pay a judgment unless the judgment is actually entered. A judgment was not entered in this case until very recently, in October of 2008. So, to suggest that we're somehow inequitably denying WMI access to the money, which by their own admission they won't have access to it because it would be sitting in a segregated account, is somewhat odd as far as I'm concerned, and so, unless the debtors are suggesting that the U.S. Treasury would default and not be able to make the payment once the Court rules on our motion on the merits, that $55 million plus whatever interest is accruing, we see no distinction between the two mechanisms. Does the Court wish us to address our alternative proposal in addition to freezing the payment?

THE COURT: Well what about the suggestion of placing the funds in an escrow a la an interpleader type of an arrangement? Although you'll want to preserve your claim to it, at least your setoff rights.

MR. GEHT: Well, we - our position, at least as - We have a modified suggestion to that approach. Ideally, of course, we would like to freeze the payment and let the interest accrue. In the absence of that, what we'd actually like is the funds to be deposited with the Registry of the Court with the United States being ordered to be a secured creditor with respect to that $55 million should we succeed in our claim that we have a right of setoff. Essentially, Your Honor, what we are afraid of is, we'd give them $55 million, what we actually have is an unsecured claim against that $55 million, because as I explained when I first approached this topic, we don't have a right of setoff once we pay $55 million. So, we would suggest, like I said, a secured status as to the $55 million and the money being in the Registry of the Court as opposed to in the hands of the debtors. That said, once again, freezing the payment with interest accruing would be preferable and whereas I understand with respect to other creditors, there are issues of payment, we haven't disobeyed any orders to pay yet. The order was issued on December 19th, and we came to this Court within ten business days of that order. So, there is no past non-payment by the United States in this case or any other bankruptcies that I'm aware of.

THE COURT: Do you have the Court order directing you to pay?

MR. GEHT: Yes - Well, we have a Court order which was submitted as an exhibit to our motion which directed us to pay - Hold on, Your Honor, just one second.

THE COURT: Well, I didn't get the exhibit then.

MR. GEHT: It's Exhibit 102.

THE COURT: I didn't get any exhibits to the motion -

MR. GEHT: Oh, I apologize, Your Honor. May I approach?

THE COURT: - in the binder. Do you have other exhibits that the binder didn't include?

MR. GEHT: We only attached the claim, the $2.3 billion claim and the order from the Court of Claims directing us to make the payment and directing to hold the parties to come before this Court. May I approach?

THE COURT: You may. I just remind counsel for the debtor to include the exhibits.

MR. ROSEN: It is included in the -

THE COURT: In yours?

MR. ROSEN: No, Your Honor. I don't think we had attached it to ours. What we had attached was the motion for contempt for failure to pay pursuant to that order. It was an exhibit to our pleading.

MR. HODARA: Your Honor, I believe it's Exhibit B to the Government's -

THE COURT: I have that. I don't have any exhibits to the motion in my binder. If there was an exhibit to the motion, I don't have it.

MR. ROSEN: Well, I'll give you all of mine, Your Honor.

MR. GEHT: Your Honor, if you take a look at that order, I believe on the second page, it directs us to make the payment, and on the last page it sends all the parties to the Bankruptcy Court, and the Claims Court divest itself of all jurisdiction to hear any claims.

MR. HODARA: Your Honor, may I approach with it? Do you have a copy?

THE COURT: I have it, he just handed it to me.

MR. ROSEN: Your Honor, if I could approach, I could give you all the exhibits that were . . . (microphone not recording).

THE COURT: I have your exhibits. You just didn't give me their exhibits.

MR. GEHT: Your Honor, I was reminded to the extent it wasn't clear in the earlier presentation, there are several motions for reconsideration pending with respect to that order, but once again, as far as we're concerned, we have an order to pay and while Strumpf allows us to freeze payment for a reasonable period of time, we can't wait until the outcome of those motions.

THE COURT: Well, I know the parties talk about as Strumpf, but I don't think it's really applicable. Strumpf was money acknowledged to be the debtors in a bank account.

MR. GEHT: But what it allowed the bank to do was to freeze first and come to Bankruptcy Court second, and I'm merely suggesting that that's what we've done here thus far. It does not create any substantive rights, just a procedural mechanism.

THE COURT: I understand. Well, let me hear from the debtor regarding your alternative suggestion.

MR. ROSEN: Yes, Your Honor. Obviously, that is something that we would oppose. The very issue that counsel is raising and that JP Morgan Chase raised here are the issues that were raised in the Federal Claims Court and now that the Court has a copy of the order, it's very clear that the money is to be paid to WMI. It is not to be paid to any other party other than WMI, and it's very clear that to the extent that a party wants to make a claim to those proceeds, and that is on the top of page 3, Your Honor, they have to come forward and file an action in this Court. We have agreed that we will not distribute the funds, however, as we set forth in the Kosturos declaration. We will not distribute the funds except pursuant to a Chapter 11 plan or other order of this Court. And as I indicated before, counsel's suggestion or his concern about being unsecured, is

not accurate, because, as I said, in response to the Court's question, we are prepared to have the monies in that account subject to, Your Honor, whatever rights of setoff may have existed prior to the payment into that account. So to the extent that the IRS, on behalf of the government, maintains a claim, we would agree that that claim would exist. Mr. Feldstein's comments about ownership, Your Honor, again, I know that JP Morgan doesn't want to be in this Court, they don't want this Court to have jurisdiction over JPM, but every time they stand up they sort of tell me that this Court has jurisdiction, but her arguments now about ownership again ring hollow, Your Honor. These are the very issues that JP Morgan raised in the Court in Washington, and it was on the basis of those arguments that the Court entered this order that is before the Court now.

THE COURT: How do I know that? I don't have the underlying pleadings. I don't know that they filed anything in the Court of Claims.

MR. ROSEN: I understand that, Your Honor, but also, they don't have any right to stand up here and make an argument as to the ownership.

THE COURT: Why?

MR. ROSEN: Why would they? On what basis are they making this claim? If they feel that they have a claim, Your Honor, I'm sure someday they'll file an action, but all we're

asking, Your Honor, is that the money get paid to us pursuant to the other order.

THE COURT: What substantively is different from paying the funds into the Registry of the Court subject to anybody's claims to it and putting it into escrow subject to anybody's claims to it?

MR. ROSEN: Your Honor, this is not an interpleader action. If the Court would like for me to send you a copy of the transcript -

THE COURT: Substantively, what is the difference?

MR. ROSEN: Your Honor, a lot because if you start with the concept that it's an interpleader and therefore a jump ball, then it's anybody's game, Your Honor. The fact is, these issues were heard in Washington.

THE COURT: *Res judicata* applies. If you're correct, why wouldn't *res judicata* apply regardless of where the money is held?

MR. ROSEN: So, should the parties go to the burden of starting an action when all of these issues have already been dealt with and all we have to do is assert *res judicata*? Your Honor, all we have said is, if somebody has an argument to that, let them file the action in the Court. There's no reason that we should start the process. There's no reason that the United States should start the process. The United States raised that very issue about depositing it into the

Registry of the Court in Washington. The United States was told no. It was told to pay the money to WMI.

THE COURT: How do I know that? You're making - See, the problem is I don't have the record.

MR. ROSEN: Your Honor, that's fine. If the Court would like, I am happy to provide the Court with a copy of the transcript, and you'll have the benefit of what went on in Washington. But I think just to make a ruling based upon a request for an interpleader to throw things into the Registry of the Court is inappropriate. You do have the benefit of the order, which says, they are to be paid to WMI. There's no reason to alter -

THE COURT: Any party who asserts a claim should come here and I have exclusive jurisdiction over any claims to that money. So that sounds like an interpleader to me.

MR. ROSEN: No, it doesn't, Your Honor. It says that if somebody has an argument with respect to that, they need to file an action, but until that time, those monies are WMI.

THE COURT: But you're conceding that there is at least some reason why you should agree that the funds are held in escrow.

MR. ROSEN: We were doing that for the benefit of the government with respect to the IRS, Your Honor. I don't think you can interpret that paragraph any more expansively

than it very clearly states, that if in fact somebody has a claim, they need to bring that claim to this Court. That doesn't say that this is an interpleader action, and the money should be paid into the Registry. It very clearly states, previously, the money gets paid to WMI.

THE COURT: Well, what do you think you're gaining if it's in your escrow versus in the Court's Registry?

MR. ROSEN: Well, Your Honor, just like we want the money that's been held by JP Morgan, we want the money so that we have the benefit of it. We know what's going on. You can say it's safe in the Registry, I accept that, Your Honor, but there's no reason for it to be there. It's likewise safe with us. We can invest it. We can try to get as much interest as possible on those funds. If it's in the Registry of the Court, it's limited as to what can be done. As long as we comply with the investment management rules of this Court, we can gain whatever interest. We are obviously limited when things are here in this courtroom.

MR. GEHT: Your Honor -

MR. ROSEN: I just don't know why it needs to be here when we have court orders that say otherwise.

MR. GEHT: May I address that specific issue?

THE COURT: Yes.

MR. GEHT: Your Honor, we're not here on a general common law right of setoff, although it is pled here. We're

not here under other rights of setoff. We're here on just 31 U.S.C. 3728. A judgment setoff statute presupposes that there is in fact an order directing a payment, that is the point at which our right of setoff arises. So, it is somewhat absurd to suggest that our right of setoff all of a sudden ceases to exist when an order is entered. It is in fact when it arises. So, yes, the order directs us to pay. At that point is when 31 U.S.C. 3728 gives us a right to assert our setoff prerogative. And so, whereas, under normal rules of setoff, this argument would be held before the Claims Court. Here it is being held after the Claims Court order because the right itself doesn't arise until that point. Normally in the cases of taxes, as Your Honor is aware, 26 U.S.C. 6402 provides for the right of setoff, that's not the case here. The case here requires an entry of judgment. The judgment has been entered. We, through the filing of a proof of claim, have asserted the right of setoff. The Supreme Court has recognized that the filing of a proof of claim constitutes a civil action for the purposes of 3728. Once again, I still have not heard a very good explanation as to why the Registry of the Court is inferior to the possession of the debtors, which leads me to believe that the United States will have a much more difficult time obtaining its funds from the debtors than it would from the Court should they be successful in its eventual arguments.

MR. LANDIS: Your Honor, again, Adam Landis for JP Morgan Chase. One more quick point. Your Honor has mentioned several times that we don't have a record of what transpired in front of the Claims Court before yourself. We do have an attorney from Sullivan & Cromwell here, David Braff who's been moved *pro hac*, who would like to address the Court because he is one attorney who was in front of the Claims Court and may be able to add or shed some light on the issue.

THE COURT: I'm not going to hear testimony on it. The parties can fight over the money.

MR. LANDIS: Thank you, Your Honor.

THE COURT: But let me suggest this, I won't accept the debtors' suggestion that it can make more money investing it than it being held in the Registry of the Court. I will take judicial notice of the status of the economy.

MR. ROSEN: Your Honor, on what basis, though, would we modify the Court order that was entered there? That has already been requested down in Washington. If in fact -

THE COURT: I don't know that it's been requested in Washington. You haven't proven that.

MR. ROSEN: No, excuse me, Your Honor, counsel stood up and said, Motions for reconsideration have been filed.

THE COURT: Okay.

MR. ROSEN: And that's fine. Assume for the moment

that that hasn't been the case and I'll say it hasn't, then all we have is an order that says it must be paid to WMI.

THE COURT: And then I'm to determine the claims to that money. I've heard conflicting claims to the money, and I'm going to order that the money be paid into the Registry. That protects the debtors' rights, it preserves the setoff rights which the debtor concedes any money will be subject to the IRS's or United States' setoff rights, and it preserves the funds for any competing claims to that money there may be, and you may be correct that there is *res judicata* reasons why nobody else can claim to those funds, but I really don't see a functional difference between the debtors' agreement to hold them in escrow and it being paid into the Registry. So I will order that it be paid into the Registry.

MR. ROSEN: Your Honor, I want to make clear though that when we confirm a Chapter 11 plan or we get a prior order of this Court, we want those funds released from that Registry. I mean that's the basis here -

THE COURT: You'll have to file an action. Somebody's going to have to file an action to determine the competing claims to that fund.

MR. LAURIA: Your Honor, if I may be heard?

THE COURT: Yes.

MR. LAURIA: My name is Tom Lauria, I'm with White & Case. We represent the WMI noteholder group. My clients

currently hold about $2 1/2 billion of notes issued by WMI. Our only concern, really, is efficiency to the estate, and I think that if the debtor holds the money in fact any proceedings to resolve entitlement to the funds will probably involve less expense to the estate than by definition if the estate has to file an action, i.e., an adversary proceeding, some type with inviting whatever parties want to join and all the procedural mechanisms that that entails, it's clear to me that this estate's going to spend a lot more money dealing with the disposition of those funds than if the estate simply gets the money and is ordered to hold it in a segregated account subject to the rights that anybody has today in those funds coming in and asserting those rights. I would submit to the Court, indeed, that with that segregation order in place, there's a high likelihood, based on the facts as we understand them, that there never will be a litigation regarding the IRS's right to the funds because there will be a determination well before you ever get there that the IRS in fact owes money to the estate, not the other way around, and once that has been established, any cloud of the IRS's interest on these funds will be gone, and we don't have to have an action in front of the Court to deal with disposition. If JPM has rights that have been preserved in some fashion, it will still have those rights pursuant to the Court, the preservation of parties' rights, but it just seems

to me, you know, this case has been marked to our dismay by a certain degree of inefficiency to this point. Time marches on. We've got funds that we've had a lot of problems just getting a reasonable rate of interest on -

THE COURT: If you're correct, the debtor can file a motion or whatever it wants to file for release of those funds, and that will tee it up for resolution. I don't see this is going to be -

MR. LAURIA: I just -

THE COURT: - any less costly than having it in escrow?

MR. LAURIA: I understand, Your Honor. I guess I'm just saying that if the debtor has it segregated pursuant to an order of this Court it may well be that there ultimately is no proceeding that will need to be filed to resolve entitlement, because I think -

THE COURT: Well, there will have to be something filed to release those funds from escrow. There will need to be a court order.

MR. LAURIA: Yes, if there's - Well, if there's a court order, for example, disallowing the IRS claim, I think we can at that point understand that the IRS doesn't have a setoff right because it doesn't have any claim against the estate, you know, for example.

THE COURT: I'm not sure that would permit release

of the funds from escrow.

MR. LAURIA: Certainly, the IRS cloud wouldn't exist at that point.

THE COURT: I'm putting these funds subject to anybody's claim to the funds, somebody's going to have to determine who, if anybody else has any claim to the funds than the debtor.

MR. LAURIA: Understood, Your Honor, understood. Our sole concern is finding the most efficient resolution possible to the administration of this estate. That's our sole concern.

MR. ROSEN: Your Honor, I appreciate the Court's ruling, but in essence not only are you totally altering the burden of proof here, but you're wiping out without the fact of anyone having to file a motion to proceed through the Federal Claims Court the months of litigation that went on there.

THE COURT: No, I'm not. *Res judicata* applies. If you're correct, you can raise the *res judicata* argument, but I don't have the record before me, and I can't make any determination at this point on any of those issues.

MR. GEHT: Your Honor, may I request either the ability to file a proposed order or have the Court address the question of whether the United States can be deemed a secured creditor with respect to that 55 million should we in

fact succeed in proving our setoff claim? Essentially, what we're concerned with it's sitting in a Registry claim, we don't want to get into a priority fight should we -

THE COURT: Submit a form of order and see if the parties can agree to it, otherwise, I'll enter an order.

MR. GEHT: And, Your Honor, would it be correct to understand that the Court doesn't have a problem with us giving ourselves a secured status with respect to those claims should we succeed in proving our setoff claim? So, I don't have -

THE COURT: You're reserving your - your setoff claim is reserved -

MR. GEHT: Okay.

THE COURT: - to those funds.

MR. GEHT: Okay. But, our setoff - setoff claims are a secured status, and I just want to make sure whether or not we can reflect that in the order.

THE COURT: You can reflect that it's a setoff claim.

MR. GEHT: Okay. Thank you.

MR. ROSEN: Your Honor, the next item on the agenda is the debtors' motion to establish a bar date in these Chapter 11 cases. Your Honor, I don't think I need to go through all the details of the motion itself unless the Court would like me to.

THE COURT: That's not necessary.

MR. ROSEN: Okay. Your Honor, we did, in accordance with the Local Rules, file our schedules. We did in accordance with the Local Rules, discuss the issues associated with the bar date with the Creditors Committee and the United States Trustee. We did in fact get their comments to the proposed forms of documents and including the date that was to be established for the bar date. As a result, we filed the motion with the Court. Your Honor, we did, notwithstanding all of those efforts, receive a response from the United States Trustee which, as we set forth in our response to that, and I hope the Court has the benefit of that, if not -

THE COURT: I have it.

MR. ROSEN: - goes really towards what is contained in the debtors' schedules, and specifically, the inclusion in the debtors' schedules of names and addresses of employees with respect to whether or not they have claims under certain benefit plans, and it was suggested to the debtors that there is no reason to include those people on the schedules and maybe in the context of the bar date, the resolution of responsibility with the benefit plans should be addressed prior to sending notice out to all of these people because they would then be faced with the burden of responding and filing a proof of claim. Your Honor, we don't know what the

resolution of obligations will be with respect to those benefit plans, and in fact, that will be something that will be discussed long and hard and potentially litigated with JP Morgan Chase. At the same time, Your Honor, we need these Chapter 11 cases to move forward and establish a bar date for the filing of claims and then dealing with the efficient resolution of those claims. Your Honor, we think it's much more in the interest of these respective employees that they be listed on the debtors' schedules because if they were not listed on the debtors' schedules, they probably would not get actual notice of the bar date. Instead, they would have to rely upon whether or not they saw a publication notice that we would have filed and published in connection with the bar date. And then of course, Your Honor, we would get into issues of whether or not constructive versus actual notice is appropriate. Nevertheless, Your Honor, these are the debtors' schedules. These are not the United States Trustee's schedules, and as a result, we sign these schedules and the U.S. Trustee doesn't, and we think it's appropriate to have all of these people listed in our schedules in whatever capacity, whether they are acknowledged claims or whether they are contingent, disputed, or unliquidated claims. And as a result, Your Honor, we don't think that that is in fact a response or a valid response to the motion to establish the bar date. Your Honor, in our response to

the other pleadings, we acknowledge that there was something logged in yet again by JP Morgan Chase with respect to establishing the bar date, and I'll note at the outset that we don't believe that JP Morgan Chase has an opportunity to stand here in accordance with what the expressed terms are of the Local Rules. But assuming for the moment, that the Court is willing to hear and acknowledge the existence of that response, we will address that. Specifically, Your Honor, JP Morgan Chase is asking that this Court exempt JP Morgan from the bar date itself. They tell their tale of woe that they have, at the request of the FDIC, jumped in here as the white knight and 24 hours after putting a bid in were successful in gaining purchaser status, acquired the assets of Washington Mutual Bank, and for the last four months, they've been burdened with the integration of those assets, and they have a lot of people who are focused on that, and as a result, they don't have the time or the resources to focus on the preparation of a proof of claim. They also assert that in fact there are issues associated with Title 11 and Title 12 and they raise jurisdictional questions as to whether this Court should consider what are assets of this estate or claims of this estate or whether those are more properly brought before a receivership proceeding. Your Honor, as we set forth in our responsive papers, we think that that is all incorrect and inappropriate. I don't have to cite anything

further than the fact that as the purchaser of Washington Mutual Bank's assets, JP Morgan Chase has been in possession of all the books and records of Washington Mutual, Inc., and Washington Mutual Bank, and in fact, that was the subject of testimony before this Court in connection with the preparation of the schedules and the statements of financial affairs. And in fact, that came up, Your Honor, in the context of also a motion by one of the parties who were a vendor who was seeking to have certain decisions made and JP Morgan Chase came up here and cross-examined the witness and talked about what was going on and the Court even acknowledged at that time that once the schedules were filed, there wouldn't be any more need for contracts, even though someone else had all the books and records. Your Honor, the receivership also, as JP Morgan Chase notes, has been going side-by-side, and in fact, the receivership had a bar date. It was December 30th, and as we note in our papers, Your Honor, we, Washington Mutual, Inc., with only 13 employees and no books and records, were able to generate a proof of claim and file it in the receivership proceeding. We did that on, let's say, three months' notice, Your Honor, because that is the time frame after the acquisition by JP Morgan. What's being suggested here is that a party with over six months of an opportunity to review the books and records, is unable to devote the resources necessary to file a proof of

claim. As we note in our response, we fully expect that there would be a placeholder claim filed. To the extent that they include quantitative analysis and actually put numbers on something, so much the better, because it allows the estate to move forward. But in the absence of that, Your Honor, we expect that there would be a contingent claim or an unliquidated claim filed, but at least it will put the parties on notice as to what is going on. What we're faced with, Your Honor, is in the event that this isn't done, we are going to be forced to sit back and wait and wait and wait. JP Morgan doesn't even suggest in their papers that there be a bar date applicable to them, rather, they suggest a status conference with the Court after March 31st, the requested bar date, at which point in time they would come forward and make their suggestion as to what date might be appropriate for them after they continue their integration or their analysis processes. By doing that, Your Honor, you are in essence - or by accepting that analysis the Court and all the parties in this courtroom and the parties in interest who aren't even here would be asked to sit back, wait for JP Morgan to conclude, and any distributions, any plan of reorganization, any disclosure statement would necessarily have to wait because we won't know what the issues are going to be in this case. We won't be able to quantify what the claims will be. We won't be able to propose a suggestion for

a plan of reorganization or in any other Chapter 11 plan. So as testified yesterday at the 341 meeting, while we believe that we're looking for a third quarter plan confirmation and consummation, that necessarily will get moved back to the fourth quarter or even worse to 2010, and creditors will be forced to wait, just like we've been waiting for the deposit money to be provided to us, but we'll be forced even longer to make a distribution to creditors. As we say in our responsive papers, Your Honor, there is no basis for JP Morgan to make this assertion. We have suggested that if in fact there is a need for additional time, Your Honor, we would be happy to discuss that issue at the appropriate time but that the bar date would apply. They would obviously have to in that circumstance, satisfy whatever requirements the Court would impose or applicable law would impose for an extension of the bar date. If in fact they chose not to meet the court-ordered bar date, there is another standard, one that the Supreme Court has already set with respect to late-filed claims and the excusable neglect standard. Again, Your Honor, it appears that all of this is knowing, but again, they don't wish to abide by what the rules of the game are. Rather, they would come in and file from the rafters whenever they can, Your Honor, but not file a claim in this Court. Based upon what we've said in our papers and as very nicely stated in the responsive papers filed by the Creditors

Committee, Your Honor, we believe that there is no basis to exempt JP Morgan Chase from the bar date, that they like every other creditor in this case should be forced to file a proof of claim by whatever date the Court imposes for all creditors. Thank you, Your Honor.

THE COURT: Thank you.

MR. STRATTON: Good morning, Your Honor, David Stratton for the Creditors Committee. I rise to address a small housekeeping matter. On Thursday of last week, JP Morgan Chase filed its objection to the motion. On Tuesday, the day before yesterday, the Committee file a motion for relief to file a reply -

THE COURT: I've granted that and read the reply.

MR. STRATTON: Thank you, we haven't seen it on the docket. Thank you very much, Your Honor.

THE COURT: Thank you.

MR. HODARA: Thank you, Your Honor. Fred Hodara for the Official Committee. Your Honor, I want to talk for a moment about the issue of time as it relates to this case generally but of course specifically as it relates to JP Morgan's objection to the timing in the bar date order and to the concept of a bar date that applies to them at all. Yesterday, at the 341 meeting of creditors, the debtors' representatives made a very important statement, and that is, for the first time in this case, they projected a date to

exit bankruptcy, and the date that was stated at the 341 meeting was in the third quarter of this year. To exit in the third quarter, in other words one year after the commencement of the case, is a very meaningful fete. It's one, however, that the Creditors Committee has urged on the company for sometime now, and it's gratifying from a creditor perspective that the company has come to this conclusion itself and has stated it publicly. Now, many things need to happen for the estate to be able to come to the point of having a confirmable plan of reorganization presumably in the late summer, in front of the Court, through the confirmation process in order to emerge as projected in the third quarter. One of those things, obviously, that has to happen, is that all claims, small and large, need to be known, and they need to be known to all parties. That is what was said by the Court in the oft-cited case of Arrow Air. In that case, the Court said, For the settlement process to work efficiently, the affected parties must negotiate with complete knowledge of the debtors' financial condition, thus, and a central purpose of setting a claims deadline is to inform participants in the reorganization process as to the debtors' liabilities. Clearly, the claims, if there are any, of JP Morgan are critical to be known to all the parties in these cases in order for this settlement process and the plan process to proceed. For JP Morgan to say that it can't file

its claims or know its claims in order to be able to file them in a six-month period from the petition date to March 31, is strange at best when we have the mirror situation of this estate having to determine its claims to be filed in the FDIC proceeding, which by statute, we're required to do by December 31. Somehow this estate, with only 13 employees and without direct possession of the books and records which had all shifted to JP Morgan in the purchase, this estate, despite those impediments, was not only able to do it, but was able to do it with a very detailed filing that was presented in the FDIC proceeding on a timely basis. So, for JP Morgan which has all the relevant employees and all of the relevant documents to say that they're not able to do it, is simply wrong. It appears they simply don't want to do it. They don't want to submit to the jurisdiction of this Court when it would appear they've already submitted to the jurisdiction of this Court, and that's the situation that was faced by the Court in the Hooker case, another case that is cited frequently in connection with disputes pertaining to bar date and filing of proofs of claim, and Hooker, a District Court decision in the Southern District is one of the courts that specifically cited the Arrow decision that I mentioned a few moments ago. In Hooker, bank creditors felt that the shouldn't need to file their claims in the Bankruptcy Court because they'd be faced with a Hobson's

choice, not dissimilar to what JP Morgan purports to be concerned with here. In Hooker, the Hobson's choice was recognized by the District Court to be a very serious one because the issue at hand was whether the banks would forego an entitlement to a trial by jury if they submitted to the jurisdiction of the Bankruptcy Court with respect to their claims. And what the District Court said there, affirming the ruling of Judge Brosnan in the Bankruptcy Court, is that notwithstanding how fundamental and important is the right to a trial by jury in our country, it is more important in the context of a bankruptcy case that all of the claims, large and small, be filed by a date certain on a timely basis so that as the Court in Arrow said, All parties can know what the claims are and can proceed from there to a settlement, a plan of reorganization, and a timely exit from bankruptcy. As Judge Brosnan succinctly stated in the Hooker case, "I'm going to deny your application to be carved out of the bar order. I think it is a very dangerous precedent as it would require me in the future to draft bar orders in such a way that I preserve rights for anybody who felt that they might have a problem, and I'm simply unwilling to do that." I think we're faced with the same situation here, Your Honor.

THE COURT: Thank you.

MS. FELDSTEIN: Good morning, again, Your Honor. Hydee Feldstein from Sullivan & Cromwell for JP Morgan Chase.

I feel a little bit like the elephant in the room. I shouldn't be heard if I don't file a pleading, and I shouldn't be heard if I do file a pleading I was invited to file. Let me start by removing what I think is a red herring. It is correct, that because we view many of the disputes between ourselves and this estate as disputes over ownership of assets, not simply claims against the estate, that in our papers we did put forth the argument that the bar date ought not to apply to us with respect to those claims. It is also the case that we have thrice, since the motion was filed, attempted to resolve this consensually with the debtors. We have asked for additional time. We do have a specific date to propose by which we think we could get matters presented formally, appropriately, and responsibly to the Court, and the debtors have advised us that they cannot give us additional time. What is before this Court today is not a complex question. These may be complex cases, but this is not a complex issue. It is an issue in fact that arises in the administration of every case. It's simply should this Court at this juncture set a bar date, and if so, what should that bar date be? That's a question, but in the ordinary course, it shouldn't reach the courthouse steps.

THE COURT: Uh-huh.

MS. FELDSTEIN: Much less come inside the courtroom, and we have been attempting to resolve it. As a procedural

matter, we believe that the Local Rules cited by the debtors is permissive, and that the debtors in filing their motion setting a return date, giving us an extension, and setting this hearing, we are properly before you today. I don't think I need to belabor the point unless the Court wishes to hear further argument on it.

THE COURT: No.

MS. FELDSTEIN: We also agreed with the Committee that the setting of the bar date is really within the sound discretion of this Court. I do want to cite what the District Court in L.J. Hooker went on to say in the opinion, further along then that which was cited by Mr. Hodara. The Court there said, "Bankruptcy Judges, armed with special expertise in the field and fully familiar with the facts and circumstances of the cases before them, are in the best position to weigh the equities in deciding whether cause exists for modifying the bar date order or exempting a party from it. That decision is properly committed to the sound discretion of the Bankruptcy Court and that Court's exercise of its discretion should not be lightly disturbed." I think we agree with that. The Court's exercise of its discretion ought not to be lightly disturbed, but particularly in this case, Your Honor, it ought not to be lightly exercised either. There are consequences to the parties of setting a bar date that is too early that brings proofs of claims

before you that candidly look like the debtors' schedules. We don't know, it could be, we have these claims, they're contingent, there may be, they're possibly. I would like to move the Court under Bankruptcy Rule 9017 and Federal Rule of Evidence 201(b)(2) to let me introduce a short section from the debtors' first amended schedules filed with the Court just yesterday, if I can do that at this point, Your Honor?

THE COURT: You may.

MS. FELDSTEIN: May I approach?

THE COURT: You may. I'll just mark it as Exhibit 1.

MS. FELDSTEIN: Thank you, Your Honor. I call the Court's attention and if we've done this correctly, we have highlighted it in yellow on page 2, and I would simply like to read into the record the debtors' own description of what we're doing here. It says, "Before the receivership, the operations of the debtors, WMB and WMBFSB, and their respective subsidiaries are necessarily connected and collectively managed. As a result it may not be immediately clear whether the debtors or WMB own or are liable for certain of the assets and liabilities listed on the schedules and SOFAs. In addition, the financial affairs and businesses of the debtors, WMB, and WMBFSB were complex and before the receivership the debtors participated in a consolidated cash management system through which certain payments may have

been made by one entity on behalf of another." And I think I'll stop there. The point is, Your Honor, that I do not believe that the ultimate facts relevant to the issue before you today are any more in dispute than the legal standards. The legal standards are clear. The ultimate facts are equally clear. We do, however, Your Honor, have a witness in the courtroom, and we are prepared to put on testimony, should the Court or the parties desire, regarding the facts and circumstances that we believe warrant a longer bar date than that suggested by the debtor. Playing by the rules, Your Honor, means playing by the rules on both sides. The mere fact that the rules would allow a bar date as short as 60 days in a case of this magnitude and the fact that perhaps the debtors could have proceeded without notice and a hearing does not mean that this Court ought to enter an order in either of those formats. Separating the assets and the liabilities of these two estates is a difficult task. It is complex. It is painstaking. The records are voluminous. They are incomplete. They are inconsistent. JP Morgan Chase has devoted substantial resources to this task as well as to all the other tasks before us. We have every interest in resolving this and moving on with our business as quickly as we can. What we are before you here today on is not the art of the possible. Again, I'd like to take the elephant out of the room. We are talking about the best way forward. If in

fact this Court orders us to file proofs of claims by March 31, that is what we will do. The quality and the substance of those claims may not be what it ought to be or what it could be if given more time. We will do as thorough, careful, and responsible a job as we can within the time frame allotted to us. We believe that a reasonable bar date, in order to put matters at issue appropriately, is July 31st of this year. We had ask the debtor for a date between June 30th and September 30th. We had - as recently as immediately prior to this hearing, we had asked the debtor whether we could please have till July 31st. That is the process that we think is required in order to get the matters at issue. We're asking for the opportunity to address these in a thoughtful way. We're asking for the opportunity to address these in a manner that is consistent with our duties to respond to regulators, to governmental authorities, and to the requirements of the parties in this Court. We are in fact in the middle. We are in fact the party to whom everyone is coming to for information, for action, and we are trying to operate in as accelerated a time frame as we possibly can. Your Honor, I ask you to contrast this with the situation if the debtor were before you in the largest bank failure in U.S. history, saying that they need more time for exclusivity or they need more time to put something together. I am letting the Court know that to whatever the

extent the Court has factual questions and is prepared to take testimony, we're prepared to address that. We are not here as a matter of tactics or litigation strategy or delay. We are attempting to behave in a responsible manner.

THE COURT: Thank you. I do not think this is something that requires testimony.

MR. McMAHON: Your Honor, good morning. Joseph McMahon for the Acting United States Trustee. I don't think the debtors have a correct understanding of the reasons why we filed our response. Your Honor's very familiar with the circumstances leading up to the filing of the debtors' schedules and statements. They asked for and obtained from this Court authority to file those schedules after approximately a three-month period on grounds that they did not have the information needed to complete them. They did file schedules and statements at a certain point, and just as recently as two days ago, I should say, filed amendments to those schedules and statements. With respect to our position or I guess the interpretation that the debtors derive from our response, it's flatly incorrect, and if we take a look at paragraphs (22) and (23) of the reply, I think it really highlights what our issue is. The debtors acknowledge that there are a series of benefit plans and that it's a defined term in paragraph (22) of the reply, under which employees may have claims against WMI on account of their

participation. In paragraph (23), the first sentence indicates - and I'll read it into the record: "It has not yet been determined whether WMI, JP Morgan Chase, as purchaser of WMB's assets, or the FDIC, as a receiver of WMB, is liable to former employees on account of the benefit plans -" and this sentence goes on. What's critical here, Your Honor, is the more than - the substantial is more than 6,000, I believe, employee claims that were all listed in one bundle as contingent, unliquidated, and disputed on the debtors' schedules without amounts attached to those. There's no dispute that the claims exist, and in fact, if we were to take us back one day prior to the FDIC takeover, presumably the debtors would be able to come forward with records which show, for example, when you're dealing with items like deferred compensation plans and rabbi trusts, it would be possible to get records which discern what the amount of those employees' investment there is. What's unique about this case, Your Honor, is we have these hanging disputes with respect to JP Morgan Chase, with respect to the FDIC, with respect to these items as the debtor acknowledged, and this is not a notice issue. From our perspective, frankly, the debtors could add the plan participants to a mailing matrix with respect to establishing a claims bar date, but the issue is, as a matter of fundamental fairness, how it is you would address these individuals in the context of this ongoing

dispute. It seems to us, Your Honor, that it's not a matter of their records being available to discern or determine what the amounts of these various claims might be that are due and owing to these individuals under the benefit plans. The issue is, who's on the hook for the obligation, and when we saw the schedules in that form, Your Honor, we simply made the determination that it was appropriate to file the response and to give the item some further consideration. We did conduct the continuation of the 341 meeting yesterday, and ultimately, Your Honor, after further discussions, it's our view that there's a couple of things that - well, with respect to those benefit plans, Your Honor, we believe that it might be more prudent for the Court to exercise some discretion in terms of carving out obligations relating to those plans from the claims bar date order at this time, subject to there being some further development with regard to ultimately who may be liable for the amounts that are due under those benefit plans.

THE COURT: Well, how do you suggest I deal with those? How do I determine who may be liable for those?

MR. McMAHON: Well, Your Honor, with respect to the - there's an entire issue here, Your Honor, with respect to the quality of the schedules.

THE COURT: Uh-huh.

MR. McMAHON: And the Court may very well posit that

that issue is not before the Court today, but to the extent that the debtors are seeking to establish a claims bar date, it's our view that the Court is entitled to look at the way the items have been scheduled and determine whether or not it is willing to establish a claims bar date in light of the information that's been presented to the Court, and frankly, it seems to us that it's a bit unfair to lump all 6- to 7,000 people in the one category and just blanket - and schedule them as such without, frankly, first knowing that there was better information available, presumably, with respect to those items, and then second, knowing that some further development in terms of the case may aid the Court in addressing these issues. In other words, employees can be required to file claims under the claims bar date motion, but the Court could exercise its discretion and carve out the benefit plan specifically pending further development of the negotiations and further consideration of what records would be available to define those obligations.

THE COURT: Thank you, I understand your argument. Anything more?

MR. McMAHON: Your Honor, just one final note. The debtors indicated in their reply that they incorporated comments from the parties, and I just wanted to note one thing with respect to the form of the claims bar date order. If the Court would take a look at the motion itself -

THE COURT: Yes.

MR. McMAHON: We had provided a comment to the debtors prior to the filing of the motion with respect to the third ordered paragraph on page 7 of the order.

THE COURT: Yes.

MR. McMAHON: It has the standard language with respect to claims being - or standard request that claims will be forever discharged from - the debtors and their property will be forever discharged from all indebtedness and liability, and our simple comment there, which we actually provided to the debtors in advance of the filing of this motion was that that language should be pared down to nearer Rule 3003, I believe, (c)(2), which provides that to the extent that someone doesn't file a claim by the claims bar date, they shouldn't be treated as a creditor for voting or distribution purposes alone in the Chapter 11 proceeding, for two reasons: Obviously, Your Honor, we don't know whether or not this case is going to turn out to be a liquidation, therefore, whether or not the claims will be discharged, viz-a-viz the debtor, is unclear at this point. Second, Your Honor, to the extent that this case were to convert, parties in interest that do file late claims would have rights against a Chapter 7 estate that need to be preserved. Thank you.

THE COURT: Thank you.

MR. CLARKE: Your Honor, very briefly. John Clarke from DLA Piper. We represent the FDIC.

THE COURT: Uh-huh.

MR. CLARKE: Just standing up to say, given the complexity of the issues that JP Morgan and the debtors and the FDIC are sorting through, we do believe there is some merit in granting JP Morgan additional time to file a proof of claim in these cases.

THE COURT: Okay.

MR. CLARKE: Thank you, Your Honor.

MR. LAURIA: Your Honor, Tom Lauria for the WMI noteholder group. Just to create some brief context here and to underscore some of the earlier comments that were made, I think parties are in fact making substantial progress in coming to an understanding of the critical issues that have to be resolved for this estate to be able to move out of Chapter 11, and in fact, I think with respect to some of the most material moving parts, one of the surprising things is perhaps how simple some of the issues are. Nevertheless, despite the progress that people have made in understanding assets and liabilities, it's clear that there are contingencies that are going to need to be framed, understood, and addressed either by agreement or by this Court or perhaps in some cases in another forum, and we think that the establishment of a bar date as requested by the

debtors is one of the very important and in fact appropriate ways to facilitate moving that process forward, and so we support the debtors' motion and believe that a bar date is needed as soon as possible. I think in reverse order as to the beneficiaries, the issue addressed by the United States Trustee, we don't know how the Court can possibly make a determination regarding the debtors' liability for these claims unless the claimants are before the Court and have asserted claims. Typically, that's how the process works. People file claims, the debtor objects to them, and the Court resolves them or they're otherwise resolved by agreement. If the parties aren't before the Court, the mechanism for claim resolution is stalled, and I think that we don't have to necessarily have a resolution in this Court of who is liable for these obligations. We need a determination as to whether or not the debtor is liable in order to move forward in a Chapter 11 process. And I just can't think of how that gets underway without requiring people to file proofs of claim.

THE COURT: Well, maybe you can tell me or the debtor can tell me, what exactly would be in any employee's proof of claim that would advance my determining whether the debtor's liable for that claim or not?

MR. LAURIA: Well, I think there certainly is an opportunity for disagreement about the amount that people are going to be owed and the type of benefits that people believe

they're entitled to. Your Honor, you, I'm sure, have been through this process more than I have, but just because the debtor believes it has certain plans that entail certain benefits and obligations to certain people, doesn't mean that the people on the other side of that agree, and in fact -

THE COURT: The debtor hasn't said that it owes that. That's the difference here. The debtor hasn't admitted it.

MR. LAURIA: That's the - people who filed claims are people who either have claims that the debtor says are contingent, disputed, or unliquidated, or who disagree with the way the claim's been scheduled by the debtor. That's how the dispute is set up.

THE COURT: The underlying dispute is whether the debtor owes it or the bank owes it; isn't that the underlying dispute?

MR. LAURIA: That's one of the disputes, Your Honor, that's one of the disputes. I mean I think we're engaging in a game of speculation to say that's the dispute. Until the claimants come forward, we don't know what all the disputes are, and I think that we're at risk of putting ourselves in a do-loop that at the end of the day is just going to delay resolution of issues rather than progress them if we don't get people to come forward and file claims, and you know, the act of filing a claim is not a great hardship. You know,

thousands and thousands of people do it in every bankruptcy case. It's -

THE COURT: And lots of people don't do it.

MR. LAURIA: And to that point, Your Honor, this Court, as well as others, have dealt with that in due course, and I don't think that you're going to tolerate the parties before this Court acting in an inequitable fashion. I think that the Supreme Court authority on bar dates clearly gives the Court room to determine whether or not a claim is time barred under certain circumstances and, you know, I'm not concerned about that problem here. I do think it would be very helpful though to crystalize the issues, to get people to put the cards on the table, and I think that really is kind of my transition point with the JPM issue. JPM is key to this, and they're key to it in two respects. I found it amazing that JPM could stand here and criticize the debtors' schedules realizing or understanding the fact that the debtors' access to its records is primarily a function of JPM having possession of those records and restricting access, and for JPM now to bootstrap that circumstance is a basis for relieving it of the obligation to file a proof of claim, just doesn't seem right. It doesn't seem fair or equitable certainly, and it seems to me that the best solution today is for the Court to fix a bar date, and if JPM believes that there is a basis for it being relieved of the bar date or

getting an extension of the bar date, it should come forward and it should bear the burden of establishing cause for that extension, which may or may not require an evidentiary record, but to do so today, to give JPM that relief today really kind of turns things around, and it's trying to put the burden on the debtor to establish that JPM should be subject to a bar date in that. I just don't think that's the way the process works, and it's incredibly important here, and we've talked - not to use the analogy of a card game in any pejorative sense at all, but as this Court is well aware, that's how these bankruptcy cases play out in large part as a card game between the principal stakeholders, and it's time for people to put their cards on the table and JPM may say, I can only put some cards on the table now and I have to put some cards on the table later, but let's get it going. Let's find out. Let's subject the extent to which their entitled to delay putting their cards on the table to this Court's determination of cause based on a record, not just because JPM who's in control of the records and who has restricted the debtors' access and continues to restrict the debtors' access to the records, saying the schedules aren't good enough.

MR. ROSEN: Your Honor, just briefly, in reply. Ms. Feldstein stood up and she made a point of handing out our first amended schedules and reading into the record a certain

sentence or sentences from those. I would note that what Ms. Feldstein didn't acknowledge was that this was a preliminary note to the schedules that was included not only in this first amended schedule but it was also included in the schedules that were filed by the Court mandated date of December 19th. What she failed to read to the Court, and I will take the opportunity to do so now, was a paragraph a little further up on that same page. "The schedules and SOFAs have been signed by John Maciel, chief financial officer of the debtors and a director of Alvarez & Marsal North America LLC, the debtors' restructuring advisors. In reviewing and signing the schedules and SOFAs, Mr. Maciel has necessarily relied upon the efforts, statements, and representations of the debtors' personnel and professionals, and information, efforts, statements, and representations of Washington Mutual Bank, JP Morgan Chase, and their respective personnel." It then goes on to say, "Although data received from JP Morgan Chase has been reviewed by Mr. Maciel, other members of Alvarez & Marsal, and the debtors, Mr. Maciel has not and could not have personally verified the accuracy of each such statement and representation including, for example, statements and representations concerning amounts owed to creditors and their addresses." It should be noted, Your Honor, and Mr. Maciel happens to be here in the courtroom today and we could certainly put him on the witness

stand, or Mr. Kosturos, who's also here, that they would testify, Your Honor, that the only way we were able to complete these schedules was because of the help of JP Morgan Chase and the fact that JP Morgan Chase essentially closed the books and records for WMI and it was with that information that we were able to file the schedules and statements and financial affairs. They have all that information, Your Honor. They have had it for a long period of time. So to stand up and say that there's too much up in the air is, again, Your Honor, just inappropriate. I will accept Ms. Feldstein's offer if the Court will establish the bar date and she says she will abide by it and she will file a proof of claim. That will work for the estates, it will give us something to work with and if more information is necessary and if an objection to that proof of claim would flesh out more information, then we'll go that process, but at least we will know. So the representation made by counsel is one that we're willing to accept. With respect to Your Honor's last questions of Mr. Lauria in response to what was said by the United States Trustee, Your Honor, there are issues associated with these benefit plans. We don't know at this point in time who is directly responsible for some of them. Some of them are actually tied up in the assets of rabbi trusts that we don't know who the ownership is with respect to some of them, Your Honor. We certainly don't know

the drill, the granular data that might come out of what the exact claim is from a particular holder who might be related to a specific rabbi trust or a deferred compensation plan. We thought it was an abundance of caution to list everybody, Your Honor. I don't think at this point in time, carving people out of a bar date is the right way to go, whether it is on the grand scale like JP Morgan is requesting or whether it's on a more - a smaller scale with respect to individual claimants under benefit plans. We're not sure how much people are owed, what assets may relate to a specific claim, meaning whether it is in a deferred comp plant, whether there was an asset earmarked for it, whether it is in a rabbi trust earmarked for it. Your Honor, we don't know who was responsible, and we certainly don't know the amounts. As Mr. Lauria said, we're looking to get that process started. If in fact it is determined that JP Morgan Chase is responsible for these benefit plans, then I assume that these people will not have claims against the estate and to the extent that a proof of claim had been submitted, we obviously would seek to object to those claims and have them wiped out on the basis that a third party took care of them. If in fact, they are not responsible, however, and they are responsible of this Chapter 11 estate, we need to know what the magnitude of those claims is, for the very reason that we need to formulate the Chapter 11 plan and get this case out in the

third quarter, which is actually less than a year. Your Honor, we're looking to do that, and we've done everything possible to move this case forward as quickly as possible. Thank you.

MS. FELDSTEIN: Your Honor, it's Hydee Feldstein one last time. I will be very brief. I'm simply here to address the issue. We're not here today asking to be exempted from the bar date. We took the opportunity in the limited time available to us between the filing of the opposition and today to develop a game plan and to see how much time we would need so we could come before you with a date that we felt was fair and reasonable. If in fact the debtors, the Committee, others are correct that these cases cannot move forward without us moving forward, what we have tried to do is as responsibly and expeditiously as we can offer you a bar date that in a case of this size and magnitude, we believe would represent adequate consideration of the facts and circumstances that support the sound exercise of your discretion. Thank you.

THE COURT: Well, I'm going to overrule JPM's objection. I press the debtor to file the schedules despite the same argument they raised that JPM now raises that this is complicated and we need time. It is true that a bar date is essential to move a case, and I think it's essential to require that JPM file their proof of claim in 60 days. If

they need to amend that claim when additional information is received, there are rules that permit that. The employees is a closer call. I am persuaded that I will enter an order or overrule the U.S. Trustee's objection and require that employees file a proof of claim, but I'm not entirely convinced that all issues regarding those claims can be resolved, simply by having them file proofs of claim. I think really the issue is between JPM and the debtors, and I don't want to prejudice any employees, but I will allow the debtor to send the bar date, require employees to file proofs of claim. I will deal, if there are any issues regarding people who did not get notice or did not file proofs of claim when perhaps they should have, I'll deal with that at the end, but I think it's a good first step to see if we can get as many parties to file a proof of claim as those who think they have claims against this estate. So, I'll grant the debtors' motion.

MR. ROSEN: Thank you. May I approach the bench, Your Honor?

THE COURT: You may. I will on your point regarding the discharge, I agree that the language in that third decretal paragraph on page 7 is just too broad. Let me see - Have you changed the pagination there?

MR. ROSEN: Your Honor, I apologize if in that form there - It would be -

THE COURT: Well, I'm going to delete from -

MR. ROSEN: Your Honor, it's in the bottom of 7 and top of 8.

THE COURT: I have it.

MR. ROSEN: Your Honor, Mr. McMahon is correct in that he did raise this issue with us, and he's also correct that the language contained in the paragraph is standard in every bar date that is entered. The language that he is now trying to limit it to is contained in the paragraph itself, Your Honor, but we believe, Your Honor, that based upon the fact that this is the standard practice, this is the custom and practice that the paragraph should remain in its entirety.

THE COURT: Well, they're not forever barred and estopped from asserting a claim. There are procedures they could file that would allow them to assert a claim. So, they really aren't, and the debtors may not receive a discharge in this case. So, regardless of whether anybody files a proof of claim, claims may not be discharged. So I think I have to strike from the penultimate sentence, or the last sentence and the top two sentences in paragraph (8).

MR. ROSEN: Your Honor, if you could, could you just tell me how it would read now?

THE COURT: It will read, "Such proof of claim shall be subject to reclassification" - excuse me, I'm sorry -

"That any holder that is required but fails to file a proof of claim in accordance with this order on or before the bar date, such holder shall not be permitted to vote or accept or reject or participate in any distribution" - is essentially what it would read.

MR. ROSEN: Okay, thank you, Your Honor.

MR. McMAHON: Thank you, Your Honor. There are corresponding changes that need to be made to both the mailing notice and the publication notice with respect to Your Honor's comment because -

MR. ROSEN: Your Honor, would you like me to take that back and we can make the corresponding changes?

THE COURT: Yes.

MR. McMAHON: Thank you.

MR. ROSEN: Your Honor, I believe that concludes this morning's agenda.

THE COURT: Alright, we'll stand adjourned then.

(Whereupon at 12:15 p.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Elain M. Ryan February 2, 2009

Elaine M. Ryan
2801 Faulkland Road
Wilmington, DE 19808
(302) 683-0221