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
	)	
	)	August 24, 2009
	)	11:38 A.M.

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

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THE COURT: Good morning.

MR. ROSEN: Good morning, Your Honor. Brian Rosen, Weil Gotshal & Manges, on behalf of the debtors.

We have a pretty full calendar this morning, Your Honor.

THE COURT: And would the parties on the phone please mute their phones? Thank you.

MR. ROSEN: Your Honor, I think we can skip to Item Number 4 since the first three were all adjournments. And Item Number 4 was the debtors' motion for an extension of exclusivity. And it is my understanding that based upon the certificate of no objection that had been filed, the Court entered the order extending exclusivity, I think either today or on Friday afternoon.

THE COURT: I did.

MR. ROSEN: Which would take us to Matter Number 5, which is the first contested matter going forward. And that is a motion by some -- several movants for relief from the automatic stay to continue certain prepetition litigation. And I will turn over the podium to them.

THE COURT: Thank you.

MR. LONG: Good morning, Your Honor. May it please the Court. Brian Long from Rigrodsky & Long in Wilmington.

I rise this morning to introduce to the Court, my co-counsel, Joe Tusa, who's been previously admitted pro hac.

Thank you.

THE COURT: All right.

MR. TUSA: Good morning, Your Honor.

THE COURT: Good morning.

MR. TUSA: Thank you for entertaining our motion this morning.

As Your Honor is, no doubt, aware, we represent the plaintiffs in a class action pending in the Eastern District of New York before the Honorable Arthur Spatt. The case was filed approximately four years ago in June of ‘06. So, I mention that just to point out that it wasn’t filed any time near the commencement of this proceeding.

The case has progressed substantially far, although -- and, of course, once this matter was filed last year, Judge Spatt has honored the bankruptcy automatic stay.

THE COURT: Um-hum.

MR. TUSA: And we come here before you this morning on behalf of the named certified plaintiffs in that case who are the movants in this particular motion to ask Your Honor to modify the stay to allow us to proceed to liquidate only our claims in our original court, the Eastern District of New York.

We’re not seeking to collect the damages at this time, merely just to liquidate the matter in that court. We’re moving pursuant to 11 U.S.C. 362(d)(1) and we believe, Your Honor, there is cause under the standards in this District to

allow the stay.

Just to briefly summarize for Your Honor the substantial amount of knowledge and the breadth of work that's already gone on in the Eastern District of New York, Judge Spatt has now resolved two motions to dismiss, a motion to strike a motion to contested for personal jurisdiction of that court, he's presided over a motion to reconsider those opinions, we have done no less than 10 discovery motions, no less than four scheduling and settlement conferences, we've taken a substantial amount of discovery, probably most of the discovery that's going to happen. We've done at least eight depositions, exchanges thousands of pages in document discovery, we have exchanged interrogatories, request to admit, so forth and so on.

We have exchanged Local Rule 56.1 statements in preparation to file summary judgment motions. Judge Spatt has entertained a pre-motion summary judgment conference. He has presided over a motion to join new parties to amend the pleadings a number of times. He has also recently decided a motion for class certification. And that motion for class certification was as to all of the defendants which were previous subsidiaries to the debtor in this particular bankruptcy, safe for the debtor in this bankruptcy in deference to the automatic stay. And he has -- in his opinion certifying the class, at least the way we read it. I realize the debtor

may read it slightly differently. We realize he is prepared to rule on that fully briefed motion as to the debtor if and when the automatic stay would ever expire.

We are prepared to go back and resume litigating that case this September. Your Honor may have seen this motion was originally filed, I believe, in April. I believe we were on the June docket. And then shortly thereafter, Judge Spatt honored a request by the FDIC to stay the matter until September. He did so, and we're about to resume in that decision staying the matter. He expressed his opinion that we not litigate piecemeal, that he would like to see all parties resume at the same time. And that was, of course, our primary argument, Your Honor.

We're happy to go through the elements of cause. But I guess generally our proposition is it's the least amount of prejudice and the least amount of hardship to all of the parties and this Court to allow the Court in the Eastern District of New York to at least liquidate any claim that may or may not exist against Washington Mutual, Inc.

Looking at the decisions that arise in this District as to what constitutes cause, we see, Your Honor, that there are probably two different tests. In an instance where you have prepetition litigation, some courts speak about a one factor test running from the statements by the houses of Congress that your cause could be, and often is, substantiated

when you have prepetition litigation. And you see courts like the Racine opinion talking about a one factor test and granting motions to modify the stay to allow the case to at least reach the liquidation amount of the claim back in the original forum.

And then, of course, you have probably your more usual tests when all types of motions for stay are filed, whether it be prepetition litigation or not. You have the three factor test that speaks of prejudice, hardship, and success on the merits.

And this is, again, where I would point Your Honor to the prior decisions in this District, the Racine opinion, the SCO opinion, Continental Airlines where they recognize that in one manner or another, the movant's claims is going to have to be liquidated somewhere. And in a case such as an SCO, which is very similar to this one, where the case is four years old, and the District Judge has gained substantial knowledge in the parties' claims, defenses, and the parties' various disputes, that makes a lot more sense to allow that judge to get to the claim resolution part of the case rather than making this Court having to basically replicate and duplicate all of those proceedings.

We realize the debtors speaks of certain prejudices that it may incur if it's continue -- forced to continue that litigation. It talks about the time and cost. And I guess we would just point out the same defenses were made in the Racine

litigation, SCO, and they were rejected.

This, of course, is a much bigger company with many more lawyers. I think by our reading of the agenda before Your Honor today, we counted 11 different law firms representing the debtor, all seeking to be paid out of the bankruptcy estate. It seems somewhat self-serving that they draw the line at continuing our case in a court where it's been litigated for four years. But nevertheless, that's seemingly the prejudice they claim.

They do claim a hardship that -- you know, if Your Honor were to grant this motion to stay, there may be as many as 180 other cases lying in the weeds that haven't filed the motion for the 11 months this bankruptcy has been going on, but they're apparently waiting for Your Honor to rule on our motion, and then they, of course, will all seek to have their own cases sent back.

We would just mention to Your Honor that there's not a single motion that we're aware of pending from any of the so-called 180 other cases. And if -- of course, if those motions were ever to be filed, we're confident this Court would deal with them in an appropriate manner.

Even though I think the cases balancing the hardships, they often times speak of prejudice and a hardship together. I think we just wanted to point out a few additional things about hardship. I've already said that most of the

discovery that's going to be done in the underlying case has probably been done.

The other thing to point out is that to the extent there is additional discovery to be done, and there is some additional discovery to be done, I don't mean to say there isn't, it's not likely to come from the debtor. As debtor points out, the first line of contact with the movants and the certified class was probably done by a subsidiary of Washington Mutual Bank. And that subsidiary, as we understand it, was, of course, seized and sold to JPMorgan Chase. They are in possession of the records.

In recognition of that fact, Judge Spatt in April, when he was extending the FDIC's request for a stay until this past September, asked the FDIC to tell JPMorgan Chase please preserve the records, realizing that they're the ones that have the discovery. It's quite unlikely there's going to be much discovery that's going to come from the debtor in this particular case.

We would also point out as far as hardships go, Your Honor, the debtor has pointed out that, of course, the policies underlying the automatic stay say, of course, this Court should be mindful of alleviating them of the burdens that drove them into bankruptcy. It's clear that our case did not drive them into bankruptcy.

They speak of the fact that you know, it would put us

in an unfair position vis-a-vis some of the other creditors. That's, we believe, not true for at least two reasons:

Number one, again, we're seeking only to liquidate the claims, not to collect on any of them.

And if you look at the cases like SCO and Racine, they were entirely comfortable with the fact that so long as you are only trying to liquidate the amount of the claims in the original forum of filing, there will be no prejudice to any of the other creditors.

I would also point out to Your Honor that none of the Creditors' Committees in this case have objected to our motion. They are certainly represented by able counsel and if they thought we were gaining an unfair advantage, I expect they would have spoken up about that.

Your Honor, the last element in the balancing test is usually spoken to about success on the merits. Most of the cases in this District talk about that burden being extraordinarily slight, that we only must possess some possibility.

There is no doubt, Your Honor, that we differ greatly from the debtor and its -- and the other defendants in our prepetition case in our view of what our success on the merits are.

I don't expect to resolve that matter today. And, indeed, it's taken four years, and we're still fighting about

it in front of Judge Spatt.

However, I would mention that we have been through a dispositive motions, motions to dismiss, motions to strike.

The motion to strike the allegations of the pleading were entirely denied. At this point in time, at least five of our nine original claims survived the motion to dismiss, and we have at least two additional of those claims left against the debtor, who is not a movant in a motion to dismiss.

So, the way we read it, we have thus far successfully prosecuted at least seven of our original nine claims against the debtor here.

There is a motion for class certification which, as I mentioned before, has been granted as to at least some of the defendants. It is fully briefed. And we believe that if Your Honor were to modify the stay to allow Judge Spatt to extend his ruling, either granting or denying class certification over the debtor, we will, of course, get a much better handle on where movants' and plaintiffs' case will be going in that proceeding.

Again, we believe it's fully briefed. As soon as that motion is decided, the parties are probably headed towards summary judgment motions. And then trial after a little bit of discovery.

So, we've made a lot of progress there. And those are all matters which would have to be replicated here. There

was some talk in defendants' objection about, well, we can do it in a claims estimation process, or maybe a adversarial proceeding. They suggest that in their objection. But all they would be doing is creating two different trial courts, and then two different appellate courts, all resolving the same matter.

If you read the cases, working out the balancing test, what you'd see, that they speak of not only prejudice and hardship to the parties, but prejudice and hardship to the courts and the judicial efficiency.

What they are asking for is at least a two-track litigation. I say at least because there was some argument, both in our motion and in the objection about whether or not our underlying claims are core or noncore. And it's not something I think we need to dwell on because regardless of whether it's core or noncore, Your Honor still has to either reach a final decision or propose findings of fact.

But assuming it's noncore, then we would just be interposing yet another court, the District Court here in Delaware that has to render its opinion on it. And it would not only throw the matter into a bit of a -- a bit of a mess, but it would also create substantial judicial efficiency.

At the moment, we have five defendants, all in front of one court. The case is partially certified. It is withholding certification due to the automatic stay of this

case.

And with that, Your Honor, I will reserve any questions you have, either now or following the position of the debtor.

THE COURT: No, thank you.

MR. TUSA: Thank you.

MR. ROSEN: Again, good morning, Your Honor. Brian Rosen on behalf of the debtors.

Your Honor, I'm not going to belabor the Court with a recitation of what the case law is because I know the Court is very well aware of what it is in the Third Circuit.

I would say that we disagree with some of the representations made by counsel as to what it is, however. But, again, we'll rely upon what's in our papers and what the Court is already very well aware of.

I would like to spend a moment, though, Your Honor, because there was a reply filed in connection with our objection. And if I could just address some of those points that were raised in that reply. So, something the Court has not heard already.

THE COURT: Okay.

MR. ROSEN: Specifically, Your Honor, the movants take the position that we have already granted relief from the automatic stay two times in this case and, therefore, the Court should not be concerned about granting relief from the

automatic stay again.

I would just point out that the two times that we have stipulated from relief from the automatic stay:

One was so that we would permit the insurance companies to advance proceeds for officers and directors to cover defense costs in connection with certain Department of Labor subpoenas and other WMI defense costs.

The other was with respect to, I believe, the -- so as to permit a party to destroy certain documents that we believe were not property of the estate.

The debtor also -- excuse me. The movant also makes the argument about the commencement of the D.C. action outside the Bankruptcy Court and, therefore, we are certainly willing to engage in litigation.

As the Court knows, the crux of this case is what brought everybody to this courtroom today. It is for the litigation that is pending in the District of Columbia, as well as the litigation that is pending in this Court.

And obviously, Your Honor, without that litigation, the recoveries to creditors in this case would be extremely limited. I tried to do a back of the envelope type of analysis because I think it really brings home the issue. Right now, Your Honor, there are approximately $800 million worth of cash in the estate. And -- excuse me -- and, of course, there are, I think, $35 billion worth of claims. And where will that

shake out, Your Honor? There's $7 billion of funded debt, and there's perhaps another billion dollars of additional debt that might be allowed in this case.

So, assume that for the moment, you obviously see that we have approximately a 10 percent recovery in that analysis, absent a recovery in the JPMorgan litigation or the litigation with respect to the FDIC.

The claim that's being asserted here in this class action is a $5 million class action. So, 5 million out of potentially $8 billion worth of claims, that would probably yield, Your Honor, about a $500,000 recovery in the event that there were no additional recoveries for the benefit of the estate.

And what's being asked here, Your Honor, is that the estate engage in litigation which is going to cost hundreds of thousands of dollars to defend itself. And I might point out, Your Honor, that while counsel -- the movants' counsel has said that there are 11 counsel lined up to receive distributions today for payment of their fees, we do not have counsel engaged in that litigation. That counsel has been on hold. They have not been retained as an ordinary course professional, they have not been retained pursuant to a separate application in the court. The debtors have no counsel involved in this litigation at this time.

Could they be engaged? Yes, Your Honor. Would they

have to be brought out to speed? Yes, Your Honor. Would they incur significant costs and expenses in doing so? Yes, Your Honor.

While counsel has said that there would not be any discovery that would be needed from WMI, we all know, however, Your Honor, that we would have to participate in that discovery. We would have to look at all the documents being produced. We would have to take part in depositions.

Counsel at one moment said there was -- substantially all of the discovery had been done. And yet counsel then subsequently mentioned that there would have to be additional discovery. And, indeed, the District Court in the Eastern District said that in responding to the FDIC's motion to stay the proceeding, "In this Court's view, it would be inappropriate to issue a stay on the one hand and order discovery on the other. Accordingly, the plaintiff's request is denied without prejudice."

Leaving for another day, Your Honor, the ongoing discovery that would be required in that litigation.

The movants also -- excuse me. The movants did raise the issue a second time with respect to those two motions for relief from stay. Again, Your Honor, one was with respect to relies on, not involving prepetition litigation but rather business forms. And the other one also dealt with, Your Honor, the termination of a Madison Square Garden naming rights

agreement. It had nothing to do with litigation.

Counsel goes on to point out that there is a desire to permit prepetition litigation to proceed in another forum, and that constitutes cause for relief from the automatic stay.

Your Honor, we, in our papers, did not say that this might be the ultimate forum to litigate this. What we said, Your Honor, was now is not the time to litigate this matter. Perhaps somewhere down the road.

What we've made a point in saying throughout this proceed, Your Honor, is we've cited to the Court to the recent decisions -- or actually the decisions in this Circuit and beyond, that said that that alone is not the reason for relief from the automatic stay. And we contend, Your Honor, that this court should, at this point in time, allow that -- allow the automatic stay to remain in effect so that we are not engaged in multiple litigations. We want to focus this Court's attention, and all parties' attention on the two litigations that matter, which is the one here and the one in the District of Columbia.

There -- as counsel pointed out, Your Honor, there is a very large disagreement as to what Judge Spatt has already ruled. We believe that class certification was already denied. And, in fact, counsel in their papers said that they would necessarily have to relitigate the issue of class certification against WMI. To us, Your Honor, that means that they are going

to have to step up and deal with that on appeal.

But at the same time, counsel stands up here and says that he's ready to go forward with that class certification before Judge Spatt.

Our point, Your Honor, is simple. There are many things that have to go on in that litigation. Our point is it's not timely. We believe that the automatic stay should remain in effect. We should get a better handle as to whether or not there's even going to be a recovery in this case for creditors that would warrant going forward with that litigation at this point in time.

Obviously if there is a significant recovery for the estate, which we believe that there will be, our position with respect to this litigation will be -- could be substantially different than it is today. But at this point in time, Your Honor, our view is dollars don't make sense to move forward with that litigation. But dollars incurred in defending that litigation would far outweigh any potential recovery that we currently see. So, based upon that, Your Honor, we would say that the hardships to the estate are significant and far outweigh anything in connection with that litigation.

If, in fact, plaintiff desires to go forward and proceed with that litigation against the other defendants, let them do so, Your Honor. We're happy to have that subsequent litigation.

So, Your Honor, our point, again, is very simple. Now is not the time, the automatic stay is here for a reason. We believe cause does not -- excuse me -- weigh in favor of continuing with that litigation. On the contrary, we say that when you apply all the factors that the Court well knows, we believe that, in fact, the automatic stay should remain in effect.

Your Honor, we have in the courtroom Mr. Charles Smith, who is general counsel to WMI. And I know that counsel did not want to -- opposing counsel did not want to get into whether or not success on the merits matters. And if the Court wants to consider that, we have Mr. Smith in the courtroom who would talk about how WMI had no involvement at all in that.

THE COURT: Well, it's just whether it's a colorable claim, correct?

MR. ROSEN: Correct.

THE COURT: They've survived a motion to dismiss.

MR. ROSEN: That's what they say, Your Honor. Again, we would say that there's an interpretation of Judge Spatt's decisions which are different on many of the matters that have already been resolved. We contend that improper defendants, as we define them in our pleading, Your Honor, many of these things have already been thrown out against WMI. We contend on the class certification issue that the Court already determined that it's not for WMI.

I know counsel has a different interpretation. That's for a different day, Your Honor. And we footnoted that, and I think counsel alluded to it.

THE COURT: Well, they only have to show a colorable claim, they don't have to prove success on the merits at this stage.

MR. ROSEN: We believe it's merely a factor, Your Honor. And as I said, we have Mr. Smith here, if the Court would like to hear from him.

THE COURT: I don't.

MR. ROSEN: But, again, Your Honor, our point is very, very simple. Now is not the time. We're happy, Your Honor, if the Court would take this up at a different point in time down the road when we have a better understanding of where we are in connection with the litigation so that the estate's assets are not burned on a litigation that would essentially be a negative yield because we would be incurring costs that would far exceed the distribution to the creditor.

Thank you, Your Honor.

MR. TUSA: May I be heard briefly on that point?

THE COURT: Let me hear from others first.

MR. GURFEIN: Your Honor, Peter Gurfein for the Creditors' Committee.

Movant commented that the Creditors' Committee has not objected to their motion. We've worked with the debtor and

kept in touch, read the papers, and agreed with what the debtors' position has been, there was no reason for us to clutter the docket with more papers.

The Creditors' Committee opposes the motion and -- for all the reasons Mr. Rosen just noted.

THE COURT: Thank you. Anybody else?

(No audible response heard)

THE COURT: All right. I'll hear a reply.

MR. TUSA: Your Honor, I know you have a busy docket so I won't take up much of your time. I just want to address just a few points made by debtors' counsel.

They state repeatedly that this is just not the right time to take it up. Their plan is more delay.

And I think if Your Honor reads the case law, SCO, Racine, the tenor is clear, more delay equals more prejudice. More time goes by, witnesses lose memories. Parties have to sit on the sidelines.

By also saying now is not the right time, they implicitly concede that there is -- this is a claim that has to get resolved somewhere at some time. There is a Court in the Eastern District ready to do it right now.

He also said, Your Honor, our claim is for $5 million only. That's not precisely right. What we pled in our complaint was that the claim was worth in excess of $5 million, and that we didn't claim $5 million only. It has something to

do with the Class Action Fairness Act jurisdictional limits.

THE COURT: Okay.

MR. TUSA: And I just want to just briefly raise the fact that discovery -- I think I said it before, but I want to be clear. We never said that there's not going to be anymore discovery in the case. I think what we said is that substantial discovery has already been completed. There might be some additional discovery. It's likely that the lion share of it will not have to be from debtor. However, that's not a death knell to the motion, as Your Honor will see in cases like the SCO case. The fact that some discovery has to be done, including perhaps a couple more depositions. And even in that case, SCO, the debtors, claiming that discovery has hardly even begun, the court, never or less, allowed the case to go back to the original forum.

Thank you, Your Honor.

THE COURT: Well, let me say this. This is a close case. As stated of the three factors, success on the merits. I think they only have to show a colorable claim, I don't have to decide the merits of the action obviously in deciding whether to grant relief from the stay to send it to somewhere else to decide the merits. I think they've shown at least a colorable claim by surviving a motion to -- motions to strike and motions to dismiss in the District Court. So, I don't think that that is a factor militating against denying relief

from the stay.

But in considering it, I do have to weigh the prejudice to the debtors and the estates versus any prejudice to the movants.

With respect to the floodgates argument, I don't think that's a sufficient basis to deny a motion for relief from the stay. I have to consider each of them on the merits. There's no evidence that this claim is similar to thousands of other claims. It may give me reason to consider an alternative to granting relief from the stay, such as a mediation or alternative dispute resolution proceeding, whether in an plan or separately. So, I just don't think that that's a basis to deny relief from the stay.

The prejudice to the movant obviously is that there will be piecemeal litigation. The prejudice to the debtor is that at this stage in the proceeding, the debtor asserts that it's just not appropriate to liquidate this claim. There may be no reason to liquidate it at all at some point.

But I think in weighing the proceedings, I'm going to grant the motion for relief from the stay. I think that any counsel that is dealing with this case will not be debtors' bankruptcy or main counsel involved in the DC litigation, or the litigation here over the property of the estate issues.

The records, witnesses, et cetera, I presume are largely in control of the bank, not the debtor. So, that while

the debtor may have to participate in discovery, the debtor won't be called upon to produce a lot of discovery itself.

I just think the main reason I'll grant relief from the stay is judicial economy.

The other court has lots of knowledge. Has dealt with this case for years. A lot has progressed in the case. And quite simply, either reeducating another judge or requiring that judge to proceed piecemeal with respect to all of the other defendants first, and then considering the action against the defendant, I think, just doesn't serve the purposes of justice.

So, for that reason, I will grant the motion for relief from stay and let it proceed to liquidate anyway.

I'll look for a form of order then from counsel.

MR. ROSEN: Your Honor, in that regard, I would say that we will have to engage counsel, probably the counsel who was handling it before. We will have to do it probably, Your Honor, so that when the application is filed, it's going to refer back to the period when we get it nunc pro tunc.

THE COURT: Okay. I assume it will be under the ordinary course professionals or separately, I don't know.

MR. ROSEN: Your Honor, I'm not sure based upon the thresholds that are in the case whether we could get it in under the ordinary course because counsel has projected a significant amount of dollars to be expended in defending the

litigation. So, we may have to file a separate application.

But just to let the Court know that it would be nunc pro tunc --

THE COURT: It will.

MR. ROSEN: -- to that point.

THE COURT: Understood.

MR. ROSEN: Thank you.

THE COURT: All right.

MR. ROSEN: Your Honor, if you'd just allow us one minute as we get all the claims materials.

THE COURT: Okay.

(Pause)

MR. ROSEN: Your Honor, I think Items 6 through -- 6 through 11 are all claims related matters. And I will try and run through them as expeditiously as possible. And to the extent that we have a proffer that we will do, Your Honor, I would ask that it be applicable to more than one of those claims objections so we don't do it more than once.

THE COURT: That's fine.

(Pause)

MR. ROSEN: Your Honor, as I indicated, we have several claims objections that are on the calendar. The first is the first omnibus objection. And there were two items that had been left there. And, Your Honor, by agreement, those have agreed to be adjourned further to September 25. Those were --

I'll refer to them as the Schindler claim and L.A. County Treasurer claim.

THE COURT: Where's the first omnibus objection listed on the agenda? I think you're going out of order, am I --

MR. ROSEN: Oh, it might have already been taken off, Your Honor. I apologize.

THE COURT: All right.

MR. ROSEN: Because we knew that it was already adjourned.

THE COURT: Okay.

MR. ROSEN: Sorry about that. So, when we get to Number 6 on the agenda, it's the third omnibus.

THE COURT: Yes.

MR. ROSEN: And they are the third and the fourth omnibus, I sort of put together, Your Honor. And the outstanding dispute that was there was with respect to language associated with the bondholder claims. Those have essentially been mooted, Your Honor, and we will be withdrawing, based upon the ninth omnibus objection, and we will be withdrawing the balance of the third and fourth omnibus objection. So, there's nothing further to do there.

THE COURT: Okay.

MR. ROSEN: Which takes us to the fifth omnibus objection, Your Honor. There were several claims there, Your

Honor:

There were two claims: Claim Numbers 2306 and 1026 filed by Asbury Park Press and Cape Publications, Inc. respectively. Those were adjourned from July 27th hearing to today based upon the counsel -- claimant's counsel. And no response has been filed to date with respect to these claims, Your Honor.

So, we just ask the Court to approve the objection as we will be going forward at this time based upon the objection that we originally filed.

THE COURT: Which ones are you talking about?

MR. ROSEN: They were the claims, Your Honor, of Asbury Park Press and Cape Publications, Inc. They had been adjourned from July 27th to today at counsel's request.

THE COURT: All right. Where are they listed on the agenda?

MR. ROSEN: Your Honor, my understanding is they were not technically listed because we never got an additional response by the -- by claimant's counsel. I apologize for not having those listed there.

THE COURT: So, what do you want me to do with them?

MR. ROSEN: Well, Your Honor, they were carried today. But I understand that if -- since they were not technically listed on that agenda, we'll move them to September.

THE COURT: Okay.

MR. ROSEN: There were some additional items that had been pushed to September also, Your Honor, just to let the Court know. They were Compliance Coach, Courier Solutions, Andrew Eschenbach and Kenneth Coch. So, with respect to the fifth omnibus, the only claims that are going forward, Your Honor, are with respect to certain employee claims that have been kicked over from the prior hearing.

THE COURT: And I'm going to suggest we continue those also because your further declaration I only got on Friday. And are you relying on that?

MR. ROSEN: Well, we have Mr. Spatelle (phonetic) here in the courtroom. We can certainly put him on the witness stand also, Your Honor.

But if the Court would like additional time to consider it, we can do that.

THE COURT: Well, I think it's necessary. I think that -- I'm not sure it addressed all the issues I raised. But --

MR. ROSEN: Okay. With --

THE COURT: And does it not deal with some of the others -- other omnibus --

MR. ROSEN: Well, it dealt with all of the matters on the fifth that were going to go forward on the employees' side, Your Honor. And they -- with all the employee issues regarding

the retention agreements, change in control --

THE COURT: Let's continue it to September since we have --

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

THE COURT: -- a full day today.

MR. ROSEN: Okay. Then with respect to the sixth, Your Honor, I would say that the majority of that would also be continued to September. There are, however, several that we could handle right now.

One of the claims was filed by John Cangiano, Your Honor. It was Claim Number 2145, Your Honor. And it related to a litigation called Cangiano versus Washington Mutual Bank.

THE COURT: Okay.

MR. ROSEN: That was pending in the Superior Court of the State of Connecticut, and that had been filed in December of 2007.

The allegations in the litigation pertain to a wire transfer made at a Washington Mutual Bank branch bank. And the claimant alleges that a bank employee confirmed for him certain funds had been deposited in his account, and that based on those representations, claimant wired $100,000 to Hong Kong.

Claimant later discovered that those funds had not been deposited in his account. As a result, his home line of credit was severely overdrawn after he wired the $100,000.

In his response to the objection, Your Honor,

claimant simply states that the debtors, quote, “may bear liability to the claimant.”

However, no allegations are contained in the underlying litigation related to WMI, nor has the claimant asserted any other theory under which WMI could be liable.

So, it was our position, Your Honor, that as, in fact, we were not truly a party to that, they failed to meet their burden with respect to Claim 2145. And that the claim should be disallowed and expunged.

THE COURT: All right. Is there anybody here on behalf of Mr. Cangiano?

(No audible response heard)

THE COURT: All right. I will sustain the objection.

MR. ROSEN: Thank you, Your Honor.

THE COURT: Despite his response.

MR. ROSEN: There is one other claim that we could handle then, Your Honor, on the sixth omnibus, and that is the claim of MSG, Madison Square Garden. And I -- counsel is here, Your Honor.

Your Honor, I guess -- why don’t we let them state their position, and then we can respond to it?

THE COURT: Okay.

MR. KORNFELD: Good afternoon, Your Honor. Alan Kornfeld and Michael Seidl, Pachulski Stang Ziehl & Jones, for MSG.

Your Honor, before I begin, we have clean copies of the agreement and amendment. May Mr. Seidl approach the Court and provide the Court with copies of those documents?

THE COURT: Yes.

(Pause)

THE COURT: Thank you.

MR. KORNFELD: Your Honor, this is a rather simple contractual interpretation matter that has given rise to two highly divergent interpretations of the contract. In particular, who is a party to the contract.

As the Court is aware, the contract arises out of naming rights and sponsorship agreement for a theater at Madison Square Garden. That naming rights and sponsorship agreement is the document that is in front of the Court.

MSG thought, and has contended in its claim, that this is a rather simple case. It has two parties on either side, one is Washington Mutual Bank, and the other is the debtor Washington Mutual, Inc. The debtor says no, despite what the contract says. There is only one counterparty to the contract, and that is Washington Mutual Bank.

The debtor makes two primary arguments about why that is the case:

One is that the contract is signed by Steve Rotella, who happens to be the President and COO of Washington Mutual Bank, although he’s also the President and COO of Washington

Mutual, Inc.

And the second argument is that the contractual language is clear to the debtor in terms of who the parties are.

And there's a third sort of ancillary argument, which is there's an amendment to this document. And that amendment, which is also before the Court, is simply an amendment that involves Washington Mutual Bank and MSG and, therefore, the claim fails because Washington Mutual, Inc. is not a party to the contract.

Your Honor, we respectfully submit that the debtors simply ignores the contractual language. And let me summarize the language that shows that Washington Mutual, Inc. is a party to the contract, and that certainly our client thought was simple and clear language.

In the first paragraph of the naming rights and sponsorship agreement, the contract says it's by and among Washington Mutual Bank, a federal savings association, having a principal office address of 1301 2nd Avenue, Seattle Avenue for itself, and on behalf of its parent company, Washington Mutual, Inc.

So, by that first clause, Your Honor, the two counterparties to the contract are Washington Mutual Bank and Washington Mutual, Inc. Those two counterparties become a defined term collectively. And collectively they're defined as

WaMu, a term that is used throughout the contract. The counterparty, of course, is MSG.

The last sentence of the first paragraph of the contract defines who the parties are to the contract. And that last sentence reads, “Each of WaMu and MSG may be individually referred to as a party and collectively are referred to as the parties.”

Well, by that last sentence, WaMu’s a defined term. And the defined term WaMu, as we’ve just discussed, means Washington Mutual, Inc. and Washington Mutual Bank.

Your Honor, the contract throughout the contract uses the defined term “WaMu.” Basic rules of contractual interpretation say to lawyers and courts, did you look at the contract, you read the contract, you provide a reasonable interpretation based on what the contract says objectively, and that reasonable interpretation is that when the contract says WaMu, it is referring to the defined term WaMu, which means Washington Mutual, Inc. and Washington Mutual Bank.

Your Honor, there is no question about anybody’s authority to enter into the document. There’s a rep and warranty regarding authority in Paragraph 15 of the contract.

So, it’s clear, based on that rep and warranty, that both MSG and WaMu represented and warranted that they each had all the rights granted to the other pursuant to this agreement. They were each authorized to grant all those rights. And,

again, WaMu is a defined term that includes two entities: Washington Mutual Bank and Washington Mutual, Inc.

I think the fundamental error of the debtor in its contractual interpretation, Your Honor, is that they simply ignore what that defined term WaMu means. They pay attention to the language that says Washington Mutual Bank is contracting --

(Interruption by telephonic participants)

THE COURT: Could the parties on the phone please mute their phones? Thank you.

I'm sorry for that interruption.

MR. KORNFELD: No problem, Your Honor. They pay attention to the language that says Washington Mutual --

THE COURT: Is the operator on the phone?

OPERATOR: Yes, Your Honor.

THE COURT: Would you please mute whoever is making that noise?

OPERATOR: Yes.

THE COURT: Mute their line. Thank you.

Go ahead.

MR. KORNFELD: The debtors acknowledge that this contract was made by Washington Mutual Bank for itself and on behalf of the debtor, Washington Mutual, Inc. They forget about the defined term that defines that WaMu means Washington Mutual, Inc. and Washington Mutual Bank.

This agreement, Your Honor, has a merger clause. It has an integration clause that's in Paragraph 25. And it says that any amendment must be in writing. And that all prior understandings of the parties, whether oral or in writing, are merged into the document.

The signature is, in fact, a signature by Mr. Rotella. There is only a signature block for Washington Mutual Bank, which frankly isn't a surprise given that Washington Mutual Bank is contracting for itself and for Washington Mutual, Inc.

THE COURT: Well, why do you say that it is contracting for Inc.?

MR. KORNFELD: Because in the first sentence, Your Honor, it says naming rights and sponsorship agreement, it's made and entered into by and among Washington Mutual Bank for itself and on behalf of its parent company, Washington Mutual, Inc.

And then I also say that, Your Honor, because the defined term WaMu, which appears throughout the document --

THE COURT: Right.

MR. KORNFELD: -- includes both entities.

THE COURT: Okay.

MR. KORNFELD: So --

THE COURT: What was the theater named?

MR. KORNFELD: The theater was named, Your Honor,

WaMu Theater at Madison Square Garden, and that's in 1.5 of the contract.

THE COURT: Thank you.

MR. KORNFELD: So, that defined term even made it into the theater's marquee.

So, Your Honor, again, in response to the debtors' argument that the signature block is Washington Mutual Bank, that's no surprise given the way this contract is drafted. And despite the debtors' argument, just because the signature block is Washington Mutual Bank, that doesn't drop Washington Mutual, Inc. from this contract.

Nor, Your Honor, does the amendment drop Washington Mutual, Inc. from the contract. Let's talk about how the amendment was arrived at. Your Honor, on Page 22 of the contract, the first document in front of the Court, there's a box that says ATM. And the first bullet point in that box says, "Subject to MSG and WaMu entering into a separate agreement with respect to all operational elements thereof, WaMu shall take over operation of all the existing ATMs in the Madison Square Garden Sports and Entertainment Complex, and all such ATMs shall be rebranded as WaMu ATMs at WaMu's sole cost," et cetera.

Basically this bullet point, which is part of the original contract, says that we need to enter into a ATM contract and we will enter into an ATM contract, which would be

separate from the first contract. And that ATM contract is a four-page document that is in front of the Court entitled first amendment to naming rights and sponsorship agreement.

That ATM contract -- that first amendment references the naming rights and sponsorship agreement. It says in background Paragraph B that the agreement provides that the parties would enter into a separate agreement regarding the placement and maintenance of ATMs, et cetera. And then it says in background Paragraph C, that this amendment is that separate agreement. And the rest of the contracts deals with the technical issues necessary to complete the placement of the ATMs at Madison Square Garden.

There is one significant provision, that's Paragraph 2. That says in its second sentence, that's on Page 3 of the first amendment, "Except as expressly set forth above, all terms of the agreement," that's the original contract in front of the Court, "remain unmodified and in full force and effect."

So, this contract doesn't say that suddenly WMI is no longer a party to the original contract.

It simply says that the original contract contemplated a technical contract regarding ATMs and here it is.

THE COURT: Okay.

MR. KORNFELD: Your Honor, Madison Square Garden entered into this contract with two entities for a reason.

Among other things, it wanted to make sure that it had two entities that would be responsible for payment. And we know that, Your Honor, not because of extrinsic evidence, but because in looking at the contract and the obligations to make payment under the naming rights and sponsorship agreement, that's an obligation in Paragraph 5 that's a WaMu obligation. That's an obligation by two entities.

And, in fact, Your Honor, the word "WaMu" goes to all of the obligations for MSG's counterparty, again, a defined term meaning all of those obligations are obligations by Inc. and by Bank.

Your Honor, contracts are interpreted by a court. They're interpreted objectively. They're interpreted based on the clear and unambiguous language of the documents. And we would respectfully submit, Your Honor, that the clear and unambiguous language of these documents show that both Washington Mutual, Inc. and Washington Mutual Bank were parties to the contract.

And, therefore, Your Honor, we would request that the objection be overruled.

THE COURT: All right. Thank you. Your response?

MR. ROSEN: Your Honor, always somebody when they stand up here they say it's a clear and unambiguous. First of all, I would like the Court to know that despite granting MSG relief from the automatic stay to terminate the naming rights

agreement a while back, this morning, when leaving Penn Station to come down here, the name WaMu is still on the side of the building.

And why is it WaMu? Because WaMu is how the bank was referred to, Your Honor. It's what's out there. It's the trademarks, it's how the bank was known.

But let's just talk about the agreement itself. Counsel very adeptly stood up here and pointed to what he said was the be all and end all, which was Paragraph 2 of the amendment where he said "except as expressly set forth, everything is the same."

But then he didn't go to the next sentence. "In the event of a conflict between the terms and conditions of the agreement in this first amendment, the terms and conditions of this first amendment shall govern."

Okay. So, now let's go backwards in time. Let's go to Page 1 of this document, Your Honor. Counsel has made a very, very large point of saying WaMu means the universe. It's not just Washington Mutual Bank, it includes its parent, it includes every affiliate that could possibly be out there.

But let's go to the first amendment, and it says, "This first amendment to the naming rights and sponsorship agreement is entered into by and between Washington Mutual Bank, a Federal Savings Association, defined as WaMu. Each of WaMu and MSG may be individually referred to as a party and

collectively are referred to as the parties."

So, to our point, Your Honor, it's pretty clear we're talking about the bank. We're not talking about a family of banks, a family of corporations and affiliates. We're always talking about the bank.

Counsel also wants to stand up here and talk about contractual interpretation. Well, let's talk about that, Your Honor.

Under the document, the governing law provision says it's governed by New York law. And under New York law, Your Honor, a party cannot be bound by the terms of a contract unless there is some objective manifestation of an intent to be bound by such a contract. For an example, a signature. Here, there is no signature on behalf of WMI in connection with the original agreement. And certainly when we get to the second, the amendment, that agreement, it's clear WaMu is WaMu. WaMu is the bank, and it was signed by Washington Mutual Bank. It is not signed by anyone else on behalf of Washington Mutual, Inc.

Yes, Mr. Rotella was an officer of Washington Mutual, Inc. But he signed the document in his capacity as a Washington Mutual Bank representative.

Counsel stands up and says that the agreement is enough to create a three-party agreement -- excuse me. The language is sufficient. Your Honor, we disagree with that. We

believe that the language is insufficient. If anything, Your Honor, one could argue that Washington Mutual, Inc. might have been a third party beneficiary of this document. But, again, Your Honor, it is not bound by the terms of it.

Again, Section 25 of the agreement required the written consent of, quote, “both parties hereto” before the agreement could be modified. This is significant because, one, it was a two-party agreement. And then when we get to that amendment, Your Honor, Washington Mutual, Inc. was not a party to that understanding.

MSG’s motion for relief from the stay that it filed way back when, Your Honor, the one I referred to about the termination of the naming rights agreement stated that it sought to -- it sought relief from the automatic stay, quote, “to the extent such relief is necessary to terminate the MSG agreement,” quote, “in an abundance of caution because WMI is both the direct parent of WMB and a debtor in these cases.”

Madison Square Garden did not allege in that stay relief motion, as they do now, that Washington Mutual, Inc. was a party to the MSG agreement.

Your Honor, we submit that the inclusion of the words “on behalf of” -- “for itself and on behalf of its parent” is not enough to bind WMI to the agreement.

If that were, in fact, the case, under New York law, it would have been required to be an express signatory to the

agreement.

So, Your Honor, we believe that, if anything, there are third party beneficiary rights, but, again, that is not enough to create a claim against the estate. Madison Square Garden is left to pursue the claim in the receivership against the FDIC. And we believe, Your Honor, that based upon that, that the claim should be denied and expunged in its entirety.

Thank you.

THE COURT: Any reply?

MR. KORNFELD: Yes, Your Honor.

Your Honor, I think the debtor asked the wrong question. The debtor asked who is the signature to the contract. The question here is who is the party to the contract.

And, frankly, this contract could have been signed by Mr. Rotella in his capacity as the President and COO of WMI, or it could be signed in his capacity as the President and COO of WMB, or it could be signed in both capacities.

That doesn’t answer the question in looking at what capacity he signed the contract about who is the party. And the New York cases don’t, and the debtor doesn’t say that the New York cases do, require a party to sign a contract in order to be a party to the contract.

Your Honor, the parties entered into this contract. Who the parties are are carefully defined in the first

paragraph of the contract.

The debtor has not responded to the position that we have based on the definition of who the parties are that defines WaMu as being WMI and WMB. The debtor has no response to that because the debtor really can't respond to that point.

And that is collectively who MSG was contracting with. And MSG entered into this contract, and put the name on the theater, and accepted payment under the contract and performed under the contract based on the objective manifestation of intent here.

So, everybody performed under this contract. It was very clear there was a contract. And the contract, by its terms, again, with all due respect to counsel's argument, we think clearly defines who the parties are.

Thank you, Your Honor.

MR. ROSEN: Your Honor, if I could just add one thing?

THE COURT: Sure.

MR. ROSEN: Your Honor, we don't argue that there wasn't performance under the contract. We just argue that the case law doesn't weigh in their favor on this.

The case law is pretty clear that to be a party to a contract, you actually have to sign a contract. In fact, I believe there was a case here in Delaware Chancery Court this year, Your Honor, and we cited it in our response. And what we

noted in the quote was “the ordinary rule is that only the formal parties to a contract are bound by its terms.”

The merger agreement was only signed by three parties. Accordingly, only those three parties had obligations under that agreement.

We don’t disagree that Washington Mutual Bank received significant benefits from that agreement. We also don’t disagree that Madison Square Garden got paid significant dollars under that contract.

Our only point of disagreement, Your Honor, is that Washington Mutual, Inc. is not a party to it. And a claim against its estate should be expunged.

THE COURT: Well, I’m going to take this matter under advisement. I want the parties, if they want to provide any additional briefing on that specific issue as to whether you have to sign the contract to be a party to the contract, I don’t know if you’ll find any cases directly on point where the contract states you’re a party, but you don’t sign it.

MR. ROSEN: Okay, Your Honor. Is there a time frame that you would like that?

THE COURT: 10 days.

MR. ROSEN: That’s fine, Your Honor.

THE COURT: All right. You can both do it simultaneously.

MR. ROSEN: Thank you.

(Pause)

MR. ROSEN: Your Honor, that then takes us up to the eighth and ninth omnibus objections.

Your Honor, that was filed on July 24th. We objected to 11 claims on substantive grounds, that fell into two general categories:

There were tax claims for claims that we're asserting a tax liability on account of property that is not owned or operated by the debtors.

And contract claims asserting contractual liability on account of contracts either entered into with WMB or pursuant to which services were provided to WMB, and not to the debtors.

Claim Number 2105 that was filed by Green & Hall was withdrawn prior to the hearing. And so that has been removed from the exhibit to the final form of order.

We did receive responses from the County of Santa Clara and the Tennessee Department of Revenue. And both of those had been resolved. Santa Clara objected -- excuse me. We objected on the grounds that WMI did not own the property. Santa Clara has reserved their right to file additional claims if they discover new evidence, and the debtors reserve their rights to object to such claims on any grounds whatsoever, including timeliness, Your Honor.

So, that claim will be withdrawn, I believe or --

expunged. Excuse me, expunged.

With respect to Tennessee, we objected to the claim on the grounds that it related to a tax obligation that was not WMI's. Counsel for the debtors and the Tennessee Department of Revenue have discussed this issue, and the Department of Revenue has no further objection to the relief sought, and will allow the claim to be expunged.

We also received a response from the L.A. County Treasurer and Tax Collector, and that objection to that claim, Your Honor, has been adjourned until September 25.

So, with that, Your Honor, all of the other claims under the eighth omnibus are unopposed.

THE COURT: All right. I'll grant that objection then.

MR. ROSEN: Thank you, Your Honor.

THE COURT: That omnibus objection.

MR. ROSEN: With respect to the ninth omnibus objection, we objected to claims on nonsubstantive grounds, amended and superseded claims, late filed claims, and unsupported claims.

We did receive several responses. One was from the WMB bank bondholders. And we have agreed to certain language, specifically we've agreed to the language that would resolve it on many levels. And this goes back, Your Honor, to that third and fourth omnibus that I referred to earlier. It is language

that was similar to the language that we included in the seventh omnibus order.

The debtors agreed to waive the right to object to the amending and superseding claim on timeliness grounds. And the bank bondholders agreed not to oppose our objection to Claim 3114.

However, we did reserve our right to object on the timeliness ground solely with respect to new bondholder claimants who are now integrated into their consortium.

Previously, Your Honor, there was a smaller group, they've added some. So, we reserved our right with respect to that.

With respect to the late filed claims, Your Honor, we received nine responses merely stating that "the claims were not timely filed, and we're sorry." And as the Court is very well aware, in order to get over the "we're sorry" or "we didn't mean to get it in late," that is not enough to get it by the excusable neglect requirements under the Pioneer decision.

No one has stepped forward to establish any excusable neglect, Your Honor. Rather it was a one-page "please allow my claim notwithstanding the fact that it was untimely."

THE COURT: Well, they say they filed it as soon as they got the notice.

MR. ROSEN: In some instances. But, Your Honor, as you know, we certainly published notice, we did everything that

was conceivably possible, and as certainly is required under the bar date order. We mailed notices to parties. We published notices in many newspapers around the country.

THE COURT: Well, but these are known claimants who presumably got written notices, am I correct?

MR. ROSEN: Your Honor, some of them are equity holders. And as you know, we did not have an equity bar date, but they are now claiming proofs of claim, not equity interest claims.

And the others are individual bondholders who would have been served through the trustees themselves rather than directly. That is pursuant to the order that was entered.

THE COURT: And how many days was given?

MR. ROSEN: Your Honor, I think it was in excess of 60 days for the bar date.

THE COURT: Well, do we know when the trustee --

MR. ROSEN: I do not know when the indenture trustee sent out the notices.

If you'd like, Your Honor, we can adjourn that and find out that information for you.

THE COURT: Let's do that.

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

THE COURT: I'm not sure what prejudice the debtor is suffering by some late claims here.

MR. ROSEN: That's fine, Your Honor. But that, of

course, opens the door to subsequently late filed claims, if that's the position we take. But I understand that. We'll get the information for the Court.

With that, Your Honor, I believe that takes care of --

MR. GURFEIN: I'm sorry, Your Honor. Peter Gurfein for the Creditors' Committee.

Just to clarify the language on the bondholder's claim objection. We understand that the agreed language would be for all parties in interest to reserve their rights as stated by debtors.

THE COURT: Yes.

MR. ROSEN: Yes, Your Honor. We don't mean to conclude the Committee or any other party.

THE COURT: Okay. All right. Then with respect to the others --

MR. ROSEN: We'll modify the orders, Your Honor, to be consistent with what we've done today, and appropriately adjourn those that we are now going to adjourn.

THE COURT: Okay.

MR. ROSEN: Your Honor, I think that takes us up now to the 12th item on the agenda, which is the motion of JPMorgan to compel disclosure pursuant to Bankruptcy Rule 2019.

THE COURT: All right. Thank you.

MR. SACHS: Good afternoon, Your Honor. Robert Sachs

from Sullivan and Cromwell on behalf of JPMorgan Chase.

We are here on a 2019 motion which applies to every entity or Committee representing more than one creditor or equity security holder. The rule is mandatory, it's written in the terms "shall disclose," and it requires disclosure of certain enumerated information.

The original SEC proposal that became this rule ultimately required disclosure of this type when you had 12 or more people being represented. The rule as adopted is more than one.

The rule is part and parcel of the Bankruptcy Court's principle of full disclosure and transparency. And it is so all interested parties in the estate, parties include the other parties to the proceeding, the Court, other creditors, know with whom they're dealing, know the interest, know the nature of the interest, know the extent of that interest, know the bias of the parties who have elected to make their interest known in proceedings before the Court.

And I think it's worth pausing, and I'm going to go through it a little more in a minute, but pausing to note that these are people who have voluntarily elected to inject themselves into this proceeding and to assert on a consolidated basis to have their views known and made known to the Court, and to advocate their position, and to act on a coordinated, consolidated basis with respect to the other parties, both in

negotiation and advocating their positions.

They don't have to do that. And if they don't want to make the disclosures the rules requires, they shouldn't do that. It has nothing to do with the fact that they have interest, but they've injected themselves into the proceeding.

It's for the interest of all constituencies. As I said, the parties who have to negotiate and litigate with this Committee. For the Court in assessing the arguments that this Committee is advancing, to know what they own, how much they own, and I'll go into it in a minute. But we don't even know for this group of noteholders what notes they own. They say they're noteholders, we don't know whether they're -- which tranche of notes they own, what level of notes they own, whether they own multiple notes, whether they bought them, whether they've sold them.

And a lot of that has a lot to do with assessing the credibility and motive behind arguments that they are advancing in this case. And it's also relevant to other creditors who, while they may not technically be representing them as fiduciaries, look to the parties who are actively participating in the process here to determine whether they're advocating similar interest or divergent interest, and whether they're protecting their interest.

The rule applies here by its express terms. The Northwest decision, Your Honor, which was recently followed in

the Chrysler case, is on point. It couldn't be clearer. The Court, again, on a practical basis in that case in Northwest said I'm not saying these individual funds can't take action in their own interest. I'm just saying that Rule 2019 says that. If they're a group, and they want to affect this case, and they certainly do, that they've got to file certain basic information that I didn't make up, I didn't create that requirement, it's on the books, it should be filed. It's basically a rule that is clear on its face, and I know there's substantial objection to it. And, indeed, you've got in the papers before you the noteholders have put before you some information put in by various industry associations who are seeking the repeal of the rule which in itself is an indication that the rule does apply, they just don't like it.

Here, this is a group of 20 plus people who are asking the Court to consider the accumulated comp heft of their supposed positions and asking the Court to accept that as the basis on which you should give credibility to the positions that they advocate.

As in Northwest, they agreed to appear here, and they -- voluntarily, and they've decided to appear as a Committee in an aggregated form.

If you look, Your Honor, at -- if there were ever a case that disclosure of this type were essential, this is it. And look at what this Committee has done, and I'm going to get

to their arguments in a minute as to why they say the rule shouldn't apply to them. But just at the outset, look at what they've done before the Court.

If Your Honor -- it's Exhibit --

THE COURT: You don't have to go through that. I'm aware of what they've done.

MR. SACHS: Oh.

THE COURT: And I think your papers and your reply list some of the various actions they've taken.

MR. SACHS: Okay. I didn't mean to go through all the things they've done. I just wanted to focus on one appearance, Your Honor, where they set forth before the Court and they said they "represent the holder of $3.3 billion."

THE COURT: Um-hum.

MR. SACHS: They "represent the principal stakeholder in this dispute." And they purported to be advocating positions that were for the benefit of the creditors.

The information that Rule 2019 requires be disclosed goes to all of those issues, and goes to an assessment of whether any of that is or is not true.

Their arguments: First, that they're not a Committee, that they're a loose affiliation. They don't represent anyone other than each other. Or they don't represent each other. And everybody makes their own investment decisions.

And second, even if they are a Committee, that there's a variety of arguments that go to what they claim to be the discretion of the Court to not require compliance with Rule 2019, that it would be burdensome to produce this information, that it's sensitive information, that it would disadvantage them in their trading activities, that the price they paid for their securities has nothing to do with their ultimate right to collect as a creditor in this estate if there's ultimately a distribution which, of course, misses the issue because part of the question is whether they are, indeed, acting as a creditor in that capacity or whether they are short-term people who are utilizing the Court for purposes of buying and selling securities rather than acting in the interest of the long-term creditors who are looking for a distribution of the estate at the end of the day, one of the issues. And they impute bad motives to JPM Chase in seeking to have this information disclosed.

And unless the Court has questions about that, I don't propose to address that last point.

The evidence that they are a Committee in this particular case is similar to the evidence that was relied upon in the Northwest case. They advocate in this case a single position. They appear in a unified form in negotiations in this case, they've indicated that.

In their own submission, they've indicated that

decisions are not made individually by people, but the decisions are made by the Committee -- members of the Committee discussing the issues, and then coming to a consensus view that they advocate in a single way through a single set of counsel. Indeed, they can only advocate a single unified position through one lawyer because otherwise the lawyer couldn't represent divergent interest.

So, by definition, they are asking the Court to take account of supposedly $3.3 billion of undefined creditor interest in deciding whether those are interests that should be worthy of consideration and their views.

And the fact that they are making their own investment decision -- well, they also indicate that they're looking at it for the interest of all creditors. They don't say it's in our interest to do this. They say it's in the creditors' interest. That's -- their arguments have been so far to the Court.

And the fact that they have the ability to make their own investment decisions, that has nothing to do with 2019. It has nothing to do with the positions they're articulating before the Court. Of course they can make their own investment decisions regarding their single investments. But in coming to the Court and asserting a position, it is in that form that they are asserting joint and uniform positions.

I've indicated why this information is relevant.

It's relevant to litigation, it's relevant to negotiation. As I said, they don't even indicate what class of debt they own. It's possible they have conflicts, certain of these people because they own senior debt, and more junior debt, unsecured debt. We don't know, and it's not transparent in this particular case.

Acting as a unified force that's relevant to the parties here who are acting and trying to deal with the substantial issues in this case in good faith to know who they're negotiating with, who are these people, what do they or don't they own?

And I would point out, Your Honor, that the interests of this group have changed. Originally it was supposedly in excess of 1.1 billion. Then it went up to in excess of 3.3 billion. And in the limited disclosures that were filed and presented to the Court, it's back down to 3.26 billion in some notes of some sort.

So, the fact that the interests are shifting is an indication in the record that there's a need for this type of disclosure, to know whether these people are, in fact, buying and selling, whether they're looking for their short-term trading interest in this case rather than advocating the interest of creditors. And it's important for us as parties to know that, and I respectfully suggest it's of interest to the Court in assessing the credibility of the positions that they

ask Your Honor to accept.

Their claim of harm from disclosure is not supported anywhere in the record that's been presented to Your Honor. They don't -- first of all, you should never get to that issue because it's not for the Court to secondguess the rule that Congress decided to pass. But I recognize that some courts have looked at it as a matter of discretion, and I'm going to get to that in a minute.

But even if you were to do that, there's no evidence in this case of the parade of horribles that they suggest. They say this is burdensome. Your Honor, if they don't know what they bought and sold, and have that information, I don't know how they could file their taxes, much less anything else. These are sophisticated institutions that clearly know what securities they bought, when they bought them, and how much they bought them for. That's not burdensome.

They suggest that this is proprietary and sensitive. Well, Your Honor, we're not asking for anyone's trading strategies. The rule doesn't require disclosure of trading strategies or the subjective factors that people take into account.

This is -- asks for disclosure of historical purchase and sale information. It's much of the type the SEC would require a five percent shareholder to disclose under Rule 13(d). There's nothing unique or proprietary or particularly

troubling about it.

And there's no evidence, although they assert it to be the case, this would have some affect on the secondary market for trading in distressed debt. There's no evidence in the record to that, other than pure speculation on their part that maybe it could affect -- if other people knew what they had purchased or sold for, they -- that it could affect the negotiation as to what they would trade the debt at. But that it wouldn't have -- there's no suggestion in this record that it would have an affect on the secondary market.

And, indeed, they talk about competitors. There are no competitors that we're talking about here, competitively sensitive information. We're talking about simply disclosure of historical information based upon positions that they have told the Court in a very general sense, or represented to the Court that they possess and that they're asking the Court to assess as the basis for giving their positions significant weight.

Finally, Your Honor, on the issue of discretion, they referred to 2019(b), and they also refer to the Scotia case from Texas on that point where the point said it wasn't a Committee, I think's just dead wrong on that issue. There's no analysis of the issue in that particular case, unlike the Northwest Airlines case which goes through the language and relies upon it, but also suggests that, indeed, if there was,

they could exercise discretion not to require compliance with the rule. And in this court, the Sea Container case where the Court found the rule applicable, rejecting the argument it is not applicable, but said I can exercise discretion as to how much compliance with the rule is required.

But, Your Honor, 2019 does not say any such thing. The rule, as indicated as in 2019(a), and that's mandatory. 2019(b) is simply a provision that grants authority to the court as to what type of relief it can order for a failure to comply with 2019(a).

So, it affirmatively authorizes the court may, not shall, but the court may offer -- order relief that is -- as draconian as saying "you guys may not participate in this case."

But in no way, shape, or form does 2019(b) say notwithstanding that this is a mandatory rule, the court can choose to ignore it if the court wants to ignore it, and it's really not a mandatory rule. When Congress says shall, it means shall. Congress means something different, it means something different.

But to seize upon something as to the discretionary relief that the Court can grant in order to say that, therefore, the affirmative obligation no longer exists is, I suggest, unwarranted and improper a statutory interpretation.

So, for all those reasons, Your Honor, we

respectfully request that you order this noteholders' committee to make the disclosures that 2019 requires in a reasonable period of time.

Thank you.

THE COURT: Thank you. Does the debtor or Committee take any position on this motion?

MR. ROSEN: Your Honor, the debtor takes no position.

THE COURT: How about the U.S. Trustee? I'm sorry, the Committee?

MR. STRATTON: Your Honor, the Committee has no position on the motion, Your Honor.

THE COURT: U.S. Trustee?

MR. McMAHON: Your Honor, Joseph McMahon for the Acting United States Trustee.

We did not file papers indicating a formal position. Although, as the Court might surmise the Program's position is more consistent with the Northwest case, as opposed to Scotia.

THE COURT: Thank you. Mr. Lauria?

MR. LAURIA: Good afternoon, Your Honor. Tom Lauria for the noteholders.

JPM premises its motion on four points when it gets all boiled down:

Chapter 11 is a transparent process and the disclosure of my client's trading position is consistent with that.

Number two, the plain language of Bankruptcy Rule 2019 requires disclosure.

Number three, requiring disclosure is consistent with existing case law.

And number four, disclosure is not prejudicial to my clients.

Careful review of the record in this case reveals that the contrary is true with respect to each point. In fact, no one else in this case, or in any case that we're aware of, has actually disclosed the information sought here.

2019 is not applicable to my clients. Case law does not support disclosure. And disclosure would be highly prejudicial to my clients in violation of their rights under 11 U.S.C. 107.

Perhaps more importantly, Your Honor, the Bankruptcy Code and rules are generally construed to promote practical, efficient administration, not the opposite as urged by JPM.

Let's go through this now point-by-point, starting with the transparency argument. JPM would have the Court believe that the cost of participating in a bankruptcy case is that you have to disclose everything about what might be motivating your interests. JPM says, in effect, that bankruptcy is the nude beach of litigation. If you want in, you can have no secrets.

Cursory review of what happens in bankruptcy cases

generally, and what has happened in this case in particular, reveals that that is not true.

Let's start with the proposition that's not in dispute. Certainly individual creditors have no such duty to disclose their trading information. They can own multiple claims at different classes. They can own CDS, they can own derivatives that may put their economics at odds with the interest of the estate. And they have no duty whatsoever to make any disclosure, no matter how large their holdings are. The same is true, interestingly, of bank agents.

THE COURT: Well, isn't it true that they have to disclose that if they seek a distribution, i.e., they have to file a proof of claim and disclose what their positions are?

MR. LAURIA: They certainly -- well, Your Honor, actually generally, the indenture trustee files the proof of claim for debt that's traded in a case, or the bank agent, which I was just going to get to, files the proof of claim. And the individual holders are under no obligation to file a proof of claim. Their distributions are received either through their bank agent, if we're talking about bank debt, or through their indenture trustee if we're talking about bonds.

THE COURT: Okay.

MR. LAURIA: As I was saying, Your Honor, though, the same is true of bank agents who generally do appear in court, and generally as a matter of their contractual obligation speak

for all of the obligations owed under the credit agreement, even though, as we all know, that debt may be held by dozens, if not hundreds, of individual investors. I think for obvious reasons, however, you don't hear JPM arguing that bank agents need to file 2019 statements.

More importantly, Your Honor, to the extent actions speak louder than words, we've gone back and we've looked at a number of cases where JPM has appeared as the agent for the banks and guess what? We find that JPM doesn't find that it has any duty to make a 2019 disclosure despite the fact that it actually has contractual obligations to speak for all of the debt, and all of the holders of the debt.

Even members of official committees who clearly are acting in a bankruptcy case as fiduciaries aren't required to publicly disclose the type of information that JPM seeks to compel my clients to disclose here the details of every trade they have made in the securities of this debtor.

The fact is that contrary to JPM's argument about the importance of transparency, absent a dispute that makes relevant the details surrounding each purchase and sale of claims against the debtor, such information is generally not disclosed by parties in bankruptcy cases.

Parties are presumed --

THE COURT: Excuse me. Could the operator please mute all of the lines?

OPERATOR: Yes, I'll mute them, Your Honor.

THE COURT: Thank you. I'm sorry. Go ahead.

MR. LAURIA: Parties are presumed to be acting in what they perceive to be their best interests. And absent extraordinary circumstances, neither the Court nor the other parties need to look behind the appearance to determine if that party really is acting in its best interest, or is acting to pursue some other agenda.

So, why pick on a group of creditors who got together for the sole purpose of sharing fees? This leads to --

THE COURT: I think you have to ask the Judicial Conference that, not Congress, but --

MR. LAURIA: Well, Your Honor, we would submit that the answer is that the rule doesn't apply to that situation. That the sine qua non of the rule -- and I want to get to this in due course. But the sine qua non of the rule is the ability to bind somebody. And here, there is no --

THE COURT: That's not what it says, though.

MR. LAURIA: Here -- well, what it says is a committee who represents. Okay?

THE COURT: Entity.

MR. LAURIA: An entity

THE COURT: It says an entity.

MR. LAURIA: Well, let's talk about -- let's attach -- attack each of those points. Let's ask if this group is an

entity.

THE COURT: Well, are you an entity? You purport to represent them.

MR. LAURIA: Well, I think JPM has conceded that the obligation is not one that falls to counsel. It's one that's directed at the party in interesting.

THE COURT: Okay.

MR. LAURIA: But, Your Honor, the term entity is defined in the Bankruptcy Code. And the term -- the words that are used there clearly would not apply to our group, with the possible exception of the word "person." And yet when you look at the word "person," what you see is corporation or partnership, in effect, that might be applicable here. And I can assure you that the noteholder group here is neither a corporation nor a partnership.

There is no shared interest by the members of this group. They are each making their own decisions on their own behalf.

And, in fact, the membership of the group has changed over time. People have come in and people have dropped out. Some cases because, in fact, a particular person didn't agree with the views that others were expressing and said, okay, I'm going to discontinue my participation.

So, there is no -- there is no understanding or agreement between and among the members to bind themselves to

anything. The only thing that's being accomplished here is an efficient mechanism to obtain advice. That is sharing the cost.

Now, Bankruptcy Rule 2019, it should be noted, is a rule, not a statute. It is not, in fact, an adopted act of Congress.

And so as a starting point, I'd like to suggest that the repeated argument of JPM that we should adopt the case law in Ron Pair, Lamey (phonetic), and other cases that when the language of the statute is clear, it should be given its plain meaning and the Court has no choice but to apply it as a matter of rote doesn't apply to Bankruptcy Rule 2019.

THE COURT: Well, what is the standard for application of rules then?

MR. LAURIA: Your Honor, a rule --

THE COURT: Not the plain language?

MR. LAURIA: A rule is -- has been promulgated -- the rules have been promulgated to facilitate the application of a code. They are not a congressional act entitled to the benefit of any interpretative rule cited by JPM. And in that regard, 2019 should not be interpreted in a fashion that is at odds with the Code, as would be the case if applied as requested.

Clearly 107, which is a statutory provision, protects proprietary information from disclosure. And 2019, as a rule, should not be construed to defeat that statutory provision.

Now, let's look at the actual language for a moment, and see what it says. As the Court has noted, an -- any entity or committee representing more than one creditor. That's the operative language to get us into Bankruptcy Rule 2019.

Your Honor, I think I've already addressed the issue of entity. But let's talk about whether or not our noteholder group is a committee representing more than one creditor.

In our initial filing of record in the case, we expressly disclaimed the representation of any creditor outside the group.

More importantly, Your Honor, the group doesn't represent, and there is no evidence to the contrary, but I can represent having sat in on meetings with the members of the group, that the group doesn't represent any individual member of the group. Each member acts individually and makes its own decision, and to the extent that we find a common denominator, sometimes it's a very painfully low common denominator. But to the extent that we find a low -- a common denominator, that is the position that's put forth by the members of the group.

To the extent individual members have different views, they have freely communicated them throughout this case to the official committee and to the debtor, and to JPM on repeat occasions.

There is simply no basis --

THE COURT: I don't know that any of them have come

into court and articulated a position.

MR. LAURIA: Well, Your Honor, I guess when they determine that they need to, if they need to, they will do that.

The fact of the matter is, let's talk about the issuance of appearances in court for a moment. Over 1,500 pleadings have been filed in this case to date, four of them have been filed by the noteholder committee, not counting the response to the present motion.

JPM cites to four appearances in the case. The fact of the matter is the business of the noteholder group is predominantly obtaining private advice regarding legal theories and positions of parties, and potential outcomes, most of which is provided in the conference room, not in the courtroom.

And certainly the level of appearance is not enough in this case to cause or to support a conclusion that this group of noteholders has bound themselves together such that they somehow can only act together, or are only -- or have somehow authorized a group to act for and bind any particular member.

In fact, there is no reason for these noteholders to be together, and to be acting through the noteholder group other than they want to share the cost. They're looking for an efficient way to represent themselves in this case, and to get legal and financial advice. They have retained a financial

advisor. The financial advisor has run models for them, has performed sensitivities and financial diligence. That's -- it's a stretch to say that because a group of noteholders are trying to get legal analysis and financial analysis, that they should now be required to disclose information in this case that no other party is disclosing.

THE COURT: Well --

MR. LAURIA: Simply --

THE COURT: They've done more than that. They've filed pleadings in court purporting to act as a group. And isn't that what 2019 -- I mean if they had simply consulted you, gotten legal advice, and represented -- acted on their own, that would be one thing. But they filed pleadings purporting to represent all of them.

MR. LAURIA: Your Honor, those pleadings took positions that all of the members agreed with. And there were people who dropped in and out of this committee because of that from time-to-time. Okay? It is not -- the sine qua non, as was made clear in the history to 2019's predecessor, Rule 10-211, is the ability to bind someone. This group has no ability to bind anyone.

THE COURT: But isn't that the problem? There have bee people in and out of the group, and that's not been disclosed as far as who was in the group. You're purporting to represent a group.

If, for example, you filed an objection to a motion that said I represent, you know, XYZ, and here is our position. And then the next motion or pleading you filed I represent ABCXYZ, it would be clear who you were representing.

MR. LAURIA: Well, Your Honor, arguably, if our papers didn't say we were representing the WMI noteholder group, but instead said we were representing at any point in time somebody between 20 and 30 individual noteholders, I suppose that would eliminate this ambiguity.

But I would hate to think that having shorthanded it, and just said we're representing the noteholder group, who we did disclose the membership of at the beginning of the case, and we have recently updated that disclosure to disclose who is currently in the group, and what the aggregate holdings are, it would -- it stretches the bounds of reasonableness to say that that mere fact subjects these noteholders to this type of disclosure, which they believe -- which they believe is harmful to them.

And quite frankly, I think the reality is -- and I'm skipping ahead here a little bit in my argument. But, Your Honor, if the Court were to rule that this type of participation in a Chapter 11 case mandates the disclosures contemplated in Bankruptcy Rule 2019, including, in particular, (a)(4) which I think is the -- where the rubber hits the road here -- that, in fact, it's likely that many of these creditors

would simply drop out. They'd say, I'm going to -- if I'm going to act in this case at all, I'll act individually. And many of them who hold small positions may conclude that they don't have the wherewithal to be represented.

And so what you'll -- the result -- the best case result of an interpretation of the rule as posed by JPM is that you would have a string of not one lawyer, but 30 lawyers filing papers when matters come up in the case. And 30 lawyers making arguments. And 30 lawyers conducting discovery. And 30 lawyers conducting legal diligence. And 30 financial advisors conducting financial diligence. Which, Your Honor, can't be the kind of inefficient result that the Bankruptcy Code seeks.

Now, I say that's the best case because the worst case is more likely that you'll have a small number of these creditors who will determine that their position is large enough, standalone, to incur the cost of separate counsel and separate financial advisors. And the vast majority will determine that they can't carry the freight. That the cost is too high.

And so the real question is is there any offsetting benefit to the estate of requiring this disclosure. And what's interesting to me about that is that the cases are unanimous. Not 95 percent in my favor, but unanimous that absent extraordinary circumstances not alleged to be present here, the price a creditor pays for its claim is irrelevant to the rights

associated with that claim in a bankruptcy case.

In fact, I would cite the Court to Chief Judge Carey's musings in the Sea Container case where Judge Carey declined to apply (a)(4) in that case. And Judge Carey said, I'm not going to give the movant their ah-ha moment to say in court these creditors got these claims for a song. Why? Because it's irrelevant. Whether the claim was bought for 99 cents, a penny, or a dollar twenty-five, the claim is 100 cent claim. And it's entitled to that treatment in the case --

THE COURT: Where --

MR. LAURIA: -- and to require --

THE COURT: Where --

MR. LAURIA: -- disclosure otherwise is nothing but a sideshow and a distraction, Your Honor.

THE COURT: But I didn't write the rule.

MR. LAURIA: Well --

THE COURT: And aren't the cases pretty straightforward that disclosure is mandatory?

MR. LAURIA: Well, the only case that so holds are the two Northwest decisions.

THE COURT: Um-hum.

MR. LAURIA: And, Your Honor, it --

THE COURT: It's the only one who has written on it. Do you have cases contra?

MR. LAURIA: Well, I believe Sea Container, which

we've cited to this Court is contra.

THE COURT: Was that a written opinion?

MR. LAURIA: No, Your Honor.

THE COURT: Okay.

MR. LAURIA: No, Your Honor. And, Your Honor, contrary to the statement of JPM on the records, in fact, in Scotia, the Bankruptcy Court specifically found that the group before him was not a committee within the auspices of Bankruptcy Rule 2019, and we have attached the lengthy transcripts conducted before Judge Schmidt where the Court can clearly see that all of the issues presently before this Court were before Judge Schmidt. And on the basis of those arguments, he concluded that disclosure was inappropriate. So, there really is only the Northwest case out there.

And let's just talk about Northwest for a moment. Because putting aside for the moment that I think Northwest was wrongly decided, there are significant factual and record distinctions between Northwest and this case that make it clear that Northwest should not be applied.

First, unlike the group in Northwest, the WMI noteholder group has never sought official status. As such, given their explicit disclaimer in our first appearance in the case, there's no basis for finding that they act in a representative capacity, which was, again, the sine qua non of Judge Gropper's decision in Northwest.

Second, unlike --

THE COURT: I'm not sure that was the basis on which he made his decision.

MR. LAURIA: Well, he -- Judge Gropper actually stretched to find an implied fiduciary duty. He said that because there's nobody else representing these stakeholders in the case, because these particular stakeholders tried to get official status, he found that, in fact, they had obtain or acquired an implicit fiduciary duty to all similarly situated stakeholders. And, therefore, their disclosures were appropriate under the principles of former Rule 10-211.

Now, that's where I part with Judge Gropper because I don't think there is such a thing as an implied fiduciary duty. I think the law is pretty clear on that.

But putting that argument aside, the facts that Judge Gropper relied on in that case aren't present here. As I said initially, number one, our folks have never sought official status. They've never asked to have the ability to represent other parties, and they've explicitly disclaimed any duty or obligation to do so. And they made that clear from the beginning.

Number two, unlike Northwest, the creditors in the group are represented by an official committee. The Official Committee of Unsecured Creditors, in fact, represents the same classes of claims that the noteholders hold.

So, there is an official Committee representing those interests. In Northwest, there was not.

Third, unlike Northwest, here there other holders of the same types of claims who have appeared and are active in this case. The Fried Frank group. Fried Frank has appeared and is representing holders of the same classes of bonds that are within the WMI noteholder group. And it has made clear that they're not being represented by us. They've got their own views. They've appeared in court. And they've appeared in meetings and conferences and the like, and they do not view themselves in any way as relying on positions we take or bound by anything that we say individually or as a group.

Fourth, unlike the group in Northwest, we take instruction from the members, not the group.

Your Honor, as I've already explained when an issue is before the group, there's discussion back and forth. And we find the lowest common denominator that everybody supports. And if we can't find a position, you don't see us here.

Fifth, our appearance on the record in these cases is sporadic, at best. As I've always -- already mentioned, Your Honor, out of the 1,500 pleadings filed in the case, we filed four, not counting the response to this motion. And we've appeared on the record four times in over a year.

I would note as an aside here, JPM argued that we made statements that the position we were asserting was in the

best interest of creditors. That we were somehow speaking -- purporting to speak for creditors.

Your Honor, I've represented individual creditors in cases, and we frequently stand up and say that what we believe is our position is in the best interest of creditors at large, or the estate, or is not in the best interest of creditors, or not in the best interest of the estate. So, the fact that a party comes to court and says I think this is in the best interest of the estate or not doesn't mean that you are now speaking for the broader group. It happens to go usually to issues that are before the Court to determine whether or not a particular course is, in fact, in the best interest of the estate or creditors, not just in the best interest of one particular stakeholder.

Sixth, and finally, Your Honor, the movant here, JPM, is not even arguably within the scope of the interest protected by Bankruptcy Rule 2019. Former Rule 10-211 made it absolutely clear that the interest protected were the people who were supposedly being represented by the committee, who the protective committee had the power to bind in the bankruptcy case.

Let's remember that JPM is the principal opponent to the estate. And by analogy or by alignment, to the noteholders. Every dollar that ends up going to JPM as a consequence of the Court's determination of the issues that are

before it is a dollar that is not available to the estate, and ultimately not available for distribution to the noteholders.

So, JPM is not a party protected by the rule when you look at its history. JPM is our opponent, which does raise the question as to why JPM is the movant here.

As the Court will note, in Northwest, the movant was the debtor. The debtor is a fiduciary for the estate, and all stakeholders. And does have standing as the debtor to assert and protect those fiduciary interests. JPM has no duty. JPM is our opponent.

We think these distinctions are sufficient and material to support the Court's determining that Northwest is really inapplicable to the circumstances before the Court here.

JPM also ignores Judge Carey's ruling in the Sea Container case, as I've referred to. And I think there's one other point that is probably worth mentioning on the issue of authority on this issue. It's instructive that there is a dearth of opinions or decisions on the issue. Certainly this Court can take notice of the fact that informal committees or groups of creditors appear regularly in bankruptcy cases. And yet, for some reason, there's no a whole body of case law describing what the bounds of their obligations are under 2019. In fact, no published decision out of the District of Delaware.

Now, the practice is to do what we've done. We disclosed the list of clients and what their aggregate holdings

are. In the absence of more, conventional wisdom says that's enough. In the absence of more, in the absence of some allegation or argument that these creditors have engaged in bad conduct.

Now, there is some insinuation, by the way, in the JPM reply that maybe these creditors continued trading in the debt when they had inside information and were subject to a confidentiality obligation.

Unless and until somebody wants to come forward and seek recompense, or assert a claim based on that and is prepared to make an affirmative allegation to that effect, that's part of the sideshow. And this information isn't made relevant until somebody does. And as of today, no one has.

Now, I want to talk for a moment about the issue of harm. JPM and this Court are both too experienced and too sophisticated for it to be necessary to go to the expense of an evidentiary hearing regarding the proprietary nature of a trader's positions and the harm that would follow from disclosure.

This Court has heard plenty on the bench about how each trader views these issues as highly proprietary, and how if it were forced to disclose the data points of its positions, that it would give its competitors -- and let's talk about JPM says there are no competitors. It's the counterparties. It's the people who are also trading in the

debt. The ability to know -- the ability to know what's driving a particular creditor's trading strategy. And if you know that strategy, you can counter it, and you can capitalize on it. You can short it. You can do other things that will cause harm, that will create an unfair detriment to the party who's forced to disclose while the other party doesn't have to disclose. Now --

THE COURT: Well, what is being disclosed is historical information, not what you think is going to be a good buy today or tomorrow.

MR. LAURIA: Well, the past is always a reflection of the future.

THE COURT: Is it?

MR. LAURIA: And when -- if you --

THE COURT: If you are correct, I'd have a lot more money in my retirement fund.

(Laughter)

MR. LAURIA: I'm not saying that they're always making money. They're not always making the right decision, Your Honor. I'm saying that if you look at their past behavior, you can understand when you line up transactions with events, you can start to extrapolate and determine exactly what is driving the transactions.

And the fact of the matter is if the Court needs evidence on that, we will come back and we will put that

evidence in the record. We will put the traders on the stand and subject them to examination as to their proprietary trading strategies and how disclosure of their past trades will create harm for them in the market. We assume that we didn't need to burden this record with that. We've got a long day already, and we could make it a long three days if the Court wants to get into that.

But, Your Honor, if you determine that it's relevant and important, we'll do so.

THE COURT: All right. I think the threshold issue, as you've articulated it, is whether Rule 2019 applies.

MR. LAURIA: Well, Your Honor, as we've said, we don't think you can get there with Northwest because of the material differences between this case and Northwest. And we think the history of the rule, going back to former Rule 10-211, which was directed at protective committees, regardless of whether they included insiders, and they often did, but regardless of whether they included insiders, they had the ability to bind people. People who were part of the group, and people who were outside the group. And the concern was that if someone can bind another party, then the party who could be bound has the right to know what's motivating the party with that power. That is a committee who represents. That's a direct translation from the former rule to the present rule. And to hold otherwise creates an impractical inefficient

result, as I've already described.

THE COURT: All right.

MR. LAURIA: These noteholders are here to share costs. If the Court rules they can't do that without having to disclose their trading positions, what we're going to get is an unfortunate and inefficient result that I don't think advances any ball, as far as the case is concerned and, probably at the end of the day, makes resolution more difficult, not easier.

THE COURT: Okay.

MR. LAURIA: So, for the foregoing reasons, Your Honor, we'd ask that the motion be denied.

THE COURT: All right. Thank you. Any reply?

MR. SACHS: Very briefly, Your Honor. I will be very brief, Your Honor.

Let me start at the end and work my way backwards towards the beginning. First, you heard Mr. Lauria talk about his -- about the members of the Committee as being traders. But they're appearing before this Court as creditors, and they're advancing the interest of creditors. I think inherently that shows exactly part of the reason why disclosure in a case like this is appropriate, and they're advocating not just their individual interest but, indeed, three plus billion dollars, and claim to be the principal stakeholder in this case. Yet they are talking about confidentiality and concern as trading, not having anything to do with their concern as

creditors.

But I don't think Your Honor has to get to any of that because that all gets to issues about whether it should or shouldn't apply. The rule on its face does apply.

Mr. Lauria made two statements that I believe just need correction about some of the cases. First, in Northwest a principal distinction was that there were -- the court found there that they were -- the committee was a fiduciary. In fact, the court found no such thing. And I'm reading now from Exhibit F to our reply. "I think that -- but it's -- I did not get to that point, and I don't think I need to get to that point as to whether or not this committee is a fiduciary. I'm not finding that, and my opinion held to the contrary."

That was not the basis of the Northwest holding. The basis of the Northwest holding is that the rule is clear, and that the rule should be enforced as it is written -- applied as it is written.

Similarly, in Sea Container, again, as well, the court there, as well, and I'm, again, looking -- there's not a written ruling in that case. But, again, the court in the hearing on that said "But I will tell you that this is probably, in my view, a committee within the meaning of the rule."

And so the application of the rule in those particular cases is clear, and those statements as to those

cases, I think, were in error.

Just -- again, getting to the point of this as being a committee, this group has to act in a unified manner. And if you look at their own submission, it may be that people have the ability to do things differently. But if they are going to participate and be members of this committee, the positions that they are putting before the Court are their unified positions, and that's -- they're trying to take advantage of that fact. And if you look at Paragraph 20, it talks about the committee coming to a judgment to present a unified position to the Court. It's precisely because of that that they ought to be here.

Ultimately what this comes down to, Your Honor, is that Mr. Lauria and his clients don't like this rule. They want to rewrite this rule. They don't want to apply this rule. But the rule is here. It exists for the benefit of everyone. It's not like JPM is some evil monster out here. You've heard from everybody talk about how we're the key to this entire case. We have -- you listened to our positions, Your Honor, you know where we're coming from. There's no mystery every time I get up here, or Ms. Friedman gets up here as to what our position is and where we're coming from. And I presume you consider that in assessing the credibility of what we're advocating before you.

Similarly, we know where the debtor comes from. We

know where the Official Committee of Unsecured Creditors come from. But we don't know where these people come from. And that's part of the reason why this rule is there. We know what Mr. Lauria says. But the rule requires for unofficial committees like this who want to come before the Court, don't want to appear as individuals but want to come and give the added heft to their positions, that they need to make disclosures, put them in an even footing if they're going to participate in a unified manner in this process, both in front of the Court, and in negotiations, and otherwise in this process. And it benefits all constituencies in this proceeding, not just the debtor, not just an individual creditor, and not just the evil doers, as JPMC has alleged to be, Your Honor. And I think you -- we respectfully request you enforce the rule as written and require these disclosures.

If the Committee doesn't want to make them, then they'll elect to participate in a different manner, or not to participate at all. You've heard there are numerous committees, official committees in place here. But they've somehow determined that they have an interest that they want to set forth before the Court in a combined fashion. And if they want to do that, if they want to participate, they should play by the rules.

Thank you very much.

THE COURT: Thank you. Well, I'm going to do this,

I'm going to take this under advisement and issue a written ruling on this. I think it's sufficiently important to have that.

Let's take a five-minute breaker before we finish.

UNIDENTIFIED ATTORNEY: Your Honor, do you need any creditor submissions with respect to the issue?

THE COURT: I don't. Thank you.

MR. ROSEN: Your Honor, one more request before you break because counsel, I think, might leave from Madison Square Garden.

The 10 days that we talked about for the submission of that other authority with respect to the party to an agreement, that falls out right around Labor Day. If we could have the Wednesday after Labor Day, Your Honor, that'd be helpful.

THE COURT: That's fine.

MR. ROSEN: Thank you, Your Honor.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

(Recess 12:36 P.M./Reconvene 1:50 P.M.)

THE COURT: All right. Where are we on the agenda?

MR. ROSEN: As I'm stepping up, Your Honor, I think we're up to Number 13 on the agenda, which is JPMorgan's motion to dismiss the debtors' counterclaims in Adversary Proceeding 09-50551.

THE COURT: Okay.

MR. ROSEN: Ms. Friedman is handling that.

MS. FRIEDMAN: Good afternoon, Your Honor. Stacey Friedman for JPMorgan Chase.

The motion to dismiss --

THE COURT: Tell me why this isn't Groundhog's Day.

(Laughter)

MS. FRIEDMAN: Funny. I thought that might be the first question.

I think there's three reasons. And one is just the simple fact, you know, this motion was pending, wasn't completely briefed when the June 24th ruling came down.

When I read the June 24th, and I focus on what Your Honor said about the counterclaims in this proceeding, I'll quote it back to you, but I'm sure you're familiar with it, this is at Page 94 of the transcript, where the debtor is -- "To the extent the debtor is asserting a claim against JPMC to assets that the debtor claims are property of the estate, for various reasons, I think that FIRREA doesn't bar it."

And what we're focusing our argument on here today, and I think that the issue is narrowed down to are two types of counterclaims:

One, assets of the receivership where the debtor admits these are WMB's. For example, the capital of WMB, they're not standing before you and saying, Your Honor, they're ours. They're saying we have a right to claw back through the

receivership to JPMorgan Chase and pull it back in.

And I would submit, Your Honor, that your ruling didn't reach whether the plain language of FIRREA, which jurisdictionally bars claims to determine rights in assets that were the assets the receiver -- of WMB, it didn't reach that point.

And so the first type of counterclaim is the time that's -- the type that's really reaching for these WMB assets.

The second type of counterclaim is the one that truly relates to what the FDIC is doing. The law of the case, Your Honor, the law of the case is not for the debtors to say, it's not for me to say, it's for the Court to say. And the reason why is that FIRREA is an extensive statute. And I think it might be worth passing it up for various reasons when we get into the substance of this argument because this really is about plain language at this point.

The Court is going to have to apply the law of the case how the Court sees fit. And I would submit, Your Honor, to the extent we're arguing about these particular counterclaims, the assets of WMB, the actions of the receiver, that your June 24th ruling doesn't reach these counterclaims.

So, if you'll allow me seven minutes --

THE COURT: Okay.

MS. FRIEDMAN: -- to go through --

THE COURT: You can have a little bit more.

MS. FRIEDMAN: I can have a little bit more. I think the debtors want me to have six and a half. And I am -- I'm going to -- if I may approach the Court and hand up a true and correct copy of 1821, the statute I think we're all familiar with, but it gets a little complex at times.

THE COURT: Okay.

MS. FRIEDMAN: The jurisdictional bar we've all been focused on -- and there's two points to this argument, Your Honor: the jurisdictional bar and the exclusive claims process set out in FIRREA. But the jurisdictional bar appears on Page 1,008, it's over on the left-hand column, we're all familiar with it, I won't read the whole thing, and it appears under Subsection D, it has two romanettes.

In Romanette 1, it bars any claim or action seeking a determination of rights with respect to the assets of any depository institution for which the corporation has been appointed a receiver. So, that's -- that's WMB.

And if you go to the counterclaims, Your Honor, the first and second counterclaim, as I said, is for the capital of WMB. The debtor is not going to stand before you and say that is their asset. They're going to say we have a right to claw that asset back. Reach through the receivership and reach to JPMorgan Chase. And, Your Honor, I would submit that is the determination of a right with respect to an asset of WMB.

THE COURT: But isn't there case law that says once

the assets have been sold by the FDIC, the jurisdictional bar is not applicable?

MS. FRIEDMAN: Two responses. One, not in Third Circuit. There is Sixth Circuit law that goes the other way. But plain language, Your Honor. The debtors are trying to read in this idea that the jurisdictional bar comes to an end when the assets are sold to JPMorgan Chase.

And just stay with me for a second here. Roll up one line to "No attachment or execution in FIRREA." And you'll see when Congress wants to limit a provision of FIRREA, to only assets that are in the possession of the receivership, Congress knows how to write that in. It says in the "No attachment or execution" that that provision only applies to assets in the possession of the receivership.

The debtors want to take those seven words, and they want to put them into the jurisdictional bar. And those seven words don't appear in the jurisdictional bar. And we should turn to the cases, and if you want to skip to that right now because I think the two maiden cases are Hudson and Rosa. Your Honor, they don't stand for the proposition that those seven words are imputed into Romanette 1 or Romanette 2.

THE COURT: Okay.

MS. FRIEDMAN: If you're okay leaving the cases til a little bit further in, I want to stay with the plain language for a little bit, okay? So, it's capital. There's trust

securities. The counterclaims that we're focused on are third, fourth, fifth and sixth. Those are the ones that say even if it went to WMB, we get to claw it back.

There's preferential transfers, same thing.

Asset of WMB. We want to claw it back.

Counterclaim 10.

The entire P&A transaction, the purchase and assumption agreement whereby the FDIC, as receiver, transfer the assets of WMB to JPMorgan Chase. They want to call that an avoidable transaction.

Counterclaim 11, Counterclaim 14, all of these ultimately seek a determination of rights with respect to the assets of the failed bank. And the seven words that the debtors want to read in about until or unless those assets are sold to another institution, Congress put them in some provisions of FIRREA, but they didn't put them in the jurisdictional provision.

It's the same for Romanette 2, Your Honor. Romanette 2, we're all familiar with. This has to do with any claim relating to an act of the receiver. Relating to is broad. And I think it's deliberately broad. And, you know, there's Supreme Court cases, including the Morales case that talks about it as anything in relation to, bearing, concern, pertaining, referring to, anything in association with. How can you have a fraudulent transfer claim where it's the FDIC

doing the transfer, and say that it's not related to an act of the receiver? How can you have a preference claim against a subsequent transferee, and it's the FDIC that made that transfer, and it doesn't relate to that preference claim? How can you have a P&A transaction whereby the assets of a failed bank are sold to a third party, and it can't relate to what the FDIC is doing as receiver.

We looked at the plain language. And, again, I submit the seven words that the debtors want to read in there, they don't exist. But you should also look at the practice because the Hudson case, and I'll turn to that in just a second. The Hudson case on which the debtors rely, it talks about the sale of assets as the standard practice. The Hudson assets stayed in the Hudson receivership for less than a day. They were sold out on the same day.

The Rosa case, which also the debtors rely upon and we'll come to in just a minute, those assets -- there were two receiverships, those assets were either sold on the day of the receivership or the day after.

In the 62 failed banks where there were asset sales since WMB failed, until about mid-July, all 62, the receiver sold off the assets on the same day the receivership put in place. How could the jurisdictional bar be a constraint, an exclusive constraint, a way to tie everything that relates to a determination of assets of the receivership that has to do with

attacks on the acts of the receiver, and yet the moment the FDIC does, again, as they said in Hudson what is standard practice, the whole jurisdictional bar is vitiated.

THE COURT: Well, courts have said that.

MS. FRIEDMAN: Your Honor, with due respect, Hudson -- let's talk about Hudson. Hudson doesn't deal with jurisdiction.

Your Honor, I really do hope -- because I think that we're going to have a disagreement on how it should be read -- that you get an opportunity to sit down and compare what we say about Hudson and Rosa to what they say about Hudson and Rosa to the cases. Hudson is a venue case. And I understand in Hudson, there were two -- there were actually two issues: There was venue and the claims procedure. And when you have a -- and the question was when you have a claim against the receiver, is that under the venue provision sent off? In this case to the District Court of DC. And when you have a claim against the receiver, is that part of the claims procedure. And the Hudson court said, yeah, it is.

The Hudson court did not reach whether a transfer of assets to a third party vitiated the jurisdictional bar. There was a third party purchaser of assets in Hudson, it was JPMorgan Chase.

And when the court decided to transfer the claims against the receiver off to what would be the District Court in

DC here, it sent the claims against Chase, as well. It did so without reaching or deciding, or in analyzing whether Romanette 1 should have those seven words imputed into it, that it gets vitiated when there's a sale of assets without putting those seven words into Romanette 2 that don't exist there. It reached that decision without even considering it.

So, Hudson, Your Honor, does not stand for that proposition.

And Rosa, it seems complex when it gets written about in the papers over and over again. But it's actually -- there's three entities: City One, it has a ERISA plan. The plan participants are bringing the suit. City One fails, it goes into receivership. Some of the assets are sold to City Two. City Two fails. It goes into receivership. Some of the assets are sold to City Three. City Three gets in trouble. It doesn't go into receivership, it goes into conservatorship, and that's where the debtors are focused. This is a conservatorship, it's different, it's more like JPMorgan Chase, Your Honor looked at what happened here.

But, Your Honor, Rosa says the claim of the plan participants are that they should be paid from the ERISA plan and they weren't being paid. Rosa says for one and two, you're seeking payments from assets of the receivership. That is core Romanette 1. That is barred under the jurisdictional provision of FIRREA. It gets to City Three. And guess what? City Three

was formed after the plan had been terminated. There is no dispute about the transfer of assets from the receivership. It wasn't analyzing whether there was an asset of the receivership at issue. It wasn't analyzing whether there was an act of the receiver to which the claim was related. It was just City Three had engaged in wrongful conduct. And, yeah, when you're a purchaser of assets, there's nothing in the FIRREA jurisdictional bar that says you're immunized from all claims for all time. It all related to the receivership.

It says, though, if what you're looking for is a determination of rights to the assets of the receivership, or if your claim is related to the actions of the receiver, it says in those circumstances, you're jurisdictionally barred from proceeding here.

So, Your Honor, I would submit on the jurisdictional bar issue, I don't think that this issue -- it was not fully briefed on June 24th. I think the law of the case, as I read your opinion, leaves open the question, the jurisdictional question as to these counterclaims. As to counterclaims that go to assets of the receiver. As to counterclaims that go to the acts of the receiver. And in any event, even if Your Honor doesn't apply the jurisdictional bar, the exclusive claims procedure is set out in FIRREA. It would now be before this Court, I guess, to apply those.

There is no recovery that's really available to the

debtors beyond what's set out in that exclusive claims procedure. And it's as simple as this: 1821(d)(2)(A), and we can go and we can look at it, if you want -- well, I guess, let's step back. What hat is the debtor wearing when they're bringing these claims? Are they bringing them as the holding company and the sole stockholder of WMB? Or are they bringing them as an ordinary creditor?

Because if they're running the holding as sole shareholder of WMB, 1821(d)(2)(A)(i) says the FDIC got all rights, titles, interest of shareholders. They don't have standing to bring that claim. So, if what they are bringing their claims as is an ordinary creditor of WMB --

THE COURT: What section are you -- at what page is that?

MS. FRIEDMAN: Oh, okay. Sorry. It's -- if you turn to Page 1,003, and you look under -- again, on the left, under D, Powers and Duties of the Corporation as Conservator or Receiver. And then to General Powers, Successor to the Institution, and then Romanette 1.

THE COURT: Okay.

MS. FRIEDMAN: So, if their hat that they're wearing is as shareholder or holding company, it's clear they don't have standing to pursue those claims any longer, those are with the FDIC.

If the hat they're wearing is creditor, then there is

an exclusive process, and that's the phrase that the Shane court used in the Third Circuit. There's an exclusive process in FIRREA for creditors' claims.

And we cited some cases about takings because they just so well articulate, Your Honor. This isn't a widget company, it was a bank. And banks sign up for not only a lot of regulation, but certain constraints that are set out in FIRREA. And in Branch, and, again, this is a takings case, but I think it articulates the point well, the Federal Circuit explained that, "An individual engaged in the banking industry is deemed to understand that if its bank becomes insolvent, the federal government may take possession of its premises and holdings. And no compensation for the government action will be due."

The same thing was applied in California Housing, again, a Federal Circuit takings court -- takings case where it said, "Such an occupation and seizure would not leave the claimant without rights." But those rights were found exclusive in FIRREA.

THE COURT: But aren't they claims against the FDIC?

MS. FRIEDMAN: They're claims, Your Honor, against -- well, let's take it into two points, okay.

THE COURT: Isn't that what the court was talking about, claims against the FDIC?

MS. FRIEDMAN: The claims against the FDIC in the

takings claims, yes, Your Honor. But I think the broad proposition here is as simple as this: That there was a -- there is a regime set down. And so you take that, and then you go on to the Shane case in the Third Circuit, which is talking about a creditors' claims. And it talks about 1821(d) being the exclusive claims process.

THE COURT: Claims against the FDIC.

MS. FRIEDMAN: Claims -- but, Your Honor, claims against the FDIC, it's claims of a creditor. And let me -- let me --

THE COURT: A creditor of the FDIC.

MS. FRIEDMAN: Creditor of the FDIC. Let me put it this way. If, on day one, the receivership happens, and we all agree holding -- bank goes into receivership, holding company has certain rights as creditor of WMB. Under FIRREA, that is exclusive. It can't be supplemented. Case after case says that.

Are we really going to read into this statute that the day the FDIC engages in what Hudson called standard conduct and starts to sell off assets, that new rights arise for creditors to go as an end run around this exclusive process? And I would argue, Your Honor, Hudson doesn't hold that. Rosa doesn't hold that. I don't know what -- if they want to go in -- there were six cases they cited in their brief, I'm happy to discuss any of them. It's not a holding of a court. And the

reason why is it's antithetical to the plain language of FIRREA.

So, Your Honor, both on jurisdictional grounds and because of the limitations the claims process set out in FIRREA, we would submit for the counterclaims that go to the assets of WMB and the conduct of the receiver, that those claims should be dismissed.

THE COURT: All right. Thank you.

MR. CARLINSKY: Good afternoon, Your Honor. Michael Carlinsky from Quinn Emanuel. Mr. Abensohn, my colleague, will address the second part of JPM's argument, which was sort of the federal law preempts. I promise to be extremely brief. And I'm sure people are saying I don't believe it --

(Laughter)

MR. CARLINSKY: -- but, Your Honor, it is Groundhog's Day, or it is déjà vu all over again. I think the Court clearly ruled on the issue of whether the jurisdictional bar applies. Ms. Friedman omitted a fact that at Page 93 of the transcript, Your Honor also made the point of saying Hudson made clear that FIRREA only bars claims against the receiver or an institution in receivership. Hudson said that, I believe, at least three times.

Your Honor also made the observation back to the day we were here with the big boards. In Your Honor's transcript, Your Honor noted that the FDIC in the Heinrich case out of the

Ninth Circuit had argued in its cert petition to the U.S. Supreme Court the very opposite of what we're now hearing, which was the jurisdictional bar only bars a claim against the institution in receivership, or the receiver. And I think really that disposes of the issue.

On law of the case, I would just also note JPM and the FDIC moved with respect to that stay motion on all of the counterclaims. And I make that observation because Ms. Friedman also suggested well, maybe Counterclaim Number 10 should be given some different treatment, or it wasn't encompassed within Your Honor's prior ruling.

Well, for the reasons I stated a moment ago, and the language from Your Honor's decision I quoted, it's clear it would encompass all claims. But also I point that out because all of the counterclaims were subject to the stay motion. And JPM, if Your Honor goes back and looks at the transcript, you will see Counterclaim Number 10 was specifically argued. And when the Court rejected the argument and rejected the stay motion, it addressed all of the counterclaims.

So, with respect to the jurisdictional bar issue, it is law of the case. Your Honor got it right the first time. And the Third Circuit law is binding, notwithstanding what Ms. Friedman suggests may be Sixth Circuit law or dicta in the case. The Third Circuit in Rosa was clear. And if there were any doubt, the Third Circuit in Hudson is referencing

specifically the holding of Rosa.

Thank you, Your Honor.

MR. ABENSOHN: Your Honor, Adam Abensohn for the debtors.

THE COURT: Yes.

MR. ABENSOHN: And I want to address specifically sort of the tail end of the argument as set forth in the briefs by JPMorgan. Once they make their -- or reargue their points as to 1821(d)(13)(D), they move into this takings case law, and they start groping for various other provisions under FIRREA, which, according to them, creates the jurisdictional bar that the Court has already concluded that 1821(d)(13)(D) does not.

And beginning with these takings cases, and counsel acknowledged that these are takings cases, I mean, frankly, they have nothing to do with the present situation. It's almost difficult to distinguish them because they are so fundamentally unrelated to what we're here to address. These are cases against federal agencies seeking damages arising out of the conduct of federal agencies. And the courts preclude takings relief because of takings analysis under the constitution having to do with reasonable investment backed expectations in a highly regulated area.

That has nothing whatsoever to do with the situation here, which is there is a claim asserted under state law, and under federal law under the Bankruptcy Code. There is a claim

of bar under the jurisdictional bars of FIRREA. The Court has already concluded that the bar does not apply. And where we are left is to see if there is any other provision that would permit them the relief they seek.

The answer is that there is not. They conjure up a number of them in their papers. And Ms. Friedman mentioned one in her argument, 1821(d)(2)(A)(i) which is a provision that simply says that the FDIC stands in the shoes of the bank for which it is appointed receiver. That's fine. And that has nothing to do with the position that we're taking here, or with the correct outcome here.

We are not purporting to stand in the shoes of WMB. We are standing in our own shoes, and we are asserting claims that we have, both under the Bankruptcy Code and under state law. That provision that Ms. Friedman cites does not purport to be a jurisdictional bar, it does not -- has not been asserted in the case law as a bar to claims by third parties asserting rights on their own behalf. It simply has nothing to do with the situation in front of us.

There's a number of other provisions that they cite. And I think the most glaring example is this 1828(u)(1) which Ms. Friedman didn't discuss in her argument, I think probably for obvious reasons, but which was raised in their papers. And it's no exaggeration to say that they used an ellipsis to mask that part of the provision that very plainly made it

inapplicable here. And it's all part and parcel of this approach of throwing things against the wall, hoping one will stick, assorted provisions under FIRREA, none of which are actually jurisdictional bars. And sort of hoping that one can get sort of passed the Court. You know, whether by use of ellipses or whether by pretending that it's a jurisdictional bar when, in fact, it simply empowers the FDIC to act in its role as receiver. None of these provisions accomplish what JPMC would need them to accomplish.

The bottom line is FIRREA is a complex regulatory scheme with a great number of provisions. And the case law is clear that when you're addressing such a scheme, the FDIC, and any other party that might be invoking rights under it, can only invoke rights that are explicitly set forth.

To the extent there is a jurisdictional bar under FIRREA, it is clearly defined under 1821(d)(13)(D). The Court has examined it. Ms. Friedman said there hadn't been full briefing on it. I -- having spent way too much time drafting those briefs, Your Honor, it surprised me to hear that. There were hundreds of pages of briefing addressed for that very issue in advance of the June hearing. It was resolved that 1821(d)(13)(D) is not applicable here without a provision that grants them a jurisdictional bar, there was nowhere else to turn in FIRREA. And we are entitled to pursue our claims, Your Honor, under state law, under the Bankruptcy Code, just as we

would be under -- as against any litigant, whether the FDIC had sort of touched this case in one way or another or not.

And if there are no questions, Your Honor, I'll rest with that.

THE COURT: Thank you.

MS. FRIEDMAN: I think just one point, Your Honor. I think I opened with somewhere after we got passed Groundhog's Day that I believe this is really down to when we're talking about assets that were part of WMB, and the acts, the receiver, a plain language analysis, both the jurisdictional bar and the claims process. I would just ask, Your Honor, before you decide, read Hudson, read Rosa, read Village of Oakwood, and asks yourself do those cases read in these seven words that the debtors want to add both to the jurisdictional bar and to the claims process that limit the scope of FIRREA, those particular provisions, only when the assets are in the hands of the receiver. I submit they aren't.

THE COURT: Well, let me say this. I think law of the case does preclude this. I have already decided this issue. I haven't heard anything new with respect to 1821(d)(13)(D) or case law construing it to convince me that my decision was wrong. There are no new facts, no new law. And I think that actions against parties other than the FDIC, and specifically JPMC are not barred by FIRREA, and specifically all of the counterclaims brought by the debtor.

So, I'll deny the motion to dismiss the debtors' counter claims.

MR. CARLINSKY: Thank you, Your Honor. We'll prepare an order.

THE COURT: Okay.

MR. ROSEN: Your Honor, the next items -- and it's, I believe, with respect to both adversary proceedings that are on the agenda, JPM's motion with respect to core or noncore issues.

THE COURT: Okay.

MR. ROSEN: Right? Is that all? Oh, it's being fully briefed -- I apologize, Your Honor. That was done as submitted. I apologize.

And then it's the -- the motions to intervene. Bank bondholders' motions to intervene in both adversary proceedings.

THE COURT: Okay.

MR. SEIDL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SEIDL: For the record, Michael Seidl, Pachulski Stang Ziehl & Jones, on behalf of the bank bondholders.

I rise to introduce our co-counsel from Wilmer Cutler, Philip Anker and Nancy Menzer. Their admissions pro hac have been moved in, granted, and I'd request that they be allowed to appear.

THE COURT: Okay.

MR. SEIDL: Thank you, Your Honor.

MR. ANKER: Good afternoon, Your Honor. Philip Anker.

I realize it's been a long day. I've often said to a judge I'll try to be brief. I will be candid. I rarely am. But I will do my best here.

We filed both an opening memorandum and a reply. I want to try to focus, because I think a lot of what has been said today on other motions is relevant here. First, let me just provide a minute of background on who my clients are. They are just under about $2 billion in bonds, bonds issued by WMB, but bonds as to which they have filed proofs of claim, not only in the receivership, which have been allowed, but against WMI and against WMI Investment on a variety of theories asserting direct liability, piercing the corporate veil, fraud, misrepresentation in the sale, failure to adequately capitalize, and creditor remedies of various kinds, including fraudulent transfer.

Mr. -- let me start with 24(a)(1) because I think it's the easiest. We argued 24(a)(1). We argue in the alternative 24(a)(2). We argue in the alternative permissive intervention under 24(b).

But let me start with a mandatory intervention, and one that is easy, at least in my mind easy.

And I agree with much of what has been said here today, including by Your Honor in response to Mr. Lauria's arguments about Rule 2019, that you start with the plain meaning. And you start with the plain meaning of the words. In this case, it is a statute. And you start with the plain meaning of the words of the Third Circuit.

24(a)(1) provides that where a party has an absolute right to intervene by statute, it must be allowed to intervene. And the Third Circuit in the Marin case, a case that I will acknowledge, Your Honor, has received some criticism in other circuits. It has been rejected in the Fifth Circuit. It has been in dicta questioned in other circuits. It's been expressly endorsed, however, in the Second Circuit.

But to quote counsel here, we are in the Third Circuit and Third Circuit precedent is binding. And that makes Your Honor's job a little bit easier on this issue, and makes me, hopefully, true to my word that I won't go on too long.

Marin dealt with the question does the right in 1109 extend to adversary proceedings. And it held in no uncertain terms an opinion by Judge Adams, once Chief Judge of the Third Circuit, that the answer is yes. In Phar-Mor, the Third Circuit said we meant what we said, the panel said we understand there's arguments to the contrary, but this court meant what it said.

And it seems to me, Your Honor, I shouldn't have to

argue policy, but I'll make one observation. Mr. Rosen, in response to the motion for relief from stay by the plaintiff, said the crux of this case -- I think that was his phrase -- is this adversary or these adversary proceedings. And that statement is one I endorse, and I think is right. And if there were a debate about the wisdom of what the Third Circuit said in Marin, what it repeated in Phar-Mor, this case illustrates that if you limited the right of intervention in 1109 to contested matters in a general bankruptcy, and didn't extend it to adversaries, then you'd have cases like this where the right would be fundamentally meaningless because the action, what really matters is the adversary.

What are the arguments that are made in response on plain meaning. Let me go through them quickly:

One is we're not a creditor. We're a creditor of a creditor. We're just a creditor of WMB.

Indeed, the brief in opposition is filed on that premise. But saying it doesn't make it so. We have outstanding proofs of claim. You heard today that as to many issues, they were adjourned. Those claims are extant.

And, again, let's talk about plain meaning. Are those claims disputed? Well, there's no objection on file, but I will acknowledge, of course, they are going to be disputed by the debtor.

But let's look at the language of 1109. 1109 gives a

creditor, that's the defined term, the use of the term in Section 1109, a right to be heard on any issue in any case. How does the Code define the word "creditor?" A holder of a claim. And how is the word "claim" defined? A right to payment whether allowed or disputed. Plain meaning of the statute.

And let me go to a point Ms. Friedman was making as a rule of statutory construction. And while I'm not going to argue to Your Honor you should revisit your rulings --

(Laughter)

MR. ANKER: -- I think she's right as a matter of statutory construction. The Supreme Court in the BFP in construing the Bankruptcy Code made the point when Congress uses words in one section of a statute, and omits them in another, you have to presume that's intentional, the disparate use and omission is intentional in that regard.

We cited in our papers Section 303 of the Code, involuntaries. In 303, Congress chose, unlike 1109, to provide that an involuntary may only be filed by three or more entities, this is 303(b)(1), each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of bona fide dispute. That language nowhere appears in 1107 (sic).

As I took the train up, it occurred to me I missed an even more obvious one. One that is perhaps more significant

because it's part of Chapter 11 of the Bankruptcy Code. 1126. 1126 says the holder of a claim or interest allowed under Section 502 of this title may accept or reject a plan. Those words "allowed," not subject to bona fide dispute, nowhere appear. And I would say for good reason. The good reason is adversaries matter. And adversaries often involve rights and affect parties whose claims are disputed.

So, we are a creditor of this bankruptcy within the plain meaning of the Code. That, of course, is without prejudice to their rights down the road. And I heard Committee counsel acknowledge all rights to object substantively are preserved.

A separate argument is to say -- and, frankly, this is not made with much -- I don't think -- I don't even know, Your Honor, whether it's really made, but I'll state it. Marin only applies to committees. The problem with that argument, again, is plain meaning. Plain meaning of the statute, plain meaning of the case law. 1109 by its terms says that any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor may raise, and may appear, and be heard on any issue.

And as I was coming on the train this morning from New York, I read Marin again. Marin on five separate occasions talks about the rights of a creditor to intervene. Now, I grant you that case was about a committee, but the case draws

absolutely no distinction.

And I will point, Your Honor, we did not cite this in our papers, but if you look at the Second Circuit's decision endorsing Marin, that's Caldor Corporation, reported at 303 F. 3d 161, that was a case about a creditor. It was about a term loan holder committee, not an official committee, which is described in the opinion as representing the holders of a term loan under a particular credit agreement. So, it was term lenders. And the Second Circuit said the Third Circuit got it right in Marin.

And to go back to something Your Honor said, it said, you know, there could be serious debate whether 1109 as written is wise or unwise, but that's Congress's job. It's not the job of this Court. And this Court's job is to follow the plain wording of the statute, and the Third Circuit got it right.

There is no case that I'm aware of reported that draws the distinction that Marin didn't draw, and that the statute plainly does not draw.

So, Marin applies to creditors, and it applies to creditors whether their claims are disputed or not.

A third argument, Your Honor, is that somehow we're -- we may be creditors, but we're not really seeking to intervene as creditors. There's two answers to that:

One, is 1109 doesn't on its face say -- I know the debtors wish it said this -- you can intervene if, but only if

you want to support the position of the debtors or the position of the official committee. It doesn't say that. But we most assuredly as a factual matter are seeking to intervene to protect our interest as creditors.

Let me give three, and only three examples, and they all stem from a basic principal. The Third Circuit has held -- the District Court in this District has held, and the Third Circuit case principally on this point, Your Honor, is Harris v. Pernsley at 820 F. 2d 592. The District Court decision I would point to, Your Honor, is the Jet Traders case.

But in Harris, the Third Circuit said, and it's later endorsed in Jet Traders, as many other courts have said, that an application has a sufficient interest. Now, we don't need to show we have a sufficient interest for these purposes because that's 24(a)(2) test. But I want to just point here for a moment, "Where a decision will have a significant stare, decisive affect on the applicant's rights, and that that particularly applies, Your Honor, where the same court will have to decide the same or similar issues.

What's our proof of claim about? What's our theory of why an entity that didn't issue the bonds is nevertheless liable?

One is, Your Honor, that it misled the bank bondholders. It said that it would ensure that there was adequate capital. The theory is that it breached those duties.

That is the antithesis of what is much in their claim. You heard, and you just denied, JPMC's motion to dismiss a counterclaim on fraudulent transfer law.

Let me tell you some facts. There allegedly was $9 billion that went downstream from WMI to WMB. What you're not being told is 15 billion went upstream, north of 15 billion, from January 2006, through September, 2008. Every dollar this bank raised was taken by WMI. And that was the -- that was clearly inconsistent with their obligations and their representations.

Part of this is a turnover action, which turns on the question of is this a deposit. Is it a legitimate liability?

Well, part of our contention is it may be viewed as a capital contribution, and properly viewed as capital of the bank.

If it's not viewed as capital, Your Honor, 541(d) says a debtor is entitled to turnover, or a trustee, if, but only if, the alleged liability is not subject to setoff rights, an offset.

So, whether there are offsets and setoffs is going to be decided in here. Those offsets and setoffs are the same legal theories of our claims: Inadequate capitalization, fraudulent transfers that go upstream. And so you have the same legal issues raised here. And, of course, it's raised by the counterclaims that Your Honor just denied a motion to

dismiss.

Another argument is that the FDIC and the Creditors' Committee are adequate representatives of our interest.

Well, let me go back to the thing I said a moment ago, but try to underscore it. 24(a)(1), by its terms, says the following: "On timely motion," so, there is a requirement of timeliness, I concede that, and I'm going to come to it, "The court must permit anyone to intervene who: 1, is given an unconditional right to intervene by Federal Statute." The adequate representation is in two, "or claims and interest relating of the transaction that is so situated that disposing of the action may, as a practical matter, impair or impede, unless parties adequately represent that interest."

So, the adequate representation requirement is a requirement only for intervention under (a)(2), not under (a)(1).

In any event, I am not here to argue to Your Honor today, some day we may have disagreements, that the FDIC is not an adequate representative of the interest of WMB receiver, the qua receiver, and qua receivership estate, but they certainly are not an adequate representative of my client's direct claims against WMI. They don't purport to be standing in my shoes as a direct claimant against those entities.

I will also note on the adequacy, and I'll get to this, on (a)(2), the law in this Circuit is absolutely clear

that where you have a governmental body that is acting out of its regulatory purposes, that it is, indeed, not an adequate representative for parties who are acting out of what I will admit, like other creditors in this case, are pecuniary interest.

Two other arguments, and then I'll be done with (a)(1), and I'll move much more quickly. One is what Your Honor called the open the floodgates argument, a parade of horribles argument. Your Honor referred to it on the motion for relief from stay and say that it wasn't an adequate ground to deny. I think Your Honor was right then, I think you'd be right here.

Marin dealt with this issue. The argument was squarely put in front of Marin, and I won't read the whole passage. But Judge Adams said the argument is made to me that I'm going to be opening the floodgates, that every Tom, Dick, and Harry in every adversary is going to come in, but I don't believe that because surely in most cases, 99.9 percent of cases, individual creditors don't have interest that are disparate perhaps from the Creditors' Committee and that are sufficient in order of financial magnitude to warrant intervention. And I think history has proven -- the other thing Judge Adams said was in any event, I can't ignore the language of the statute for policy reasons, that's a judgment for Congress. But the court had it right in Marin.

I will say parenthetically Judge Adams also said, of course, permitting intervention does not mean that the court lacks the power to control its docket. And I concede that point.

If we are permitted to intervene, and a motion comes before you, for example a summary judgment motion, Your Honor may say it's within your discretion, I will hear from one lawyer supporting summary judgment for the debtors, and one lawyer not, and the parties on each side of the V need to get together and figure out how they're going to divide up time. There's no rule that says because there's multiple parties, and parties are going to intervene, that the normal seven-hour rule for depositions gets extended by the number of parties.

I do not dispute that Your Honor has ways to control your own docket. But what Marin says quite clearly is you can't deny intervention altogether.

I will note, by the way, and I want to get to this untimeliness in a moment, I think we try to take that to heart. If Your Honor looks at the piece of paper, and I hope Your Honor doesn't think we're presumptuous, because you hadn't granted our motion to intervene, but we felt that time was moving and so we filed a piece of paper with respect to summary judgment. It's, I think, three pages, it may be two and a half pages. It certainly is not going to -- we tried not to kill trees and repeat arguments that were made quite effectively by

others.

The final argument is that somehow you read 1109 out of the statute, you read Marin out of the statute where there's a countervailing federal interest against intervention. And on that, the only provision that is cited is the one that Ms. Friedman directed you to a moment ago, 1821(d)(2)(A) of the Federal Deposit Insurance Act. And it does say, Your Honor, that the FDIC succeeds to, and is the representative of, the interest of the bank. And it also says, as Ms. Friedman was pointing out, the shareholders of the bank.

What it doesn't say is, and obviously wouldn't say, is that the FDIC succeeds to the rights of creditors of the bank against third parties. These individuals purport to be creditors of the bank, they say they've got claims against the receivership, but they also say they have claims against JPMC, a third party.

And I am confident they do not believe that the FDIC speaks for them, nor does it speak for me or my clients with respect to our claims against third parties.

That leaves one, and only one issue, timeliness. Your Honor, I don't try to kill trees. We moved to intervene early in the DC litigation. We understood and read the papers here filed by the FDIC and JPMC for a stay. We thought to ourselves why file a motion to intervene here if it may all be mooted by the time it's fully briefed because maybe that motion

will be granted.

On June 24th, Your Honor announced in open court, although you didn't enter the order that day, that you would not be granting that motion. We filed our motion three weeks later on July 15th. The cases say you look at timeliness based on prejudice to the parties in the stage of the proceedings.

Your Honor, if what I'm about to say is wrong, I apologize. I haven't been in every hearing in this courtroom. But until today when you denied a 12(b)(6) motion to dismiss, I think it fair to say no substantive ruling had occurred in this case.

What had occurred was a procedural ruling. The litigation will proceed here. There has been no discovery. Indeed, my understanding is the first deposition is scheduled for later this week. Not one deposition.

The litigation is beginning. There will be nothing about our intervention that will delay consideration of summary judgment. We filed our short piece of paper.

And as the debtor acknowledges, we don't purport to expand or add any issues to this litigation. Indeed, when you think about judicial efficiency, which I think ties in with timeliness, it surely is judicially efficient. We heard about how there's all these claims that are going to have to be resolved before there's a distribution, they include my client's claims. Let's get all the issues in one proceeding

teed up now before this Court.

That deals with timeliness. On 24(a)(2), and 24(b), I'm going to be very brief, and this time I'm going to try to be true to my word. You don't need to reach either, if you rule our way, on 24(a)(1). As to 24(a)(2), I think I've dealt with adequacy of representation already. I think I've dealt with timeliness.

That leaves only is there an interest that we have that is legally protected and may, as a practical matter, it be impaired here?

Certainly we have a legal interest in having our claim allowed against these debtors. We're a plaintiff, that's the very interest that is the quintessential interest of a claim in a litigation. And, yes, as a practical matter, it can be impacted. Because if Your Honor, with us being excluded from the courtroom, determines that the people on my right are entirely right, and the people on my left are entirely wrong, I'll go before Your Honor and say, Your Honor, I wasn't in the courtroom when you made all those decisions, hear me out, give me a fair chance.

But my experience is that when judges have heard a dispute, and particularly where the parties on each side are as capable as they are -- represented by lawyers as capable as these lawyers, Your Honor would be rather unique, and I've have to be lot smarter and more persuasive than I am if I could

persuade you to change your mind.

So, having these issues decided without us absolutely affects us as a practical matter, or may affect us, which is the standard.

Under 24(b), it's permissive. The only standards are are the issues in common as I've described. They plainly are in common. Indeed, the debtor doesn't dispute the point.

Is it timely? Will there cause undue delay? No, there won't for the reasons I've articulated.

I do want to just close by saying one thing. I can appreciate, and it goes back to something I said earlier, why a judge would say, you know, this case has a lot of lawyers already, why do I want another in front of me. And I want to underscore in that regard, A, I understand that. And as I point to the proof is in the pudding, we filed a very short piece of paper on summary judgment.

And, two, I do not dispute -- I may come back to Your Honor, and we may have a discussion about how to proper -- you know, what's the best way to manage this litigation. But I do not at all suggest that Marin ties Your Honor's hands as to how you manage a docket.

Unless Your Honor has questions, I'll reserve my remaining remarks.

THE COURT: No. Thank you.

MR. KIRPALANI: Good afternoon, Your Honor. Susheel

Kirpalani from Quinn Emanuel on behalf of Washington Mutual, Inc.

Your Honor, I will be brief. Everyone says that, but I think you'll find I will be.

I think the issues are fairly straightforward. I've seen these issues in lots of cases, including the Revco (phonetic) Second Circuit case. There really is no question that this is a creditor of a creditor.

However, I do understand the Court may be reluctant to rely on that because they do have a proof of claim on file.

THE COURT: Right.

MR. KIRPALANI: And so for today's purposes, that may, in fact, be technically true.

However, although Mr. Anker talked about a couple of Third Circuit cases, he didn't talk about the third Third Circuit case, which is Amatex, and I think there's a good reason why he didn't. It's because Mr. Anker is actually Peter John Robinson. Peter John Robinson, in the Amatex case, Your Honor, was a futures claimant, a future claimant in asbestos court. And he, too, sought to intervene. And he, too, said he was a party in interest.

I agree with Mr. Anker that a creditors' committee in Marin Motor Oil, a creditors' committee in Phar-Mor doesn't mean that you read the word creditors' committee differently than you'd read the word creditor. Same is true with the word

party in interest.

The Third Circuit Court of Appeals, Your Honor, in the Amatex case clearly held that futures -- future claimants are parties in interest. May not be creditors, they kind of danced around that issue, but they are parties in interest. So, now we're in 1109.

So, what has the Third Circuit said about Section 1109? It's not quite as sweeping as Mr. Anker would like. In fact, if you look, Your Honor, at the Third Circuit's most recent pronouncement on that issue, it stated, quote, "We conclude that future claimants are sufficiently affected by the reorganization proceedings to require some voice in them. Moreover, none of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants. And, therefore, future claimants require their own spokesperson."

What the Third Circuit said, though, is there should be a futures claims representative to serve that function. In other words, there's no rigid application in Rule 24 on how 1109 is implemented and interpreted.

They may be a party in interest. Peter John Robinson was a party in interest, but the Third Circuit Court of Appeals says you're already going to be represented by the futures claims representative that the debtors will find, or the Bankruptcy Court will appoint. That is the FDIC here, Your

Honor. The FDIC is the futures claims representative that should be heard.

And I think, Your Honor, the key here is we really don't know who these bank bondholders are. Your Honor has not ruled on the 2019 issue that relates to the other committee that has appeared here, and the debtors did not take a position on that.

It's pretty clear, Your Honor, under Rule 2019, to the extent Your Honor does rule, that disclosure of the stake and the interest that these creditors do have is relevant or must be complied with.

Rule 2019(b) clearly says that the Court, on its own initiative, may preclude a party from intervening if they do not comply with the rule.

We know, Your Honor, from the 2019 statements that were filed, there are 33 entities purporting to hold $1.6 billion, and they come into Your Honor's courtroom and say the FDIC is not my representative, we've got $1.6 billion of bank bonds and, therefore, we're creditors here in the Chapter 11 case. And the Third Circuit's tying their hands, Your Honor.

Your Honor, this is Peter John Robinson. The FDIC is the adequate representative. And 1109 is not rigid the way that counsel for the bank bondholders, they unabashedly admit, that's their position, that they are bank bondholders, not WMI creditors, would have Your Honor believe.

But to the point of --

THE COURT: What about their point that the FDIC, a federal agency, cannot represent -- be an adequate representative of a party's pecuniary interest?

MR. KIRPALANI: But their pecuniary interest, Your Honor, is entirely derivative of the WMB estate. They have no privity or direct claim --

THE COURT: Well, they --

MR. KIRPALANI: -- against the WMI estate.

THE COURT: That's incorrect. According to their proof of claim, they say they do.

MR. KIRPALANI: Well, Your Honor, if you look at the motion that they filed that we're here arguing --

THE COURT: And they say the same thing. That they have direct claims against the debtors. These are not simply derivative.

MR. KIRPALANI: Well, Your Honor, I'm looking at Page 3 of their motion. What it states is, "Accordingly, the bank bondholders and other holders of senior notes," so they're purporting to act as a representative of a whole bunch of people we don't know, "must look to the WMB receivership estate or third parties, such as the debtors, for payment of their undisputed substantial debt."

And what they say on Page 4 is in their pre-proofs of claim, "The bank bondholders assert, among other claims, a

claim against the debtors relating to funds that the debtors claim to be deposits owed to them asserting, among other things, that the receivership estate and its creditors, including the bank bondholders, have rights of offset against any liability on the putative deposits."

This is a bit of mincing of words, Your Honor. But I think the substance of what they're stating is that they are claiming exactly what the receivership estate is supposed to be getting. And that because the receivership estate did not get sufficient funds, they're looking for more money to be relayed into the receivership estate. That's exactly what they're claiming. That's exactly what they're here trying to do, Your Honor.

On Page 13 of their motion, Your Honor, they stated, "Disposition of the turnover action may impact the bank bondholders' recovery from the WMB receivership estate."

And the next quote, "Any order mandating that JPMC turn over the deposits may eliminate the receivership estate's ability to request their return, thereby reducing the potential assets of the receivership estate, and the recovery of the bondholders' claim in the receivership estate."

They are seeking to intervene, Your Honor, in our turnover action.

So, to the extent they seek to intervene on our turnover action, Your Honor, they absolutely are claiming

through the receivership. They do not agree that our position is it's our money, give us our ATM card, let's withdraw the $4 billion. They don't agree with that.

They're saying, no, it's WMB's estate's monies and, therefore, we can be enriched if you'd just let the WMB estate have it.

And to that extent, Your Honor, they are stuck with the FDIC.

And what I'm trying to tell the Court, Your Honor, is that their broad reading of Marin Motor Oil is not so broad in light of Amatex. That's what I'm trying to communicate, Your Honor.

And Amatex acknowledged there is a party in interest under the Third Circuit's holding that was John Peter Robinson or Peter John Robinson who yet did not have the right to intervene in the Third Circuit's eyes, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: If Your Honor has any other questions, I said I would be brief.

THE COURT: No.

MR. KIRPALANI: Thank you.

THE COURT: Thank you.

MR. CLARKE: Good afternoon, Your Honor. My name is John Clarke on behalf of the FDIC receiver.

I'm sure this may be the only time in these cases

that Mr. Kirpalani and I agree, but --

(Laughter)

MR. CLARKE: -- but we do. And the reason that we put in an objection here is because the bondholders' basis for intervention is entirely derivative of their losses on WMB bonds, which are a claim against the FDIC receivership and their -- that interest is represented here by the FDIC receiver.

THE COURT: Well, the -- it may be -- is the claim, in fact, derivative? Or is just the amount they're seeking a function --

MR. CLARKE: They have a theory that's a direct theory.

THE COURT: Right.

MR. CLARKE: And I'm not disputing that.

THE COURT: Are you representing them in that direct theory?

MR. CLARKE: No, we're not.

THE COURT: Are you representing them in the derivative theory?

MR. CLARKE: Yes. We're representing the receivership, and in that respect, we're representing these creditors of the receivership, as well as the other creditors of the receivership.

THE COURT: Okay.

MR. CLARKE: Your Honor, I wanted to just -- I know you've heard a lot of argument on a lot of different motions today. I wanted to just make a couple of supplemental points, and I promise to, like everybody else, to be brief.

First of all, I agree with Mr. Kirpalani. This motion really needs to be evaluated under Rule 24 (a)(2), not under Rule 24 (a)(1).

I invite the Court to look at Judge Becker's opinion in Phar-Mor which the bank bondholders rely on in support of their argument that they're entitled as of right to intervene in an adversary proceeding. That case was about a creditors' committee, just like Marin was about a creditors' committee.

Judge Becker came as close as an appellate judge can come to saying my Circuit got it wrong in a prior decision, but I'm bound by it.

THE COURT: But, yes, they --

MR. CLARKE: -- so I have to follow it for a creditors' committee.

Your Honor, I urge you to look at those cases. I believe that those cases should be limited to their facts, which involve a creditors' committee, and that this intervention motion needs to be evaluated under 24 (a)(2).

I also don't think that the bondholders' view of 1109, whether it's supported by Marin and Phar-Mor or not, can explain why the judicial conference included Bankruptcy Rule

7024 in the bankruptcy rules.

Section 1109 says that any -- bear with me for one second. Any debtor, any trustee, any creditors' committee, any equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may be heard on any issue in the case.

THE COURT: But there are clearly parties who may seek to intervene under Rule 24 that are not in that category.

MR. CLARKE: It -- it seems to cover almost everybody to me, Your Honor. It covers creditors, equity security holders, indenture trustees, committees, debtors, trustees, who is left?

If everybody has a right to intervene as of right by virtue of --

THE COURT: That's not everybody --

MR. CLARKE: -- Section 1109 in an adversary proceeding, why have Rule 7024?

THE COURT: How about directors and officers who may --

MR. CLARKE: They may be creditors. They're a party in interest.

THE COURT: They may not. They may not. I can conceive of many third parties who don't fit into that category who may have a right to intervene, or may seek to intervene, at least under 24 (a)(2).

MR. CLARKE: Okay. It would -- just seemed like an anomaly from Marin to me, Your Honor. I think Judge Becker, in the Third Circuit, described the problems with Marin as well as anybody can. It's right in the decision.

Mr. Anker now agrees that we're an adequate representative, at least for the moment. He reserves the right to change his mind later, and I don't -- you know, that's fine, he can.

THE COURT: I don't think he did admit you were an adequate representative.

MR. CLARKE: He was willing to agree today that we are an adequate representative but he was saying --

THE COURT: He says --

MR. CLARKE: -- it doesn't matter because it's only relevant if (a)(2) applies.

THE COURT: Well, he said assuming that you were.

MR. CLARKE: Okay. That's fine. I didn't mean to misstate his position.

Then let me address the two bases that he has -- the bondholders have raised in their papers for opposing the FDIC receiver as allegedly inadequate representative of them:

One is that the FDIC receiver doesn't have a pecuniary interest in this case. Well, the FDIC receiver does have a pecuniary interest in this case because it's charged by statute in Section 1821(d)(13)(E) to maximize the recovery for

creditors of the receivership basically. I don't think it's necessary to work through the specific language of that section.

So, that is the -- that's the function of the -- one of the functions of the FDIC receiver.

And Mr. Anker's analogy of the FDIC to cases that involve police power functions like might be exercised by the SEC or the Department of Justice or Environmental Protection Agency misses the distinction between the FDIC receiver in its capacity as receiver, and the FDIC in its other capacities as regulator or in its corporate capacity.

The FDIC receiver is charged with taking over the estate of a failed bank and operating it for the benefit of the creditors of the failed bank, trying to seek recovery, selling assets, doing all the things that are set forth in the statute in 1821(d). And one of those things, we're named as a party here. Mr. Anker's clients are creditors of that receivership. We believe we're adequate representatives. And just as a practical matter, I would note that one of the reasons that we oppose the intervention here is illustrated by one of the examples that Mr. Anker gave in support of his argument. He said, well, one of the things Your Honor could do if there are too many parties is limit the parties. Say one side puts in their opposition to summary judgment, the other side has one brief in support of summary judgment. Well, maybe the FDIC

receiver wants the ability as a party in this case to file its own brief.

But by virtue of having the receivership creditors participating individually, it's going to create a situation where the Court has to issue those kinds of limiting orders. So, the FDIC receiver objects to the bondholders' motion to intervene, Your Honor.

Thank you.

THE COURT: Thank you.

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

THE COURT: Yes.

MR. LAURIA: Tom Lauria for the WMI bondholders.

Your Honor, we support denial of the motion to intervene. And we have been content not to seek to participate directly in the adversaries.

However, I don't know that that will continue to be the case if the Court disagrees and grants the bank bondholder intervention. It may be that WMI noteholders will also feel the need then to become direct participants in these adversary proceedings. And if based on the broad interpretation of 1109 as urged by counsel for the bank bondholders, presumably that would permit that participation.

This is not a result that we endorse or support, but I just wanted the Court to be aware that, you know, dynamics inevitably will change and be affected.

THE COURT: Understood.

MR. LAURIA: Thank you.

MR. ANKER: I will really try to be brief. Let me start, because it's then easy with the point Mr. Clarke made, which is really an argument against Marin. That you can't read 1109(b) to give an unconditional right to intervene under 24(a)(1) because that would render the rules a nullity.

The Second Circuit in the Caldor case was faced with that exact argument. And at Pages 171 to 172, it said the following. I think Your Honor -- I don't know if Your Honor had read it, but it certainly parrots Your Honor's words. Quote, "The joint liquidators," they are defendants, "assert that a broad interpretation of Section 1109(b) would render Federal Rule of Bankruptcy Procedure 7024 a nullity. They suggest that reading 1109(b) to confer an unconditional right to intervene within the meaning of FRCP 24(a)(1) would make FRCP 24(a)(2) and (b)(1) and (b)(2) superfluous in adversary proceedings.

"This argument is flawed for the simple reason that Section 1109(b), by its expressed terms, pertains only to parties in interest. Other entities seeking intervention in an adversary proceeding may well find it necessary to enter those proceedings by way of FRCP 24(a)(2), (b)(1) or (b)(2)."

As for Amatex, Your Honor, actually there's a more simple reason why I didn't address it in my remarks. It was

never cited by the debtor in their papers. And, therefore, I didn't -- if you -- I just looked again at the table of contents, it's never cited. If it were such a seminal and critical case for this issue, I would have thought it would have.

As I recall Amatex and, Your Honor, I am handicap because it was not cited in the papers:

First, it dealt with a future claims representative who, by definition, represents holders of demands, not claims. And, therefore, is not a creditor.

Second, it was not a 24(a)(1) intervention case.

And, third, and I guess this brings me to a point that matters, on both Mr. Clarke's and Mr. Kirpalani's argument, the FCA -- future claims representative most assuredly is a fiduciary for future demand holders who only have claims that will rise in the future. Here you have an FDIC where I think Mr. Clarke was very candid, and I appreciate his candor, said I do not represent the bank bondholders with respect to their direct claims. And so that there is no confusion, we most assuredly assert direct claims.

If you look at our proof of claim, and you look at the very beginning of the proof of claim, we say in Paragraph 2, "Because the bank bondholders have suffered direct injury, the bank bondholders have standing to bring the bank bondholder claims."

Mr. Kirpalani says, but they're not really seeking to try to intervene on their direct claims. We most assuredly are. The point is our direct claims start from theories. Theories of why there should be direct liability that go to the utter mismanagement and breach of duties owed that are fundamentally also at issue in this adversary proceeding. And so you have exactly the circumstance that the Third Circuit and the District Court here have said give rise to an interest that matters, even if you analyze the issue under 24 (a)(2).

Finally, Your Honor, on the adequacy of representation. And I don't want to spend much time on this because I think as to the direct claims, it could not be more clear. I think Mr. Clarke was telling. The Third Circuit in the Kleissler, K-L-E-I-S-S-L-E-R v. United States Forest Service case said, and I quote, "When an agency's views are necessarily colored by its views of the public welfare, rather than more parochial views of a proposed intervener whose interest is personal to it, the burden is comparatively light."

One last point, Your Honor, on the 2019, I appreciate that Your Honor's going to issue -- we have filed 2019 statements. They do not provide the date of acquisition of bonds and the dollar amount paid. I appreciate Your Honor is going to issue a decision. And if that decision issues affects us, we will comply with the order or, as Mr. Kirpalani said, there may be consequences, including, at that point, revisiting

intervention.

But I understand Your Honor's going to reach a decision. But it's not here yet, and it's not a reason at this point to fail to apply what I think is the quite clear law of this Circuit.

For all those reasons, Your Honor, I would urge the Court to grant the motion.

I also will say it is, at the end of the day, the only fair thing. Your Honor -- given Your Honor's views on the fundamental question here of the jurisdictional bar, the -- you don't hear Mr. Kirpalani disputing this. The theories that underlie my client's proofs of claim are going to be litigated in this adversary. And to have that litigation proceed in front of the very same judge who ultimately is going to decide the validity of those claims. Nearly two billion in claims without having us in the courtroom is fundamentally unfair.

Finally just one last point, and this is why I think case management issues should be taken up at the appropriate time. I was not suggesting that Mr. Clarke and I have to file a joint brief.

I was simply suggesting that when it comes to argument, if Your Honor doesn't in a future argument on summary judgment to be still on the bench, and we appreciate all the time and care you've paid -- spent today. Three and a half hours after a hearing, you can say you need to divide up

argument. And, frankly, Your Honor, you can also say if the parties don't reach agreement, I want to hear from the following parties because they are, in my view, the central figures on this dispute.

THE COURT: Okay.

MR. ANKER: Thank you, Your Honor.

THE COURT: Thank you.

MR. KIRPALANI: Your Honor?

THE COURT: Yes?

MR. KIRPALANI: Can I just clarify the record, please?

THE COURT: Yes.

MR. KIRPALANI: Okay. On Page Romanette 2 of the table of authorities on the debtors' opposition clearly listed In Re: Amatex, 755 F. 2d 1034, it's cited to on three pages in our brief, Pages 5, 8, and 12.

Thank you, Your Honor.

MR. ANKER: If I misrepresented, Your Honor, I apologize. I must say, I did look, and I didn't see it.

MR. KIRPALANI: It's the third page, Phil.

MR. ANKER: My apologies, Your Honor.

THE COURT: All right. All right. Well, let me issue my ruling.

I think that I will grant the motion. I think there is an absolute right to intervene. I think that the fact that

the bondholders have filed a proof of claim asserting direct action claims against the debtors means they're a creditor. The claim may be disputed, but it is a claim nonetheless. 1109 gives them the right to appear and be heard on any matter in the case.

The Third Circuit has held that that includes adversaries.

I think the Amatex -- excuse me. I think the Marin and the Phar-Mor cases, although Phar-Mor criticized Marin, it did not reverse that holding. I think they both stand for the proposition that there is an absolute right to intervene. I don't think either limited it specifically to creditors' committee, and I don't know how they could given the plain language of the statute, which says creditors' committee and creditor have rights to intervene.

As I understand the Amatex holding, it was a reversal of a decision -- a reversal on remand to the Bankruptcy Court directing the Bankruptcy Court to appoint a legal representative for future claimants and to reconsider the motion to intervene to see if continued intervention was a matter of right.

I think that future claimants are in a different position from creditors because by their very nature, they do not currently hold a claim against the estate. And so that may be a reason that the Third Circuit was not prepared to direct

or conclude that Robinson had an absolute right to intervene. It might have been viewing it under 24(a)(2) rather than (a)(1).

But I think (a)(1) is clear, as is 1109. And I think that I'll grant the motion.

MR. ANKER: Your Honor, we attached a very plain vanilla order of the motion. We can resubmit it. It just said the motion is granted.

THE COURT: All right. Why don't you resubmit it under certification of counsel?

MR. ANKER: I will, Your Honor. Thank you.

MR. ROSEN: Your Honor, I think the only item remaining then on the agenda are interim fee applications from various parties.

THE COURT: All right. Let's go ahead then.

MR. ROSEN: Your Honor, I believe there are a total of 16 applicants who may have filed, if I got that right. Yes, 16 different professional groups that filed applications.

To my understanding, there are certificates of no objection with respect to the monthlies that have been filed. And so, therefore, Your Honor, and I don't know of any objections that were interposed to the actual notices for the interim fee applications. So, it would leave it then to the Court if the Court has any questions with respect to the respective --

THE COURT: Well, let's take five minutes so I can find my notes.

MR. ROSEN: Okay.

THE COURT: All right?

(Recess 3:10 P.M./Reconvene 3:30 P.M.)

THE COURT: All right. I'm going to do this on your fees, I'm going to let you guys all go. But one of them -- was it Akin Gump who had redacted --

MR. ROSEN: I'm sorry, which one, Your Honor?

THE COURT: Akin Gump, is it, that has redacted their fees?

MR. GURFEIN: I'm not aware of what you're referring to, Your Honor. Peter Gurfein for the Committee.

THE COURT: I pulled my notes and left them back there. Whichever law firm redacted their fee applications, I need the full fee application. This is the second time, I think.

MR. GURFEIN: We've redacted legal issues. Is that what you're referring to, Your Honor?

THE COURT: Yes.

MR. GURFEIN: I understand.

THE COURT: Yes.

MR. GURFEIN: We'll provide that promptly.

THE COURT: Submit your fee application again exactly as an entire fee application so I can read it in context.

MR. GURFEIN: Strictly for the Court's eyes.

THE COURT: Strictly for the Court.

MR. GURFEIN: Yes, Your Honor.

THE COURT: Yes. But otherwise, I'm going to allow the fees on an interim basis. But deal with any issues at the final hearing. How's that?

MR. ROSEN: Thank you, Your Honor.

THE COURT: If the intent was to wear me out, it worked.

(Laughter)

MR. ROSEN: I didn't even have one on today, Your Honor. So, I wish I had taken advantage of that.

THE COURT: Okay.

MR. STRATTON: Now we know how to deal with fees in this court.

(Laughter)

THE COURT: Exactly.

MR. STRATTON: Your Honor, I think I understand that what you want is the Akin Gump fee, unredacted fee applications, the monthlies delivered to chambers.

THE COURT: Well, the whole quarterly.

MR. STRATTON: Well, the quarterly is just a summary of the monthly.

THE COURT: Well, I want the summary, too --

MR. STRATTON: Okay.

THE COURT: -- is what I'm saying.

MR. STRATTON: We'll get you the whole package, but without the redaction.

THE COURT: Redaction, exactly. And deliver it directly to chambers. It will be returned to counsel.

MR. STRATTON: Thank you, Your Honor.

MR. GURFEIN: Thank you.

MR. CARLINSKY: May I present a form of order, Your Honor?

THE COURT: You may. Thank you. All right. And I think we're finally adjourned.

(Whereupon, at 3:32 P.M., the hearing was adjourned.)

CERTIFICATE

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

/s/ Karen Hartmann AAERT CET**D0475 Date: August 26, 2009

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UNITED STATES BANKRUPTCY COURT
District of Delaware

In Re:
Washington Mutual, Inc.
1301 Second Avenue
Seattle, WA 98101
EIN: 91−1653725

Chapter: 11

Case No.: 08−12229−MFW

NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION

A transcript of the proceeding held on 8/24/2009 was filed on 8/27/2009 . The following deadlines apply:

The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 9/16/2009 .

If a request for redaction is filed, the redacted transcript is due 9/28/2009 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 11/24/2009 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.

Clerk of Court

Date: 8/27/09

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