

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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1 THE COURT: Good morning.

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

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

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

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

15 THE COURT: I did.

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

21 THE COURT: Thank you.

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

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

1 Thank you.

2 THE COURT: All right.

3 MR. TUSA: Good morning, Your Honor.

4 THE COURT: Good morning.

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

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

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

16 THE COURT: Um-hum.

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

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

1 allow the stay.

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

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

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

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

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

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

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

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

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

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

1 litigation, SCO, and they were rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 it in front of Judge Spatt.

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

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

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

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

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

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

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

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

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

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

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

1 case.

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

5 THE COURT: No, thank you.

6 MR. TUSA: Thank you.

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

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

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

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

21 THE COURT: Okay.

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

1 automatic stay again.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 agreement. It had nothing to do with litigation.

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. ROSEN: Correct.

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

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

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

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

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

10 THE COURT: I don't.

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

19 Thank you, Your Honor.

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

21 THE COURT: Let me hear from others first.

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

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

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

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

6 THE COURT: Thank you. Anybody else?

7 (No audible response heard)

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

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

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

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

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

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

1 do with the Class Action Fairness Act jurisdictional limits.

2 THE COURT: Okay.

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

16 Thank you, Your Honor.

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

1 from the stay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: It will.

5 MR. ROSEN: -- to that point.

6 THE COURT: Understood.

7 MR. ROSEN: Thank you.

8 THE COURT: All right.

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

11 THE COURT: Okay.

12 (Pause)

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

19 THE COURT: That's fine.

20 (Pause)

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

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

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

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

8 THE COURT: All right.

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

11 THE COURT: Okay.

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

14 THE COURT: Yes.

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

23 THE COURT: Okay.

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

1 Honor:

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

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

11 THE COURT: Which ones are you talking about?

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

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

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

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

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

1 THE COURT: Okay.

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

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

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

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

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

20 MR. ROSEN: Okay. With --

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

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

1 the retention agreements, change in control --

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

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

5 THE COURT: -- a full day today.

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

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

13 THE COURT: Okay.

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

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

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

25 In his response to the objection, Your Honor,

1 claimant simply states that the debtors, quote, "may bear
2 liability to the claimant."

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

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

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

12 (No audible response heard)

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

14 MR. ROSEN: Thank you, Your Honor.

15 THE COURT: Despite his response.

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

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

22 THE COURT: Okay.

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

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

4 THE COURT: Yes.

5 (Pause)

6 THE COURT: Thank you.

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

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

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

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

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

1 Mutual, Inc.

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

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

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

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

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

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

3 The last sentence of the first paragraph of the
4 contract defines who the parties are to the contract. And that
5 last sentence reads, "Each of WaMu and MSG may be individually
6 referred to as a party and collectively are referred to as the
7 parties."

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

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

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

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

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

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

8 (Interruption by telephonic participants)

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

11 I'm sorry for that interruption.

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

14 THE COURT: Is the operator on the phone?

15 OPERATOR: Yes, Your Honor.

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

18 OPERATOR: Yes.

19 THE COURT: Mute their line. Thank you.

20 Go ahead.

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

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

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

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

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

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

20 THE COURT: Right.

21 MR. KORNFELD: -- includes both entities.

22 THE COURT: Okay.

23 MR. KORNFELD: So --

24 THE COURT: What was the theater named?

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

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

3 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

23 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 collectively are referred to as the parties."

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

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

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

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

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

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

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

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

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

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

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

1 agreement.

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

8 Thank you.

9 THE COURT: Any reply?

10 MR. KORNFELD: Yes, Your Honor.

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

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

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

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

1 paragraph of the contract.

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

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

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

15 Thank you, Your Honor.

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

18 THE COURT: Sure.

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

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

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

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

6 We don't disagree that Washington Mutual Bank
7 received significant benefits from that agreement. We also
8 don't disagree that Madison Square Garden got paid significant
9 dollars under that contract.

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

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

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

21 THE COURT: 10 days.

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

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

25 MR. ROSEN: Thank you.

1 (Pause)

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

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

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

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

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

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

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

1 expunged. Excuse me, expunged.

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

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

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

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

15 MR. ROSEN: Thank you, Your Honor.

16 THE COURT: That omnibus objection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: And how many days was given?

14 MR. ROSEN: Your Honor, I think it was in excess of
15 60 days for the bar date.

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

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

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

21 THE COURT: Let's do that.

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

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

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

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

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

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

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

12 THE COURT: Yes.

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

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

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

20 THE COURT: Okay.

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

24 THE COURT: All right. Thank you.

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

1 from Sullivan and Cromwell on behalf of JPMorgan Chase.

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

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

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

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

1 negotiation and advocating their positions.

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

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

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

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

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

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

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

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

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

4 If Your Honor -- it's Exhibit --

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

7 MR. SACHS: Oh.

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

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

14 THE COURT: Um-hum.

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

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

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

1 And second, even if they are a Committee, that
2 there's a variety of arguments that go to what they claim to be
3 the discretion of the Court to not require compliance with Rule
4 2019, that it would be burdensome to produce this information,
5 that it's sensitive information, that it would disadvantage
6 them in their trading activities, that the price they paid for
7 their securities has nothing to do with their ultimate right to
8 collect as a creditor in this estate if there's ultimately a
9 distribution which, of course, misses the issue because part of
10 the question is whether they are, indeed, acting as a creditor
11 in that capacity or whether they are short-term people who are
12 utilizing the Court for purposes of buying and selling
13 securities rather than acting in the interest of the long-term
14 creditors who are looking for a distribution of the estate at
15 the end of the day, one of the issues. And they impute bad
16 motives to JPM Chase in seeking to have this information
17 disclosed.

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

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

25 In their own submission, they've indicated that

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

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

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

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

25 I've indicated why this information is relevant.

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

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

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

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

1 ask Your Honor to accept.

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

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

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

22 This is -- asks for disclosure of historical purchase
23 and sale information. It's much of the type the SEC would
24 require a five percent shareholder to disclose under Rule
25 13(d). There's nothing unique or proprietary or particularly

1 troubling about it.

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

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

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

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

6 But, Your Honor, 2019 does not say any such thing.
7 The rule, as indicated as in 2019(a), and that's mandatory.
8 2019(b) is simply a provision that grants authority to the
9 court as to what type of relief it can order for a failure to
10 comply with 2019(a).

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

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

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

25 So, for all those reasons, Your Honor, we

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

4 Thank you.

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

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

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

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

12 THE COURT: U.S. Trustee?

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

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

18 THE COURT: Thank you. Mr. Lauria?

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

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

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

1 Number two, the plain language of Bankruptcy Rule
2 2019 requires disclosure.

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

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

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

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

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

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

25 Cursory review of what happens in bankruptcy cases

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

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

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

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

22 THE COURT: Okay.

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

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

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

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

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

23 Parties are presumed --

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

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

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

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

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

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

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

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

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

21 THE COURT: Entity.

22 MR. LAURIA: An entity

23 THE COURT: It says an entity.

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

1 entity.

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

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

7 THE COURT: Okay.

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

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

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

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

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

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

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

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

15 MR. LAURIA: Your Honor, a rule --

16 THE COURT: Not the plain language?

17 MR. LAURIA: A rule is -- has been promulgated -- the
18 rules have been promulgated to facilitate the application of a
19 code. They are not a congressional act entitled to the benefit
20 of any interpretative rule cited by JPM. And in that regard,
21 2019 should not be interpreted in a fashion that is at odds
22 with the Code, as would be the case if applied as requested.

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

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

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

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

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

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

24 There is simply no basis --

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

1 into court and articulated a position.

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

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

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

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

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

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

7 THE COURT: Well --

8 MR. LAURIA: Simply --

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

15 MR. LAURIA: Your Honor, those pleadings took
16 positions that all of the members agreed with. And there were
17 people who dropped in and out of this committee because of that
18 from time-to-time. Okay? It is not -- the sine qua non, as
19 was made clear in the history to 2019's predecessor, Rule 10-
20 211, is the ability to bind someone. This group has no ability
21 to bind anyone.

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

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

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

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

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

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

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

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

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

1 associated with that claim in a bankruptcy case.

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

10 THE COURT: Where --

11 MR. LAURIA: -- and to require --

12 THE COURT: Where --

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

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

16 MR. LAURIA: Well --

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

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

21 THE COURT: Um-hum.

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

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

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

1 we've cited to this Court is contra.

2 THE COURT: Was that a written opinion?

3 MR. LAURIA: No, Your Honor.

4 THE COURT: Okay.

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

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

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

1 Second, unlike --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: Is it?

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

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

17 (Laughter)

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

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

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

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

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

12 MR. LAURIA: Well, Your Honor, as we've said, we
13 don't think you can get there with Northwest because of the
14 material differences between this case and Northwest. And we
15 think the history of the rule, going back to former Rule 10-
16 211, which was directed at protective committees, regardless of
17 whether they included insiders, and they often did, but
18 regardless of whether they included insiders, they had the
19 ability to bind people. People who were part of the group, and
20 people who were outside the group. And the concern was that if
21 someone can bind another party, then the party who could be
22 bound has the right to know what's motivating the party with
23 that power. That is a committee who represents. That's a
24 direct translation from the former rule to the present rule.
25 And to hold otherwise creates an impractical inefficient

1 result, as I've already described.

2 THE COURT: All right.

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

9 THE COURT: Okay.

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

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

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

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

1 creditors.

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

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

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

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

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

1 cases, I think, were in error.

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

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

25 Similarly, we know where the debtor comes from. We

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

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

24 Thank you very much.

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

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

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

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

7 THE COURT: I don't. Thank you.

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

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

16 THE COURT: That's fine.

17 MR. ROSEN: Thank you, Your Honor.

18 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

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

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

21 MR. ROSEN: As I'm stepping up, Your Honor, I think
22 we're up to Number 13 on the agenda, which is JPMorgan's motion
23 to dismiss the debtors' counterclaims in Adversary Proceeding
24 09-50551.

25 THE COURT: Okay.

1 MR. ROSEN: Ms. Friedman is handling that.

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

4 The motion to dismiss --

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

6 (Laughter)

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

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

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

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

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

1 receivership to JPMorgan Chase and pull it back in.

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

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

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

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

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

23 THE COURT: Okay.

24 MS. FRIEDMAN: -- to go through --

25 THE COURT: You can have a little bit more.

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

6 THE COURT: Okay.

7 MS. FRIEDMAN: The jurisdictional bar we've all been
8 focused on -- and there's two points to this argument, Your
9 Honor: the jurisdictional bar and the exclusive claims process
10 set out in FIRREA. But the jurisdictional bar appears on Page
11 1,008, it's over on the left-hand column, we're all familiar
12 with it, I won't read the whole thing, and it appears under
13 Subsection D, it has two romanettes.

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

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

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

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

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

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

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

22 THE COURT: Okay.

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

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

4 There's preferential transfers, same thing.

5 Asset of WMB. We want to claw it back.

6 Counterclaim 10.

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

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

18 It's the same for Romanette 2, Your Honor. Romanette
19 2, we're all familiar with. This has to do with any claim
20 relating to an act of the receiver. Relating to is broad. And
21 I think it's deliberately broad. And, you know, there's
22 Supreme Court cases, including the Morales case that talks
23 about it as anything in relation to, bearing, concern,
24 pertaining, referring to, anything in association with. How
25 can you have a fraudulent transfer claim where it's the FDIC

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

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

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

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

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

4 THE COURT: Well, courts have said that.

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

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

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

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

1 DC here, it sent the claims against Chase, as well. It did so
2 without reaching or deciding, or in analyzing whether Romanette
3 1 should have those seven words imputed into it, that it gets
4 vitiated when there's a sale of assets without putting those
5 seven words into Romanette 2 that don't exist there. It
6 reached that decision without even considering it.

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

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

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

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

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

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

25 There is no recovery that's really available to the

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

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

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

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

20 THE COURT: Okay.

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

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

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

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

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

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

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

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

25 MS. FRIEDMAN: The claims against the FDIC in the

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

7 THE COURT: Claims against the FDIC.

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

11 THE COURT: A creditor of the FDIC.

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

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

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

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

8 THE COURT: All right. Thank you.

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

14 (Laughter)

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

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

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

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

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

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

1 specifically the holding of Rosa.

2 Thank you, Your Honor.

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

5 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

15 To the extent there is a jurisdictional bar under
16 FIRREA, it is clearly defined under 1821(d)(13)(D). The Court
17 has examined it. Ms. Friedman said there hadn't been full
18 briefing on it. I -- having spent way too much time drafting
19 those briefs, Your Honor, it surprised me to hear that. There
20 were hundreds of pages of briefing addressed for that very
21 issue in advance of the June hearing. It was resolved that
22 1821(d)(13)(D) is not applicable here without a provision that
23 grants them a jurisdictional bar, there was nowhere else to
24 turn in FIRREA. And we are entitled to pursue our claims, Your
25 Honor, under state law, under the Bankruptcy Code, just as we

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

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

5 THE COURT: Thank you.

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

18 THE COURT: Well, let me say this. I think law of
19 the case does preclude this. I have already decided this
20 issue. I haven't heard anything new with respect to
21 1821(d)(13)(D) or case law construing it to convince me that my
22 decision was wrong. There are no new facts, no new law. And I
23 think that actions against parties other than the FDIC, and
24 specifically JPMC are not barred by FIRREA, and specifically
25 all of the counterclaims brought by the debtor.

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

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

5 THE COURT: Okay.

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

10 THE COURT: Okay.

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

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

17 THE COURT: Okay.

18 MR. SEIDL: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

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

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

1 THE COURT: Okay.

2 MR. SEIDL: Thank you, Your Honor.

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

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

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

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

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

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

7 24(a)(1) provides that where a party has an absolute
8 right to intervene by statute, it must be allowed to intervene.
9 And the Third Circuit in the Marin case, a case that I will
10 acknowledge, Your Honor, has received some criticism in other
11 circuits. It has been rejected in the Fifth Circuit. It has
12 been in dicta questioned in other circuits. It's been
13 expressly endorsed, however, in the Second Circuit.

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

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

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

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

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

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

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

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

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

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

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

10 (Laughter)

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

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

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

1 because it's part of Chapter 11 of the Bankruptcy Code. 1126.
2 1126 says the holder of a claim or interest allowed under
3 Section 502 of this title may accept or reject a plan. Those
4 words "allowed," not subject to bona fide dispute, nowhere
5 appear. And I would say for good reason. The good reason is
6 adversaries matter. And adversaries often involve rights and
7 affect parties whose claims are disputed.

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

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

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

1 absolutely no distinction.

2 And I will point, Your Honor, we did not cite this in
3 our papers, but if you look at the Second Circuit's decision
4 endorsing Marin, that's Caldor Corporation, reported at 303 F.
5 3d 161, that was a case about a creditor. It was about a term
6 loan holder committee, not an official committee, which is
7 described in the opinion as representing the holders of a term
8 loan under a particular credit agreement. So, it was term
9 lenders. And the Second Circuit said the Third Circuit got it
10 right in Marin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 dismiss.

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

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

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

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

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

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

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

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

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

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

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

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

1 others.

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

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

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

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

1 will be granted.

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

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

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

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

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

1 teed up now before this Court.

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

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

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

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

1 persuade you to change your mind.

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

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

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

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

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

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

24 THE COURT: No. Thank you.

25 MR. KIRPALANI: Good afternoon, Your Honor. Susheel

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

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

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

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

11 THE COURT: Right.

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

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

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

1 party in interest.

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

7 So, what has the Third Circuit said about Section
8 1109? It's not quite as sweeping as Mr. Anker would like. In
9 fact, if you look, Your Honor, at the Third Circuit's most
10 recent pronouncement on that issue, it stated, quote, "We
11 conclude that future claimants are sufficiently affected by the
12 reorganization proceedings to require some voice in them.
13 Moreover, none of the parties currently involved in the
14 reorganization proceedings have interests similar to those of
15 future claimants. And, therefore, future claimants require
16 their own spokesperson."

17 What the Third Circuit said, though, is there should
18 be a futures claims representative to serve that function. In
19 other words, there's no rigid application in Rule 24 on how
20 1109 is implemented and interpreted.

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

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

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

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

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

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

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

1 But to the point of --

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

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

8 THE COURT: Well, they --

9 MR. KIRPALANI: -- against the WMI estate.

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

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

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

17 MR. KIRPALANI: Well, Your Honor, I'm looking at Page
18 3 of their motion. What it states is, "Accordingly, the bank
19 bondholders and other holders of senior notes," so they're
20 purporting to act as a representative of a whole bunch of
21 people we don't know, "must look to the WMB receivership estate
22 or third parties, such as the debtors, for payment of their
23 undisputed substantial debt."

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

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

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

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

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

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

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

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

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

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

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

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

17 THE COURT: Okay.

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

20 THE COURT: No.

21 MR. KIRPALANI: Thank you.

22 THE COURT: Thank you.

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

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

1 that Mr. Kirpalani and I agree, but --

2 (Laughter)

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

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

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

14 THE COURT: Right.

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

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

18 MR. CLARKE: No, we're not.

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

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

25 THE COURT: Okay.

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

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

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

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

16 THE COURT: But, yes, they --

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

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

23 I also don't think that the bondholders' view of
24 1109, whether it's supported by Marin and Phar-Mor or not, can
25 explain why the judicial conference included Bankruptcy Rule

1 7024 in the bankruptcy rules.

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

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

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

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

15 THE COURT: That's not everybody --

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

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

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

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

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

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

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

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

13 THE COURT: He says --

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

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

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

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

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

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

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

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

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

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

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

8 Thank you.

9 THE COURT: Thank you.

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

11 THE COURT: Yes.

12 MR. LAURIA: Tom Lauria for the WMI bondholders.

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

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

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

1 THE COURT: Understood.

2 MR. LAURIA: Thank you.

3 MR. ANKER: I will really try to be brief. Let me
4 start, because it's then easy with the point Mr. Clarke made,
5 which is really an argument against Marin. That you can't read
6 1109(b) to give an unconditional right to intervene under
7 24(a)(1) because that would render the rules a nullity.

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

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

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

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

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

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

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

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

21 If you look at our proof of claim, and you look at
22 the very beginning of the proof of claim, we say in Paragraph
23 2, "Because the bank bondholders have suffered direct injury,
24 the bank bondholders have standing to bring the bank bondholder
25 claims."

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

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

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

1 intervention.

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

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

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

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

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

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

5 THE COURT: Okay.

6 MR. ANKER: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. KIRPALANI: Your Honor?

9 THE COURT: Yes?

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

12 THE COURT: Yes.

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

17 Thank you, Your Honor.

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

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

21 MR. ANKER: My apologies, Your Honor.

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

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

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

6 The Third Circuit has held that that includes
7 adversaries.

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

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

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

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

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

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

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

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

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

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

16 MR. ROSEN: Your Honor, I believe there are a total
17 of 16 applicants who may have filed, if I got that right. Yes,
18 16 different professional groups that filed applications.

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

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

3 MR. ROSEN: Okay.

4 THE COURT: All right?

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

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

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

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

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

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

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

20 THE COURT: Yes.

21 MR. GURFEIN: I understand.

22 THE COURT: Yes.

23 MR. GURFEIN: We'll provide that promptly.

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

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

2 THE COURT: Strictly for the Court.

3 MR. GURFEIN: Yes, Your Honor.

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

7 MR. ROSEN: Thank you, Your Honor.

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

10 (Laughter)

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

13 THE COURT: Okay.

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

16 (Laughter)

17 THE COURT: Exactly.

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

21 THE COURT: Well, the whole quarterly.

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

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

25 MR. STRATTON: Okay.

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

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

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

6 MR. STRATTON: Thank you, Your Honor.

7 MR. GURFEIN: Thank you.

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

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

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

13

14 CERTIFICATE

15

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

19

20

21 /s/ Karen Hartmann AAERT CET**D0475 Date: August 26, 2009
22 TRANSCRIPTS PLUS, INC.

23

24

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<p>\$</p> <p>\$1.6- 124:16,18</p> <p>\$100,000- 31:21,24</p> <p>\$2- 107:12</p> <p>\$3.3- 55:13 57:9</p> <p>\$35- 16:25</p> <p>\$4- 127:2</p> <p>\$5- 17:9</p> <p>23:22,24,25</p> <p>\$500,000- 17:11</p> <p>\$7- 17:1</p> <p>\$8- 17:10</p> <p>\$800- 16:23</p> <p>\$9- 114:4</p> <hr/> <p>&</p> <p>&- 5:3,23 32:24</p> <p>47:14 106:21</p> <hr/> <p>'</p> <p>'06- 6:10</p> <hr/> <p>/</p> <p>/s/- 143:21</p> <hr/> <p>0</p> <p>0950551- 87:24</p> <hr/> <p>1</p> <p>1- 41:17 90:14</p> <p>91:21 95:3,24</p> <p>97:19 115:8</p> <p>1,003- 97:16</p> <p>1,008- 90:11</p> <p>1,500- 70:6 77:21</p> <p>1.1- 58:14</p> <p>1.5- 38:1</p> <p>10- 7:8 17:5</p> <p>46:21 71:19 82:15</p> <p>87:11 92:6</p> <p>101:9,17</p> <p>100- 74:8</p> <p>10211- 76:11</p> <p>78:17</p> <p>1026- 29:2</p> <p>1034- 138:15</p> <p>107- 63:14 68:23</p> <p>11- 6:24 10:4,13</p> <p>17:18 27:14 47:5</p> <p>62:23 63:13 72:22</p> <p>92:11 111:1</p> <p>124:19</p> <p>1107- 110:23</p> <p>1109- 108:18</p> <p>109:8,25 110:2,18</p> <p>111:18 112:12,24</p> 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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.



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Date: 8/27/09

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