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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE  
Case No. 08-12229 (MFW)

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In the Matter of:

WASHINGTON MUTUAL, INC., et al.,

Debtors.

- - - - -x

United States Bankruptcy Court  
824 North Market Street  
Wilmington, Delaware

October 26, 2010  
10:03 AM

B E F O R E:  
HON. MARY F. WALRATH  
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: BRANDON MCCARTHY

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TELEPHONIC HEARING: Teleconference on Texas Group Motion to  
Enforce Order Regarding Production of Documents

Transcribed by: Karen Schiffmiller

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A P P E A R A N C E S :

RICHARDS, LAYTON & FINGER, P.A.

Attorneys for Debtors

BY: CHUN I. JANG, ESQ. (TELEPHONICALLY)

WEIL, GOTSHAL & MANGES LLP

Attorneys for Debtors

BY: ADAM P. STROCHAK, ESQ. (TELEPHONICALLY)

SUNNY J. THOMPSON, ESQ. (TELEPHONICALLY)

PACHULSKI STANG ZIEHL & JONES LLP

Attorneys for Creditor

BY: TIMOTHY P. CAIRNS, ESQ. (TELEPHONICALLY)

SMITH, KATZENSTEIN & FURLOW LLP

Attorneys for the Texas Group

BY: MICHAEL P. MIGLIORE, ESQ. (TELEPHONICALLY)

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GREER, HERZ & ADAMS LLP

Attorneys for the Texas Group

BY: JAMES M. ROQUEMORE, ESQ. (TELEPHONICALLY)

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P R O C E E D I N G S

THE COURT: All right. Are the parties on the line?

MR. ROQUEMORE: James Roquemore for the Texas Group that's on the line.

MR. JANG: Your Honor, this is Chun Jang, of Richards, Layton & Finger, on behalf of the debtors. I believe Adam Strochak of Weil Gotshal is on the line as well.

MR. MIGLIORE: Good morning, Your Honor, Mike Migliore, Smith Katzenstein, on behalf of the Texas Group.

THE COURT: All right. Well, it's the Texas Group's motion. You want to go first?

MR. ROQUEMORE: Yes, ma'am, thank you. James Roquemore, again, on behalf of the Texas Group. Your Honor, this is a -- we're here before you because Your Honor had ordered the debtors to produce documents to us, and the debtors clearly have not produced documents in response to that order. We believe this is a clear violation of the order to compel production.

As you will recall, we were here before the Court on September 24th for a motion to compel. Your Honor granted our motion to compel, declared that the Texas Group was a party in interest and entitled to discovery. The debtors submitted an order for your signature to memorialize the Court's ruling. Your Honor signed that ruling -- signed that order on October 5th. Particularly, that order required the debtors within

1 fourteen days, and I quote, "within fourteen days of the entry  
2 of this order the debtors shall respond to requests 2, 3, 9,  
3 34, 36, and 37 of the Texas Group's first request for  
4 production of documents, as supplemented by paragraph 7 of the  
5 reply." Particularly, the reason why we're here today is  
6 because of requests number 2 and number 34.

7 Request number 32 (sic) saw production of, and I'm  
8 quoting this, "all production reflecting or concerning  
9 communications between and among the debtors, and any party  
10 including JPMC and the FDIC, concerning: one, the Texas  
11 litigation; two, the factual basis of any allegation contained  
12 in the Texas litigation; three, the settlement of the Texas  
13 litigation; and four, any requests for information or documents  
14 from any third party or government agency concerning the Texas  
15 litigation or the factual basis, and any allegations contained  
16 in the Texas litigation." So, in sum, number 2 requested  
17 communications between the debtor and other parties. We  
18 clarified at the hearing on the 24th, we weren't seeking  
19 internal communications.

20 And, again, request number 34 saw production of all  
21 documents concerning negotiation of the settlement release and  
22 dismissal of the Texas litigation. The order required the  
23 debtors to produce all response documents by October 19th. The  
24 debtors failed to do this. Instead the debtors -- instead of  
25 producing responsive documents, the debtors filed their

1 objection and responses, which disregarded the Court's order  
2 and the Texas Group's need to receive discovery.

3           The objections fail in a number of ways. Number --  
4 mainly that there's no production of any documents, in response  
5 to the Court's order or the request for production. Instead,  
6 the debtors refer the Texas Group to documents that they had  
7 already had access to in the data room. And I will say as an  
8 aside, the documents they refer to constituted 10,000 file  
9 folders of 100,000 pages -- more than 100,000 pages. Your  
10 Honor, we're not here because of what they referred us to in  
11 the data room; we're here because there's a population of  
12 documents that weren't put in the database that the debtors are  
13 refusing to produce and are ignoring our request and the  
14 Court's order.

15           And that's why we have to -- that's why we're forced  
16 to file this motion. The purpose -- the whole purpose of  
17 filing our motion to compel in the first instance, was to  
18 obtain documents that were outside the data room. The debtors  
19 cannot reasonably believe that referring us to documents, that  
20 we had already had access to, constituted a response to the  
21 Court's order as it was issued on October 5th. To believe that  
22 that was a sufficient response or constituted compliance with  
23 the order, would mean that the September 24th hearing was  
24 meaningless.

25           Number two, in addition to not producing any

1 documents, the debtors didn't even conduct a timely search for  
2 any documents that would be responsive to the Texas Group's  
3 request. And we know this because the -- Mr. Stochak's 10/19  
4 email to me actually stated that we will be searching for and  
5 producing additional documents. And in their objections they  
6 also say that we will -- we agree to supplement and we will  
7 search for some additional documents. Your Honor, this is not  
8 compliance with the Court's order, or production response to  
9 our reasonable request for production of documents.

10 To add further noncompliance, I suppose, the debtors  
11 interposed a number of objections, and purported to limit their  
12 response to certain topics that they agreed to produce.  
13 Particularly, in paragraph 1, the debtors objected to  
14 definitions of Washington Mutual, WMB, WMBS, FSB, WMI new. And  
15 in an apparent effort to limit their response to documents that  
16 may or may not be in their possession, custody or control, Your  
17 Honor, we would argue that, if they were going to argue that  
18 the production was -- that the original document requests were  
19 somehow flawed, then they should have raised it on the 24th,  
20 which they didn't.

21 In addition, they objected to producing -- in their  
22 objections, paragraph number 2, "producing documents that are  
23 in a third party's possession". Your Honor, that is an  
24 unreasonable restriction on production, and one that was not  
25 raised or ruled upon at the Court's order. And, again, that



1 one -- that objection cannot prevent them from having to  
2 produce documents.

3 THE COURT: Well, if they're in a third party's  
4 possession, how are they subject to production by the debtor?

5 MR. ROQUEMORE: Well, this would be in the case, if  
6 the documents are in the possession of the debtor and the third  
7 party's possession, so then the debtors would not be relieved  
8 of their duty to produce.

9 THE COURT: Oh, I see.

10 MR. ROQUEMORE: Yes, thank you. They also interposed  
11 objections regarding relevancy, reasonable calculations to lead  
12 to the discovery of admissible evidence, overbroad -- these are  
13 already -- already objections that were -- could have been  
14 raised or were actually raised at the hearing of the 24th, and  
15 these were not ruled in their favor, Your Honor. And we would  
16 argue that these objections are just another -- more roadblocks  
17 that they're trying to throw up to prevent having to produce  
18 reasonable discovery.

19 Our final problem with their "response" has to do with  
20 reservation of certain privileges, such as a common interest  
21 privilege they refer to, and other privileges that may or may  
22 not be in existence. Your Honor, the debtors produced a couple  
23 of privileged logs that reference a number of documents  
24 withheld from the equity committee previously, on the basis of  
25 attorney-client and work-product privilege.

1           Your Honor, we're not disputing that those documents  
2 should be produced. As we had a discussion on the 24th about  
3 production of privileged documents, and Your Honor, the debtors  
4 have represented that they're not going to rely on advice of  
5 counsel, and they're not going to rely on these documents, in  
6 particular, apparently.

7           So, we're not disputing with regard to these, we just  
8 don't want to have some nebulous objection out there that they  
9 can hide behind later on, and say, well, these were protected  
10 by the common interest privilege. The debtors have not  
11 produced a privileged log for any other documents and we're  
12 just arguing that any privilege that could attach to other  
13 documents had been waived or did not exist in the first  
14 instance.

15           Your Honor, the documents that we're seeking are  
16 directly relevant to our plan objections. We've objected to  
17 the debtors' plan, because, of what we view, as impermissible  
18 releases, injunctive release, bars that are called for under  
19 the plan, and settlement agreement. Your Honor, as you may  
20 recall, the Texas Group are only bond holders of Washington  
21 Mutual Bank. We have litigation against JPMorgan Chase and Co.  
22 and JPMorgan Chase Bank.

23           We're going to argue at the plan confirmation, this is  
24 not -- these are not -- this does not constitute property of  
25 the estate, that the purported releases are -- violate third

1 circuit law, and that they're nonconsensual and don't provide  
2 any consideration to the Texas Group. The debtors, on the  
3 other hand, are -- they've stated a couple times that the plan  
4 only requires that the parties to use their reasonable best  
5 efforts. For whatever that's worth, Your Honor, the --  
6 whatever the meaning of the reasonable best efforts, the  
7 debtors ignore the fact that there are broad releases, the  
8 definitions that cover the Texas litigation, and it includes  
9 the Texas litigation in the releases and injunctive releases.

10 We have a practical stake in this plan, and the  
11 discovery is narrowly tailored to determine the basis of the  
12 settlement agreement. The negotiations between outside  
13 parties, the settling parties, and we're entitled to have -- to  
14 determine what the basis of that was. And that's why we're  
15 seeking this discovery and that's what we're entitled to it.

16 Your Honor, the debtors, however, have created a  
17 truncated timetable which apparently has -- which has the  
18 effect of prejudicing our ability to work, I guess -- work with  
19 the debtors outside -- without the Court's intervention in  
20 trying to obtain discovery in this way. We know that there are  
21 additional documents out that aren't in the data room, that  
22 have not been produced to us. We know this by previous  
23 conversations with debtors' counsel, who stated that  
24 communications, such as the ones that we're seeking, were not  
25 put in the data room. This was not the type of information

1 that was put in the data room -- emails and documents shared  
2 between the settling parties.

3 And that was the whole purpose of us having to file  
4 the motion to compel. We've looked at timesheets for debtors'  
5 counsel, which refer to documents shared between the settling  
6 parties, and other communications between the settling parties.  
7 So, we know that there's some documents, and the debtors  
8 haven't produced even those. And those were listed in  
9 paragraph 7 of our reply to the -- to the debtors' opposition  
10 to our motion to compel in the first instance.

11 And finally the more recent correspondence and the  
12 objections of the debtors' counsel on October 19th, refer to  
13 the fact that they're going to search and look for documents  
14 that they expect are out there. Your Honor, there are  
15 documents out there that are directly responsive to our request  
16 and the debtors haven't even start -- begun to search for them  
17 in violation of both your order and in total disregard to our  
18 rights to discovery. And that's why we're here.

19 THE COURT: All right. I understand your position.

20 MR. ROQUEMORE: Okay, thank you, Your Honor.

21 THE COURT: Mr. Stochak?

22 MR. STROCHAK: Your Honor, this is Adam Stochak from  
23 Weil for the debtors. Let me start with the order. We did not  
24 understand your order on the motion to compel to require us to  
25 complete our production by the fourteen days. What we

1 understood was that it required a response to the discovery  
2 which we served within the appropriate time deadline. We told  
3 them what we were going to be producing, how we were going to  
4 be supplementing the production, and we tried to direct them to  
5 the places in the data room, where we think the vast majority  
6 of the documents, that are responsive to their request, are  
7 located.

8 I'm not unsympathetic to the idea that there's a lot  
9 of information in the data room, and that's because parties  
10 have requested a lot of information from us, including the  
11 Texas Group. We have offered them long before they even filed  
12 their motion papers, and I'm talking months ago, we offered  
13 them access to the type of dataset that we gave to the trust  
14 preferred plaintiffs, that is a dataset that included, you  
15 know, better data that they could put into a litigation, a  
16 database of their own, if they wanted greater searching  
17 capabilities, and they've never taken us up on that offer.

18 So, like I said, I'm not unsympathetic to the large  
19 number of documents that are out there, but the reason there's  
20 a large number of documents is because that's what they've  
21 requested from us, in asking for all the documents that go to  
22 the settlement negotiations.

23 With respect to the additional documents, it is simply  
24 untrue that we have not started searching. We started  
25 collecting documents, identifying where -- places we needed to

1 search as soon as the order was entered, and Mr. Roquemore is,  
2 unfortunately, reading something into my email that simply was  
3 not there and was not intended in my email.

4 We are searching for the proverbial needle in a  
5 haystack, in trying to find documents that relate specifically  
6 to the Texas litigation. It's obviously a very big matter on  
7 Mr. Roquemore's radar screen, because it's his lawsuit. It is  
8 a relatively small matter in the scope of all the issues that  
9 we have been dealing with over the -- almost two years, that  
10 this case -- I think it's actually greater than two years now --  
11 -- that this case has been filed, and the very long period that  
12 we've had in negotiating settlements of various issues.

13 So, we have identified who we think are the  
14 appropriate custodians of potential documents that would relate  
15 specifically to this lawsuit. We have collected them; we have  
16 searched them, and what we have found is about seventy  
17 documents, seven-zero, emails and attachments and things like  
18 that, from within Weil custodians, relating to, you know,  
19 communications, relating to the Texas litigation, with external  
20 parties, such as the FDIC and JPMorgan Chase, you know, any  
21 specific communications relating to the releases and things  
22 like that.

23 We have identified about seventy from Weil; we've  
24 identified about twenty-five documents from lawyers at the  
25 Quinn Emanuel firm that relate to similar issues. So, we have,

1 in fact, searched for the specific documents that they've told  
2 us that they're looking for, and found the needle in the  
3 haystack in identifying these documents. It is our view, and  
4 JPMorgan's view, that some of these documents are, in fact,  
5 subject to a common interest privilege, where we had  
6 communications relating to the defense or the positions that  
7 the parties were taking in relation to the underlying lawsuit.

8 And we've consulted with counsel for JPMorgan, and  
9 we've actually been able to work out a protocol, that if we can  
10 get either the Court's confirmation that certain conditions  
11 would apply, or the -- Mr. Roquemore's consent to certain  
12 conditions, we can simply produce all those documents. And  
13 what we're looking for is that with anything where we think  
14 that there's a common interest privilege attached to it, we  
15 just want an agreement, or an order of the Court, that by  
16 giving them to the Texas Group, we're not in any way waiving  
17 any privilege, we're prepared to give it to them and not fight  
18 about whether there is or is not an applicable privilege, but  
19 we just don't want it asserted as a waiver of any privilege.  
20 We don't want it asserted as a subject matter waiver of  
21 anything else that might be privileged.

22 And the other condition that we'd like is to make sure  
23 that to the extent that they're going use those documents in  
24 connection with the confirmation hearing, we'd just like  
25 everyone's agreement or an order that they are, you know,

1 highly confidential documents, and would be, you know, not  
2 shared with any party and to the extent necessary to lodge them  
3 with the Court, it would be lodged under seal in a way that  
4 would protect against disclosure from any third parties.

5           So, I don't think that we have any privilege issues.  
6 I would hope that those conditions are acceptable to Mr.  
7 Roquemore, and that we could then provide those documents. And  
8 like I said, the search has been completed, the documents have  
9 been gathered, and I think that they'd be ready to go very  
10 shortly in terms of producing them out.

11           We are also looking for any documents that might have  
12 been provided to the Washington Mutual Board, in connection  
13 with the Texas litigation. Again, it's a, kind of, a search  
14 for a needle in a haystack, but we are in process, and close to  
15 completing our review of any additional documents that we can  
16 identify that relate specifically to the Texas litigation. We  
17 have not tried to impose obstacles on discovery.

18           The objections that we asserted to the discovery were  
19 not for the purpose of saying, well, we're simply not going to  
20 search, or not going to agree to produce anything. The  
21 objections we asserted were because it is extraordinarily  
22 difficult given the volume of materials we have and the way the  
23 data room is set up and everything else, it is extraordinarily  
24 difficult for us to say with a hundred percent certainty that  
25 we have everything.



1           So, really the objections are asserted to just help us  
2           make sure that everyone understands that we are doing our level  
3           best to find everything that might be responsive to these  
4           requests, but because the requests are very, very broad in many  
5           places, and because the limitations of what we can do in order  
6           to identify specific documents are just there -- I mean, we  
7           could search for a year, and not be a hundred percent confident  
8           that we found every single piece of paper that might be  
9           responsive to these very, very broad requests.

10           The objections are simply to say, look, you know,  
11           we're doing our level best. We've tried to tell them what we  
12           are going to be producing; we've tried to tell them where we've  
13           searched for it. We think it's satisfactory, but we don't  
14           anyone to come back later and say, hey, you said you produced  
15           all documents, but, you know, here's one you didn't produce, or  
16           something like that. And that's the only reason that we've  
17           interposed the objections that we have.

18           On the privileged documents, I don't quite understand  
19           Mr. Roquemore's position. They asked us for, in request number  
20           3, for all internal communications of the debtors regarding the  
21           Texas litigation and a whole series of other things. The vast  
22           majority of that is privileged. As Your Honor knows, we have  
23           provided a lot of privileged documents to the equity committee  
24           and to the examiner. We've given them a log of those  
25           documents. And I really don't understand -- if Mr. Roquemore

1 thinks something else is required, or if he's saying that's  
2 satisfactory. We believe it is satisfactory.

3 So, that's where we are, Your Honor, and I'm happy to  
4 answer any questions you may have.

5 THE COURT: Well, with respect to the privileged log,  
6 you're not asserting any other documents are privileged, other  
7 than this common interest privilege that you think can be  
8 worked out?

9 MR. STROCHAK: I think that's correct, Your Honor.  
10 With respect to documents that are responsive to the particular  
11 request that we have, I don't think that we're asserting a  
12 privilege for anything else, and if we are, we will certainly  
13 provide a log for it.

14 THE COURT: Well, when are you going to get that log  
15 to them?

16 MR. STROCHAK: It's really just a question of if we  
17 identify anything else, Your Honor. I think the logs that we  
18 provided cover everything. You know, the only issue is should  
19 we find something else, and we believe it's privileged, we  
20 would log it and provide it to them for other logs.

21 THE COURT: Well, when are you going to produce the  
22 documents, the seventy and twenty-five that you found?

23 MR. STROCHAK: I know my colleague Ms. Thompson is on  
24 the phone and she's been in charge of the technical issues of  
25 collecting. And, so, if I could ask her to just provide an

1 answer when we think they could be produced. I think we're  
2 talking a couple of days here.

3 MS. THOMPSON: That is true, a couple of days.

4 THE COURT: All right. Any response from Texas Group?

5 MR. ROQUEMORE: Yes, Your Honor. James Roquemore,  
6 again. I'll be brief. The debtors have had our request since  
7 June 8th. They refused that any access to the data room until  
8 after we filed the motion to compel. And now they've had  
9 another fourteen days after the Court ordered, and now they're  
10 asking for additional time. There is a plan objection deadline  
11 of November 19th. You know, if all they're going to produce is  
12 some ninety-something documents, it's not going to -- you know,  
13 we can work with that on a two-day schedule.

14 However, you know, it's -- if it's going to be later  
15 than two days, then we're going to have difficulty and we are  
16 already -- feel that we've been prejudiced by this delay.  
17 Regarding the privileged -- the common interest privilege and  
18 Mr. Stochak's suggestion, we're fine with his suggestions, as  
19 long as we're not restricted in what's produced, and we're not  
20 restricted in how we're able to use it at the hearing. We're  
21 willing to work with them with regard to maintaining  
22 confidentiality and nonwaiver privilege. Thank you, Your  
23 Honor.

24 THE COURT: All right. Well, I'm going to basically  
25 direct the debtors to produce by Friday all of the documents

1 they've identified to date, subject to the parties working out  
2 a common interest defense agreement. If the parties don't  
3 agree to that, though, I'll order the debtor, nonetheless, to  
4 produce them as subject to a highly confidential designation.  
5 And I'll work it out at the time we get to the hearing.

6 But I agree any further delay is going to be -- cause  
7 me to reconsider my scheduling of the confirmation hearing and  
8 objections to confirmation.

9 MR. ROQUEMORE: Thank you, Your Honor.

10 MR. STROCHAK: Thank you very much, Your Honor.

11 THE COURT: All right. We'll stand adjourned then.

12 MR. ROQUEMORE: Thank you.

13 MR. STROCHAK: Thank you, good day.

14 MR. MIGLIORE: Thank you, Your Honor.

15 (Whereupon these proceedings were concluded at 10:30 AM)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript is a true and accurate record of the proceedings.

**Karen  
Schiffmiller**

Digitally signed by Karen Schiffmiller  
DN: cn=Karen Schiffmiller, o, ou,  
email=digital1@veritext.com, c=US  
Date: 2010.10.27 15:11:53 -04'00'

KAREN SCHIFFMILLER

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 27, 2010