

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

WASHINGTON MUTUAL, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 08-12229 (MFW)

(Jointly Administered)

Re: Docket No. 10843

**CERTIFICATION OF COUNSEL OF AT&T CORP.  
REGARDING PROPOSED ORDER, GRANTING IN PART, AND  
DENYING IN PART, WMI LIQUIDATING TRUST'S MOTION FOR AN  
ORDER COMPELLING THE PRODUCTION OF DOCUMENTS FROM AT&T**

I, Donna L. Culver, hereby certify as follows regarding the order (the "Proposed Order") attached hereto as Exhibit A:<sup>2</sup>

1. On or about June 11, 2009, AT&T Corp., on behalf of itself and its affiliates and subsidiaries (collectively, "AT&T"), timely filed its Proof of Claim, designated as Claim No. 3725 (the "AT&T Claim") in the above-captioned cases alleging damages against Washington Mutual, Inc. ("WMI") and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the "Debtors"), resulting from Debtors' rejection of a certain Master Services Agreement with AT&T.

2. On or about August 31, 2011, the Debtors served AT&T with Debtors' First Request for the Production of Documents to AT&T Corp and its Affiliates (the "Document Requests").

3. On or about October 18, 2011 AT&T served Debtors with Objections and

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors' principal offices are located at 925 Fourth Avenue Suite 2500, Seattle, WA 98104.

<sup>2</sup> Exhibit A also includes a redline comparison of the parties' proposed orders.



Responses to Debtors' First Set of Document Requests (Claim No. 3725).

4. AT&T also produced certain documents responsive to the Document Requests and, subsequently, informally provided Debtors with additional documents and information. All such documents and information produced or provided by AT&T were provided pursuant to a certain confidentiality Stipulation and Protective Order, executed by the parties on October 18, 2011. *See* Rule 9018-1(d) (preserving the confidentiality of information and documents designated as confidential pending agreement by the parties or order of the Court).

5. On November 15, 2012, WMI Liquidating Trust (the "Trust"), as successor in interest to Debtors, filed WMI Liquidating Trust's Motion for an Order Compelling the Production of Documents (the "Motion to Compel").

6. On December 3, 2012, AT&T filed AT&T's Objection to WMI Liquidating Trust's Motion for an Order Compelling the Production of Documents (the "AT&T Objection").

7. On December 11, 2012, the Court heard argument on the Motion to Compel and issued a bench ruling granting, in part, and denying, in part, the Motion to Compel (the "December 11 Hearing"). The Court compelled the production of certain documents from AT&T, but narrowed the document requests, and directed the parties to submit a proposed order in accordance with the Court's rulings.

8. On Friday December 14, 2012, the Trust circulated a proposed form of order to implement the Court's ruling (the "Trust's Proposed Form of Order") on which it requested AT&T's comment. On Monday, December 17, 2012, AT&T provided its comments on the Debtors' Proposed Form of Order, including various substantive revisions based upon

AT&T's understanding of the Court's ruling at the December 11 Hearing. In light of the upcoming holidays, and potential difficulties in collecting documents during this period, AT&T also proposed a February 28, 2012 deadline for producing documents, instead of by January 31, 2012, as proposed by Debtors. In addition, AT&T proposed that the order include a reference to a certain stipulation and protective order governing the confidentiality of the documents being produced by AT&T. Regrettably, the Trust has been unwilling to agree to (or even to negotiate in good faith) any of the substantive revisions proposed by AT&T or AT&T's proposed schedule for production. Instead, the Trust agreed to only two minor and non-controversial edits to the Trust's Proposed Form of Order and also agreed to reference the parties' confidentiality stipulation.

9. AT&T respectfully submits that the proposed order submitted by the Trust yesterday, December 17, 2012, does not accurately reflect the Court's ruling at the December 11 Hearing (excerpts attached hereto as Exhibit B).

10. As a preliminary matter, the Trust's Proposed Form of Order narrows only one request, related to the Master Services Agreement and matters between the Debtor and AT&T. It does not narrow any of Document Requests 2-4 dealing with the JP Morgan agreements, documents and communications that were a large part of the December 11 Hearing and the Court's ruling, nor does it include the Trust's agreement to narrow Document Request No. 3. *See* Motion at 6 ("WMILT agreed to narrow Document Request Nos. 1 and 3 . . ."). Finally, the Trust's proposed language with respect to Document Request No. 6, which had requested the production of documents that AT&T intends to rely upon to support the AT&T Claim, has been altered by the Trust to require production of such documents "by at least thirty (30) days prior to a hearing on the Claim Objection," but AT&T proposes a change to this

language, directing simply that the parties submit an agreed upon pre-trial order addressing this contested matter and which would include, among other things, the exchange of documents to be used at the final evidentiary hearing on the AT&T Claim.

11. With respect to the specific requests, the Trust's proposed order narrows Document Request No. 1 to "documents and communications relating to liquidated damages, damages and other like provisions in the Master Services Agreement." The Court limited such discovery, despite an extended argument by counsel for the Trust for broader discovery, concluding that "[w]ell I will allow, but only limited to any discussion of liquidation damages clauses or damage clauses." Ex. B 52:4 – 52:5. Mr. Gurdian then ended the discussion as he seemed to indicate his understanding by stating "Damage clauses." *Id.* at 52:6. The Trust now attempts to broaden AT&T's obligation by referencing "other like provisions." AT&T submits that such language is unnecessarily vague and should be excluded as reflected in AT&T's proposed order.

12. The Trust's Proposed Form of Order also fails to narrow Document Requests 2-4 and, thus, does not reflect at all the Court's rulings at the hearing. These Document Requests relate to the "JPMC Agreement,"<sup>3</sup> as well as matters related to communications between AT&T and JP Morgan that were expressly addressed by the Court at the December 11 hearing. After hypothesizing the potential relevance of information regarding negotiations with JP Morgan, the Court narrowed these requests and ordered the production of only those documents and communications regarding the negotiation of and payment for services to JP Morgan that had previously been governed by the Master Service Agreement with the Debtors.

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<sup>3</sup> The JPMC Agreement is a separate master agreement between AT&T and JP Morgan covering the parties' entire relationship and much more than services formerly provided by AT&T to the Debtors.

THE COURT: Well, I can posit how they might have something to do with it. I don't know that this was true, and I -- but certainly JPMorgan could've agreed to pay a certain amount on this service, and got a deal on other services.

MR. ROSENZWEIG: Well, JPMorgan drives a hard bargain no matter what the -- I can tell you that. They get the bottom price basically on everything.

THE COURT: Well, I think I agree with the Trust. I think they're entitled to the documents to the extent they prove anything or don't prove anything, you know, I -- we're not there yet. But I think they are entitled to discovery of it, because it could lead to relevant information *related to the damages suffered with respect to just these services*.

MR. ROSENZWEIG: Okay. So that's on the Washington Mutual services that essentially what JPMorgan --

THE COURT: Whatever Washington Mutual services JPMorgan negotiated --

MR. ROSENZWEIG: Right.

THE COURT: -- with and obtained from you.

MR. ROSENZWEIG: Not just the seven but whatever they -- the full panoply were.

THE COURT: Yes.

MR. ROSENZWEIG: Okay. So that's what we're talking about.

THE COURT: I think so.

Ex. B at 46:11 –47:10 (emphasis added).

13. The Court then instructed the parties to settle a form of order and submit it to the Court. *Id.* at 47:12 – 47:13. After AT&T's counsel pointed out that the proposed order previously prepared by the Trust's counsel would have to be revised, the Court reiterated its ruling to counsel for the Trust.

MR. ROSENZWEIG: I think we have to revise it because we talked about -- the Judge is talking about the mitigation issues as a whole, the WaMu services moved over to JPMorgan if they --

MR. GURDIAN: You know, I'm sorry, Your Honor, I might have missed it, the -  
- you're not narrowing the scope to just the JPMC services that went over; is that  
right?

THE COURT: Well, I don't think you're entitled to discovery any JPM services  
that they got before they took over the bank.

MR. GURDIAN: Correct. But services that would overlap would be similar  
services that they either changed or would've moved around after the WaMu  
AT&T agreement was rejected, those would be relevant. That's the way I  
understood.

MR. ROSENZWEIG: I think the Judge was saying, the WaMu services of the 64,  
the whole package, that was moved over, that's what we're focused on. So I  
understand --

THE COURT: I guess we're focused on -- I agree. If you had negotiations with  
JPMorgan --

MR. ROSENZWEIG: Yeah.

THE COURT: -- at the time they took over the bank, and they said, we don't need  
attachment 1, because we already have it, but give us a deal on that.

MR. ROSENZWEIG: Right, I understand.

MR. GURDIAN: Yeah.

THE COURT: That would be relevant.

MR. ROSENZWEIG: So when we focus on the negotiations at the time --

MR. GURDIAN: Okay.

MR. ROSENZWEIG: -- as opposed --

THE COURT: Yes.

MR. ROSENZWEIG: -- to all the mundane stuff for the last X number of years.

MR. GURDIAN: Well, again, just to clarify. With respect to -- now let's get off  
of the JPMorgan issue. With respect to only the Washington Mutual agreement . .  
. .

Ex. B at 47:12 – 48:25. As reflected in the last line quoted above, there is no doubt that counsel

for the Trust understood that the Court's ruling regarded the requests relating to JP Morgan (i.e., Document Requests 2-5).

14. The Court's rulings on Document Requests 2-4 are reflected nowhere in the Trust's proposed order. The Trust's proposed order would leave AT&T in the untenable position of having to produce voluminous documents and communications regarding JP Morgan services that were never provided to or related to any service provided to Debtors – precisely as the Court refused to do. Instead, the Court indicated that discovery should be limited to documents and communications relating to the negotiation of and payment for AT&T services to JP Morgan that had previously been governed by the Master Service Agreement with Debtors.

WHEREFORE, in light of the Court's rulings from the bench, and the unnecessary burdens that would be imposed by the Trust's proposed order, AT&T respectfully requests that the Court enter the proposed order attached hereto as Exhibit A implementing the Court's rulings at the December 11, 2012 hearing.

Dated: December 18, 2012  
Wilmington, Delaware

Respectfully submitted,

/s/ Donna L. Culver  
MORRIS, NICHOLS, ARSHT &  
TUNNELL LLP

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*Attorneys to AT&T Corp. and its affiliates  
and subsidiaries*



**EXHIBIT A**

**PROPOSED FORM OF ORDER**

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

-----X	:	
<i>In re</i>	:	<b>Chapter 11</b>
	:	
WASHINGTON MUTUAL, INC., <u>et al.</u> , <sup>1</sup>	:	<b>Case No. 08-12229 (MFW)</b>
	:	
<b>Debtors.</b>	:	<b>(Jointly Administered)</b>
	:	
-----X	:	<b>Re: Docket No. 10843</b>

**ORDER GRANTING THE WMI LIQUIDATING  
TRUST’S MOTION FOR AN ORDER COMPELLING THE  
PRODUCTION OF DOCUMENTS TO THE EXTENT SET FORTH HEREIN**

Upon the motion (the “Motion”),<sup>2</sup> dated November 15, 2012, of WMI Liquidating Trust (“WMILT”), as successor in interest to Washington Mutual, Inc. (“WMI”) and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the “Debtors”), for an order, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, as made applicable to these proceedings by rules 9014, 7026, and 7034 of the Federal Rules of Bankruptcy Procedure, compelling AT&T Corp. and its affiliates (collectively, “AT&T”) to produce documents responsive to the *Debtors’ First Request for the Production of Documents to AT&T Corp. and its Affiliates*, dated August 31, 2011; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and

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<sup>1</sup> The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed in the Motion.

1409; and the Court having held a hearing (the “Hearing”) with respect to the Motion on December 11, 2012; and after due deliberation, it is

ORDERED that the Motion is GRANTED to the extent provided herein; and it is further

ORDERED that Discovery Request No. 1 is hereby narrowed to include only all documents and communications relating to liquidated damage clauses or damage provisions in the Master Services Agreement, as such term is defined in the Discovery Request; and it is further

ORDERED that Discovery Request No. 2 is hereby narrowed to include only those portions of the JPMC Agreement relating to those services that AT&T previously provided to Debtors under the Master Services Agreement and subsequently provided to JPMC; and it is further

ORDERED that Discovery Requests Nos. 3 and 4 are hereby narrowed to include only those communications and documents relating to the negotiation of, or payment for, any services that AT&T previously provided to Debtors under the Master Services Agreement and subsequently provided to JPMC; and it is further

ORDERED that AT&T shall produce all documents responsive to Discovery Request Nos. 1-5, as modified herein, by February 28, 2012; and it is further

ORDERED that the parties shall agree upon and submit a proposed pre-trial order that shall, *inter alia*, address the exchange of documents to be relied upon by the parties at the final evidentiary hearing on the Claim Objection; and it is further

ORDERED that all documents produced pursuant to this Order or previously produced or provided by AT&T to Debtors, or to WMILT, shall be governed by the Stipulation

and Protective Order executed by counsel to Debtors and by counsel to AT&T on October 18, 2011;

ORDERED that to the extent not granted herein, the Motion is DENIED; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: December \_\_\_, 2012  
Wilmington, Delaware

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THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

-----X	:	
<i>In re</i>	:	<b>Chapter 11</b>
	:	
WASHINGTON MUTUAL, INC., <u>et al.</u> , <sup>1</sup>	:	<b>Case No. 08-12229 (MFW)</b>
	:	
<b>Debtors.</b>	:	<b>(Jointly Administered)</b>
	:	
-----X	:	<b>Re: Docket No. 10843</b>

**ORDER GRANTING THE WMI LIQUIDATING  
TRUST’S MOTION FOR AN ORDER COMPELLING THE  
PRODUCTION OF DOCUMENTS TO THE EXTENT SET FORTH HEREIN**

Upon the motion (the “Motion”),<sup>2</sup> dated November 15, 2012, of WMI Liquidating Trust (“WMILT”), as successor in interest to Washington Mutual, Inc. (“WMI”) and WMI Investment Corp., formerly debtors and debtors in possession (collectively, the “Debtors”), for an order, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, as made applicable to these proceedings by rules 9014, 7026, and 7034 of the Federal Rules of Bankruptcy Procedure, compelling AT&T Corp. and its affiliates (collectively, “AT&T”) to produce documents responsive to the *Debtors’ First Request for the Production of Documents to AT&T Corp. and its Affiliates*, dated August 31, 2011; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having held

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<sup>1</sup> The Debtors in these chapter 11 cases along with the last four digits of each Debtor’s federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The Debtors’ principal offices are located at 925 Fourth Avenue, Seattle, Washington 98104.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed in the Motion.

a hearing (the “Hearing”) with respect to the Motion on December 11, 2012; and after due deliberation, it is

ORDERED that the Motion is GRANTED to the extent provided herein; and it is further

ORDERED that Discovery Request No. 1 is hereby narrowed to include only all documents and communications relating to liquidated ~~damages, damages and other like~~damage clauses or damage provisions in the Master Services Agreement, as such term is defined in the Discovery Request; and it is further

ORDERED that Discovery Request No. 2 is hereby narrowed to include only those portions of the JPMC Agreement relating to those services that AT&T previously provided to Debtors under the Master Services Agreement and subsequently provided to JPMC; and it is further

ORDERED that Discovery Requests Nos. 3 and 4 are hereby narrowed to include only those communications and documents relating to the negotiation of, or payment for, any services that AT&T previously provided to Debtors under the Master Services Agreement and subsequently provided to JPMC; and it is further

ORDERED that AT&T shall produce all documents responsive to Discovery Request Nos. 1-5, as modified herein, by ~~January 31,~~February 28, 2012; and it is further

ORDERED that ~~AT&T shall produce all~~the parties shall agree upon and submit a proposed pre-trial order that shall, *inter alia*, address the exchange of documents ~~responsive to Discovery Request No. 6 by at least thirty (30) days prior to a~~to be relied upon by the parties at the final evidentiary hearing on the Claim Objection; and it is further

ORDERED that all documents produced pursuant to this Order or previously produced or provided by AT&T to Debtors, or to WMILT, shall be governed by the Stipulation and Protective Order executed by counsel to ~~WMILT~~Debtors and by counsel to AT&T on October 18, 2011;

ORDERED that to the extent not granted herein, the Motion is DENIED; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: December \_\_, 2012  
Wilmington, Delaware

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THE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT B**



1 UNITED STATES BANKRUPTCY COURT  
2 DISTRICT OF DELAWARE  
3 - - - - - x  
4 In the Matter of:  
5 WASHINGTON MUTUAL, INC., et al., Case No. 08-12229 (MFW)  
6 Debtors. (Jointly Administered)  
7 - - - - - x  
8 - - - - - x  
9 WASHINGTON MUTUAL, INC. and  
WMI INVESTMENT CORP.  
10 Plaintiff,  
11 v. Adv. Proc. 10-53420 (MFW)  
12 PETER J. AND CANDANCE R. ZAK  
LIVING TRUST OF 2001 U/D/O  
13 AUGUST 31, 2001, ET AL.  
Defendant.  
14 - - - - - -x  
ANTHONY BOZZUTI, Adv. Proc. 10-53131 (MFW)  
15 - - - - - -x  
CHANDAN SHARMA, Adv. Proc. 10-53147 (MFW)  
16 - - - - - -x  
EDWARD F. BACH, Adv. Proc. 10-53132 (MFW)  
17 - - - - - -x  
HENRY J. BERENS, Adv. Proc. 10-53134 (MFW)  
18 - - - - - -x  
JAMES CORCORAN, Adv. Proc. 10-53158 (MFW)  
19 - - - - - -x  
JOHN M. BROWNING, Adv. Proc. 10-53156 (MFW)  
20 - - - - - -x  
KEITH O. FUKUI, Adv. Proc. 10-53139 (MFW)  
21 - - - - - -x  
MARC MALONE, Adv. Proc. 10-53152 (MFW)  
22 - - - - - -x  
MICHAEL R. ZARRO, Adv. Proc. 10-53143 (MFW)  
23 - - - - - -x  
RACHEL M. MILEUR a/k/a Adv. Proc. 10-53133 (MFW)  
24 RACHELLE M. MILEUR,  
- - - - - -x  
25



1 THE COURT: All right. Why don't you do that.

2 (Pause)

3 MR. BROWN: If I can approach, Your Honor.

4 THE COURT: You may. Thank you. All right. I'll  
5 enter that order.

6 All right. Number 30.

7 MR. GURDIAN: Under number 30, Your Honor, is WMI  
8 Liquidating Trust's motion for an order compelling the  
9 production of documents from AT&T.

10 I know Your Honor dislikes discovery disputes. I'll  
11 keep it very brief, and I won't go into the atmospheric of the  
12 discussions between the parties, but just to let you know how  
13 (indiscernible) these motions and over four years of this case,  
14 we've only filed two motions to compel. This is only our  
15 second, so that just gives you a flavor for what we're up  
16 against.

17 I think the motion to compel lays out the documents  
18 that we are seeking. There are not that many requests for  
19 productions. There are only six of them. Five of them dealing  
20 with documents that can be readily ascertainable today, and all  
21 go to the contract interpretation issues are at the core of the  
22 claim objection and on the defense side whether a liquidated  
23 damages clause is relevant here.

24 Under Rule 26(b) the debtors are allowed -- the Trust  
25 is allowed to take discovery on matters that are on the scope

1 that we've outlined in our request. I think there's really no  
2 real reason to not grant that discovery, in fact, as we point  
3 out in our reply, there are other courts that have been faced  
4 with this issue, do you allow discovery in the face of a  
5 liquidated damages clause. And the other court in New York,  
6 interpreting New York contracts say you don't foreclose  
7 discovery simply because a party raises a liquidated damages  
8 clause defense.

9 So we think that A&T should produce the documents that  
10 are relevant to that defense, and are relevant to this  
11 litigation, Your Honor.

12 THE COURT: Thank you.

13 MR. ROSENZWEIG: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 MR. ROSENZWEIG: David Rosenzweig, Fulbright &  
16 Jaworski representing AT&T.

17 Your Honor, I think just to give some background here,  
18 this claim and what the case is about. The claim is for a  
19 liquidated damage amount of \$8.3 million, relates to a master  
20 services agreement that was entered into in 2002. And it's a  
21 massive agreement with over 60 attachments and scores of  
22 individual services and contracts underneath that master.

23 The liquidated damage claim relates only to a subset  
24 of the services under that contract. Of the 64 attachments, it  
25 relates only to 7 attachments. Those seven attachments are

1 related to a contract to custom build what are called metro  
2 area networks and ultra available rings, which is lingo in the  
3 telecom world, but essentially attaches the network for a  
4 specific customer together, and that was Washington Mutual. So  
5 it's specifically built for them.

6 Washington Mutual then rejected the entire MSA, and  
7 AT&T filed the claim. Now, JPMorgan which took over Washington  
8 Mutual took over some of those services, but not all of them,  
9 and they terminated some early, the result of which was large  
10 scaled damages to our client.

11 Now, the liquidated damage clause to us is very  
12 straight forward. Okay. Essentially says this, if Washington  
13 Mutual breaches, AT&T gets 35 percent of a minimum covering the  
14 whole contract, all 64 attachments, plus because those ultra  
15 rings and that manned metro network was special and custom  
16 built for them, we get the termination charges just for those.  
17 Okay. And the termination charges are just based on the  
18 monthly sort of fixed payment.

19 But it's kind of like your cell phone bill, you have a  
20 fixed payment, and then you have a lot of other charges that  
21 were added on. We don't get those. We only get the fixed  
22 payment. Now -- so the liquidated damage clause sets all that  
23 out.

24 Now, the 45 percent of the minimum, that's totally  
25 irrelevant because we agree that's been satisfied, but we do

1 get the rest of the liquidated damage clause, which are the  
2 termination charges just for those services. It's not services  
3 under any other amendment, it's not services under that  
4 amendment that are non-recurring, it's those flat charges.

5 So when you step back and you say, well, what's the  
6 black letter law which they agree I think of what a liquidated  
7 damage clause is, whether it's enforceable is number one, and  
8 the cases they cite say this, at the time of the contract was  
9 -- were the damages difficult to ascertain. And number two,  
10 does the liquidated damage amount, is it plainly or grossly  
11 disproportionate to what actual damages were incurred.

12 So let's look at what we have produced. If you look  
13 at page 7 of our reply, we have produced many, many documents  
14 out of the request that has been made by the debtors and now  
15 the Trust. And what you'll see is we have produced documents  
16 that hit squarely on the second prong of that test, which is  
17 what were the actual damages.

18 We've produced the invoices that WaMu received and  
19 paid for these charges, we've produced invoices showing what  
20 JPMorgan paid for those services. We've produced documents  
21 showing when JPMorgan fully terminated them. We produced the  
22 agreement by which JPMorgan took over those services or some of  
23 them. And so we've produced everything that we can think of  
24 with one minor exception, we still have a few more invoices to  
25 produce on a small portion of the claim, so that's still out

1 there. But we've produced probably 90 percent of the rest of  
2 it, that can show what were the actual damages, and they're  
3 clearly not disproportionate to what we -- to what the  
4 liquidated damage amount requires.

5 So we think we've produced most of what they would be  
6 entitled to, except for that little piece that I mentioned, and  
7 in fact, the cases that they cite in their reply at page 3 and  
8 4, if you read the parentheticals, they all say, you're  
9 entitled to discovery to show what the actual damages were, so  
10 you can connect it to whether it was plainly disproportionate  
11 to the liquidated damage amount. We've produced that because  
12 we think that that's correct, so we have produced that.

13 But as to the first prong whether or not there's --  
14 you know, the damages at the time of the contract inception  
15 were hard to ascertain, none of their requests go to that  
16 point, and it's probably not susceptible to document requests  
17 really. It's probably other types of discovery tools to  
18 ascertain that.

19 But if you look at all of their requests which we can  
20 go through, they're extremely broad. For example, number one,  
21 while there are only five, they would require us to do -- go  
22 back ten years in time to gather every single document that has  
23 any relation to the master services agreement and more. So you  
24 can have one document request, but it can be burdensome.

25 So the first one says all documents related to the

1 master services agreement. Well, that goes back ten years, and  
2 the master services agreement relates again to 64 different  
3 services and amendments that have nothing to do with the 7 at  
4 issue. And (indiscernible) sorts of mundane communications  
5 about what bills were paid, technical issues, the system went  
6 down for two seconds, what are they going to do about that, all  
7 these mundane matters would be captured in their request. So  
8 we said that's too broad, can you focus it a little bit. And  
9 they say, well, how about -- they limit it to how about  
10 documents related to negotiations related to the MSA. But they  
11 also say (indiscernible) agreement with JPMorgan.

12 Now, again, the negotiations on the MSA cover all  
13 different attachments and don't deal with the issue of this  
14 clause that they're focused on, the liquidated damage clause.

15 In addition, the JPMorgan agreement is not -- that's  
16 it's own stand alone agreement that AT&T has with JPMorgan for  
17 a myriad of services having nothing to do with Washington  
18 Mutual. It preexisted the relationship, so that has thousands  
19 of pages in and of itself, and is totally irrelevant, with the  
20 one exception of the agreement that related -- the one addendum  
21 that related to the Washington Mutual services that are the  
22 subject of the claim. That we gave them, with all the pricing  
23 showing what JPMorgan was paying, and for how long. We gave  
24 them other documents showing when they early terminated.

25 So we think we focused them on the -- we think we have



1 given them what is relevant and what is not burdensome, so that  
2 they could ascertain what the damages were absent the  
3 liquidated damage clause.

4 Now, if you look at document request number 2, they  
5 ask for again that famous JPMorgan agreement that I just  
6 mentioned, again having nothing to do with the services at  
7 issue here with the one exception. But more importantly, what  
8 does the JPMorgan agreement and negotiations and communications  
9 have to do with the enforceability of the liquidated damage  
10 clause in the Washington Mutual contract? Nothing. It doesn't  
11 have anything to do with the two prongs that the black letter  
12 law says are relevant.

13 But as I said before, we produced the documentation  
14 that relates to these services, and we gave them, you know,  
15 relevant invoices and other documents showing when JPMorgan  
16 terminated them.

17 Document number 3, request number 3 asks for all  
18 documents related to that amendment 8, that's the one that has  
19 the services that JPMorgan took from WaMu, and here again, they  
20 focused on communications and documents, evidencing payment by  
21 JPMorgan. Well, we gave them the second part, as I've already  
22 mentioned, we gave them that information.

23 The communications again is sort of broadly a scatter  
24 shot that it has nothing to do with the enforceability of the  
25 liquidated damage clause. That's a WaMu issue. JPMorgan has

1 no communications between AT&T and JPMorgan won't tell you  
2 whether or not the liquidated damage clause is enforceable.

3 We did give them the information that showed that the  
4 actual damages incurred, so they could see it was not  
5 disproportionate. That we gave them. Finally, you've got a  
6 similar request, document request number 4, all communications  
7 between AT&T and JPMorgan related to the Washington Mutual  
8 master services agreement. Again, what would that have to do  
9 -- what would communications between JPMorgan and AT&T have to  
10 do with whether or not the liquidated damage clause is  
11 enforceable, other than we gave them the documents showing what  
12 JPMorgan paid so they could see what the damages were, and that  
13 it was not disproportionate it.

14 So time again we've tried to give them what is  
15 relevant to the enforceability of this clause, but you've got  
16 to step back and say, well, this clause is -- I mean, there's  
17 nothing ambiguous about it. And so the real issue is we're  
18 being put through sort of ten years worth of a paper trail for  
19 a pretty straight forward cause, and it's very burdensome and  
20 time consuming for us to do that. And they haven't really  
21 shown why it's relevant to the enforceability of the clause.

22 So from having stepped back from the nitty gritty of  
23 this dispute, one of the things that our client would like to  
24 propose is essentially perhaps the parties should go to  
25 mediation on the substance of the claim and move it forward.

1 Because we do want to move this claim forward. It's an \$8.3  
2 million claim and we would like to move it forward.

3 So that's something I would -- I think our client  
4 would be open to and would agree to, to try and move this  
5 matter forward on the big picture issues. It's also possible  
6 to move it forward perhaps on a -- sort of a track where Your  
7 Honor decides is this clause enforceable, is it unambiguous so  
8 that that will then cut down on perhaps some of the issues that  
9 are needed for fact finding and the like.

10 But at any rate, I think that's, you know, where we  
11 are on all the documents. We're certainly willing to talk to  
12 Mr. Gurdian about trying to produce some more focused on the  
13 issues related to the enforceability of the clause, but we  
14 haven't really been able to, you know, reach an agreement yet  
15 on that. Thank you.

16 THE COURT: Thanks.

17 MR. GURDIAN: Your Honor, just a brief reply. You  
18 know, I appreciate the mediation request at the end, but we  
19 really can't even go there without knowing what we're working  
20 with, with respect to a liquidated damages clause. I think Mr.  
21 Rosenzweig spends a lot of time on the JPMC documents and  
22 communications with JPMC documents. The reason those are  
23 relevant is because -- the reason they think they're irrelevant  
24 is because they presupposed that the liquidated damages clause  
25 is already enforceable.

1           If the liquidated damages clause is not enforceable,  
2 then you get into mitigation theories which all deal with the  
3 JPMorgan communications with AT&T related to the Washington  
4 Mutual agreement, because we -- that determined what is being  
5 mitigated, what services were discussed, and what potential  
6 mitigation there might have been.

7           With respect to the JPMC agreement, the place we do  
8 say in -- from the Seventh District of New York specifically  
9 goes to the concept of this, do you allow discovery,  
10 essentially competitor agreements dealing with the same subject  
11 matter, the JPMC agreement is the same subject matter. It  
12 would go to whether AT&T has entered into similar agreements  
13 for liquidated damages clauses. And the Court there said that  
14 those are relevant agreements that the Court should look into.

15           With respect to the invoices, Mr. Rosenzweig spends a  
16 lot of time on the invoices that were produced that -- there  
17 were a lot of invoices over 2,800 pages of invoices, but they  
18 don't really go to whether AT&T actually suffered damages in  
19 the case and what the size of those damages are, and whether  
20 they can be ascertained. Only the communications between the  
21 parties would really deal with those particular issues. And  
22 here we've gotten one e-mail string in total of the 3,000  
23 pages. And I think we're entitled to additional information in  
24 order to properly defend against this claim.

25           Thank you, Your Honor.

1 THE COURT: Any reply?

2 MR. ROSENZWEIG: Your Honor, on the mitigation, that's  
3 the bulk of the documents we have given them, which is to show  
4 what JPMorgan paid, how long they paid it, and what it amounted  
5 to. We've given a whole bunch of documents on that invoices  
6 (sic), spreadsheets, informally trying to show what was there.  
7 So that's already covered in the sense of the documentation we  
8 put forward. So I'm not sure that there's much of anything  
9 other than the small amount I mentioned to produce on that.

10 The problem I think are -- and is we can't really come  
11 to an understanding of what the playing field is. We say we --  
12 this is sort of what was JPMorgan took, and they say, well  
13 JPMorgan took this other stuff we'd like to count too. And  
14 that other stuff is not relevant, it's a different service, but  
15 they'd like to count it as mitigation.

16 So that's a fundamental issue that they want us to go  
17 down this trial and produce all this stuff that relates to  
18 other services that they'd like to count for mitigation.  
19 That's what that last comment was about.

20 MR. GURDIAN: Your Honor, again, jumping right to the  
21 legal conclusion here that there's no need to pre-judge what  
22 are the correct damages that a) would amount to a liquidated  
23 damages clause, or b) that would amount to mitigation. Those  
24 are all legal conclusions, which will be tested once this  
25 matter is set for hearing.

1           But a party should not be foreclosed from discovery  
2 simply because the counterparty has said there's a legal  
3 conclusion that I've reached, and that means that you get no  
4 discovery on the issues. There are matters in the JPMC  
5 agreement that we would like to explore with respect to  
6 mitigation, and we've rightfully narrowed our request to only  
7 the JPMC agreement, and the communications between JPMC and  
8 AT&T related to the Washington Mutual agreement.

9           So directly related to this matter, they're not  
10 extraneous to this matter that's at hand.

11           MR. ROSENZWEIG: Your Honor, just one -- I'm sorry,  
12 just one second on this. I -- since they don't want to do the  
13 mediation, maybe the issue is first, we have to decide -- Your  
14 Honor should decide maybe what -- if this clause is  
15 unambiguous, is enforceable. And if it is, that's one avenue  
16 and the case proceeds. If it's not, then you're in a regular  
17 contract litigation with all of this other mitigation and other  
18 things that can happen.

19           But we've got to first decide whether this liquidated  
20 damage clause is enforceable, we think it is. They're  
21 presupposing it's not, and they want all this discovery, and  
22 they're sort of flipping the cart and the horse.

23           THE COURT: Well, but I think they are citing New York  
24 law that says you get discovery before you decide that issue.

25           MR. ROSENZWEIG: Understood. And that's why we were

1 focused on giving them the kind of discovery that dealt with  
2 that prong too, which was what actual damages were suffered and  
3 we gave them that information.

4 THE COURT: Well, but they're suggesting that it's not  
5 just limited to that attachment. That they are entitled to  
6 information regarding all of it and why aren't they.

7 MR. ROSENZWEIG: They're -- so they're entitled --  
8 they're saying they're entitled to information regarding 50  
9 plus other attachments and damages and invoices that have  
10 nothing to do with the seven that are at issue.

11 THE COURT: Well, I can posit how they might have  
12 something to do with it. I don't know that this was true, and  
13 I -- but certainly JPMorgan could've agreed to pay a certain  
14 amount on this service, and got a deal on other services.

15 MR. ROSENZWEIG: Well, JPMorgan drives a hard bargain  
16 no matter what the -- I can tell you that. They get the bottom  
17 price basically on everything.

18 THE COURT: Well, I think I agree with the Trust. I  
19 think they're entitled to the documents to the extent they  
20 prove anything or don't prove anything, you know, I -- we're  
21 not there yet. But I think they are entitled to discovery of  
22 it, because it could lead to relevant information related to  
23 the damages suffered with respect to just these services.

24 MR. ROSENZWEIG: Okay. So that's on the Washington  
25 Mutual services that essentially what JPMorgan --

1 THE COURT: Whatever Washington Mutual services  
2 JPMorgan negotiated --

3 MR. ROSENZWEIG: Right.

4 THE COURT: -- with and obtained from you.

5 MR. ROSENZWEIG: Not just the seven but whatever they  
6 -- the full panoply were.

7 THE COURT: Yes.

8 MR. ROSENZWEIG: Okay. So that's what we're talking  
9 about.

10 THE COURT: I think so.

11 MR. ROSENZWEIG: All right. Thank you.

12 THE COURT: Do you want to settle a form of order and  
13 submit it?

14 MR. ROSENZWEIG: I think we have to revise it because  
15 we talked about -- the Judge is talking about the mitigation  
16 issues as a whole, the WaMu services moved over to JPMorgan if  
17 they --

18 MR. GURDIAN: You know, I'm sorry, Your Honor, I might  
19 have missed it, the -- you're not narrowing the scope to just  
20 the JPMC services that went over; is that right?

21 THE COURT: Well, I don't think you're entitled to  
22 discovery any JPM services that they got before they took over  
23 the bank.

24 MR. GURDIAN: Correct. But services that would  
25 overlap would be similar services that they either changed or



1 would've moved around after the WaMu AT&T agreement was  
2 rejected, those would be relevant. That's the way I  
3 understood.

4 MR. ROSENZWEIG: I think the Judge was saying, the  
5 WaMu services of the 64, the whole package, that was moved  
6 over, that's what we're focused on. So I understand --

7 THE COURT: I guess we're focused on -- I agree. If  
8 you had negotiations with JPMorgan --

9 MR. ROSENZWEIG: Yeah.

10 THE COURT: -- at the time they took over the bank,  
11 and they said, we don't need attachment 1, because we already  
12 have it, but give us a deal on that.

13 MR. ROSENZWEIG: Right, I understand.

14 MR. GURDIAN: Yeah.

15 THE COURT: That would be relevant.

16 MR. ROSENZWEIG: So when we focus on the negotiations  
17 at the time --

18 MR. GURDIAN: Okay.

19 MR. ROSENZWEIG: -- as opposed --

20 THE COURT: Yes.

21 MR. ROSENZWEIG: -- to all the mundane stuff for the  
22 last X number of years.

23 MR. GURDIAN: Well, again, just to clarify. With  
24 respect to -- now let's get off of the JPMorgan issue. With  
25 respect to only the Washington Mutual agreement, and the

1 negotiations between AT&T and Washington Mutual, I don't think  
2 Your Honor was narrowing that scope, except for how we've  
3 agreed to already narrow it with respect to negotiations,  
4 correct?

5 THE COURT: I think right. You don't have any problem  
6 providing the negotiations of the contract with the debtor?

7 MR. ROSENZWEIG: Well, let's put it this way. The  
8 contract is ten years long, and there's a whole bunch of  
9 attachments. If they want to focus on the negotiations of the  
10 liquidated damage clause, that's one thing, but negotiations  
11 about the entire contract and every clause of, you know, 64  
12 attachments, only 7 of which are part of the claim? That's  
13 burdensome to us, Your Honor. And if we want to focus on the  
14 negotiations that's --

15 THE COURT: Why are the other 53 relevant?

16 MR. ROSENZWEIG: Yeah.

17 MR. GURDIAN: Well, they are relevant because this --  
18 the -- if you see the supposed liquidated damages clause comes  
19 in at amendment 27 or something like that, how you negotiated  
20 previous agreements, whether you intended previous agreements  
21 to have liquidated damages clauses, and how the parties agreed  
22 to structure those clauses, that's all relevant to interpreting  
23 the liquidated damages clause that's presently at issue.

24 MR. ROSENZWEIG: Well, okay, but that's liquidated  
25 damage clause, you're not talking about the negotiate -- it has

1 to do with a lot of things, but they're talking about  
2 liquidated damage clauses, so you know, that's a different  
3 story.

4 MR. GURDIAN: We can't limit it to a liquidated  
5 damages, that's just unworkable. You'll end up only searching  
6 for paragraph 32 of the agreement. If that doesn't happen to  
7 appear, then there are no documents. I don't think that's what  
8 the scope of the discovery rule allows us to get. It's --

9 THE COURT: Do you want all of the negotiations for  
10 the last ten years?

11 MR. ROSENZWEIG: Yes.

12 MR. GURDIAN: We want the negotiations related to the  
13 specific amendments, not just all the communications, and you  
14 know, we don't have the benefit of the communications.

15 MR. ROSENZWEIG: The seven amendments?

16 MR. GURDIAN: No.

17 MR. ROSENZWEIG: The 64?

18 MR. GURDIAN: We don't have the benefit of those  
19 communications to allow us to narrow it at this point, we don't  
20 know what they say.

21 MR. ROSENZWEIG: But you're Washington Mutual.

22 MR. GURDIAN: We don't have the documents, Your Honor  
23 knows the history on how the documents got handled in this  
24 case.

25 MR. ROSENZWEIG: Your Honor, I think that that's sort

1 of the problem is we've got an expansive discovery looking for  
2 needles in the haystack. It's not focused on the legal and  
3 factual issues at play here as I indicated. So we need to  
4 focus -- we would suggest we need to focus it on the relevant  
5 issues, and not this broad, we want everything to do with the  
6 negotiation of the agreement, when those attachments were  
7 negotiated piece meal, added on over time, and have nothing to  
8 do -- unfortunately, they don't have anything to do with these  
9 seven attachments that have the claims in them that we're  
10 dealing with.

11 So we're -- you know, we're being asked to go, you  
12 know, neck deep into a bunch of irrelevant material that's very  
13 burdensome to us, going back ten years in time.

14 THE COURT: Yeah, why is the --

15 MR. GURDIAN: We don't know if they're relevant,  
16 that's the point. We need --

17 THE COURT: But we do know it's burdensome. We're  
18 talking about ten years negotiating 60 attachments.

19 MR. GURDIAN: We -- even that we don't know, Your  
20 Honor. They haven't told us what it entails to go into that.  
21 You know, when we asked for a narrowed request, we would've  
22 talked about all these issues, but we have not been approached  
23 with the fact that it's burdensome because of X, Y and Z. We  
24 just haven't gone there, and we can't tie our hands now when  
25 Rule 26 allows us to review the documents and see if there's

1 relevant information in those documents. Only with respect to  
2 negotiations of those documents. I'm not talking about service  
3 calls. I'm not talking about the mundane issues that Mr. --

4 THE COURT: Well, I will allow, but only limited to  
5 any discussion of liquidation damages clauses or damages.

6 MR. GURDIAN: Damages clauses.

7 MR. ROSENZWEIG: All right. Thank you, Your Honor.

8 MR. GURDIAN: Thank you, Your Honor, so we're file an  
9 order under certification of counsel, we'll talk about it.

10 MR. ROSENZWEIG: Why don't you send -- yeah, we'll  
11 work on it.

12 MR. GURDIAN: Thank you, Your Honor. That was the  
13 last matter on the agenda, Your Honor.

14 THE COURT: Okay. Then I'll look for a form of order  
15 from you.

16 MR. GURDIAN: Thank you, Your Honor.

17 THE COURT: All right. We'll stand adjourned.

18 (Proceedings concluded at 2:44 PM)

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**CERTIFICATION**

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

Dated: November 21, 2012

**Sheila  
Orms**



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