

2 SUPREME COURT OF THE STATE OF NEW YORK
3 NEW YORK COUNTY: CIVIL TERM: PART 49

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: Index No.
5 600780/08
IN RE BEAR STEARNS LITIGATION :

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7 -----X
8 60 Centre Street
New York, New York 10007
9 August 11, 2008

10 B E F O R E:

11 THE HON. HERMAN CAHN, Justice

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(Whereupon, the following takes place in open court, in the presence of the Court, Mr. Krasner, Mr. Nespole, Mr. Kriner, Mr. Sheils, Mr. Markel, Mr. Halper, Mr. Wolinsky, Mr. Boczko, Mr. Moritz, Ms. Kelly, Mr. DiBlasi, Mr. Kaplan, and Mr. Orsini:)

THE COURT: Whose motion? Who wants to start?

MR. MARKEL: Good morning, your Honor.

THE COURT: Good morning.

Tell me who you are, who you're talking for.

MR. MARKEL: I was going to go to the podium.

THE COURT: Please do. Feel free.

MR. MARKEL: Good morning, your Honor. My name is Gregory Markel. I'm from Cadwalader, Wickersham & Taft; and I represent the Bear -- I remember Bear Stearns and certain inside individual defendants.

THE COURT: Directors?

MR. MARKEL: Inside directors, yes.

THE COURT: Inside directors.

MR. MARKEL: Right.

May I start, your Honor?

THE COURT: Sure.

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MR. MARKEL: Thank you, your Honor.

First of all, your Honor, may I ask, did you get a copy of a handout, this handout?

You did. Okay, great.

Your Honor, we believe that there are a few simple principles important and sufficient to decide this case that -- at least vis-a-vis the Bear Stearns defendants. And the first, the first item in your booklet and on this board is the Summary of Oral Argument. And we would suggest to your Honor that there are four facts that are uncontested that are key to the decision of this motion. The first is, the truly extraordinary circumstances, truly extraordinary circumstances are what occurred and are at stake in this lawsuit.

This is not, this is not a contest between a couple of people vying for corporate control. It is not a hostile tender offer. These are truly extraordinary circumstances.

If we go to the next page, your Honor, and it's also on the board here, you'll see that not Be -- that isn't just Bear Stearns or JPMorgan talking. Robert Steel, then Under Secretary of the Treasury, on April 3 testifying before Congress said, The funding condition of Bear Stearns had rapidly deteriorated and

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2 by March 13, 2008, had reached a critical stage that
3 the company would have faced a bankruptcy filing on
4 March 14 absent an extraordinary infusion of liquidity.

5 There are similar quotes from Timothy
6 Geithner, the President of the Federal Reserve Bank of
7 New York; Christopher Cox, the SEC Commission Chairman;
8 and Ben Bernanke, the Chairman of the Board of
9 Governors of the Federal Reserve System, all of them
10 saying that a crisis developed suddenly, that Bear
11 Stearns' viability was threatened, that the only
12 alternative really was to either workout a transaction
13 or Bear Stearns would have to go into bankruptcy.

14 And so once again, your Honor, this is not a
15 situation of the parties, just the parties saying that
16 they are, that this was a crisis. This was a true
17 crisis. And as we'll see when we later get to Delaware
18 law, the circumstances that a board is dealing with are
19 critical in evaluating the reasonableness of the
20 actions of the board. And so the contrast between this
21 crisis and a typical, typical contest for corporate
22 control is dramatic; and it affects how the law of
23 Delaware should apply.

24 The next major point, your Honor, is Bear
25 Stearns' Board, nine of 12 of them were outside, non
26 management directors whom had nothing to gain for

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2 themselves from merger or merger agreement provisions.

3 These are all in the summary.

4 So what do we have here?

5 We have a board that is dominated, nine of
6 12, by outside directors. All of the directors were
7 going to resign under what ultimately was the plan and
8 have in fact resigned. None of them got anything
9 financial out of this transaction other than what every
10 other shareholder got. To the extent they owned
11 shares, they got the same price as everyone else. So
12 there is no interest, no special interest that any of
13 the directors had in the outcome of dealing with this
14 crisis, none. And that also is relevant, very relevant
15 in the applicability of Delaware law.

16 The third item, your Honor, is the Board was
17 truly diligent. The crisis really arose as a crisis on
18 the evening of March 13. And over the next 11 days the
19 Board met 11 -- excuse me, 12 times in 11 days. It was
20 on the phone frequently with management in between
21 board meetings. They were working constantly to try
22 and come up with, with a solution to the liquidity
23 crisis that had arisen for Bear Stearns.

24 And so the diligence of the Board and the
25 care they exercised -- and we certainly will go into
26 that in more detail -- it was, it was a high degree of

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2 effort and care; and they had sophistication as well on
3 that Board in addressing the question what is a
4 reasonable solution to these problems. Once again, all
5 of that is relevant to the considerations under
6 Delaware law of whether or not the Board has any
7 liability for breach of fiduciary duty.

8 THE COURT: Why was the -- why was it
9 necessary to enter into a no shop agreement?

10 I mean, to me, if things were as bad as you
11 say they were, and I also read the newspapers, I read
12 the newspapers, and I understand that, I understand the
13 crisis, but if there was such a serious crisis going on
14 immediately, there was no one else out there who could
15 possibly have taken JPMorgan's place, so why, why a no
16 shop agreement?

17 MR. MARKEL: Well, your Honor, first of all,
18 let me, let me respond to that question in two parts.

19 First of all, it depends on what, at what
20 point in that 11 days we're talking about. In
21 fact, Lazard, the financial adviser, was contacting a
22 number of people in the first few days; and throughout
23 the first weekend JC Flowers was evaluating the, the --

24 THE COURT: The first weekend ended, and
25 I'm trying to understand just to make -- for myself,
26 the first weekend ended when the announcement of the

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sell or buyout was made for \$2 a share.

MR. MARKEL: That is correct, your Honor.

THE COURT: So on that weekend, let's talk about that weekend then.

MR. MARKEL: Okay. On that weekend there was -- first of all, there was no no shop during that weekend. They were searching during that weekend. There was no merger agreement. The only agreement that had been entered into prior to that weekend -- and perhaps, your Honor, if you'd like we can skip ahead to the chronology if that would be helpful.

THE COURT: No. If you intend to --

MR. MARKEL: The answer to your question is during that weekend there was no no shop. The merger agreement wasn't entered into until the end of the weekend, number one.

Number two, a shop, shop clause is a standard clause in this agreement. They are in virtually every agreement.

Number three, your Honor, in fact, we contend that there was the possibility of someone coming forward, there was the theoretical possibility of someone coming forward certainly after the two-dollar deal was done and, and again after the 10-dollar deal was done; so at least there was a theoretical

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2 possibility.

3 Fourth, your Honor, that particular issue,
4 the issue relating to why a no shop was requested, will
5 be addressed by Mr. Wolinsky; but why we accepted it
6 was the Board of Bear Stearns was faced with either
7 bankruptcy, which is my next point, or doing a deal
8 that would get the shareholders money, would not result
9 in losses to creditors, and would avoid at least some
10 of the employment losses. So all of those are part of
11 the rationale; but ultimately, ultimately -- and, and I
12 don't know if I've answered your question sufficiently
13 because I'd like --

14 THE COURT: Yes, you've answered it. You've
15 answered the question, although it is not going away,
16 you'll hear it again; but you've answered it so far.

17 MR. MARKEL: I expect I will, and I expect we
18 all will; but before we get to that, and I think my
19 point four really addresses this --

20 THE COURT: Okay.

21 MR. MARKEL: -- in a sense. And we're going
22 to put up the board, but you have it in your --

23 THE COURT: I have it in my book, yes.

24 MR. MARKEL: Right.

25 Your Honor, the fact of the matter is a
26 bankruptcy would result. And there is no testimony,

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2 there is no admissible evidence, there's only
3 speculation from experts to the contrary. All of the
4 evidence suggests that the Board understood that there
5 would be no recovery for shareholders in a bankruptcy.
6 So from a, from the perspective of the Bear Stearns
7 Board, they had a choice, right.

8 And if we're now talking about the first
9 weekend --

10 THE COURT: First weekend.

11 MR. MARKEL: Yeah. In the first weekend the
12 choice was -- and it was given to us in effect by the
13 United States government -- either you do a deal by
14 Sunday night or you will not have any, you will not be
15 able to open on Monday. So we had, we, the Board had
16 to do a deal on that first Sunday night; and the terms
17 that were available were, the best terms that were
18 available were the terms that we were given and that we
19 agreed to. All right? There wasn't a -- there wasn't,
20 there was no negotiating room.

21 Now, let me go back briefly to this slide,
22 your Honor. Under the facts and circumstances that we
23 have here, under Delaware law, we would respectfully
24 suggest that it is not for this court to question the
25 directors' judgment. We -- there are four possible
26 approaches to the legal analysis. One would be under

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2 the business judgment rule, and we believe that's the
3 right answer.

4 Under that, clearly the Court here because
5 the Board is not interested -- it's not an interested
6 board, it's a disinterested board. It was diligent, it
7 made a reasonable judgment of the options open to it;
8 therefore, this Court should defer to the Board under
9 the business judgment rule.

10 Under Unocal because the directors acted
11 reasonably, and we'll go into that in more detail,
12 there's the same answer. Under the law of
13 Unocal -- and we will, as I say, we will go through the
14 Unocal analysis -- once again, the Board acted
15 reasonably in dealing with the circumstances it was
16 faced with.

17 The third option, your Honor, is Blasius, and
18 we think that Blasius does not apply here. Blasius
19 applies -- the case law is clear, is used very
20 sparingly, and it's used where directors are trying to
21 entrench themselves. That's the context of Blasius
22 that's where, in those rare circumstances where Blasius
23 applies. It is where the board is trying to entrench
24 itself or benefit itself. We don't have that here;
25 and, therefore, you don't go to Blasius. Even if you
26 did -- and we think, we submit, your Honor,

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2 respectfully, that would be clear error -- the answer
3 is if there's ever compelling circumstances, there are
4 the circumstances that are existing here because there
5 was no option other than bankruptcy. Zero recovery for
6 the shareholders, losses for the creditors.

7 And finally, your Honor, under Revlon, which
8 is also suggested by plaintiffs as possibly applying,
9 it's also clear that, number one, Revlon doesn't apply
10 because it's stocks for stocks deal. But even if it
11 did apply, this Board clearly tried to maximize the
12 recovery for the shareholders, had four law firms
13 advising it, had Lazard advising them, had experienced
14 advisors search for alternatives. The only alternative
15 available was the alternative it took. And it tried to
16 maximize the value for the shareholders, and, once
17 again, going back to the slide that's on the board
18 here, was able to raise the recovery for the
19 shareholders from \$2 a share to \$10 a share and from
20 290 million to 1.45 billion. So the Board was trying
21 throughout this process not to, not to entrench itself,
22 not to benefit itself, but to get as much as it could
23 for the shareholders in this crisis atmosphere.

24 Now, your Honor, I think in order to
25 understand fully what's going on in this time period it
26 would be helpful for us to go through a timeline. And

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2 there are three pages of timeline, and I realize
3 there's a lot of material, I am not going to go through
4 every item there.

5 THE COURT: Yes, I really don't think you
6 have to on this.

7 Just, I'd like you to skip for a little bit
8 to -- in my folder it says here Bear Stearns' Board
9 fully considered the consequences of a bankruptcy
10 filing.

11 What were the consequences of a bankruptcy
12 filing, Chapter 11 filing?

13 MR. MARKEL: Your Honor, if -- I do have a, I
14 do have three slides on the bankruptcy issue. The
15 first of which is being put up now.

16 THE COURT: Okay.

17 MR. MARKEL: And --

18 THE COURT: That's the one I was referring
19 to.

20 MR. MARKEL: And it is the one you were
21 reading from.

22 THE COURT: That's what I was reading from.

23 MR. MARKEL: Bear Stearns had several
24 different businesses, as we all know. The brokerage
25 business is not eligible for reorganization or Chapter
26 11, okay, under the law, under SIPC.

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THE COURT: It can't do that.

MR. MARKEL: You can't do it. So it's,
that's gone.

So the brokerage business effectively has zero value because the accounts will be shifted by SIPC to other brokerage firms, so you can't get any value in bankruptcy for the brokerage business. That's number one. And the first two items on this chart refer to that.

Now, the other problem with a, with a bankruptcy of a brokerage firm is that many of the liabilities that Bear Stearns had were things like Repo Agreements and commodities contracts. Under the Bankruptcy Law there is a safe harbor for which, which, which applies to these kinds of arrangements; and there's no automatic stay that applies to them. So those to whom Bear Stearns owed money in a bankruptcy, hypothetical bankruptcy, can seize the collateral and sell it, and there is no automatic stay to stop that. So you have, you have their collateral going out the door. All right.

THE COURT: Yes.

MR. MARKEL: Okay. Next, vis-a-vis Bear Stearns' own ability to -- well, it would lead to further downgrades of its debt rates, make it

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2 impossible as a financial institution to continue
3 business. So in the non -- even in the non brokerage
4 businesses, businesses, you have, you'll have true
5 damage to the ability of this company as a financial
6 institution to continue to operate in the financial
7 markets.

8 And finally, your Honor, finally, like any
9 business that is dependent on the talents of its people
10 more than hard assets, they leave every day at five
11 o'clock. And so the people of Bear Stearns, the big
12 producers, would be out the door working for other
13 investment banks that didn't have these problems if
14 there was a bankruptcy filing. And so what remains is
15 there's nothing left. There are no machines to sell.
16 There's no inven -- the inventory, to the extent there
17 are securities, many of them are going out the door
18 because they're pledged.

19 THE COURT: It's clear.

20 MR. MARKEL: Okay? So as a result of that,
21 and I think it's important when you turn to the next
22 page, your Honor, to understand that we're talking here
23 about what the Bear -- whether the Bear Stearns Board
24 acted reasonably. They had four major and respected
25 law firms advising them, as well as Lazard. And all of
26 them, all of them were advising the Board that there

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2 was a zero value in a bankruptcy for shareholders as
3 well as losses to creditors.

4 Now, the Bear Stearns Board is entitled under
5 the law of every state I know, and certainly Delaware
6 and New York, to rely on the advice of its professional
7 advisors. Its advisors said there's not going to be
8 anything here.

9 Now, your Honor may think, well, maybe
10 there'll be something; but the Board's information in
11 this timeframe was there's no value. That's what the
12 Board understood. It was advised by all the law firms
13 and Lazard; and there's no, there's no contrary
14 evidence on that. There's no contrary evidence on what
15 the Board was told or what the Board believed. The
16 only thing that you have in contradiction of that is a
17 speculative affidavit of an expert who says it might
18 have been possible, might have been possible. Maybe
19 they could have gotten some value. But there's no
20 evidence, no evidence to that effect that's admissible,
21 and it certainly doesn't go to what the Board believed.
22 This is what the Board relied on, the advice of its
23 advisors and its management about what would happen in
24 a bankruptcy.

25 Mr. Schwartz's affidavit, which is
26 admissible on this motion, his deposition was taken,

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2 his affidavit has been submitted twice, it was
3 submitted on the preliminary injunction motion slightly
4 different, but essentially the same, they withdrew
5 that. They took his depo -- they submitted a second
6 affidavit. They took his deposition. There's still no
7 evidence other than that the Board was advised there
8 was no value here. That's it on evidence.

9 And so, your Honor, that is what the Board
10 believed; no value for shareholders, losses for
11 creditors, and losses of jobs for employees. Not to
12 mention, not to mention because maybe it's not directly
13 relevant here, what it would do to the economy of the,
14 of the United States, the economy of New York City, the
15 financial markets. Those aren't my main arguments, but
16 those are also here. But what caused their decision
17 was that their advisors had told them there was no
18 value here; and there was no contrary information, none
19 before that Board. And once again, in Delaware case
20 law, the court takes into account the circumstances
21 that the board was operating under. And it was
22 operating under a timeframe that was very short, it
23 was -- it met 12 times in 11 days to try and meet its
24 duties, and it did. This is the information it had.

25 THE COURT: Okay, why don't we let the
26 plaintiff argue and tell me why I shouldn't, why I

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2 shouldn't go along with your argument.

3 MR. MARKEL: That's fine, your Honor.

4 I -- you want me to -- if you want me to
5 address any, any case law, I will do that.

6 THE COURT: Well, there's actually one issue
7 that I want you to address. There's one issue that I
8 want you to address which you haven't, and that's this.

9 You've made a very strong argument, in my
10 mind; but is it an argument that I can use in ruling on
11 a motion for summary judgment, or does it leave me with
12 issues of fact?

13 You've told me all about, really haven't told
14 me because I cut you off, but all about the crisis
15 situation that was going on that weekend and all about
16 the other things that the Board heard or was advised.

17 Are those issues of fact?

18 MR. MARKEL: There's no --

19 THE COURT: On summary judgment I'm concerned
20 with -- the first question I'm concerned with is are
21 there issues of fact here.

22 MR. MARKEL: Well, your Honor, first of all,
23 plaintiffs' brief, if you read it, as I did for the
24 probably the tenth time this morning, admits, admits
25 that there was a crisis at Bear Stearns. They admit
26 there's a liquidity crisis. It's in their brief.

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2 Not only do we have the --

3 THE COURT: Well, I'm going to ask them the
4 same question, the reverse of the question of course.5 MR. MARKEL: Well, you can do that. Of
6 course, your Honor, you are free to do anything you
7 would like; but I'm telling you they will be
8 contradicting their brief if they say --9 THE COURT: What I'm asking you is are there
10 issues of fact?11 MR. MARKEL: And I'm saying, I'm trying to
12 answer that, your Honor. There's no contrary evidence
13 on the first -- you asked me about two points. The
14 first is was there a crisis at Bear Stearns.

15 There is not even a dispute --

16 THE COURT: I wasn't asking that. Of course,
17 there was a crisis at Bear Stearns.18 No. My question is, what I said is you
19 talked to us about the crisis at Bear Stearns and the
20 other issues. Are those factual issues?21 MR. MARKEL: They're not, your Honor, because
22 the -- if you're-- let's take the last issue I just
23 addressed, which is did the Board believe that there
24 was any alternative to doing the deal because
25 bankruptcy, there would be a zero recovery in
26 bankruptcy. Response to an earlier question of your

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2 Honor. There's no contrary admissible evidence on that
3 point. None, zero.

4 So, yes, number one, summary judgment is
5 appropriate. There is no issue of fact. Plaintiffs
6 haven't created an issue of fact.

7 THE COURT: Well, that's what I'm going to
8 ask them.

9 Okay, I've heard your view. Let me ask, let
10 me hear theirs.

11 Who is going to speak for the plaintiff?

12 MR. WOLINSKY: Your Honor, may I speak for
13 JPMorgan?

14 THE COURT: No. Why don't I hear the
15 plaintiffs first.

16 By the way, are the other directors -- you
17 spoke for the inside directors. The outside directors
18 are --

19 MR. DiBLASI: I speak for outside directors,
20 your Honor.

21 THE COURT: Do you effectively join his
22 argument?

23 MR. DiBLASI: I do. And I don't plan to make
24 extended remarks. I may have a comment or two.

25 THE COURT: All right, let's hear from the
26 plaintiffs.

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2 MR. KRASNER: Your Honor, I'm only going to
3 address at this point then that first weekend, unless
4 your Honor wants me to address the entire transaction.

5 THE COURT: Well, I would. I'd like you to
6 address the entire transaction. Let's start with the
7 first weekend.

8 MR. KRASNER: There are several factual
9 issues here that need to be dealt with, with respect to
10 that first weekend and what the directors did and did
11 not do. Let's first look at the opinion they obtained
12 from Lazard.

13 The opinion they obtained from Lazard is
14 absolutely no use. It has no factual information, it
15 has no value information. It doesn't tell the
16 directors or anyone else what this company was worth
17 during that weekend. The Lazard opinion simply says we
18 think that the company may be insolvent; and therefore,
19 since it may be insolvent, anything you can get is
20 better than nothing, take it.

21 That's, that's in essence their opinion.
22 They don't value the various businesses of the company,
23 they don't value -- they don't give any alternative
24 advice as to what the company could or should do to
25 preserve value. They simply say for \$20 million we
26 think that you got to take the \$2 a share.

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2 Why the directors didn't cross-examine Lazard
3 and say come up with some kind of value for this
4 company so we could determine whether \$2 a share is a
5 fair price --

6 THE COURT: But we are here --

7 MR. KRASNER: -- is inexplicable.

8 THE COURT: But we are here today after a lot
9 of depositions and after a lot of investigations by
10 everybody. Congress was referred to, you had
11 depositions, and so on.

12 Question, what could the directors have done
13 that Sunday night?

14 MR. KRASNER: The directors did have, they
15 did have several choices, your Honor.

16 THE COURT: What were they?

17 MR. KRASNER: Let's not go down the
18 bankruptcy route because I don't know that that was a
19 viable option for them.

20 THE COURT: Okay, so that's out.

21 MR. KRASNER: They had -- they had interim
22 financing from JPMorgan on Thursday, and they did have
23 an agreement by the Fed through JPMorgan to finance
24 them over the weekend. When the Fed said to them we
25 will not continue that financing unless you have a
26 transaction in hand, the directors could and should

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2 have determined whether the transaction offered to them
3 by JPMorgan was the best transaction available.

4 THE COURT: Was there any other transaction
5 available?

6 MR. KRASNER: Over that weekend it appears
7 there was not. It was a very short period of time.

8 THE COURT: Then what could they have done
9 that Sunday night?

10 MR. KRASNER: They probably -- and, and, you
11 know, your Honor may consider this a concession. They
12 probably could have done nothing else.

13 THE COURT: Okay.

14 MR. KRASNER: But what they did not do is
15 inform themselves because what happened in the
16 subsequent week is because they had not informed
17 themselves, they put themselves in an impossible box.

18 They also did two other things that they
19 should not have done. The first thing they did is they
20 turned over the keys to the company to JPMorgan. This
21 they should not have done. Even if there was going to
22 be a merger transaction with JPMorgan, they should have
23 prevented JPMorgan from in effect taking over the
24 operation to Bear Stearns during the subsequent period.

25 THE COURT: Did they have the power to do
26 that?

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2 MR. KRASNER: I believe that they had the
3 power to negotiate a transaction where JPMorgan would
4 have remained an outsider to, to Bear Stearns.

5 THE COURT: We are talking about that Sunday
6 night.

7 MR. KRASNER: Pardon?

8 THE COURT: That Sunday night.

9 MR. KRASNER: On Sunday night.

10 They, they, they made no effort at all to
11 preserve the integrity of Bear Stearns as a separate
12 entity.

13 THE COURT: And we've already agreed -- by
14 the way, just because I'm asking these questions
15 doesn't mean I agree with you. I'm trying to
16 understand, I'm just trying to understand his position.

17 MR. MARTEL: I understand that, your Honor.
18 And I assume that just because you ask me questions
19 doesn't mean you disagree with me.

20 THE COURT: That's right.

21 But seriously, we've already agreed that they
22 had no choice on Sunday night.

23 MR. KRASNER: Correct. They had no choice,
24 but to enter into a transaction with JPMorgan.

25 THE COURT: What -- did they have the ability
26 on Sunday night effectively to say no to JPMorgan on

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anything?

MR. KRASNER: I think -- I think they had the ability as an independent board of directors under the supervision of the United States government to say that we cannot turn over the keys to the company to you on Sunday night.

THE COURT: Two questions on that.

MR. KRASNER: They made no effort, so we don't know --

THE COURT: Number one, isn't that pure speculation?

MR. KRASNER: Well, since they made no effort to do it, they didn't even ask, we don't know what would have happened had they asked.

THE COURT: Was JPMorgan and its president or officers, were they deposed?

MR. KRASNER: They were not approached.

THE COURT: No. Were they deposed here in this?

MR. KRASNER: Mr. Diamond was deposed.

THE COURT: What did he say? Was he asked on that question?

MR. KRASNER: I don't believe he was asked that specific question would he have gone ahead with the deal if he didn't have his people in control at the

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2 bank. No, he was not asked that specific question.

3 It's clear that he wanted control of the bank
4 for his purposes.

5 THE COURT: Sure, but --

6 MR. KRASNER: So from that point of view,
7 Mr. Diamond certainly would have wanted that.

8 Let's go to another piece of information that
9 the Board never had and which created problems
10 throughout the transaction.

11 THE COURT: Also, how would that have helped
12 anything?

13 MR. KRASNER: Well, it would have helped
14 because if, if they had maintained their independence
15 and integrity, then the transaction that occurred on
16 the second weekend would not have occurred the way it
17 did.

18 THE COURT: Okay, so do you want to argue on
19 that second transaction?

20 MR. KRASNER: Yes. I -- the center of my
21 argument, your Honor, is that second transaction.

22 THE COURT: Okay.

23 MR. KRASNER: What happened between the first
24 and second transaction?

25 First of all, let's, let's clear up some
26 issues because the defendants have, I'm not saying

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2 intentionally, but they have misstated certain key
3 facts that relate to what occurred.

4 The first key fact is that under the first
5 transaction all of the debts of Bear Stearns, all
6 existing debts were guaranteed by JPMorgan. Whether
7 this was a wise decision or not, is not what we're here
8 to debate. The fact of the matter is that if your
9 Honor looks at the guarantee, it guaranteed all debts.
10 So any argument that the directors had to be concerned
11 after that first weekend with the debtors of Bear
12 Stearns is a filaceous argument. The debtors of Bear
13 Stearns from that weekend going forward stood in the
14 position of having a guarantee from the second or third
15 largest bank in the country, backed up by the Fed for
16 all of its debts; so that should not have been of
17 concern to the directors going forward.

18 Second, and equally important, your Honor,
19 all of the transactions of Bear Stearns were guaranteed
20 by JPMorgan, as a consequence of which, and this is in
21 the record, two things occurred during that week.
22 First of all, the price of default securities for Bear
23 Stearns, in other words, securities that
24 guaran -- against default, the price of those
25 securities went down significantly because the market
26 perceived that the risk to Bear Stearns had passed.

1 Proceedings

2 Second, the price of Bear Stearns stock
3 during that entire week traded far above the two-dollar
4 price that had been agreed to, so the market was saying
5 that Bear Stearns was worth considerably more than \$2
6 and that it expected that there would be a value
7 enhancing transaction either from JPMorgan or from a
8 third-party.

9 The biggest mistake that the directors made
10 during that week was they turned over the keys of the
11 bank to JPMorgan and in effect put themselves in a
12 position so that on the -- that when Mr. Diamond came
13 to them, as he did on Tuesday after he read all of
14 those agreements and realized what he had done, when he
15 came to them on Tuesday and said we have to remake this
16 deal to make it a certainty that JPMorgan acquires Bear
17 Stearns, the risks had shifted entirely. And had they
18 not been in a position where JPMorgan was in effect in
19 control, they could have said to JPMorgan we like that
20 first agreement, we know the price is inadequate, but
21 we expect that someone is going to come along, another
22 bank, and there were other banks out there that given
23 sufficient time could have come in and acquired them
24 for closer to fair value.

25 Now, one of the things, as I've indicated,
26 that we found fault with is the Lazard opinion because

1 Proceedings

2 the Lazard opinion doesn't tell us what the fair value
3 of the bank was of Bear Stearns.

4 There is a lot of evidence in the record that
5 the fair value of Bear Stearns was anywhere from 20 to
6 \$80 a share. The book value of Bear Stearns was
7 \$80 billion. And Mr. Black, one of the senior
8 employees of JPMorgan, is quoted in a document that we
9 have submitted to your Honor that he felt that that
10 80 billion-dollar value, book value was solid. And
11 that was after looking at the books and records of Bear
12 Stearns. So people that had, including JPMorgan,
13 people that had looked at the books of Bear Stearns
14 concluded that there was significant value in Bear
15 Stearns far above the billion .5 -- .45 that was paid
16 for Bear Stearns.

17 So there were a lot of options that these
18 directors had during this interregnum period that they
19 foreclosed by the actions that they took, or the
20 inaction, during that week.

21 THE COURT: No. But, again, on taking your
22 view, didn't they foreclose these actions by the
23 agreement that they signed on Sunday night?

24 MR. KRASNER: No, they did not foreclose
25 these actions by that agreement.

26 THE COURT: Okay, then what actions did they

1 Proceedings

2 take or didn't they take that you are talking,
3 referring to?

4 MR. KRASNER: During that period of time,
5 during that week they had the ability to go to JPMorgan
6 and say to JPMorgan we are satisfied with the deal we
7 cut, let's go forward and let's see what happens. We
8 don't need a new deal. We're very satisfied with the
9 old deal. And even though we believe the price is
10 inadequate, we believe the market will ultimately prove
11 that that price will be increased either in one of two
12 ways. Either somebody else will come along or,
13 JPMorgan, you will have to pay fair value if you want
14 to get this bank.

15 And the weapon that they had was the
16 shareholder vote. That was their weapon. Because
17 nobody here will dispute the fact that under Delaware
18 law, under New York law, under any corporate law, the
19 ultimate decision on whether or not to have a merger is
20 a decision the shareholders have to make. Nobody else
21 is entitled to make that decision for them.

22 THE COURT: And if the shareholders had voted
23 no, then what?

24 You're saying, you're arguing that the crisis
25 had passed?

26 MR. KRASNER: What I'm arguing is that, first

Proceedings

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2 of all, before there would be a shareholder vote, you
3 would have had a period of four, six, eight, 10 weeks
4 because that's how long it takes. During that period
5 of time another buyer could have come along and offered
6 a significantly higher price for Bear Stearns; and
7 therefore, in effect, the shareholder vote would have
8 been, no, we don't like JPMorgan; we'll go to Dresdner
9 Bank, we will go to Deutsche Bank, we will go to Royal
10 Bank of Scotland, we will go to HSBC Bank.

11 There were a significant number of banks
12 throughout the world who would have seen significant
13 value in Bear Stearns; but by the time the second
14 weekend was over there was nobody who could possibly
15 have come in and acquired that bank. They had
16 foreclosed that possibility because they had in effect
17 sold the shareholder vote to JPMorgan. They had gone
18 ahead and with the options that they gave JPMorgan and
19 with the fact that they understood that JPMorgan was
20 going to go out and buy additional shares in the
21 marketplace immediately after that second announcement,
22 they knew that they had wrapped it up.

23 Mr. Diamond testified repeatedly in his
24 deposition that what he was looking to do was certainty
25 that they would get Bear Stearns. And the directors
26 handed Bear Stearns over to him and created that

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2 certainty during that second weekend. They created
3 that certainty by giving them 39.5 percent of the
4 stock, not asking them even -- there is conflict of
5 testimony as to whether they did or did not ask to have
6 a standstill agreement so they couldn't buy any more.
7 Mr. Diamond says there was no request, Mr. Schwartz
8 says we did request it. In any event, it never
9 happened.

10 Within a matter of days JPMorgan Chase had
11 acquired the majority of the stock, or controlled the
12 majority of the stock; and at that point in time nobody
13 could come along. So from the first situation, the
14 first weekend where they had an option to buy only
15 20 percent of the stock, and it was only an option, and
16 it was in effect a termination payment so that if
17 someone came along and offered considerably more
18 JPMorgan could cash in its 20 percent and make a
19 significant profit, which is what the structure of that
20 first transaction was.

21 The difference between the first and second
22 transaction is the first transaction was the ordinary
23 kind of a deal. You can see these deals every Monday
24 and Thursday in the newspaper. A company comes along,
25 the board of directors strike a deal, a price, whether
26 it's the right price or the wrong price, the first

Proceedings

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2 buyer gets some kind of termination payment, an
3 agreement whereby if a higher offer comes along he
4 doesn't walk away empty handed, if a higher offer comes
5 along either he matches it or exceeds it or the
6 offerer, the second offerer gets the prize, and the
7 first offerer walks away with a significant profit for
8 its trouble. That was what the first deal looked like.
9 It had options, it had other factors, but it gave the
10 marketplace the opportunity to place a fair value on
11 Bear Stearns.

12 And the marketplace -- we have here, your
13 Honor, for example, these, these are the prices of Bear
14 Stearns' stock. As your Honor could see, on Friday the
15 14th Bear Stearns closes at \$30 a share, which is what
16 the market thought on that day it was worth. On the
17 17th after the announcement of the first deal it is
18 trading at a little less than \$5. And during that
19 entire week the price of the stock is going up, not
20 down. You could see, see on the 17th it is 4.81. 18th
21 it's 5.91. The 19th it's 5.32, and the 20th it's 5.96.
22 Twenty-first was a holiday, and there was no trading.
23 So during this entire period of time the marketplace
24 was saying that two-dollar deal is not the end of the
25 story. There's going to be another deal at a higher
26 price. And whether that deal was going to be made by

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1 JPMorgan or by a third-party, it was going to happen.

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3 And if one looks at the price of JPMorgan
4 stock, you could see, your Honor, on the 14th of March
5 JPMorgan stock closes at 36.54 a share. On the 17th,
6 18th, 19th and 20th it is moving upward.

7 And I should add, your Honor, that in the
8 record and as part of our expert's reports, while the
9 price of JPMorgan stock is going up during that week,
10 all other financial stocks are going in the opposite
11 direction. The only one that's going up is JPMorgan.
12 And the only reason it could possibly have been going
13 up, in contrast to everyone else, is that the market
14 perceived that this was a bargain purchase; this was a
15 fire sale. And JPMorgan was getting an excellent deal.
16 It was getting a deal that according to its own
17 employees was going to generate over a billion dollars
18 a year in income going forward to JPMorgan.

19 So JPMorgan was paying at this point a couple
20 of hundred million dollars for a billion dollars a year
21 in income. Not a bad deal. But it was in fact such a
22 good deal that the market was saying that was not going
23 to be the end of the story. It was no way that
24 JPMorgan was going to end up acquiring this bank for
25 that amount of money. What the directors did, however,
26 during that second weekend is the directors gave

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that -- gave the bank to JPMorgan. And the reason they gave the bank to JPMorgan is they had no choice by that time because they had turned over the keys of the bank.

THE COURT: What are you referring to?

MR. KRASNER: When I say turned over the keys, they had the following situation: JPMorgan employees were in the bank -- they were in Bear Stearns in all positions. All transactions had to be cleared through them, and any issue was supposed to work its way up to the senior people at JPMorgan. They connected their computer systems, so they could get information about every single transaction that was going on at Bear Stearns. They knew the day-to-day profit, they knew all the transactions. In effect, they had, they had total access to all of the information being generated at Bear Stearns. They had, they had employees --

THE COURT: Yes, but so far --

MR. KRASNER: -- supervising every one --

THE COURT: Okay, but that's -- tell me what the directors did because that's what I'm focusing on. Not focusing on whether they were making money.

What did they, what did the directors do?

MR. KRASNER: They -- well, first of all, they turned over the keys to JPMorgan. They, they --

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THE COURT: You know --

MR. KRASNER: They agreed to let JPMorgan
come in.

THE COURT: That was that first weekend.

MR. KRASNER: Right.

THE COURT: Let's go past the first weekend.

MR. KRASNER: The second weekend, the major
issue with respect to the second weekend for the
directors --

THE COURT: Or during the week.

MR. KRASNER: -- is the sale of the vote.

THE COURT: Either during the week or the
weekend.

MR. KRASNER: In that second weekend they had
in effect sold the vote to JPMorgan. They precluded
the shareholders from taking any action on -- in their
own behalf.

THE COURT: You mean by the way they
permitted, by the way they gave JPMorgan shares.

MR. KRASNER: By giving shares -- what made
it even worse, your Honor, what mad it so much harder
for anyone else to come along and even consider buying
them is they didn't even sell the shares for cash.
They sold their shares to JPMorgan for JPMorgan shares
that were, that were unregistered, unsalable.

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2 If somebody had come along and bought Bear
3 Stearns, they would have been stuck with this huge
4 block of JPMorgan stock which was a simple albatross
5 around their neck. They couldn't sell it, they
6 couldn't do anything with it. So even worse than the
7 norm they, they turned over 39.5 percent of the stock
8 to JPMorgan in return for illiquid JPMorgan shares.

9 Second, they did not request, at least
10 according to JPMorgan, or if they did request, they
11 certainly didn't request it very hard, a JPMorgan
12 standstill and not buy additional stock. They agreed
13 to vote all of their shares for the deal. And in fact,
14 your Honor, even without 10 percent of the stock
15 JPMorgan could not have carried this deal if it had not
16 been for the fact that the directors in effect sold the
17 vote to JPMorgan. JP -- as the vote turned out, as we
18 pointed out, there were not sufficient votes for this
19 merger absent the vote from JPMorgan.

20 THE COURT: How did the vote turn out?

21 MR. KRASNER: Pardon?

22 THE COURT: How did the vote turn out?

23 MR. KRASNER: The vote turned out that
24 absent, absent the shares that were voted by JPMorgan a
25 majority did not vote for the merger. And under
26 Delaware law you need a majority of the outstanding.

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2 So if you eliminate the shares of JPMorgan entirely,
3 the shares they voted, it would have been less than a
4 majority of the outstanding voted for the merger.

5 THE COURT: Is there anything else that you
6 claim the directors did wrong at this point?

7 MR. KRASNER: There are other items, your
8 Honor, which I -- I don't think they are significant,
9 but they are certainly important. For example,
10 although the directors gave JPMorgan an option to buy
11 the building for a billion dollars, they never got any
12 appraisal as to the value of the building; so they had
13 no idea --

14 THE COURT: What was the value of the
15 building?

16 MR. KRASNER: We allege that the building was
17 worth between a billion three and a billion five.

18 THE COURT: Do you have any proof of that?

19 MR. KRASNER: We have no proof because there
20 is --

21 THE COURT: In other words, your guess is as
22 good as theirs is what it sounds.

23 MR. KRASNER: We allege it. They don't come
24 forward with any evidence to the contrary; so I think
25 on summary judgment we are entitled to the benefit
26 because they have not, there's not an iota of evidence,

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2 any record, as to what that building is worth other
3 than what the complaint says.

4 THE COURT: When did they make the -- when
5 did they give them the option for the building?

6 MR. KRASNER: They gave them the option on
7 both the first and second transaction merger.

8 THE COURT: They had the option on the first
9 transaction.

10 MR. KRASNER: They changed the option on the
11 second transaction, so it became automatic.

12 THE COURT: What else was there?

13 MR. KRASNER: They, they -- finally, I would
14 say, with respect to the directors, they did not inform
15 themselves as to the going concern value of the company
16 they were selling. They were selling Bear Stearns as a
17 going concern. Although defendants would argue that,
18 well, you know, it was a bankrupt -- it was insolvent,
19 it was not. It was sold intentionally, so it was sold
20 as a going concern; but they never informed themselves
21 as to the value of this going concern.

22 THE COURT: But when they consult Lazard,
23 which is certainly a prominent firm in this field,
24 isn't that sufficient, aren't they entitled to rely on
25 Lazard?

26 MR. KRASNER: They, they didn't ask Lazard

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the right question; or Lazard didn't give them any, any information.

THE COURT: But that's second --

MR. KRASNER: If you go to a banker and you say how much is my, my company worth and I need to inform myself, so I could determine how much to ask for it and the banker says don't concern yourself with things like value, we can't tell you what it's worth, we don't want to tell you what it's worth, go ahead and sell it, I mean, they gave them no information. Lazard had the ability, they have the manpower, they knew this company, they could have told them what this going concern was worth. The only people that told them what the going concern was worth were outside analysts.

Why, why were they able to put a value on it and not Lazard?

THE COURT: But again, here we get into that first weekend. The first weekend, everybody admits, is a crisis weekend.

MR. KRASNER: Yes.

THE COURT: And all kinds of terrible threats are being thrown around at this Board. Now, they have Lazard who, after all, is a -- supposedly a very prominent, you know, people in the field.

Aren't they doing their duty when they talk

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to Lazard and say, Lazard, help us, tell us, advise us? And in this crisis situation that they're in, aren't they reasonable in listening to Lazard?

You know, sitting here in a courtroom five months later is easy, but --

MR. KRASNER: I could say to your Honor that there's certainly less of a problem with that first weekend. But why they didn't ask Lazard the second weekend or during that entire week, you know, Lazard, you know that Bear -- that JPMorgan is pressing us for a new deal; tell us what we're worth; tell us what we're worth in the market; tell us what the business is, businesses are worth, so we can determine what a fair price is. Nothing.

They -- they take two opinions from Lazard, neither of which -- and let's concede the first opinion is a rush opinion. It's done over a weekend. The second opinion is a week later; and Lazard's on notice that there is discussion about changing the agreement, about renegotiating the deal.

Where is the value? Why isn't Lazard there telling them what they should be asking for?

And when it comes to finally this, this negotiation, it's the most one-sided negotiation I've ever seen on the second weekend. Forget about the

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first weekend. The second weekend.

Mr. Diamond testifies, and Mr. Diamond is very clear, I told them \$10, take it or leave it.

Did they negotiate with him? Not really. Did Lazard say, but it's worth \$30, we've done an analysis, we think it's got substantial value here, these businesses could be sold for 7 billion, 8 billion, \$8 billion?

There's nothing. They don't have the ammunition to deal with him even because they did not ask the right questions. They simply relied on Lazard to give them an opinion which is worthless. Pay \$20 million for an opinion that tells you nothing. Says, you're in a tough spot guys, do the best you can. That's -- I mean, I don't need to go to a banker for that. I mean, I could tell them that.

THE COURT: Okay.

MR. KRASNER: So I -- it's, it's just -- it's, it's incredible that a bank as distinguished as Lazard could not give them any ammunition to negotiate with in terms of value and --

THE COURT: Let me ask you, do you want to respond?

MR. WOLINSKY: May I jump in, your Honor?

THE COURT: Give him a chance to respond

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2 because I cut him off before.

3 MR. MARKEL: I have a number of responses,
4 but Mr. Wolinsky wanted to say a few things, so I don't
5 care which order we go.

6 THE COURT: Why don't you finish. We'll get
7 Mr. Wolinsky.

8 Why don't you tell us about the second
9 weekend, or the second agreement, which you didn't
10 discuss before. And maybe I cut you off.

11 MR. MARKEL: Okay. Can we have the third,
12 the third section of the timeline put up.

13 Your Honor, this is the Third Threat of
14 Bankruptcy. You have that?

15 THE COURT: Right.

16 MR. MARKEL: Now, let me just mention a
17 couple of things.

18 One thing that was useful that my friend
19 Mr. Krasner said was that they concede, they've
20 conceded that bankruptcy wasn't an option in the first
21 weekend. So we get into that next week.

22 And if you go on, if you go to the
23 Tuesday -- first of all, on the Monday March 17 there
24 are, there are issues in the marketplace. There are
25 withdrawals from Bear Stearns, there are still issues
26 about that. On Tuesday JPMorgan and Bear Stearns

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2 discussed revisions to the initial agreement. On
3 Wednesday they continued discussions, but are unable to
4 reach a deal.

5 So one thing Mr. Krasner just said was we
6 didn't negotiate. Well, we're negotiating Tuesday and
7 Wednesday with JPMorgan, okay -- on Thursday. Excuse
8 me, that's Wednesday and Thursday, the 19th and the
9 20th. This is after the first weekend, before the
10 second weekend. Then on Friday, once again, we're
11 continuing discussions. Those are negotiations. So
12 there is clear evidence in the record supporting this.

13 There's, there's, there's testimony from
14 witnesses in addition to Mr. Schwartz who was deposed.
15 A couple of outside directors, Mr. Tese, Mr. Goldstein,
16 were deposed. There's ample evidence from the minutes,
17 from the documents that there were negotiations going
18 on all through this week. So it's just false, and
19 there's no -- it's not an issue of fact. There's no
20 contrary evidence, no contrary evidence that we weren't
21 negotiating during that week, none. It's, it's just
22 said in court.

23 On Friday the 21st JPMorgan informs Bear
24 Stearns that it cannot continue to extend credit to
25 Bear Stearns. Okay? That precipitates a new crisis.
26 Okay? Bear Stearns --

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2 THE COURT: Excuse me. Did JPMorgan have the
3 right to do that?

4 MR. MARKEL: Your Honor, there is -- I think
5 the fairest way to say this is there is a legal issue
6 as to whether or not that could be done.

7 And if we want to skip ahead, legal advice
8 was --

9 THE COURT: No, okay.

10 MR. MARKEL: Right. There is an issue about
11 that. But, but it's not clear that they didn't have
12 the right to do it. It is not clear they didn't have
13 the right to do it, okay.

14 All right, now, continuing on, on Friday Bear
15 Stearns rejects JP Morgan's advice -- this is the
16 fourth bullet point -- on the Friday,
17 JPMorgan's request, and advising JPMorgan that it will
18 only agree to amend the agreement in exchange for a
19 significant increase in merger consideration.

20 Now, how does that fit with
21 Mr. Krasner's statement there was no negotiation?

22 We didn't rollover, we hadn't turned over any
23 keys. We're negotiating for four days here. We're
24 threatened with, we're threatened with bankruptcy on
25 Monday and we're still negotiating. We're saying no.
26 Okay?

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In addition, at this time, in this timeframe JPMorgan isn't asking for 39 percent of stock, they're asking for 66 percent of the stock. We say no. No. We're not going to amend the agreement to provide for that. We say no.

So it's simply wrong, simply wrong that we didn't negotiate, that we weren't looking out for shareholders' interests. And it's just made up or speculation to say that we just turned over the keys and stopped negotiation. There is no support, no evidentiary support for that. It's speculation by Mr. Krasner and his experts.

Now, continuing on Friday Bear Stearns analyzes the available alternatives. After the threat of no more, no more credit being available, what can we do?

So this is not a board that's sitting there letting JPMorgan running things and not doing anything. The Board is meeting. The Board is addressing the issue. What can we do? What are our options? They're negotiating and they're considering their options.

Now, what the Board does conclude once again is if New York Fed and JP Morgan do not continue to extend credit, Bear Stearns will have to file for

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2 bankruptcy on Monday. That's what they concluded.
3 There's evidence in the minutes, there's evidence in
4 the record, there's evidence from the depositions
5 that's what they concluded on Friday evening. That's
6 the conclusion, the evidence. Not speculation,
7 evidence.

8 So what do they do? They meet all weekend
9 again to try and find solutions. On Saturday the Board
10 meets with senior management to discuss JPMorgan's
11 proposed revisions. Then next item, legal advisors
12 discuss the litigation options available to the
13 company. And the minutes demonstrate that the Board
14 got advice on whether or not they could sue JPMorgan,
15 whether or not they could sue JPMorgan either with
16 respect to the continuation of, of the guarantee
17 agreement or whether they could sue them in bankruptcy.
18 And the advice that the Board got was the outcome was a
19 doubt, it could easily take years to resolve, J -- Bear
20 Stearns would be gone by the time it's resolved because
21 they, they would have to file for bankruptcy. There
22 was no -- that was not a good option.

23 Now, that's what the legal advisors from very
24 distinguished law firms advised the Board. And once
25 again, you know, people, people were once again in a
26 crisis. That second weekend was a second crisis.

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Okay?

Friday night we're told get a new deal or we're done. Do a new deal or we're done. And on Saturday we're evaluating what options -- Friday we are evaluating options, Saturday we are evaluating options including litigation options. That's what we are doing on Saturday.

Once again, the speculation that we are sitting there and we turned over the keys and JPMorgan is running the place is simply speculation. It's wrong. This is what the evidence shows. Evidence backs every one of the items in this timeline. Evidence.

Now, what happens Sunday? The Board meets, I don't know how many times, four times, five times on Sunday. They're evaluating options, negotiating terms, negotiating terms. Not sitting back, negotiating terms. The Board is advised once again by all their advisors, Lazard, the lawyers, they will get nothing in bankruptcy, nothing in bankruptcy.

Now, Mr. Krasner says, well, they didn't consider the going concern value. Well, all -- we have been evaluating internally for all, all Friday night, all day Saturday what other options are there, what other options other than bankruptcy are there, what is

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2 the going concern option. And there isn't one. No one
3 came forward.

4 Lazard had tried to sell this company to more
5 than, more than just JPMorgan and Flowers the prior
6 week. They went out to many people. The only
7 two -- they invited four people in for due diligence.
8 Two of them didn't even show up. The only -- in the
9 prior week. And the only two that showed up were JC
10 Flowers and JPMorgan. So there was nobody there
11 willing to pay more than \$2 a share. Nobody came
12 forward that week and said we'll give you \$5. It
13 didn't happen. That wasn't an option. But what they
14 did know on Friday night and on Saturday and on Sunday
15 as they met all weekend was that the option to not
16 renegotiating a deal was bankruptcy. And for all the
17 reasons we went over earlier bankruptcy meant zero.

18 So what did they do? Do you think that
19 JPMorgan wanted to give -- wanted to multiply by five
20 the compensation for this merger? Do you think they
21 said fine, that's great?

22 There was a negotiation leading up to that.
23 And, finally, Mr. Diamond said drop dead, take it or
24 leave it, \$10. That wasn't because we didn't try to
25 get more, and it wasn't because there weren't steps
26 along the way; but the negotiation drove that price to

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2 \$10. And anything to the contrary is not supported by
3 their record and is pure speculation, once again, on
4 the part of the plaintiffs. There's no evidence.
5 Summary judgment is appropriate. This is not an issue
6 of fact.

7 Now, there are a couple of other points I'd
8 like to make. I think that's the central point.
9 There's evidence in the record from the March 16
10 minutes. Mr. Krasner told you there was no evidence on
11 the value of the building. That's what he told you.

12 THE COURT: Yes.

13 MR. MARKEL: Right. He's wrong. The
14 March 16 minutes say that the head of Bear Stearns'
15 real estate group was asked to give the Board a value
16 for the building, and he indicated that 1.1 million was
17 a fair price for the --

18 THE COURT: Billion.

19 MR. MARKEL: -- billion, excuse me, billion
20 was a fair price for the building. He's got no
21 evidence. We did put in evidence. He has no evidence,
22 but we did put in evidence of what the record -- we put
23 the minutes into this record on this motion, and the
24 minutes reflect that the Board did have in front of it
25 the best information it could get on that weekend of
26 the value of that building.

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Now, in the end, your Honor, what, what Mr. Krasner -- and I don't mean to attack him personally; he's a friend of mine, okay; but what he is doing here this morning is suggesting speculation should defeat a summary judgment motion. That's his job. It's not a personal attack, but that is what he has suggested. Maybe somebody would come along with a better offer if the Board rejected. This is on the second weekend. Maybe, maybe somebody would come along and bid more. In the meantime, we're going through all the horrors of a bankruptcy proceeding, more people are thrown out of work. Maybe it could be someone will come forward.

It's speculation. Speculation doesn't defeat summary judgment.

THE COURT: Okay, you've made the point. Thank you.

MR. MARKEL: Thank you.

THE COURT: Do you want to add anything?

I know you're there, Mr. Wolinsky.

MR. DIBLASI: Your Honor, I'm going to accede my time to Mr. Wolinsky. I obviously join in Mr. Markel's argument.

THE COURT: Okay, Mr. Wolinsky.

MR. WOLINSKY: Thank you.

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Your Honor, it is not easy to sit still for an hour and 15 minutes, but --

THE COURT: Excuse me?

MR. WOLINSKY: -- I did my best.

It's not easy to sit still for an hour and 15 minutes.

THE COURT: I know. Me too.

MR. WOLINSKY: You saw me jumping up there. I did my best.

I think that Mr. Krasner really gave away his case when he said bankruptcy was not an option the first weekend because bankruptcy was not an option the second weekend either.

He made a factual statement that was just wrong. JPMorgan did not guarantee the \$70 billion for unsecured debt of Bear Stearns. There were public bondholders who were owed \$70 billion. JPMorgan did not guarantee that debt. JP Moran's guarantee was of the trading operations of Bear Stearns. The trading guarantee was designed to assure counter-parties, customers --

THE COURT: But isn't that really what the directors had to be concerned with?

MR. WOLINSKY: -- the bondholders.

In this situation the stock is essentially

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2 worth nothing because the company is on brink of
3 bankruptcy and because the directors are being advised
4 that in a bankruptcy the shareholders are going to get
5 wiped out. The Board's responsibility is not only to
6 consider the interests of the shareholders, but also
7 the bondholders.

8 THE COURT: Yes; but it is basically its
9 shareholders, and the guarantee --

10 MR. WOLINSKY: No, your Honor. Just --

11 THE COURT: Isn't that -- once they had your
12 guarantee, couldn't they continue doing business?

13 MR. WOLINSKY: Exact -- your Honor, here's
14 the one document that says why that's not so, Exhibit,
15 Hearing Exhibit 3.

16 Your Honor, the whole case, the whole case is
17 boiled down in this E-mail. This is from Michael -- it
18 is Hearing Exhibit 3. It is before you.

19 We must do something today.

20 This is on March 20, 2008, 5:49 a.m.

21 THE COURT: From who?

22 MR. WOLINSKY: From Michael Minikes, who is
23 the head of Bear Stearns Securities Corp. He's C.E.O.
24 of the broker/dealer, sixty percent of the company is
25 under his operation.

26 It's sent on Thursday March 20, so that's

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2 right in the middle of the first weekend and the second
3 weekend. The situation is, all caps, no less serious
4 than a run on our bank similar to last week. Given
5 today's noise about Joe Lewis employees, etc., looking
6 for a new deal, the doubts about the JPM deal will only
7 heighten, and there will be even more concern about the
8 JPM guarantee should shareholders vote no.

9 That is the essence of what the problem was
10 between the first weekend and the second weekend. The
11 first crisis was precipitated by a run on the bank.
12 The assumption, the hope was the announcement of the
13 first deal would stop the run, but it didn't.
14 Mr. Minikes is writing on that Thursday the situation
15 is no less serious than a run on our bank similar to
16 last week.

17 The run on the bank continued between the
18 first weekend and the second weekend because the
19 trading guarantee was not doing its job. There was
20 concern that the deal might not close because
21 shareholders would vote no. So giving assurance to
22 counter-parties and customers that this deal was going
23 to close or was likely to close was critical to
24 stopping the run on the bank. If the run on the bank
25 didn't stop, bankruptcy was the only option. And as
26 Mr. Krasner concedes, bankruptcy was not an option.

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2 And, your Honor, I have to come back to this
3 other point. There was \$70 billion of outstanding
4 bonds that was not covered by the trading guarantee.
5 So the shareholders had essentially nothing at risk at
6 this point. The company is going into bankruptcy, but
7 the Board properly considered keeping the company
8 intact, keeping the company operating so that the
9 bondholders, the bondholders' interests would be
10 protected. That's what really takes this case outside
11 of practically any case that's been cited to you.

12 And Mr. Markel made the point. This is not a
13 contest for corporate control, this is not a board
14 that's trying to entrench itself. This is not a board
15 that's trying to keep itself in office. The Board
16 knows it's all going out of office. This is a board
17 that's trying to preserve the value for the share, for
18 the shareholders and for the bondholders and got 10
19 billion -- \$10 a share for stock that's worth nothing;
20 and protected the interest of the bondholders \$70
21 billion, which vastly thwart the interest of the
22 shareholders at this point in time.

23 Mr. Krasner says that the Board, that the
24 Board should have been looking at the going concern
25 value of Bear Stearns. Bear Stearns was not a going
26 concern. It wasn't a going concern the first weekend.

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2 It wasn't a going concern the second weekend.

3 Let me show you, this is from the Lazard
4 book, Exhibit 2, Hearing Exhibit 2. This is what the
5 Board is told when they're being asked to approve the
6 second deal. Bear was out of cash. Bravo management,
7 that's Bear management, is continually refining
8 estimates and has indicated that estimates are subject
9 to change. After material deterioration in its
10 liquidity position since March 10, 2008, Bravo
11 management has indicated to Lazard that it has little
12 to no remaining cash nor access to near-term financing
13 sources.

14 It's not JPMorgan -- they could have gone to
15 any bank in the world with any pool of security that
16 they had to offer to try and raise more cash. There
17 was no more cash to run the business. And Mr. Minikes
18 says the customers were still trying to get their cash
19 out.

20 And here's the summary of what the Board is
21 told. On March 15, beginning of period estimated
22 liquidity, no more than \$4.8 billion. End of period
23 estimated liquidity -- that's the end of Friday going
24 into the weekend -- little to none. Difference,
25 \$4.8 billion. Change, 100 percent.

26 There's no cash. The idea that the Bear

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2 Stearns Board had some alternative the second weekend
3 is just a fiction. There's no proof behind it. It's
4 just not true. The bondholders were still at risk.
5 There was no -- a whole week had passed. The first
6 deal is announced on Monday, and the world sees
7 JPMorgan stock trading up.

8 Where is UBS? Where is Deutsche Bank? Where
9 is Citigroup? Where's Barclays?

10 Your Honor, this was all out, played out on
11 the front page of every paper in the world. If there
12 was a bank that saw an opportunity to come in, they
13 would have. There was nothing to stop them.

14 Your Honor, let me just touch on your
15 question, which was a good question. Why the no shop.
16 It's a typical provision. The company had been shopped
17 before that weekend. No one was interested. You heard
18 from Mr. Markel. Only one other person agreed to come
19 into the building at Bear Stearns that weekend, and
20 they couldn't put a deal together. There was no
21 significant impediment to someone else coming in.
22 That's what Mr. Schwartz said, that's what Mr. Diamond
23 said. If someone else wanted to come in, they could
24 have. But the key point, why a no shop, it goes back
25 to Mr. Minikes' E-mail.

26 One of the reasons why this deal was done and

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2 one of the reasons why the federal government put
3 \$30 billion of its credit on the line was because there
4 was a critical need to assure the marketplace, assure
5 the world marketplace that things had stabilized.
6 People didn't want to create the impression that this
7 deal might not go through because that would only
8 exacerbate the run on the bank. And that's what
9 Mr. Minikes is saying in his E-mail.

10 If people think that there's going to be
11 another deal, that a JC Flower, private equity shop,
12 fine firm, but they have limited resources, maybe they
13 had -- I think they talked about putting a billion or
14 two billion dollars into this situation. That is not
15 going to stop the run on the bank.

16 People who need to be encouraged to continue
17 to do business with Bear Stearns needed to be reassured
18 that this deal was going to close. And when they saw
19 there wasn't, that it wasn't going to close or that it
20 might not close, they did the thing that any rational
21 person would do. I'll take my money now. If the
22 reorganization succeeds, I'll talk to you about putting
23 it back in later. And that was the situation that they
24 were faced. That's why. That is why the cash was all
25 gone by the second weekend, and that's why bankruptcy
26 was not an option the first weekend. It wasn't an

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option the second weekend.

THE COURT: Why did the stock go up?

MR. WOLINSKY: JPMorgan stock or Bears Stearns?

THE COURT: No, Bear Stearns.

MR. WOLINSKY: Bear Stearns stock went up for reasons that, that -- there are a lot of theories as to why it went up.

THE COURT: No, but you're getting -- no, you're giving a very persuasive argument that Bear Stearns had no choice, that by the second weekend it was either nail this deal down once and for all or go into bankruptcy and it's zero. And yet the market goes up from 5.91 on March 18 up to in between 11, \$12 --

MR. WOLINSKY: Goes up about \$4 and change. Goes up to about \$4 and change.

THE COURT: No. Goes up to \$11 and change.

MR. WOLINSKY: Your Honor, it goes up for -- we can only speculate as to why it went up; but here are a couple of reasons why it went up, why we think it went up.

One is bondholders were buying the stock to make sure that the deal would go through.

THE COURT: And yet Mr. Krasner told me just a few minutes ago that without that 39 percent that

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2 JPMorgan bought, the deal would not have gone through.

3 MR. WOLINSKY: He misspoke, or I know he was
4 very careful, but --

5 THE COURT: Well, if he misspoke, then clear
6 it up for me.

7 MR. WOLINSKY: Without the 39-and-a-half
8 percent, without the 39-and-a-half percent it would
9 have gone through. Fifty-two percent voted in favor.

10 THE COURT: Fifty-two percent of what?

11 MR. WOLINSKY: Excluding the 39-and-a-half
12 percent.

13 THE COURT: You mean the balance was 52?

14 MR. WOLINSKY: The balance was 52 percent.

15 THE COURT: That's obviously different than
16 what he said.

17 MR. WOLINSKY: No, he was careful in his
18 words. He said exclude -- 39-and-a-half percent, but
19 then JPMorgan went into the marketplace and bought
20 another 10; so if you include the 10 that JPMorgan
21 bought in the marketplace, it would not have. But
22 obviously, the Bear Stearns Board didn't sell us those
23 shares. Those were arms-length transactions in the
24 marketplace. Those were shares that were bought before
25 the record date properly voted. So if you include the
26 10 percent that were bought in the marketplace, it was

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2 approved, it would have been approved.

3 Your Honor, why the, why did the stock go up
4 during that week? Maybe --

5 THE COURT: Well, no, you have just given me
6 one answer.

7 MR. WOLINSKY: Okay.

8 THE COURT: Okay. Do you have anything
9 further?

10 MR. WOLINSKY: Well, your Honor, I didn't
11 talk at all about the interest of my client.

12 THE COURT: I was waiting for that.

13 MR. WOLINSKY: And why we have a direct
14 liability.

15 THE COURT: I was waiting for that.

16 MR. WOLINSKY: I did want to correct just one
17 more point, factual.

18 THE COURT: Why don't you talk about your
19 client.

20 MR. WOLINSKY: Just one factual point, if I
21 may.

22 During the first week, during the period
23 between the first weekend and second weekend the first
24 offer my client made was not \$10, it was not \$8; it was
25 a contingent value, right, a security whose right
26 value, whose -- that would only have value depending

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2 upon future event. So the notion there was no
3 arms-length negotiation over price between the first
4 weekend and second weekend is not true, there clearly
5 was. And the Board was able to extract five times
6 increase in price.

7 Your Honor, I think the two claims against my
8 client are aiding and abetting and also the notion that
9 my client owed a direct fiduciary duty to the Bear
10 Stearns shareholders. And on aiding and abetting, I
11 think we agree in order to have aiding and abetting you
12 need a primary violation. And to have a primary
13 violation you need to show that the Bear Board violated
14 its duties. And we don't think on this summary
15 judgment record that that conclusion could be reached.

16 There was a crisis. We've talked about it
17 this morning. The Board acted properly. And faced
18 with not one bank -- the prospect of not one
19 bankruptcy, but bankruptcies, bankruptcy in which the
20 shareholders would have gotten nothing and the
21 bondholders would have lost billions, there's no basis
22 for this Court to second guess the Board's judgment.

23 Let me turn to the direct claim against
24 JPMorgan, the claim that JPMorgan had a direct
25 fiduciary duty to the shareholders. In order to
26 establish that JPMorgan had a direct duty to another

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2 company's shareholders, obviously, JPMorgan has a duty
3 to its own shareholders, but to another company's
4 shareholders they need to show either one of two
5 things. They need to show that JPMorgan owned a
6 majority of the shares at a relevant point in time or
7 that JPMorgan exercised actual domination and control
8 of the business affairs of Bear Stearns.

9 So first test, majority --

10 THE COURT: Let's talk about the control.

11 MR. WOLINSKY: Sure. Because obviously at
12 this point we didn't have a majority.

13 Mr. Krasner said that -- his phrase was a
14 nice phrase, that Bear Stearns' Board turned over the
15 keys of the company to JPMorgan in the first week after
16 the first weekend. Obviously, if that were the case,
17 we wouldn't have agreed to increase the price
18 five-fold.

19 What did happen that first week?

20 JPMorgan had no role in Bear
21 Board's deliberation. We were not in the board room
22 ever. Board was independently advised.

23 And, and specifically addressing
24 Mr. Krasner's point, JPMorgan was not running Bear's
25 business. Bear was running Bear's business.

26 THE COURT: But JPMorgan had people at every

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2 level of Bear's operations.

3 MR. WOLINSKY: Yes, they had people going
4 across the street to monitor the operations for a very
5 significant reason. JPMorgan had extended the trading
6 guarantee.

7 THE COURT: I know. But by doing that, what
8 does it mean -- what do you mean by monitoring the
9 business?

10 MR. WOLINSKY: Monitoring the business just
11 means this.

12 Let me show you what Mr. Diamond had to say.
13 Mr. Krasner asked Mr. Diamond:

14 "QUESTION: But you felt secure that your
15 people were on top of everything?

16 "ANSWER: Absolutely not.

17 "QUESTION: Not?

18 "ANSWER: Absolutely not.

19 Question by Mr. Krasner, "Why do you say
20 that?

21 "ANSWER: Because it's a huge company and we
22 just got to know it. We didn't know the people. This
23 was \$400 billion of assets. Our people didn't buy it.
24 They didn't value them. Part of the major risks of
25 this was you didn't completely know, and it would take
26 a while before you could really get your hands around

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2 it so you thought you were in control and secure."

3 He didn't get the answer he wanted, so he
4 asked it. Typical litigator's mistake.

5 "QUESTION: I'm sorry, maybe I didn't phrase
6 my question properly; but in terms of transactions
7 going on, you felt secure that your people were on top
8 of it, that whatever business was being transacted your
9 people were aware of?

10 "ANSWER: No."

11 Your Honor, this is a 14,000 employee
12 operation with \$400 billion of assets. The notion that
13 JPMorgan on a Monday morning was going to walk in and
14 start running the place is silly, and Mr. Diamond
15 testified to that.

16 THE COURT: Wait a minute, wait a minute.

17 On Monday morning JPMorgan sends in its
18 employees.

19 How many employees did it send in?

20 MR. WOLINSKY: 400. I think approximately
21 400.

22 THE COURT: And could those employees
23 effectively state or control what trades were being
24 done?

25 MR. WOLINSKY: No, your Honor, they could
26 not. This was what they were told to do. This is the

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2 directive that goes out. It is Exhibit CCCC. This is
3 from Steve Black and Bill Winters. This is the two
4 heads of JPMorgan Investment Bank.

5 People going over there were guiding our
6 integration approach and day to day interaction. That
7 is what they are told to do, Encourage them, that's
8 Bear Stearns' employees, Encourage them to continue
9 with business as usual.

10 What the concern was that business was
11 unusual. There were risk guidelines in place at Bear
12 Stearns. The company is now heading towards bankruptcy
13 or prospectively bankruptcy. Things are extremist, so
14 what people are encouraged to do from JPMorgan is to
15 encourage the Bear Stearns people to continue with
16 business as usual. It's not directing the business,
17 it's to make sure that the business is conducted in the
18 ordinary course.

19 THE COURT: But Mr. Krasner argued, or stated
20 that if there were issues or problems, they were kicked
21 up to the top.

22 MR. WOLINSKY: They were kicked up.

23 THE COURT: And I presume that that meant to
24 JPMorgan's people.

25 MR. WOLINSKY: No. They were kicked up to
26 the top of Bear Stearns to consult with JPMorgan

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people.

THE COURT: Okay.

MR. WOLINSKY: There was no right to approve.

THE COURT: Close enough, close enough.

So my question is, was any of that done?

MR. WOLINSKY: I am sorry.

THE COURT: Were there issues that were decided by Bear Stearns and JPMorgan people together, consulting together?

MR. WOLINSKY: No evidence whatsoever that that ever happened. This is all a theoretical possibility.

So let me emphasize, in order to create a fiduciary duty it's not a theoretical ability to manage it.

THE COURT: Oh, I understand.

MR. WOLINSKY: It has to be actual. And there is no evidence whatsoever that there was any corporate action that Bear Stearns wanted to take that JPMorgan said you can't take. Just didn't happen. And it didn't happen for the reasons that Mr. Diamond referred to. The 400 billion-dollar organization, it was only a week --

THE COURT: Yes. Okay, all right.

MR. WOLINSKY: What did happen, this is what

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they say in their brief, page 11 of their brief. This is a quote in their brief.

JPMorgan was directing Bear Stearns' operation.

And for that they cite Mr. Diamond at pages 77 to 78.

At 77 Mr. Diamond said:

"QUESTION: So starting Monday morning there were JPMorgan people over there, and there was constant communication?

"ANSWER: Yes."

Of course there was constant communication, but there was no actual control and certainly no actual control that had any bearing on the negotiations that week, which is at the end of the day what counts.

It is very nice for there to be some theoretical ability to oversee Bear Stearns' operations, but there is certainly no evidence that anything JPMorgan did during that first week influenced the outcome, the negotiations. The one thing that JPMorgan did do that week was loan Bear Stearns almost \$15 billion at the beginning of the week on a largely unsecured basis, and as the week progressed on a secured basis.

And the plaintiffs claim in their brief that

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2 not only was JPMorgan running the show, but that they
3 were funneling cash out of Bear Stearns; but that's
4 what they say at page 20 of their brief. That's not
5 what happened in the first week. What happened was
6 that JPMorgan had extended \$15 billion of credit to
7 keep the company alive and that they identified
8 opportunities to obtain security for those loans. So
9 there was no outflow of -- there was no unfettered
10 outflow of cash during that week.

11 THE COURT: Okay.

12 MR. WOLINSKY: Your Honor, let me point to
13 what I think is the most interesting argument and the
14 one -- well, it's the most interesting argument.

15 Their most interesting argument is that you
16 heard that there was a threat to pull the funding.

17 THE COURT: There was a?

18 MR. WOLINSKY: A threat to pull the funding
19 and that JPMorgan was a creditor. The exercise by a
20 creditor of its negotiating leverage as a creditor does
21 not create a fiduciary duty. And the case law, I
22 think, there is very well established.

23 We cited to you In Re Marketxt Holdings case.
24 The threat of putting the company into bankruptcy may
25 be evidence of leverage, but any creditor has a degree
26 of leverage.

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2 THE COURT: Okay.

3 MR. WOLINSKY: Plaintiffs -- you have it.

4 THE COURT: I have it.

5 MR. WOLINSKY: Okay. Your Honor, assuming a
6 threat was made, what actually happened was a
7 renegotiation. JPMorgan wanted things, Bear Stearns
8 wanted things, the Fed wanted things, and --

9 THE COURT: What did Bear Stearns want?

10 MR. WOLINSKY: Bear Stearns was actually very
11 interested in two things. Bear Stearns wanted the
12 trading guarantee enhanced as well because they saw the
13 customers going out the door.

14 THE COURT: Was it enhanced?

15 THE WITNESS: It was enhanced the second
16 weekend. It was expanded very significantly between
17 the first weekend and the second weekend.

18 THE COURT: And what else did they want?

19 MR. WOLINSKY: More money, which they --

20 THE COURT: Well, more money, that's true.

21 MR. WOLINSKY: Which they got.

22 THE COURT: That's true.

23 MR. WOLINSKY: That's pretty significant,
24 about a billion and a quarter.

25 THE COURT: Okay. We're going to take a
26 five-minute recess, and then we may continue just on

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2 one issue, one other issue.

3 All right, take a five-minute recess.

4 (Whereupon, there is a recess.)

5 (Whereupon, the following takes
6 place in open court following the
7 recess:)

8 THE COURT: Mr. Krasner, is the major issue
9 that -- the one issue that I've really left open is the
10 issue of the claim that you're entitled to attorneys'
11 fees or you're not entitled to attorneys' fees.

12 Do you want -- by the way, everybody sit
13 down. Feel free.

14 Do you want to, do you want to talk about
15 that?

16 MR. KRASNER: It was their motion, your
17 Honor. The question of whether we are or are not
18 entitled to attorneys' fees I thought was not really in
19 front of the Court today, but the only question was
20 they had moved to say we're not entitled to attorneys'
21 fees.

22 THE COURT: Okay.

23 MR. KRASNER: And we said that that's an
24 issue that should be left up to the Court if and when
25 we made an application.

26 THE COURT: Do you want to be heard on it?

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MR. MARKEL: Your Honor, we're perfectly willing to rely on briefs on that question to the extent it's relevant now, if that's acceptable to your Honor.

THE COURT: Yes.

MR. MARKEL: It is short sections in our brief and their brief.

THE COURT: So realistically, that means though that we're going to leave it to another day. Effectively, it means we are going to leave it to another day. I'm not, at this point, I'm not buying your argument that they're not. I'm not buying their argument that they are either. That's why I wanted some argument. But if you want to leave that to another day, I can leave it until after we decide the other two motions.

MR. MARKEL: Can I --

THE COURT: Or the other motions.

Yes.

MR. MARKEL: You're going to decide it now?

THE COURT: No, not going to decide it from the bench.

MR. MARKEL: No, that's what I thought.

Could I have one moment, your Honor?

THE COURT: Sure.

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Proceedings

(Pause in proceedings)

MR. KRASNER: Is your Honor going to hear me with respect to Mr. Wolinsky's position?

THE COURT: I don't know what they want to do.

MR. KRASNER: I have an awful lot to say about what he said.

THE COURT: You know what --

MR. MARKEL: Mr. Halper has just a couple of words on this.

THE COURT: Let's leave it till decisions on these motions are done. Let's leave it till these decisions are done.

MR. MARKEL: They could be muted.

THE COURT: Yes, it may be. That's why I said let's leave it till these decisions are done.

Okay, thank you one and all.

MR. KAPLAN: Your Honor, Bruce Kaplan, representing Joseph C. Lewis.

THE COURT: You wrote me some letters, sir.

MR. KAPLAN: I did, your Honor. And I, with the Court's permission, ask by way of specificity to have the access, subject to the protective order, on behalf of Mr. Lewis, who is the largest shareholder.

THE COURT: Let's talk about that in a

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moment. Okay? Stay here. We'll talk about that in a moment.

We're now finished with the argument on the motions. That transcript is closed, okay.

You want to come up, sir.

MR. KAPLAN: Yes, your Honor.

THE COURT: Have you all seen copies of his letters?

MR. WOLINSKY: Yes.

MR. KRASNER: Yes.

MR. MARKEL: Your Honor, could I mention one other thing, your Honor. Your law secretary had a phone conference with us last week on some of these issues with Mr. Kaplan.

THE COURT: Ex parte?

MR. KAPLAN: No, no.

MR. MARKEL: With all of us.

THE COURT: Oh, with everybody.

MR. KAPLAN: Yes, your Honor.

MR. MARKEL: So there is a history is all I am saying.

MR. KRASNER: Your Honor, I did want to respond to Mr. Wolinsky because there are points he made that --

THE COURT: No, we're finished. We really

1 Proceedings

2 are finished with this argument.

3 My question is this. Let me stop. Let me
4 talk about Mr. Kaplan's application.

5 To some degree, first of all, to some degree
6 there's a lot of stuff in the public domain; so to that
7 you were certainly entitled to it, as any member of the
8 public is.

9 Anybody have any view as to anything else?

10 I have gotten letters back and forth. You
11 want to be heard?

12 MR. KAPLAN: Should I state briefly what we
13 are asking?

14 THE COURT: Briefly state it, but I don't
15 really --

16 MR. KAPLAN: Briefly, there was a -- after a
17 round of letters as to which we got, we got access to
18 the public file here, Mr. Lewis being the largest
19 shareholder of Bear Stearns who's mentioned by name in
20 one of the E-mails that Mr. Wolinsky showed you in his
21 argument, lost a billion dollars on the stock
22 personally.

23 We're charged with investigating for him his
24 rights. He's a member of putative class in this case.
25 And we asked counsel, all counsel to have access,
26 subject to the protective order, to all the discovery

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2 in the case. Plaintiff said sure, fine. The
3 defendants, through Mr. Wolinsky's firm leading,
4 basically said no; what is in the public file in the
5 court, fine. Beyond that, there's 38 or 40,000 pages
6 which, whether it's packed tightly into 20 boxes or
7 into 40 boxes, so what.

8 Your Honor's law secretary conducted a
9 conference call among all, with all sides participating
10 on and which she said that the Court was disinclined to
11 give Mr. Lewis general access to everything.

12 THE COURT: That's correct.

13 MR. KAPLAN: But the Court gave permission
14 through your law secretary that we could be specific if
15 we wished to follow up. And we wrote you a letter
16 saying we were specifically asking for four types of
17 documents.

18 THE COURT: Well, that's --

19 MR. KAPLAN: Anything that mentions Lewis by
20 name, anything that has a valuation of the company or
21 its components within two-dollar deal or the
22 four-dollar deal, anything that has to do with
23 valuation by JC Flowers, and anything that has to do
24 with why Lazard either in the first weekend or in
25 between never attempted by any method a valuation.

26 We could undertake the review --

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THE COURT: Is Mr. Lewis going to be a member of the class that Mr. Krasner represents?

MR. KAPLAN: Mr. Lewis is a member of the putative class. Whether he opts out, he --

THE COURT: Well, that's what I'm asking.

MR. KAPLAN: That's what he is trying to decide.

And despite our high respects for excellent counsel in pulling together the evidence, he's asked us to do an independent review for his benefit and to give our advice. And once -- in a simple sense, you could say what's the harm? He is --

THE COURT: Well, no, that's not -- there's plenty of possible harm. I can see the defendants' arguments on that. Doesn't mean I agree with it, but I can see it.

Let me ask a question. Why shouldn't Mr. Lewis at least, subject to a confidentiality agreement and stipulation, have access to anything which mentions him by name, any document which mentions him by name?

MR. WOLINSKY: No objection to that.

THE COURT: Okay, so your first situation you have gotten.

I presume you don't object either.

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MR. DiBLASI: No objection.

MR. MARKEL: No objection.

THE COURT: Fine.

And, Mr. Krasner, you consent anyway.

MR. KRASNER: We had no objection at all.

THE COURT: So you've got that.

MR. KAPLAN: That is appreciated.

THE COURT: Okay, Mr. --

MR. KAPLAN: The other three items are we think essential, and if we're to do an independent review for our client, they are very focused, maybe the answer is that there are no documents reflecting a valuation of Bear Stearns or its components in connection with the two-dollar deal or 10-dollar deal.

THE COURT: Does this have to go -- does this argument have to be on the record?

And I'm asking counsel, all counsel.

MR. KAPLAN: I've been before your Honor many times. It does not have to be on the record so far as I'm concerned. We just started that way.

THE COURT: Mr. Krasner, how do you feel?

MR. KRASNER: No reason to be on the record.

MR. WOLINSKY: Does not have to be.

THE COURT: How do you feel?

MR. MARKEL: I agree.

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2 MR. DiBLASI: No problem, your Honor.

3 THE COURT: Come on in, Counsel.

4 (Whereupon, there is a robing room
5 conference, off the record.)

6 THE COURT: We're finished with this case.
7 Thank you.

8 For the record, I will put on the record that
9 we have agreed, and I have ruled, that Mr. Kaplan is
10 entitled to any documents that were turned over to
11 Mr. Krasner which had Mr. Lewis' name in them, in the
12 documents. Other documents I decline.

13 That's all. Thank you.

14 MR. KAPLAN: Thank you, your Honor. One
15 slight amendment.

16 THE COURT: And that would be done by the end
17 of the week.

18 MR. KAPLAN: One slight amendment. Since he
19 traded through five companies, the names of which
20 counsel have, that reference to his companies should be
21 within the --

22 THE COURT: Just make sure that counsel has
23 the names of the companies.

24 MR. KAPLAN: They know them, but we'll give
25 them to him in an E-mail promptly.

26 THE COURT: Thank you.


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2 (Whereupon, the matter concluded.)

3 * * *

4 C E R T I F I C A T E

5 This is certified to be a true and accurate
6 transcription of the stenographic minutes taken in the
7 above proceedings.

8 
9 JEANETTE LAKE, CSR, RMR
Official Court Reporter

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