## UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

In re:	)	CHAPTER 11
WORLDCOM, INC., et al.,	)	CASE NO. 02-13533 (AJG)
Debtors.	)	(Jointly Administered)
		MOTION FOR ORDER ING AGREEMENT
Rejecting Agreement Between WorldCo the Court having considered: (i) the Mo the Motion ("Response"); (iii) Debtor	om, Inc. and lotion; (ii) Ke rs' Reply to	tors' Motion for Order Nunc Pro Tunc Kennedy and Associates (the "Motion"), nnedy & Associates, Inc.'s Objection to the Response; and (iv) argument of and the Debtors, and the Court being
IT IS HEREBY ORDERED to open court on February 28, 2006, as full		tion is denied for the reasons stated in lin Exhibit A, attached hereto; and
		that a status conference on Kennedy & ereto is scheduled for April 25, 2006 at
DATED:, 2006 New York, New York		
	_	Honorable Arthur J. Gonzalez, United States Bankruptcy Judge

## Exhibit A

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2	AC CORRECTED AND MODIFIED BY THE
3	AS CORRECTED AND MODIFIED BY THE COURT ON 2/28/2006
4	UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK
5	x
6	In re Case No.
7	WORLDCOM, INC., et al, 02-13533
8	Reorganized Debtors.
	February 28, 2006
9	United States Custom House
10	One Bowling Green New York, New York 10004
11	EXCERPT
12	
13	10:05 02-13533 WORLDCOM, INC., ET AL DECISION TO BE RENDERED
14	Motion filed by the Debtors for an order nunc
 15	pro tunc rejecting agreement between WorldCom, Inc. and Kennedy & Associates.
16	Response by Kennedy & Associates, Inc. filed.
17	BEFORE:
18	
19	THE HONORABLE ARTHUR J. GONZALEZ United States Bankruptcy Judge
20	
21	
	DEDODAY WWW.CANAN Court Devotes
22	DEBORAH HUNTSMAN, Court Reporter 198 Broadway, Suite 903
23	New York, New York 10038 (212) 608-9053 (917) 723-9898
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                 Proceedings
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               (Whereupon, the following is an
    excerpt from 2/28/2006 in In re WorldCom,
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4
    Inc., et al, case no. 02-13533.)
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               JUDGE GONZALEZ: You may be seated.
6
               With respect to the first matter in
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    WorldCom, Kennedy & Associates?
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              MR. PIROGOVSKY: Yes. Alex
    Pirogovsky on behalf of Kennedy & Associates.
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10
              MR. POLALES: With Dean Polales.
              MS. WELCH: Sara Welch on behalf of
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12
    the Debtors.
              JUDGE GONZALEZ: All right. I am
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14
    going to read a decision into the record.
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16
               Before the Court is the Debtors'
1.7
    Motion for Order Nunc Pro Tunc Rejecting
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    Agreement Between WorldCom, Inc. and Kennedy
19
    & Associates, dated August 5, 2005 (the
    "Motion"). The Debtors contend that if an
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21
    executory contract actually does exist
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    between the parties, the required standards
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    have been met to grant nunc pro tunc
24
    rejection of a contract between Kennedy &
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Associates, Inc. ("Kennedy") and the Debtors

- 1 Proceedings
- 2 as of the date of confirmation of the
- 3 Debtors' Modified Second Amended Joint Plan
- 4 of Reorganization Under Chapter 11 of the
- 5 Bankruptcy Code, dated October 21, 2003 (the
- 6 "Plan"). Kennedy argues in response that the
- 7 relief sought by the Debtors would violate
- 8 the Bankruptcy Code and additionally that no
- 9 basis exists to grant the nunc pro tunc
- 10 relief.
- 11 The matter arose from proof of
- 12 claim no. 23470 (the "Claim") that was timely
- 13 filed by Kennedy in the Debtors' chapter
- 14 11 cases. The Debtors objected to the Claim
- 15 in their Twenty Second Omnibus Objection to
- 16 Proofs of Claims (Employment Related Claims),
- 17 dated August 4, 2004 (the "Claim Objection"),
- 18 on the grounds that (i) the Debtors had no
- 19 liability for the Claim and their records
- 20 reflected that they did not owe Kennedy any
- 21 money, and (ii) Kennedy had not provided
- 22 sufficient information to support the claim
- 23 or permit the Debtors to evaluate it.
- 24 Kennedy responded to the Claim Objection by
- 25 stating that the Claim was based on a certain

## 1 Proceedings

- 2 Benefit Plans Consulting Services Agreement
- 3 (the "Alleged Contract") for services related
- 4 to consulting on and auditing of WorldCom's
- 5 ERISA benefit plans. Kennedy asserts that
- 6 the Alleged Contract was executory in nature
- 7 within the meaning of Section 365 of the
- 8 Bankruptcy Code. An unsigned copy of the
- 9 Alleged Contract was attached to the proof of
- 10 claim form, which also stated that the total
- 11 amount of the Claim was "to be determined
- 12 pending audit of prepetition and postpetition
- 13 recoveries." The Debtors have, for purposes
- 14 of the Motion, accepted Kennedy's assertion
- 15 that the Alleged Contract is executory, but
- 16 have not conceded that there is an existing
- 17 agreement between the parties, or that such
- 18 agreement is executory in nature.
- 19 Additionally, the Debtors have reserved the
- 20 right to commence an action seeking a ruling
- 21 that (a) no agreement exists or existed
- 22 between the parties, and (b) that any
- 23 agreement between the parties was not an
- 24 executory contract. This Court finds that
- 25 the Debtors have failed to establish that it

- 1 Proceedings
- 2 has the inherent, applied, or stated
- 3 authority to grant post-confirmation nunc pro
- 4 tunc rejection of the Alleged Contract, and,
- 5 therefore, the Court does not reach the issue
- 6 of whether a basis exists to grant the relief
- 7 requested.
- 8 The Debtors cite to Sections
- 9 1123(b)(2) and 105(a) of the Bankruptcy Code
- 10 as authority for the nunc pro tunc rejection
- 11 of an executory contract subsequent to
- 12 confirmation of a plan. Section 1123(b)(2)
- 13 states that "a plan may ... subject to
- 14 section 365 of this title, provide for the
- 15 assumption, rejection, or assignment of any
- 16 executory contract or unexpired lease of the
- 17 debtor not previously rejected under such
- 18 section." 11 U.S.C. Section 1123(b)(2).
- 19 Section 105(a) provides that "[t]he court may
- 20 issue any order, process, or judgment that is
- 21 necessary or appropriate to carry out the
- 22 provisions of this title." 11 U.S.C. Section
- 23 105(a). The Debtors note that the language
- 24 of Section 1123(b)(2) does not limit when
- 25 assumption or objection must be effected.

- 1 Proceedings
- 2 While this is true, the statute specifically
- 3 states that the rejection must take place
- 4 through a plan.
- 5 Section 8.01 of the Debtors' Plan
- 6 provides that executory contracts and
- 7 unexpired leases were to be deemed assumed as
- 8 of the Effective Date, except with respect to
- 9 those contracts or leases that (i) had been
- 10 previously rejected prior to the Effective
- 11 Date, (ii) for which a motion for approval of
- 12 rejection had been filed and served prior to
- 13 Confirmation, or (iii) that were listed on
- 14 Schedules 8.01(A) or (B) in the Plan
- 15 Supplement. The Plan reserved the right of
- 16 the Debtors to amend the Schedules on or
- 17 prior to the Confirmation Date. However, the
- 18 Plan contains no language reserving the right
- 19 to either amend the Schedules or to seek
- 20 rejection of contracts subsequent to
- 21 confirmation of the Plan. Thus, the Plan
- 22 itself has not provided the Debtors with the
- 23 authority to seek post-confirmation rejection
- 24 of the Alleged Contract, as is required by
- 25 Section 1123(b)(2) of the Bankruptcy Code.

Τ	Proceedings
2	Additionally, Section 12.01 of the
3	Plan contains several provisions relating to
4	the Court's post-confirmation retention of
5	jurisdiction. The Debtors specifically cite
6	to the Court's retention of jurisdiction:
7	(a) To hear and determine pending
8	applications for the assumption or
9	rejection of executory contracts or
10	unexpired leases and the allowance of cure
11	amounts and Claims resulting therefrom;
12	(b) To hear and determine any and
13	all adversary proceedings, applications
14	and contested matters;
15	(c) To hear and determine any
16	objection to Administrative Expense
17	Claims or Claims;
1.8	(e) To issue such orders in aid of
19	execution and consummation of the Plan, to
20	the extent authorized by section 1142 of
21	the Bankruptcy Code;
22	(h) To hear and determine disputes
23	arising in connection with the
24	interpretation, implementation, or
25	enforcement of the Plan, including any

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Proceedings
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        disputes arising under Section 5.12 or
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        6.18 of the Plan; ...
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 4
               (1) To resolve any Disputed Claims;
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 6
               (n) To hear any other matter not
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        inconsistent with the Bankruptcy Code; ...
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    (Plan Para, 12.01.) The Debtors assert that
    nunc pro tunc rejection of the Alleged
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    Contract would constitute an exercise of this
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    Court's retained jurisdiction. The Court
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    disagrees, and specifically addresses the
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    retentions provided under sections 12.01(c),
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    (1) and (n) of the Plan.
               The Court retains jurisdiction to
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    hear and determine objections to claims under
    Section 12.01(c) of the Plan and to resolve
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    any disputed claims pursuant to Section
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    12.01(1) of the Plan. While the actions the
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    Debtors seek to take under the Motion are
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    tangentially related to a claim objection,
    they do not constitute an objection to a
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    claim or the resolution of a disputed claim.
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    Rather, the Debtors seek to create a set of
    facts (rejection of the Alleged Contract)
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- 1 Proceedings
- 2 that will ultimately enable them to take
- 3 action to resolve the Claim or object to any
- 4 additional claim that might arise as a result
- 5 of the rejection of the Alleged Contract.
- 6 Section 12.01(n) of the Plan
- 7 provides jurisdiction for the Court to hear
- 8 any matter not inconsistent with the
- 9 Bankruptcy Code. Yet, rejection of the
- 10 Alleged Contract under these circumstances
- 11 would be viewed as inconsistent with the
- 12 Bankruptcy Code. The rejection of executory
- 13 contracts is provided for by Sections 365 and
- 14 1123(b)(2) of the Bankruptcy Code. Section
- 15 365(d)(2) of the Bankruptcy Code allows for
- 16 rejection of an executory contract prior to
- 17 confirmation, while Section 1123(b)(2) allows
- 18 for rejection through a Plan. In this case,
- 19 rejection of the Alleged Contract clearly was
- 20 not sought prior to confirmation of the Plan
- 21 and is not provided for in the Plan itself.
- 22 Thus, to reject the Alleged Contract at this
- 23 point in time would constitute an act that is
- 24 inconsistent with those provisions of the
- 25 Bankruptcy Code that permit rejection of

- 1 Proceedings
- 2 executory contracts.
- 3 The Debtors cite to several cases
- 4 as authority for the position that courts
- 5 have utilized retained jurisdiction to grant
- 6 nunc pro tunc assumption or rejection
- 7 post-confirmation. These cases, however, can
- 8 be distinguished from the situation at hand.
- 9 The case of Alberts v. Humana Health Plan,
- 10 Inc. (In re Greater Southeast Community
- 11 Hospital Corp. I) 327 B.R. 26 (Bankr. D. D.C.
- 12 2005), specifically states that "[t]he
- 13 Bankruptcy Code permits questions of
- 14 assumption or rejection under a plan to be
- 15 determined after confirmation of a plan
- 16 calling for such post-confirmation
- 17 determination. Id. at 34 (emphasis
- 18 added) (citing In re Gunter Hotel Assocs., 96
- 19 B.R. 696, 699-700 (Bankr. W.D. Tex. 1998);
- 20 TMS Assocs. v. Kroh Bros. Dev. Co. (In re
- 21 Kroh Bros. Dev. Co., 100 B.R. 480, 486-87
- 22 (W.D. Mo. 1989)). In the Greater Southeast
- 23 case, the Plan had specifically retained the
- 24 right for the debtors to reject the contract
- 25 if the required cure amount was unacceptable.

## 1 Proceedings

- 2 See
- 3 In re Greater Southeast, 327 B.R. at 30 ("The
- 4 order confirming the plan slightly modified
- 5 the plan by making the Humana executory
- 6 contracts deemed assumed by the reorganized
- 7 debtors as of the effective date of the plan,
- 8 and by providing that the reorganized debtors
- 9 ... could decline to assume the executory
- 10 contracts if the cure amounts were
- 11 unacceptable, with the executory contract to
- 12 be 'deemed rejected' upon the reorganized
- 13 debtors so declining to assume.") As
- 14 previously discussed, the Debtors' Plan makes
- 15 no comparable post-confirmation retention of
- 16 such right. Similarly, in the case of In re
- 17 Gunter Hotels, 96 B.R. 696 (Bankr. W.D. Tex.
- 18 1988), while citing to a general plan
- 19 provision allowing the court to hear and
- 20 determine all matters relating to the plan,
- 21 the court's ruling to extend the deadline to
- 22 reject a contract until sixty days after
- 23 confirmation was made prior to the
- 24 confirmation of the plan itself (and was
- 25 presumably incorporated into the confirmation

- 1 Proceedings
- 2 order.) See Gunter Hotel Assocs., 96 B.R. at
- 3 701 (extending the deadline for seeking
- 4 rejection for 60 days past the effective date
- 5 of confirmation). Indeed, the Court has been
- 6 unable to locate case law on the issue in
- 7 which some acknowledgment of the debtors'
- 8 rights to act post-confirmation was not made
- 9 prior to confirmation of the plan.
- 10 The Debtors also cite to several
- 11 cases as authority for permitting the use of
- 12 nunc pro tunc relief in the context of
- 13 Section 365 of the Bankruptcy Code. However,
- 14 these cases do apply in the post-confirmation
- 15 context, as Section 365 of the Bankruptcy
- 16 Code specifically relates to assumption or
- 17 rejection "at any time before the
- 18 confirmation of a plan." 11 U.S.C. Section
- 19 365(d)(2). Furthermore, as pointed out by
- 20 Kennedy, all relate to extension of the
- 21 60-day deadline for unexpired leases of real
- 22 property. As stated in the case of In re GST
- 23 Telecom, Inc., 2001 WL 686971 (D.Del. June 8,
- 24 2001), courts have recognized that Congress
- 25 did not intend that debtors be granted only

- 1 Proceedings
- 2 60 days in which to decide whether to assume
- 3 or reject a nonresidential commercial lease,
- 4 and equity dictates that courts can grant a
- 5 debtor extensions to do so. Id. at \*3.
- When the Debtors structured the
- 7 Plan to assume all contracts that were not
- 8 specifically rejected, they took upon
- 9 themselves the burden that certain contracts
- 10 that they may not have been aware of or did
- 11 not consider executory might not be able to
- 12 be rejected if found to be executory. The
- 13 Plan, however, did not include a reservation
- 14 of rights allowing the Debtors to reject,
- 15 post-confirmation (i) those contracts that
- 16 were accidentally excluded from the
- 17 Schedules, or (ii) those contracts that were
- 18 not included in the Schedules because the
- 19 Debtors did not consider them to be
- 20 executory, but which are ultimately
- 21 adjudicated to be executory contracts. The
- 22 Debtors must therefore bear the burden of
- 23 those contracts that were unidentified, or
- 24 that are disputed in nature. While the Court
- 25 acknowledges the Debtors' concern with

- 1 Proceedings
- 2 additional creditors asserting that contracts
- 3 against the Debtors were executory in nature,
- 4 it is important to note that this opinion
- 5 does not forestall the ability of the Debtors
- 6 to challenge whether the Alleged Contract was
- 7 executory in nature, or whether the Alleged
- 8 Contract even existed. However, in light of
- 9 the statutory language, the related case law,
- 10 and the lack of any Plan provisions that
- 11 would address this issue, the Court does not
- 12 feel it is able to grant nunc pro tunc
- 13 rejection of the Alleged Contract
- 14 post-confirmation.
- 15 Based upon the foregoing, the
- 16 Motion is denied. Counsel to Kennedy is to
- 17 settle an order consistent with this Court's
- 18 opinion.
- 19 \* \* \* \*
- That concludes the Court's ruling.
- I think we need to move to the next
- 22 pre-trial stage in the Kennedy & Associates
- 23 matter, and I think when you settle the order
- 24 you can put in a proposed date to continue
- 25 the pretrial aspects of Kennedy and discuss

- 1 Proceedings
- 2 with the Court any outstanding issues that
- 3 the Court may need to address at that time.
- 4 The next comment I have is for
- 5 Court Conferencing. Would the operator
- 6 please --
- 7 MR. POLALES: Your Honor, are you
- 8 moving to another case? This is Dean
- 9 Polales.
- JUDGE GONZALEZ: Yes.
- MR. POLALES: Your Honor, we did
- 12 have a motion to compel certain discovery. I
- 13 don't know if Your Honor has had a chance to
- 14 look at that yet, but that was argued in the
- 15 same court appearance in which we were
- 16 arguing the nunc pro tunc motion.
- JUDGE GONZALEZ: I still think we
- 18 need a status conference. I will look at
- 19 that again. My recollection is that I waited
- 20 on that to resolve this issue, and now that
- 21 this issue has been resolved favorably to
- 22 Kennedy, I may have to then address the
- 23 discovery issue. It has been a while since I
- 24 looked at that issue. I think what I would
- 25 like you to do is set up the pretrial, and I

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Proceedings
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    will familiarize myself with the discovery
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    issue and you can address it again at that
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4
    time.
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               MR. POLALES: Thank you, Your
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    Honor.
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               THE OPERATOR: Thank you, Your
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    Honor.
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2	CERTIFICATE
3	STATE OF NEW YORK )
4	: SS: COUNTY OF NEW YORK )
5	
6	I, DEBORAH HUNTSMAN, a Shorthand
7	Reporter and Notary Public within and for the
8	State of New York, do hereby certify:
9	That the within is a true and
LO	accurate transcript of the Digitally Recorded
L1	Proceedings recorded on the 28th day of
L2	February, 2006.
L3	I further certify that I am not
L4	related by blood or marriage to any of the
L5	parties and that I am not interested in the
L6	outcome of this matter.
L7	IN WITNESS WHEREOF, I have hereunto
L8	set my hand this 7th day of March, 2006.
۱9	
20	DEBORAH HUNTSMAN
21	AS CORRECTED AND MODIFIED BY THE COURT ON 2/28/2006
22	**PROOFREAD BY HALLIE CANTOR
23	**PROOFREAD BY YA'AKOVAH WEBER
24	