

EXHIBIT E

855VWTCC Argument

1 (In open court)

2 (Case called)

3 **THE COURT: Mr. Tyrrell, it's your motion.**

4 **MR. TYRRELL: Good afternoon, your Honor. May it**
5 **please the Court, for the record, my name is James Tyrrell from**
6 **the firm of Patton Boggs. I represent the City of New York and**
7 **its contractors.**

8 **Your Honor, there are certain special circumstances**
9 **that apply to today's arguments, so it is only appropriate that**
10 **I articulate that at the outset.**

11 **Normally, in arguing the details of a protective**
12 **order, we would have applied to the Court for permission to**
13 **argue in camera. We are well aware of the fact of the concern**
14 **of the public interest in this argument; and, therefore, we**
15 **have not asked to argue it in camera. That does not mean,**
16 **however, that we believe it is appropriate for me or any other**
17 **counsel, in the course of advancing our argument today, to, in**
18 **fact, disclose matters which your Honor will later decide**
19 **whether they can or cannot be disclosed.**

20 **I intend to hold myself to the standard set in the**
21 **protective order entered by Judge Lynch, now subject to**
22 **reconsideration by your Honor. And I hope your Honor will not**
23 **allow today's public argument of the very question of a**
24 **protective order to be the reason for information that is not**
25 **yet determined to be appropriately disclosed to the public to**

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1 somehow be laid on the public record.

2 **THE COURT:** I don't believe, Mr. Tyrrell, that the
3 argument needs to deal with amounts or conditions or
4 qualifications of particular insurance policies. And,
5 therefore, I don't see anything that needs to be a matter of
6 concern.

7 **MR. TYRRELL:** I agree, your Honor. I just wanted to
8 be sure my --

9 **THE COURT:** Secondly, we're not dealing with a motion
10 for reconsideration; we're dealing with a motion in the first
11 instance of the wisdom of a protective order in its scope. As
12 you will recall, when I asked Judge Lynch to sign the
13 protective order that had been tendered by the parties, I left
14 open the opportunity to argue the wisdom of a protective order
15 and its reach at a later time. And this is that later time.

16 **MR. TYRRELL:** Thank you, your Honor. Groundwork laid.
17 Let's talk now about what the motion today is about
18 and what it is not about.

19 It is not about whether insurance information will be
20 produced by the contractors; it has already been produced. My
21 motion is not about whether that insurance information can be
22 seen by plaintiffs' counsel; it already has been seen by
23 plaintiffs' counsel.

24 The motion is about whether the details of the private
25 contractors' global insurance programs can be disclosed to the

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1 press, can be disclosed to the 10,000 individual plaintiffs,
2 can be disclosed to inside counsel for other defendants, and
3 can be disclosed to inside counsel for numerous unidentified
4 insurance companies.

5 We believe and submit to your Honor that it is
6 sufficient to disclose insurance information to outside counsel
7 and the legitimate experts engaged by outside counsel; that a
8 protective order, as we have submitted a draft of such to the
9 Court, strikes the appropriate balance between maintaining the
10 confidentiality of very closely-guarded and toughly tough
11 negotiated insurance programs, balanced against the need for
12 plaintiffs and others, through their outside counsel, to
13 understand what is on the table with respect to insurance
14 coverages.

15 Let me talk briefly about context, and then turn to my
16 specific arguments.

17 I don't dwell on it, but I'd point out that going back
18 to the fall, when your Honor had indicated that a protective
19 order in an appropriate form was appropriate, was going to be
20 entered in this case, we actually succeeded twice in
21 negotiating with all counsel, except for a very minor point,
22 which your Honor then resolved, and agreed upon the form of
23 protective order. The Court will remember at one point you
24 decided that the form was complicated and we should try to
25 simplify it. We actually succeeded in getting that done and

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1 having agreement.

2 Then, with all due respect, there was 180-degree turn
3 in position by plaintiffs' counsel. I'm not saying that they
4 are barred from doing that, but it's worth recognizing. And
5 now they effectively do not want any protective order at all.

6 I point out that the Court has, when this issue has
7 come up -- not with the degree of formality that it is coming
8 up today -- the Court has observed that it is appropriate for
9 there to be a protective order.

10 On November the 16th, 2007, your Honor referred to the
11 insurance information that is the subject of today's focus as
12 competitively important information. On February the 2nd of
13 2008, in an order entered by the Court, your Honor referred to
14 that insurance information as having competitive sensitivity;
15 and that such information should be protected; and that a
16 protective order could appropriately regulate the sensitivity.

17 As recently as March 18, in another order entered by
18 your Honor, you recognized that confidential information may be
19 limited to counsel. Indeed, the Special Masters, before this
20 matter became elevated by way of formal motion, were close to,
21 in fact, recommending what their view of a protective order
22 should be. And that is now neither here nor there, because we
23 are here today to argue it as a formal motion.

24 My motion, my argument, is key to six specific points.

25 First. We respectfully submit that the defendant

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1 contractors have showed good cause, as that term is defined in
2 the Federal Rules of Civil Procedure, for the entry of a
3 protective order. The relevant standard of good cause is set
4 forth in Federal Rule of Civil Procedure 26(c)(7). It is clear
5 that such good cause can apply and a protective order is
6 appropriate for confidential commercial information.

7 So what is my burden today? My burden is to make a
8 showing that there is confidential commercial information; and
9 that the harm of disclosing that information to the press, to
10 10,000 individual plaintiffs, etc., outweighs the needs of the
11 party advocating such disclosure. If my affidavits and my
12 argument make that prima facie showing, the case law indicates
13 that the burden then shifts to plaintiffs to demonstrate why
14 there should be nevertheless unfettered disclosure, as they
15 request.

16 I point out, in starting on this point, that
17 attorneys' eyes only protective orders, which is what we are
18 asking for for insurance information only, are well-recognized
19 and adopted by the federal courts.

20 Now, we've searched, as you can imagine, not only in
21 New York, but in every federal court we could find, and we've
22 set forth the case law in our brief. But the two cases that I
23 would specifically focus on, because they are very close to
24 what your Honor has been trying to do here, one was Klein v.
25 King in the Northern District of California. And there, the

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1 **THE COURT:** As I think about it some more, the
2 litigation concern is a very big concern, and the publicity
3 concern is a very big concern. And I like to be able to deal
4 with those concerns, because I think that's really what you're
5 concerned about.

6 **MR. TYRRELL:** It's two-thirds of it. But let me take
7 a moment to explain to you how it really works.

8 When you're a big contractor, a Bovis, a Turner, an
9 Amack, global company --

10 **THE COURT:** One minute. I'm going to trying to make
11 the courtroom a little cooler.

12 **MR. TYRRELL:** Thank you, your Honor. I've been
13 accused of causing those problems before, your Honor.

14 When you're a big company, you don't just rely on the
15 average broker to go to a carrier and cut a deal for you with
16 respect to your insurance coverage.

17 **THE COURT:** I'm aware.

18 **MR. TYRRELL:** You have a big internal staff, and
19 you're always trying to create the equivalent of new
20 intellectual property, because you want to win the bid. And
21 then you go out to the carriers and you say to a Lloyd
22 syndicate, Here's what we have in mind: Let's get a special
23 deal going here. But if you're going to be our carrier, you
24 have to give us an exclusive; you have to sign something, we
25 are going to share it with you; but if we can go to the market

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1 with it, and I'll give you one specific example, we're going to
 2 have a big competitive advantage, because we can agree with the
 3 owner of the project, let's say the Port Authority building the
 4 Freedom Tower, we can come in, and we'll agree to assume more
 5 risk. And that's very attractive to the Port Authority, okay,
 6 and it will affect their willingness to pay a higher price.
 7 But I know, because I cut a great deal with the London
 8 syndicate, because of a creative idea, that I can lay that risk
 9 off on them.

10 So Bovis now has an advantage, I'll use another one of
 11 my clients over Turner or Amack, in going to that project.

12 Look at what happens if Mr. Napoli has his way. He's
 13 going to have the information and give all the advice he wants
 14 to his counsel. He wants to, of course, disclose it publicly,
 15 that's what he says on page 2 of his brief. But look, for
 16 example, at what I'm faced the very first time we disagreed
 17 with the Port Authority.

18 THE COURT: There's no need for publicity releases in
 19 this issue. There is a need to be able to write freely briefs
 20 and for the Court to write briefly opinions.

21 MR. TYRRELL: And no one disputes that, because you're
 22 not going to decide your opinion based on whether Bovis has a
 23 unique deal with the London syndicates. That doesn't have to
 24 be in those papers.

25 THE COURT: Supposing we establish a rule of no

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1 publicity on insurance information, creating a log that
2 identifies every time information about insurance is expressed
3 and delayed filings of court papers, so that if there's
4 disputes, I can rule on what should be redacted and what should
5 be open.

6 MR. TYRRELL: I think that's a great practical
7 solution. Because if it doesn't go into the public record yet
8 and there still is the issue of who can see it for other
9 purposes, and I'll come to that, but if it doesn't go into the
10 public record yet, and it gets filed only with you if the flag
11 goes up that there's insurance information in it, it gets
12 served on me, I look at it and say, Not a problem; you don't
13 have anything to decide. If there's real detailed towers of
14 coverage information in it, I say, Please don't file it yet
15 until the judge has had a chance to decide either to redact --

16 THE COURT: I can tell you this also. I think we're
17 interested not in the precise excess and reinsurance
18 components, our interest is amounts. So the details of the
19 insurance plan should not be important. Your conditions of
20 insurance are important, the exclusions are important, the
21 amounts are important. I don't think the program is important.

22 I think we can work this out, but I don't really feel
23 comfortable with tight provisions that make it very difficult
24 to litigate the case.

25 MR. TYRRELL: I don't think it's going to be

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