UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**

POST-HEARING BRIEF IN FURTHER SUPPORT OF CONFIRMATION OF THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

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

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

BACKGROUND 4

FACTS 11

ARGUMENT 80

I. THE COURT HAS JURISDICTION TO APPROVE AND IMPLEMENT THE GLOBAL SETTLEMENT AGREEMENT AND THE MODIFIED PLAN 80

A. The Court Has Jurisdiction to Implement the TPS Summary Judgment Opinion and Related Order 81

B. The TPS Consortium Is Attempting to Seek a Stay Without Meeting the Requirements of the Bankruptcy Rules 85

C. This Court Has the Constitutional and Statutory Authority to Approve the Global Settlement Agreement and Confirm the Modified Plan 87

II. THE GLOBAL SETTLEMENT AGREEMENT IS FAIR AND REASONABLE AND IS NOT SUBJECT TO RELITIGATION 96

III. THE MODIFIED PLAN COMPLIES WITH SECTION 1129 OF THE BANKRUPTCY CODE 102

A. Section 1129(a)(1) – The Modified Plan Complies with Applicable Provisions of the Bankruptcy Code 103

B. Section 1129(a)(3) – The Modified Plan Was Proposed in Good Faith 112

C. Section 1129(a)(7) – The Modified Plan Satisfies the Best Interests Test 117

D. Section 1129(b) – The Modified Plan Satisfies the “Cramdown” Requirements 141

IV. THE MODIFIED PLAN SATISFIES THE REQUIREMENTS OF SECTION 1127 146

V. THE EVIDENCE CONFIRMS THAT THE DEBTORS’ VALUATION OF REORGANIZED WMI IS FAIR AND PROPER 147

A. The Amount of NOLs Available to Reorganized WMI is Limited 147

B. Blackstone’s Valuation of Reorganized WMI is Fair and Proper 149

TABLE OF CONTENTS
(continued)

Page

C. The Court Should Grant the Debtors' Motion in Limine and Exclude Maxwell's Report and Testimony with respect to the Hypothetical Value of Reorganized WMI 158

D. The Equity Committee's Experts Failed to Put Forth a Credible Alternative Valuation 171

VI. EXCESS VALUE OF THE ESTATES WILL BE DISTRIBUTED TO JUNIOR CLASSES 182

CONCLUSION 183

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

CASES

In re 11,111, Inc.,
117 B.R. 471 (Bankr. D. Minn. 1990) 142

Am. Nat. Ins. Co. v. F.D.I.C.,
642 F.3d 1137 (D.C. Cir. 2011) 97

In re AmeriServe Food Distribution, Inc.,
315 B.R. 24 (Bankr. D. Del. 2004) 97

Arizona v. California,
460 U.S. 605 (1983) 93

In re Armstrong World Indus., Inc.,
348 B.R. 111 (D. Del. 2006) 102, 143

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999) 117

In re Barney and Carey Co.,
170 B.R. 17 (Bankr. D. Mass 1994) 142

In re Bergman,
397 B.R. 348, 352 (Bankr. E.D. Va. 2008) 84

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) 126

In re Best,
365 B.R. 725 (Bankr. W.D. Ky. 2007) 139

In re Bialac,
694 F.2d 625 (9th Cir. 1982) 84

Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.,
No. 05-6882, 2009 WL 362118 (S.D.N.Y. Feb. 9, 2009), aff'd, 355 F. App'x 516 (2d Cir. 2009) 137

Boltar, L.L.C. v. C.I.R.,
No. 25954-08, 2011 WL 1314445 (U.S. Tax Ct. Apr. 5, 2011) 166

In re Bush Indus., Inc.,
315 B.R. 292 (Bankr. W.D.N.Y. 2004) 115

In re Buttonwood Partners, Ltd.,
111 B.R. 57 (Bankr. S.D.N.Y. 1990) 143

Calhoun v. Yamaha Motor Corp.,
350 F.3d 316 (3d Cir. 2003) 160

Calyon New York Branch v. Am. Home Mortg. Corp.,
383 B.R. 585 (Bankr. D. Del. 2008) 100

Case v. Los Angeles Lumber Prods. Co.,
308 U.S. 106 (1939) 90

Casey's Gen. Stores, Inc. v. Alimentation Couche-Tard, Inc.,
No. 4:10–cv–00265, 2010 WL 3604097 (S.D. Iowa Sept. 8, 2010) 5

Celli v. First Nat'l Bank of N. New York (In re Layo),
460 F.3d 289 (2d Cir. 2006) 93

In re Charter Commc'ns,
419 B.R. 221 (Bankr. S.D.N.Y. 2009),
appeal dismissed, 449 B.R. 14 (S.D.N.Y. 2011) 118

In re Chiapetta,
159 B.R. 152 (Bankr. E.D. Pa. 1993) 140

In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,
791 F.2d 524 (7th Cir. 1986) 123

City Solutions v. Clear Channel Commc'ns, Inc.,
201 F.Supp.2d 1048 (N.D. Cal. 2002) 137

In re Commercial Loan Corp.,
316 B.R. 690 (Bankr. N.D. Ill. 2004) 92

In re Cont'l Airlines, Inc.,
279 F.3d 226 (3d Cir. 2002) 124

In re Coram Healthcare Corp.,
315 B.R. 321 (Bankr. D. Del. 2004) 123, 138, 141, 152

CoreStates Bank, N.A. v. Huls Am. Inc.,
176 F.3d 187 (3d Cir. 1999) 93

Cosoff v. Rodman (In re W.T. Grant Co.),
699 F.2d 599 (2d Cir. 1983), cert denied, 464 U.S. 822 (1983) 92

Dardashti v. Golden (In re Dardashti),
No. CC-07-1311, 2008 Bankr. LEXIS 4678 (B.A.P. 9th Cir. Feb. 12, 2008)....................82

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)....................159, 160, 163, 166

In re DeMarco,
258 B.R. 30 (M.D. Fla. 2000)....................84

DePaepe v. Gen. Motors Corp.,
141 F.3d 715 (7th Cir. 1998)....................162

Disibio v. Mission Nat'l Bank,
127 Fed. Appx. 950 (9th Cir. 2005)....................101

In re Dow Corning Corp.,
244 B.R. 678 (Bankr. E.D. Mich. 1999)....................124

Elcock v. Kmart Corp.,
233 F.3d 734 (3d Cir. 2000)....................161, 166

In re Emergency Beacon Corp.,
58 B.R. 399 (Bankr. S.D.N.Y. 1986)....................84

In re Energy Coop., Inc.,
886 F.2d 921 (7th Cir. 1989)....................92

In re Enron Corp.,
No. 01-16034 (AJG) (Bankr. S.D.N.Y. July 15, 2004)....................111

In re Evans,
No. 10-80446C, 2010 WL 2976165 (Bankr. M.D.N.C. July 28, 2010)....................139

In re Federal-Mogul Global Inc.,
No. 01-10578, 2007 WL 4180545 (Bankr. D. Del. Nov. 16, 2007)....................108

F.D.I.C. v. Killinger, et al.,
No. 2:11-cv-00459 (MJP) (W.D. Wash.)....................121

F.D.I.C. v. McFarland,
243 F.3d 876 (5th Cir. 2001)....................102

Filing v. Phipps,
No. 5:07CV1712, 2010 WL 3789539 (N.D. Ohio Sept. 24, 2010)....................127

In re Furlow,
70 B.R. 973 (Bankr. E.D. Pa. 1987) 143

In re Greate Bay Hotel & Casino, Inc.,
251 B.R. 213 (Bankr. D.N.J. 2000) 143

GMGRSST, Ltd. v. Menotte (In re Air Safety Int'l, LC),
336 B.R. 843 (S.D. Fla. 2005) 141

In re Gulfport Pilots Ass'n, Inc.,
434 B.R. 380 (Bankr. S.D. Miss. 2010)...139

H&C Dev. Grp., Inc. v. First Vt. Bank & Trust Co. (In re Miner),
222 B.R. 199 (B.A.P. 2d Cir. 1998)..91

Hagel v. Drummond (In re Hagel),
184 B.R. 793 (B.A.P. 9th Cir. 1995)..81, 82

Hayman Cash Register Co. v. Sarokin,
669 F.2d 162 (3d Cir. 1982)...97

Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II),
994 F.2d 1160 (5th Cir. 1993) 102

Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A.,
43 F.3d 843 (3d Cir. 1994)..101

In re Imperial "400" Nat'l Inc.,
374 F. Supp. 949 (D.N.J. 1974) 152

Ingles Mkts., Inc. v. Henderson Investors, Ltd. (In re Rose's Stores, Inc.),
No. 94-2011, 1995 U.S. App. Lexis 8090 (4th Cir. Apr. 12, 1995) 86

In re Innkeepers USA Trust, et al.,
No. 10-13800-scc (Bankr. S.D.N.Y. 2010)...167

In re Jartran, Inc.,
44 B.R. 331 (Bankr. N.D. Ill. 1984) 152

In re Johns-Manville Corp.,
68 B.R. 618 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988)...103, 143

In re Kahihikolo,
807 F.2d 1540 (11th Cir. 1987) 85

Kane v. Johns-Manville Corp.,
843 F.2d 636 (2d Cir. 1988)..103, 113, 142

In re Key3Media Group,
336 B.R. 87 (Bankr. D. Del. 2005) 92

In re Lernout & Hauspie Speech Prods., N.V.,
301 B.R. 651 (Bankr. D. Del. 2003) 143

In re Leslie Fay Cos., Inc.,
207 B.R. 764 (Bankr. S.D.N.Y. 1997)...114

Koelbl v. Glessing (In re Koelbl),
751 F.2d 137 (2d Cir. 1984) 113

Levie v. Sears Roebuck & Co.,
676 F. Supp. 2d 680 (N.D. Ill. 2009) 127

In re Lincolnshire Campus, LLC,
441 B.R. 524 (Bankr. N.D. Tex. 2010)...114

Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.,
767 F. Supp. 1220 (S.D.N.Y. 1991), rev'd on other grounds, 967 F.2d 742 (2d Cir. 1992) 137

Mary Ann Pensiero, Inc. v. Lingle,
847 F.2d 90 (3d Cir. 1988)..82

In re Melenyzer,
143 B.R. 829 (Bankr. W.D. Tex. 1992)...140

Mill Bridge V, Inc. v. Benton,
No. 08-2806, 2010 WL 5186078 (E.D. Pa. Dec. 21, 2010)..127

Miller v. Greenwich Capital Fin. Prods., Inc. (In re Am. Bus. Fin. Servs., Inc.),
Adv. No. 06-50826, 2011 WL 3240596 (Bankr. D. Del. July 28, 2011) 89, 93, 137

In re Mirant Corp.,
334 B.R. 800 (Bankr. N.D. Tex. 2005)...172, 173

In re Motors Liquidation Co.,
No. 09-50026 (REG) (Bankr. S.D.N.Y. Mar. 29, 2011)...111

In re Nellson Nutraceutical, Inc.,
356 B.R. 364 (Bankr. D. Del. 2006) 160

No. 84 Emp'r Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.,
320 F.3d 920 (9th Cir. 2003) 128

In re Nutritional Sourcing Corp.,
398 B.R. 816 (Bankr. D. Del. 2008) 103

Oddi v. Ford Motor Co.,
234 F.3d 136 (3d Cir. 2000)....160

Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.),
200 F.3d 154 (3d Cir. 1999)....112

Official Committee of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.),
456 F.3d 668 (6th Cir. 2006) 123, 143

In re Okwonna-Felix,
No. 10–31663–H4–13, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011) 91, 96

Oran v. Stafford,
226 F.3d 275 (3d Cir. 2000)....125

In re Paoli R.R. Yard PCB Litig.,
35 F.3d 717 (3d Cir. 1994)....160, 161, 166

Pereira v. Foong (In re Ngan Gung Rest.),
254 B.R. 566 (Bankr. S.D.N.Y. 2000)....113

In re Petition of the Bd. of Dir. of Hopewell Int'l Ins. Ltd.,
258 B.R. 580 (Bankr. S.D.N.Y. 2001)....82

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
390 U.S. 414 (1968)....90

Providers Benefit Life Ins. Co. v. Tidewater Grp., Inc. (In re Tidewater Grp., Inc.),
734 F.2d 794 (11th Cir. 1984) 91

In re Purofied Down Prods. Corp.,
150 B.R. 519 (S.D.N.Y. 1993)....92

In re Rago,
149 B.R. 882 (Bankr. N.D. Ill. 1992) 141

Ries v. Paige (In re Paige),
610 F.3d 865 (5th Cir. 2010) 93

In re Rivera Echevarria,
129 B.R. 11 (Bankr. D.P.R. 1991) 143

Rosa v. Resolution Trust Co.,
938 F.2d 383 (3d Cir. 1991) 101

Royal Bank & Trust Co. v. Pereira (In re Lady Madonna Indus., Inc.),
76 B.R. 281 (S.D.N.Y. 1987) 91

In re Schoeneberg,
156 B.R. 963 (Bankr. W.D. Tex. 1993) 124

Schulz v. Celotex Corp.,
942 F.2d 204 (3d Cir. 1991) 162

S.E.C. v. Novus Techs., L.L.C.,
No. 2:07–CV–235–TC, 2010 WL 3516347 (D. Utah, Sept. 2, 2010) 166

S.E.C. v. Butler,
No. 00-1827, 2005 WL 5902637 (W.D. Pa. Apr. 18, 2005) 127

S.E.C. v. Thrasher,
152 F.Supp.2d 291 (S.D.N.Y. 2001) 127

Stecyk v. Bell Helicopter Textron, Inc.,
295 F.3d 408 (3d Cir. 2002) 170

Stern v. Marshall,
131 S. Ct. 2594 (2011) .... passim

In re Sun Country Dev., Inc.,
764 F.2d 406 (5th Cir. 1985) 113

Taylor v. First Union Corp. of S.C.,
857 F.2d 240 (4th Cir. 1988) 125, 126, 136, 137

In re Teligent, Inc.,
417 B.R. 197 (Bankr. S.D.N.Y. 2009) 92

Tonkoff v. Synoground (In re Merle's Inc.),
481 F.2d 1016 (9th Cir. 1973) 91

In re Toy & Sports Warehouse, Inc.,
37 B.R. 141 (Bankr. S.D.N.Y. 1984) 103

TSC Indus., Inc. v. Northway, Inc.,
426 U.S. 438 (1976) 125, 127, 137

Turner v. First Cmty. Credit Union,
No. 10-32706-H4-13, 2011 WL 2708907 (Bankr. S.D. Tex. July 11, 2011) 96

In re Urban Dev. Ltd., Inc.,
42 B.R. 741 (Bankr. M.D. Fla. 1984) 84

Venen v. Sweet,
758 F.2d 117 (3d Cir. 1985) 84

In re VII Holdings Co.,
362 B.R. 663 (Bankr. D. Del. 2007) 82

Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.),
898 F.2d 1544 (11th Cir. 1990), cert. denied, 498 U.S. 959 (1990) 91

Walton v. Morgan Stanley & Co., Inc.,
623 F.2d 796 (2d Cir. 1980) 137

In re Whispering Pines Estates,
369 B.R. 752 (B.A.P. 1st Cir. 2007) 84

STATUTES

11 U.S.C. § 363(b) 190

11 U.S.C. § 365 110

11 U.S.C. § 365(b)(1) 33, 112

11 U.S.C. § 365(f) 110

11 U.S.C. § 510 141

11 U.S.C. § 726 141

11 U.S.C. § 726(a) 141

11 U.S.C. § 1102 139

11 U.S.C. § 1107(a) 4

11 U.S.C. § 1108 4

11 U.S.C. § 1122 .... 20, 103, 104, 107, 146

11 U.S.C. § 1123 .... 20, 103, 107

11 U.S.C. § 1123(a) 107

11 U.S.C. § 1123(a)(4) 107, 108

11 U.S.C. § 1123(b) 110

11 U.S.C. § 1123(b)(3) 90, 93

11 U.S.C. § 1123(b)(4) 111

11 U.S.C. § 1123(b)(6) 111

11 U.S.C. § 1123(c) 112

11 U.S.C. § 1123(d) 112

11 U.S.C. § 1124 .... 26, 27

11 U.S.C. § 1125 18

11 U.S.C. § 1126 71

11 U.S.C. § 1126(f) 70

11 U.S.C. § 1127 .... 79, 146

11 U.S.C. § 1129(a)(1) 20, 103

11 U.S.C. § 1129(a)(2) 34, 102

11 U.S.C. § 1129(a)(3) 34, 112, 117

11 U.S.C. § 1129(a)(4) 38, 102

11 U.S.C. § 1129(a)(5) 38, 102

11 U.S.C. § 1129(a)(6) 39

11 U.S.C. § 1129(a)(7) .... passim

11 U.S.C. § 1129(a)(8) 70, 102

11 U.S.C. § 1129(a)(9) 71, 103

11 U.S.C. § 1129(a)(10) 72, 103

11 U.S.C. § 1129(a)(11).......72, 103

11 U.S.C. § 1129(a)(12).......73

11 U.S.C. § 1129(a)(13).......73, 103

11 U.S.C. § 1129(a)(14).......73

11 U.S.C. § 1129(a)(15).......74

11 U.S.C. § 1129(a)(16).......74

11 U.S.C. § 1129(b)....... passim

11 U.S.C. § 1129(b)(2).......142, 144, 145

11 U.S.C. § 1129(c).......78, 112

11 U.S.C. § 1129(d).......78, 103

11 U.S.C. § 1129(e).......78

11 U.S.C. § 1141(d).......111, 140

11 U.S.C. § 1141(d)(3).......115

26 U.S.C. § 269....... passim

26 U.S.C. § 382.......148, 149, 151

28 U.S.C. § 157(b)....... passim

28 U.S.C. § 1334(a).......89

28 U.S.C. § 1930.......73

Financial Institutions Reform, Recovery, and Enforcement Act of 1989,
§ 1821(d)(13)(D).......101

Securities and Exchange Act of 1934 § 10(b).......127

Wash. Rev. Code §§ 23B.08.300.......120

Wash. Rev. Code § 23B.08.320.......120

Wash. Rev. Code § 23B.08.420.......120

Wash. Rev. Code § 23B.08.510(4).......120, 121

Wash. Rev. Code §§ 23B.08.560 121

Wash. Rev. Code §§ 23B.08.570 121

OTHER AUTHORITIES

7 Lawrence P. King, Collier on Bankruptcy § 1123(a)(4) (15th ed. 2009) 108

10 Collier on Bktcy P. 8005.01 (2001) 85

10 Collier on Bktcy P. 8005.03 (2001) 85

12 Moore's Federal Practice – Civil § 60.23 100

12 Moore's Federal Practice – Civil § 62.03 86

Chaim J. Fortgang & Thomas M. Mayer, Valuation in Bankruptcy, 32 UCLA L. Rev. 1061, 1130 (1985) 153

Fed. R. Bank. P. 1015(b) 4

Fed. R. Bank. P. 3016 20

Fed. R. Bank. P. 3019 6

Fed. R. Bank. P. 7054 100

Fed. R. Bank. P. 7062 ....83, 85, 87

Fed. R. Bank. P. 8005 .... passim

Fed. R. Bank. P. 9019 ....90, 91, 92, 184

Fed. R. Bank. P. 9023 100

Fed. R. Bank. P. 9024 100

Fed R. Civ. P. 54(b) 100

Fed R. Civ. P. 59 100

Fed R. Civ. P. 59(e) 100

Fed R. Civ. P. 60 84

Fed R. Civ. P. 60(b) 100

Fed R. Civ. P. 62 85

Fed R. Civ. P. 62(d) 85

Fed R. Evid. 702 .... passim

Fed R. Evid. 703 170

Fed R. Evid. 705 170

U.S. Const., art. I, § 8, cl. 4..88

H.R. Rep. No. 95-595 (1977)..103, 114

S. Rep. No. 95-989 (1978)..103

Treas. Reg. § 1.269-3..153, 180

Treas. Reg. § 1.269-5(b) 153

Treas. Reg. § 1.382-6..149

Treas. Reg. § 1.1502-91-6..149

17 C.F.R. § 240.10b-5..120, 22

PRELIMINARY STATEMENT

It is time for the Debtors[2] to exit from chapter 11 and, in order to do so, it is time for the Court to confirm the Debtors' chapter 11 plan. The Modified Plan has been overwhelmingly accepted by the relevant constituencies and only faces dissent from parties that have been found to be "out-of-the-money". Now, after indulging many parties with many theories (legal, factual and conspiracy) for almost three years, the Debtors have nothing left to do but to distribute the estates' assets to the Debtors' stakeholders, which, upon consummation of the Global Settlement Agreement, will exceed $7 billion in cash and value. Indeed, not to do so would be directly contrary to the dictates of the Bankruptcy Code, the Court's proclaimed "law of the case", including the Court's determination regarding the reasonableness of the Global Settlement Agreement, the evidence submitted at the Confirmation Hearing and applicable law. Everything that is before the Court firmly establishes that the Modified Plan satisfies the requirements of section 1129 of the Bankruptcy Code. Likewise, the equities of the Debtors' Chapter 11 Cases, as well as creditors that have been awaiting receipt of recoveries for over a year, demand consummation of the Modified Plan.

The following pages set forth the relevant history of the Debtors' Chapter 11 Cases and the pertinent facts adduced, through declarations, testimony and exhibits, at the Confirmation Hearing. Additionally, such pages address the multitude of arguments that have been proffered in an effort to derail confirmation of the Modified Plan and even the Court's consideration of the Modified Plan. Such arguments in opposition, and the limited facts proffered in support thereof, are empty. They fail to provide a formidable or supportable basis not to confirm the Modified Plan. More importantly, they actually establish the Debtors' good

[2] All defined terms used in the Preliminary Statement shall have the meanings ascribed to them in succeeding sections hereof.

faith approach to all parties and the Chapter 11 Cases and the negotiation of the Global Settlement Agreement and the Modified Plan.

The TPS Consortium's effort to stop the Confirmation Hearing in its tracks, claiming a divestiture of jurisdiction due to its pending appeal (a blatant attempt to obtain a stay without addressing the procedural and legal requirements with respect thereto), fails to address the numerous cases directly on point that provide that this Court has jurisdiction to implement its prior TPS Summary Judgment Opinion and corresponding order. The supplementally espoused "Stern" theory, as the argument du jour, also is baseless. As this Court recently noted in its recent American Business Financial Services decision, and other courts have held, Stern is to be narrowly applied and has no relevance to confirmation of a chapter 11 plan or the approval of a Bankruptcy Rule 9019 compromise and settlement. Furthermore, the TPS Consortium's argument regarding claims and causes of action and the "Senate PSI Report" is an ill-conceived shot in the dark. As detailed below, not only is such an assertion flailing and non-responsive to the Court's posited question regarding "value", it fails to consider not only the Debtors' difficulties of asserting claims and causes of action, but also, the numerous resultant claims against the Debtors' estates.

Similarly, the Equity Committee tries one last time to complicate the issues through a series of misguided arguments. First, through Messrs. Maxwell and Anderson, the Equity Committee attempts to generate additional value for Reorganized WMI through speculation, hypothecation and a general failure to consider prevailing law. Such efforts would be laudable but for the fact that they were soundly displayed as conjecture, and not expert opinion, and acknowledged to be made of whole cloth by their very producers. More importantly, even if they were remotely correct, which they are not, such enhanced valuation

would not be a basis to deny confirmation, as the Modified Plan is designed to adopt the Court's determination of value regarding Reorganized WMI.

Next, while realizing that the Global Settlement Agreement has been found by the Court to be fair and reasonable, the Equity Committee attempts to circumvent such finding by lashing out at third parties in the hope that noise about the negotiation process and alleged inequitable conduct will cause the Court to either reconsider its prior determination of the "law of the case" or find that some form of inequitable conduct warrants application of the federal judgment rate of interest and not the contract rate of interest to be applied pursuant to the Modified Plan. Again, the Equity Committee falls miserably short. Despite the Equity Committee's introduction of countless emails and the cross-examination of the Settlement Note Holders, the only conclusions that can be drawn from such evidence are that (1) the Debtors were in charge of the settlement process, (2) subject to confidentiality agreements, the Debtors allowed the Creditors' Committee and certain creditor constituencies to participate in and provide input with respect to the negotiation process, (3) at the conclusion of periods of confidentiality, the Debtors publicly disclosed all "material" non-public information, (4) the Debtors and the Debtors alone reached an agreement with the FDIC, JPMC and the Bank Bondholders, and (5) the Settlement Note Holders and other parties in interest became aware of such agreement when it was read into the record of the Court and subsequently modified in amended documentation. Nothing adduced says otherwise. Nothing warrants this Court to diverge from its stated presumption that the contract rate of interest should be applied.

As set forth in full below, the Global Settlement Agreement and the Modified Plan were developed in direct response to the Opinion and the Court's statements at the January

20 Status Conference. Thus, the other miscellaneous objections to confirmation, including the classification of claims, should be denied.

At bottom, all hurdles have been cleared and all hoops have been jumped through in connection with the Modified Plan. The Debtors have complied in all respects with section 1129 of the Bankruptcy Code, the requirements set forth in the Opinion and the Court's statements at the January 20 Status Conference. As such, the Debtors submit that entry of the Confirmation Order is all that remains and respectfully request that the Modified Plan be confirmed.

Accordingly, the Debtors respectfully request that the Court enter an order confirming the Modified Plan.

BACKGROUND[3]

Events Leading to the Hearing to Consider Confirmation of the Modified Plan

On September 26, 2008, each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Court. [D.I. 1,6] The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. In accordance with this Court's Order, dated October 3, 2008 [D.I. 25], the Debtors' cases are being jointly administered pursuant to Bankruptcy Rule 1015(b). Conf DX 374 – Goulding Decl. at ¶ 7.

On October 6, 2010, the Debtors filed the Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated October 6, 2010 [D.I. 5548] (as subsequently modified, the "Sixth Amended Plan"). Conf DX 2 – Sixth

[3] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Memorandum of Law in Support of Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated July 8, 2011, an unredacted copy of which was filed on July 12, 2011 [D.I. 8185] (the "Confirmation Brief"). Conf DX 424 – Confirmation Brief.

Amended Plan; Conf DX 374 – Goulding Decl. at ¶ 15. The Sixth Amended Plan was premised on the implementation of that certain Amended and Restated Settlement Agreement, dated as of October 6, 2010, by and among the Debtors, JPMC, the FDIC, the Creditors' Committee, and certain creditor constituencies resolving certain claims and causes of action among such parties (the "Initial Global Settlement Agreement"). Conf DX 2H – Initial Global Settlement Agreement; Conf DX 374 – Goulding Decl. at ¶ 15.

The Court held a hearing to consider confirmation of the Sixth Amended Plan on December 2, 3, 6 and 7, 2010 (the "First Confirmation Hearing"). Upon the conclusion of the First Confirmation Hearing, on January 7, 2011, the Court issued an Opinion with respect to the Sixth Amended Plan [D.I. 6528] (the "Opinion") and a related Order [D.I. 6529], which, among other things, found that (i) the Initial Global Settlement Agreement on which the Sixth Amended Plan was premised, and the transactions completed therein, are fair, reasonable, and in the best interests of the Debtors' creditors and the Debtors' chapter 11 estates, Conf DX 265 – Opinion at 2, 60, and (ii) certain modifications to the Sixth Amended Plan, if made, would enable the Sixth Amended Plan to be confirmed. Id. at 2. In conjunction with its determination that the Initial Global Settlement should be approved, the Court concluded that (i) the Debtors are not likely to achieve a significantly better result if they were to continue to litigate the claims resolved pursuant to the Initial Global Settlement Agreement, (ii) there are difficulties inherent in collecting on account of the Debtors' potential claims against JPMC and the FDIC Receiver, (iii) the claims resolved pursuant to the Initial Global Settlement Agreement are complex and would be expensive and would cause delay to litigate, and (iv) the Initial Global Settlement Agreement provides a reasonable return in light of the possible results of the litigation resolved by such agreement. Id. at 56-60. The Court specifically noted that, "[a]lthough equity interest

holders are not likely to get a recovery, the Court is not convinced that continued litigation, against JPMC and/or the FDIC would change that result." Id. at 66-67.

Also on January 7, 2011, the Court entered two related opinions concerning the TPS Action and Dime Warrant Litigation. In the opinion regarding the TPS Action, the Court granted the defendants' motions for summary judgment and found, among other things, that the Conditional Exchange was automatic and occurred on September 26, 2008 [Adv. Proc. 10-51387, D.I. 179] (the "TPS Summary Judgment Opinion"). Conf DX 267 – TPS Summary Judgment Opinion. Thus, the Court determined that the prior holders of the Trust Preferred Securities now hold Depositary Shares representing related series of WMI Preferred Shares (as each term is defined in the TPS Summary Judgment Opinion). Id. at 13. In the opinion regarding the Dime Warrant Litigation, the Court denied the defendant's motion for summary judgment [Adv. Proc. 10-50911, D.I. 145]. See Conf DX 268 – Opinion Denying Defendant's Motion for Summary Judgment.

On January 20, 2011, the Court held a status conference (the "January 20 Status Conference"), during which it stated, among other things, that the determinations in the Opinion constitute the law of the case and are not subject to relitigation or reconsideration:

> THE COURT: As one example. But in concept, with respect to those items that I did decide, they're not going to be relitigated.
> MR. SARGENT: Correct.
> THE COURT: Okay. It's law of the case, basically.
> MR. SARGENT: We would agree with that.

See Conf DX 270 – Hr'g Tr. 1/20/2011 at 51:22-52:3.

Consistent with the Court's directions in the Opinion and at the January 20 Status Conference, on February 8, 2011, the Debtors filed the Modified Plan [D.I. 6696] and a related disclosure statement [D.I. 6697] (as has, and may be further amended, the "Supplemental

Disclosure Statement"[4]). Conf DX 255 – Modified Plan;[5] Conf DX 253 – Supplemental Disclosure Statement. The Modified Plan is premised upon the Second Amended and Restated Settlement Agreement, dated as of February 7, 2011 (as amended, the "Global Settlement Agreement"). Conf DX 255H, 402, 422 – Global Settlement Agreement (as amended).[6] The Global Settlement Agreement incorporates the terms of and mirrors the Initial Global Settlement Agreement, except that it excludes certain creditors who previously were parties to the Initial Global Settlement Agreement and has been amended to conform to certain revisions reflected in the Plan, or otherwise required by the Opinion. See id.

By order, dated March 30, 2011, the Court, among other things, approved the adequacy of the information contained in the Supplemental Disclosure Statement [D.I. 7081] (the "Supplemental Disclosure Statement Order"). See Conf DX 272 – Supplemental Disclosure Statement Order. Pursuant to the Supplemental Disclosure Statement Order, the deadline to submit votes on and elections with respect to the Modified Plan was May 13, 2011. Id.

In support of or in connection with the Modified Plan, the Debtors filed the following documents:

(1) Service Affidavits [Conf DX 379, 380, 381, 385, 386, 387, 388, 389, 390; D.I. 8212, 8233];

(2) Publication Affidavits [Conf DX 382, 383, 384];

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[4] The Supplemental Disclosure Statement contains the disclosure statement filed in connection with the Sixth Amended Plan as Exhibit A (the "Prior Disclosure Statement"). Conf DX 253A – Prior Disclosure Statement.

[5] As used herein, citations to Conf DX 255 – Modified Plan are deemed to incorporate Conf DX 256 – First Plan Modification, and Conf DX 258 – Second Plan Modification.

[6] On the final day of the evidentiary portion of the Confirmation Hearing, the Debtors sought to introduce certain proposed exhibits into evidence, including, among others, those designated herein as Conf DX 402 – Second Amendment to Global Settlement Agreement, and Conf DX 422 – Amendment to Global Settlement Agreement. See Hr'g Tr. 7/21/2011 at 92:22-23. In response, counsel for the Equity Committee requested that the Court reserve judgment on the admission of the documents until after Mr. Kosturos testified. See id. at 93:1-3. The Court agreed to consider whether to admit proposed exhibits Conf DX 402 and Conf DX 422 following such testimony. See id. at 92:20-21, 93:4, 269:19-270:1. The Court's decision in this regard remains pending.

(3) Cure Notice [Conf DX 392];

(4) Voting Certifications [Conf DX 18, 19, 377, 403];

(5) Goulding Declaration [Conf DX 374];

(6) Notice of Election of Treatment of Priority Tax Claims, dated December 1, 2010 [D.I. 6193] (the "Priority Tax Claim Election Notice") [Conf DX 393];

(7) Plan Supplement in Support of Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated April 28, 2011 [D.I. 7217] (the "Plan Supplement") [Conf DX 259];

(8) Notice of Filing of Updated Liquidation Analyses, dated May 7, 2011 [D.I. 7430] [Conf DX 254, as amended by Conf DX 375] (the "Updated Liquidation Analyses");

(9) Notice of Filing Documents Related to Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated July 8, 2011 [D.I. 8120] (the "First Supplemental Notice") [Conf DX 405];

(10) Notice of Filing Additional Plan Supplement Documents, dated July 12, 2011 [D.I. 8200] (the "Second Supplemental Notice"); and

(11) Third Modification of Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated August 10, 2011 [D.I. 8423] (the "Third Plan Modification").

The filing, notice, and service of the Plan Supplement documents was done in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, and no other or further notice is or should be required. See Conf DX 385 – Service Affidavits.

Acceptance of the Modified Plan

Pursuant to the Modified Plan and the Supplemental Disclosure Statement Order, sixteen (16) Classes of Claims and Equity Interests were entitled to vote to accept or reject the Modified Plan. Conf DX 272 – Supplemental Disclosure Statement Order at 4; Conf DX 403 – Klamser Decl. at ¶ 11; Conf DX 377 – Sharp Decl. at ¶ 11. As discussed in more detail below,

see infra at 70-72, of such Classes, the following thirteen (13) voted overwhelmingly to accept the Modified Plan: Class 2 (Senior Notes Claims), Class 3 (Senior Subordinated Notes Claims), Class 5 (JPMC Rabbi Trust/Policy Claims), Class 6 (Other Benefit Plan Claims), Class 10 (Bond Claims), Class 11 (WMI Vendor Claims), Class 12 (General Unsecured Claims), Class 12A (Late-Filed Claims), Class 13 (Convenience Claims), Class 14 (CCB-1 Guarantees Claims), Class 15 (CCB-2 Guarantees Claims), Class 16 (PIERS Claims), and Class 17A (WMB Senior Notes Claims). Conf DX 403 – Klamser Decl. at ¶ 24; Conf DX 377 – Sharp Decl. at ¶ 24; Conf DX 18 – Klamser Decl. for the Sixth Amended Plan at ¶ 29. In addition, Class 17A (WMB Senior Notes Claims) is deemed to have accepted the Modified Plan, in accordance with such Class's vote with respect to the Sixth Amended Plan. See Conf DX 272 – Supplemental Disclosure Statement Order at 5; Conf DX 18 – Klamser Decl. for the Sixth Amended Plan at ¶ 29. Moreover, Class 1 (Priority Non-Tax Claims), Class 4 (WMI Medical Plan Claims) and Class 7 (Qualified Plan Claims) are unimpaired and, therefore, are conclusively presumed to have accepted the Modified Plan. Conf DX 403 – Klamser Decl. at ¶ 17.

Objections to the Modified Plan

Pursuant to the Supplemental Disclosure Statement Order, except with respect to certain parties to whom the Debtors granted extensions of time, the deadline to file objections to the Modified Plan (collectively, and inclusive of certain objections filed in connection with the Supplemental Disclosure Statement,[7] the "Objections") was May 13, 2011. Conf DX 272 –

[7] In the Debtors' Omnibus Response to Objections to Motion of Debtors for an Order Pursuant to Sections 105, 502, 1125, 1126, and 1128 of the Bankruptcy Code and Bankruptcy Rules 2002, 3003, 3017, 3018, and 3020 [D.I. 6963], the Debtors asserted that certain of the objections filed in connection with the Supplemental Disclosure Statement were, in fact, objections to the Modified Plan. See Conf DX 287 at 4-5. Accordingly, the Debtors submitted that such objections should be reserved and raised in connection with the hearing to consider confirmation of the Modified Plan. See id. at 5. The Debtors responded to such objections in their submissions relating to confirmation of the Modified Plan.

Supplemental Disclosure Statement Order at 23. On or prior to the objection deadline, certain parties, including, without limitation, individual shareholders, interposed Objections to the Modified Plan. Of these, the overwhelming majority were duplicative "form" pleadings and letters filed by individual shareholders acting on a *pro se* basis; only twenty-five (25) Objections were filed by other parties in interest.

In addition, on July 1, 2011, pursuant to an order of the Court extending the objection deadline, the Equity Committee filed, under seal, the Objection of the Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization (the "Equity Committee Objection"). The Equity Committee Objection later was publicly filed in unredacted form on July 12, 2011 [D.I. 8192]. Further, on July 7, 2011, the TPS Consortium filed an untimely supplemental Objection to confirmation of the Modified Plan [D.I. 8100].

Categorized generally, the Objections primarily relate to: reconsideration of the Global Settlement Agreement; the appropriate rate of postpetition interest (including whether certain parties engaged in inequitable conduct warranting a reduction of the interest rate); classification of the PIERS Claims; treatment of purported Claims of holders of Dime Warrants; the reasonableness and accuracy of the Debtors' valuation of Reorganized WMI; certain jurisdictional issues; and certain intercreditor issues.

The Debtors' Responses to the Objections

Pursuant to an order, dated June 28, 2011 [D.I. 8010], the Court authorized the Debtors to file an omnibus reply to any Objection on or before July 11, 2011, but required the Debtors to submit all other documentation in support of confirmation on or before July 8, 2011.

On July 8, 2011, the Debtors filed redacted versions of the Confirmation Brief [D.I. 8121] and the Debtors' Omnibus Response to Objections to Confirmation of the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States

Bankruptcy Code [D.I. 8122] (the "Omnibus Response"). In addition, on July 11, 2011, in response to the Equity Committee Objection, the Debtors filed, under seal, the Debtors' Supplemental Response to the Objection of the Official Committee of Equity Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization [D.I. 8131]. Unredacted versions of each of these documents were filed on July 12, 2011 [D.I. 8185, 8186, 8188]. Conf DX 423-25. Further, on July 12, 2011, the Debtors filed the Debtors' Response to the First and Second Supplemental Objections of the Consortium of Trust Preferred Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization [D.I. 8176]. Conf DX 421.

The Hearing to Consider Confirmation of the Modified Plan

The Court held a hearing to consider confirmation of the Modified Plan on July 13-15 and 18-21, 2011 (the "Confirmation Hearing"). At the conclusion of the evidentiary portion of the Confirmation Hearing, the Court directed that any party desirous of filing a written submission with respect to the evidence presented at the Confirmation Hearing file such submission on or prior to August 10, 2011.

FACTS

The Modified Plan and Global Settlement Agreement Are Consistent with the Opinion

The Modified Plan and the Global Settlement Agreement are consistent with the Opinion and the Court's statements at the January 20 Status Conference. Specifically, the Opinion raised nine (9) areas of concern with respect to the Sixth Amended Plan: (i) the releases (including the scope of the Debtors' releases, the extent of third party releases, and the definition of "Released Claims"); (ii) the injunctions; (iii) the exculpation provision; (iv) the rate of postpetition interest; (v) classification of purported Claims of holders of Dime Warrants; (vi) the classification and treatment of PIERS Claims; (vii) the provision for stock elections; (viii) the

post-confirmation process; and (ix) the payment of fees of certain settling parties. See Conf DX 265 – Opinion at 67-83, 86-87, 90-94, 100-01, 107-09. Each of these areas has been addressed by revisions incorporated in the Modified Plan and Global Settlement Agreement.

Releases

With respect to the release provisions, the Court noted three areas of concern. As to the scope of the Debtors' releases, the Court noted that Section 43.5 of the Sixth Amended Plan should provide for releases by the Debtors only, Conf DX 265 – Opinion at 63 n.33, and the Debtors should not be releasing certain third parties. See Conf DX 265 – Opinion at 67, 70, 72. Section 43.5 of the Modified Plan is only binding on the Debtors. See Conf DX 255 – Modified Plan § 43.5. In addition, the Global Settlement Agreement limits the definition and scope of the Debtors' releases in accordance with the Opinion. See, e.g., Conf DX 255H – Global Settlement Agreement § 3.5. Moreover, the definition of "Released Parties," Section 1.165 of the Modified Plan, includes only the Debtors, WMB, the Debtors' estates, the JPMC Entities, the FDIC Receiver and FDIC Corporate, and the Related Persons of each of the JPMC Entities, FDIC Corporate and the FDIC Receiver, as required by the Opinion.

With respect to the release of third parties, in accordance with the Opinion, Section 2.1 of the Modified Plan provides, in relevant part, as follows:

> In the event of any inconsistency . . . with respect to the releases provided in Section 43.6 [of the Modified Plan], the documents shall control in the following order of priority: (i) Confirmation Order, (ii) Modified Plan, and (iii) Amended GSA.

Conf DX 255 – Modified Plan § 2.1. With respect to the ANICO plaintiffs, Section 43.6(g) of the Modified Plan provides as follows:

> Texas Litigation. Nothing contained herein or in the Confirmation Order with respect to the releases, exculpations, injunctions or similar provisions is intended to, nor shall it, release, enjoin or restrain the prosecution of direct claims, if any, asserted, or that

> could have been asserted, in the Texas Litigation against any non-Debtor Entity; provided, however, that the foregoing is without prejudice to the rights of any such non-Debtor Entity to contest, upon notice and a hearing, the validity, merits and ownership of or standing to assert any such direct claims; and, *provided, further, that the Bankruptcy Court is not making, either pursuant to the Plan or the Confirmation Order, a determination as to which Entity, including, without limitation, the Debtors, owns the claims asserted, or that could have been asserted, in the Texas Litigation; and, provided, further*, that any and all direct claims against the Debtors and derivative claims of the Debtors, if any, that have been or could have been asserted against any Released Party in the Texas Litigation shall, upon the Effective Date, be released, discharged and enjoined.

Conf DX 255 – Modified Plan § 43.6(g) (emphasis added). As directed by the Opinion, the form Stipulation of Dismissal attached to the Global Settlement Agreement has been similarly modified. See Conf DX 255H – Global Settlement Agreement, Exhibit H. Further, Section 43.6 of the Modified Plan applies only to Entities that are entitled to receive a distribution or satisfaction of such claim pursuant to the Modified Plan and affirmatively elect to grant the releases set forth in Section 43.6 of the Modified Plan, and the releases granted pursuant to Section 43.6 of the Modified Plan do not bind consenting Entities' Related Persons.

With respect to the specific claims to be released, Section 1.164 of the Modified Plan provides that "Released Claims" means: "claims or causes of action that arise in, relate to or have been or could have been asserted . . . (ii) by the Debtors (with respect to releases given by the Debtors) and by Creditors relating to Claims or holders or Equity Interests relating to Equity Interests, as the case may be, they have against the Debtors (with respect to releases given by Creditors or holders of Equity Interests, as the case may be) . . . ." Conf DX 255 – Modified Plan § 1.164.

Injunctions

In the Opinion, the Court noted that injunctions should be limited to the terms of the permissible releases. Conf DX 265 – Opinion at 87. Section 43.2(b) of the Modified Plan enjoins the assertion of claims against the Debtors or the Reorganized Debtors only, and not against any third parties. Additionally, Section 43.3 of the Modified Plan, which is subject to the terms of Section 43.6 thereof, provides for an injunction against enumerated acts only to the extent taken "on account of any Claim or other debt or liability that is discharged or Equity Interest that is terminated, cancelled, assumed or transferred pursuant to the Plan." Conf DX 255 – Modified Plan § 43.3. Similarly, Section 43.7 of the Modified Plan enjoins only acts taken "on account of or based on the subject matter of [Claims released pursuant to Section 43.6 of the Modified Plan]." Id. at § 43.7. Section 43.9 of the Modified Plan applies only "[t]o the limited extent provided in Section 43.6 of the Plan." Id. at § 43.9. And, Section 43.12 of the Modified Plan enjoins, generally, acts to recover from Released Parties with respect to Released Claims or Equity Interests arising prior to the Effective Date, and is subject to the provisions of Section 43.6 of the Modified Plan. See Id. at § 43.12.

Exculpation

The Opinion stated that exculpation should be provided only to the Debtors, the estates' professionals, the Creditors' Committee and Equity Committee and their respective members, and the Debtors' directors and officers. Conf DX 265 – Opinion at 73. However, the Court found that, based upon allegations made with respect to the Dime Warrant Litigation, exculpation of directors for postpetition activities related to the Dime Warrant Litigation should be reserved pending a determination of the merits of such allegations. Conf DX 265 – Opinion at 74. Accordingly, Section 43.8 of the Modified Plan provides:

> Exculpation: The Debtors, the Debtors' officers and directors serving during the period from the Petition Date up to and including the Effective Date, the Creditors' Committee and each of its members in their capacity as members of the Creditors' Committee, the Equity Committee and each of its members in their capacity as members of the Equity Committee, and each of their respective professionals shall not have or incur any liability to any Entity for any act taken or omitted to be taken in connection with the Chapter 11 Cases . . . provided, further, that, unless otherwise ordered by the Bankruptcy Court in connection with the Dime Warrant Litigation, the foregoing provisions of this Section 43.8 shall not affect the liability of any member of the Debtors' Board of Directors and officers with respect to actions asserted in the Dime Warrant Litigation and relating to the period from the Petition Date up to and including the Effective Date.

Conf DX 255 – Modified Plan § 43.8.

Postpetition Interest

With respect to postpetition interest, the Opinion stated that interest cannot be paid on unsecured claims until the payment in full of late-filed claims. Conf DX 265 – Opinion at 89-90. The Modified Plan contains a Class for Late-Filed Claims, and provides that such Claims shall be satisfied prior to the payment of Postpetition Interest Claims. Conf DX 255 – Modified Plan § 16.2.

Classification of Dime Warrant Claims

The Opinion noted that, if the holders of Dime Warrants prevail in the Dime Warrant Litigation and their Claims are not subordinated pursuant to section 510(b) of the Bankruptcy Code, they would be entitled to treatment as general unsecured creditors in Class 12. Conf DX 265 – Opinion at 89. Section 25.1 of the Modified Plan provides that, to the extent that holders of Dime Warrants are determined, pursuant to a Final Order, to hold Allowed Claims, and such Allowed Claims are not otherwise subordinated in accordance with section 510 of the Bankruptcy Code, such Allowed Claims shall be deemed to be Allowed General Unsecured Claims classified in Class 12 and shall receive the treatment provided in Article XVI thereof.

Conf DX 255 – Modified Plan § 25.1. Additionally, the definition of "Unsecured Claim," Section 1.209 of the Modified Plan, has been further modified to include such Claims to the extent determined pursuant to a Final Order:

> Unsecured Claim: A Claim against the Debtors, other than an Administrative Expense Claim, a Priority Tax Claim, a Priority Non-Tax Claim, a Convenience Claim, a Trustee Claim or a Subordinated Claim; *provided, however, that, in the event that the Bankruptcy Court determines, pursuant to a Final Order, that the Dime Warrants constitute Claims, such Claims shall be considered to be Unsecured Claims and, pursuant to such Final Order, shall be treated as General Unsecured Claims in accordance with Class 12 of the Plan or as otherwise determined by the Bankruptcy Court*.

Conf DX 255 – Modified Plan § 1.209 (emphasis added).

Rights Offering

With respect to the rights offering, the Court found that it should be available to all holders of PIERS Claims, regardless of the size of a holder's claim. Conf DX 265 – Opinion at 100. Due to federal securities laws issues associated with a wide-ranging offering, the Modified Plan no longer provides for a rights offering.

Stock Elections

The Opinion stated that holders of Disputed Claims should have the option to participate in the stock election. Conf DX 265 – Opinion at 101-02. In connection with solicitation of the Modified Plan, the Debtors solicited stock elections from all holders of Disputed Claims and Dime Warrants and, pursuant to Section 27.3 of the Modified Plan, the Debtors will reserve Reorganized Common Stock on behalf of each such electing holder. See Conf DX 255 – Modified Plan § 27.3; Conf DX 377 – Sharp Decl. at ¶ 11; Conf DX 403 – Klamser Decl. at ¶ 11.

Post-Confirmation Process

With respect to the post-confirmation process, the Opinion stated that (i) the Equity Committee should continue to have a role, albeit limited, after confirmation to protect the interests of shareholders, Conf DX 265 – Opinion at 107, and (ii) there should be some mechanism for replacement of the Liquidating Trustee by the beneficiaries of the Liquidating Trust. Conf DX 265 – Opinion at 108. Pursuant to Section 1.201 of the Modified Plan and the First Supplemental Notice, the Equity Committee designated one person to serve on the Trust Advisory Board. Additionally, Section 35.2 of the Modified Plan states:

> . . . provided, however, that, in the event that (a) the Equity Committee has taken a timely appeal from the Confirmation Order and (b) such appeal remains pending, the Equity Committee shall be dissolved on the earlier to occur of (1) dismissal or withdrawal of such appeal and (2) a determination, by Final Order, as to the merits of such appeal; and, provided, further, that, in the event that the Equity Committee timely files an appeal of the Confirmation Order, the Equity Committee's members and professionals shall, upon approval of the Bankruptcy Court, after the filing of appropriate applications for allowance thereof and notice and a hearing, be entitled to reimbursement of their reasonable and necessary fees and expenses, until the earlier of (1) and (2) above.

Conf DX 255 – Modified Plan § 35.2.

Pursuant to Section 8.2 of the form Liquidating Trust Agreement that was filed as part of the First Supplemental Notice, the Liquidating Trustee may be removed by a majority vote of the members of the Trust Advisory Board for fraud or willful misconduct in connection with the affairs of the Liquidating Trust or for breach of fiduciary duty. Conf DX 405 – First Supplemental Notice, Exhibit 1.

Payment of Fees

The Opinion stated that fees to be paid by the Debtors must be approved by the Court as reasonable before they are paid. Conf DX 265 – Opinion at 109. Sections 32.12 and

43.18 of the Modified Plan provide that any party may file a request for payment of its fees and Court approval is required before payment thereof. Conf DX 255 – Modified Plan §§ 32.12 and 43.18.

The Global Settlement Agreement Is Substantially Identical to the Initial Global Settlement Agreement

The Global Settlement Agreement incorporates the terms of the Initial Global Settlement Agreement, including all of the economic provisions thereof, except to the extent that (i) certain creditors who previously were parties to the Initial Global Settlement Agreement have been excluded and (ii) certain non-economic provisions were modified consistent with the terms of the Opinion. Compare Conf DX 2H – Initial Global Settlement Agreement with Conf DX 255H, 402, 422 – Global Settlement Agreement (as amended); see also supra pp. 11-17.

The Solicitation Process

Pursuant to the Supplemental Disclosure Statement Order, the Court found, among other things, that the Supplemental Disclosure Statement, together with the Prior Disclosure Statement, contained "adequate information" within the meaning of section 1125 of the Bankruptcy Code and authorized the Debtors to solicit acceptances and rejections of the Modified Plan, as well as certain elections with respect thereto. Conf DX 272 – Supplemental Disclosure Statement Order.

As described in the Voting Certifications, the (i) Supplemental Disclosure Statement Order, (ii) Confirmation Hearing Notice, (iii) Supplemental Disclosure Statement (which includes as an exhibit a copy of the Modified Plan), (iv) Ballots, (v) Election Forms, and (vi) Notices of Non-Voting Status, as applicable (collectively, the "Solicitation Packages") were served in compliance with the Bankruptcy Code, Bankruptcy Rules, Local Bankruptcy Rules, and the Supplemental Disclosure Statement Order. See Conf DX 403 – Klamser Decl. at ¶ 3;

Conf DX 377 – Sharp Decl. at ¶ 3; Conf DX 18 – Klamser Decl. at ¶ 3; Conf DX 19 – Sharp Decl. at ¶ 3. The (i) service of the Solicitation Packages, (ii) publication of the Confirmation Hearing Notice, and (iii) notice of the Voting and Election Deadline: (A) were adequate and sufficient under the circumstances of these Chapter 11 Cases; (B) provided adequate and sufficient notice of the Voting and Election Deadline, the deadline for objecting to confirmation of the Modified Plan, and the date, time, and location of the Confirmation Hearing; (C) provided holders of Claims and Equity Interests with a reasonable period of time to make an informed decision to accept or reject the Modified Plan and to make certain elections provided thereunder; (D) were in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, the Supplemental Disclosure Statement Order, and any other applicable orders and rulings of the Court; and (E) provided due process to all parties in interest in these Chapter 11 Cases. See Service Affidavits; Conf DX 403 – Klamser Decl. at ¶ 3; Conf DX 377 – Sharp Decl at ¶ 3; Conf DX 18 – Klamser Decl. at ¶ 3; Conf DX 19 – Sharp Decl. at ¶ 3; Publication Affidavits.

As evidenced by the Voting Certifications, votes to accept or reject the Modified Plan were solicited and tabulated fairly, in good faith, and in a manner consistent with the Prior Disclosure Statement Order, the Supplemental Disclosure Statement Order, the Bankruptcy Code, the Bankruptcy Rules, and the Local Bankruptcy Rules. See Conf DX 403 – Klamser Decl. at ¶ 3; Conf DX 377 – Sharp Decl at ¶ 3; Conf DX 18 – Klamser Decl. at ¶ 3; Conf DX 19 – Sharp Decl. at ¶ 3. Prior to the transmission of the Supplemental Disclosure Statement, the Debtors did not solicit acceptances of the Modified Plan by any holder of Claims or Equity Interests. Conf DX 374 – Goulding Decl. at ¶ 24. Similarly, as set forth in the Voting Certifications, elections made by holders of Claims and Equity Interests pursuant to the Modified Plan were solicited, tabulated, and implemented fairly, in good faith, and in a manner consistent

with the Modified Plan, the Prior Disclosure Statement Order, the Supplemental Disclosure Statement Order, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. See Conf DX 403 – Klamser Decl. at ¶ 3; Conf DX 377 – Sharp Decl at ¶ 3.

Compliance with Section 1129(a)(1) of the Bankruptcy Code

As required by Bankruptcy Rule 3016, the Modified Plan is dated and identifies the Debtors as proponents. Conf DX 255 – Modified Plan at 1, 95. In addition, the Modified Plan contains provisions consistent with the requirements of sections 1122 and 1123 of the Bankruptcy Code, as set forth below.

Sections 1122 and 1123(a)(1)

With the exception of Administrative Expense Claims and Priority Tax Claims, which need not be classified, Article IV of the Modified Plan classifies twenty-four (24) Classes of Claims and Equity Interests. Conf DX 255 – Modified Plan Art. IV. The Claims or Equity Interests in each Class are substantially similar to the other Claims or Equity Interests, as the case may be, in each such Class. Conf DX 374 – Goulding Decl. at ¶ 23. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Modified Plan, and such classification does not unfairly discriminate between holders of Claims and Equity Interests. Id. Specifically, with respect to the separate classification of Unsecured Claims of equal priority, the Debtors submit the following justifications for the separate classification thereof:

(1) The Claims in each of Classes 2, 3 and 16 relate to notes issued by WMI, but such notes arose from different debentures, each with slightly different legal rights, including, among other things, inter-creditor contractual subordination provisions.

(2) The Claims in Classes 4 through 11 are for liabilities related to certain assets transferred to JPMC pursuant to the P&A Agreement, or to be transferred to JPMC pursuant to the Global Settlement Agreement and, accordingly, JPMC has agreed to

satisfy such Claims.

(3) The Claims in Classes 14 and 15 relate to guarantees issued by WMI and are governed by slightly different underlying documentation (both as compared to other Unsecured Claims as well as compared to one another).

(4) The Claims in Classes 17A and 17B relate to funded indebtedness of WMB, with respect to which such holders asserted related Claims against WMI. The Claims in Class 17A are contractually senior to the Claims in Class 17B, and the Claims in Class 17B represent only derivative, and not direct, Claims against the Debtors.

See Conf DX 374 – Goulding Decl. at ¶ 23. With respect to the separate classification of Equity Interests of equal priority, the Debtors submit the following:

(1) The REIT Series and Preferred Equity Interests in Classes 19 and 20, respectively, relate to different series of preferred stock and, moreover, certain holders of REIT Series are entitled to an additional, separate distribution from JPMC in consideration for a release of JPMC from all claims related to the Trust Preferred Securities, as set forth in more detail in the Modified Plan.

(2) Although the Dime Warrants and Common Equity Interests in Classes 21 and 22, respectively, represent common stock interests, the Dime Warrants arise from a different, unrelated issuance of securities.

See id. In addition to the above justifications, as set forth in further detail below, such separate classification does not unfairly discriminate between holders of similar Claims and Equity Interests. See Conf DX 374 – Goulding Decl. at ¶ 23. Moreover, the definition and classification of Convenience Claims in Class 13 is reasonable and necessary for administrative convenience. Id.

Moreover, the PIERS Claims are properly classified and treated as Claims against the Debtors pursuant to the Modified Plan. In accordance with that certain Amended and Restated Declaration of Trust, dated as of April 30, 2001, WMI, as sponsor, established Washington Mutual Capital Trust 2001 ("WMCT 2001") to issue Trust Preferred Income Equity

Redeemable Securities SM (the "PIERS Units") to investors. See Conf DX 295 – Amended and Restated Declaration of Trust of WMCT 2001. WMCT 2001 is a statutory business trust created under the Delaware Business Trust Act and, as of the Confirmation Hearing, continues to exist as an independent separate entity, duly formed and in good standing. See Conf DX 401 – Certificate of Good Standing of WMCT 2001; Hr'g Tr. 7/14/2011 at 20:17-21:14 (Goulding Direct). WMI owns the common securities (the "PIERS Common Securities") of such trust. Hr'g Tr. 7/14/2011 at 26:22-24 (Goulding Direct).

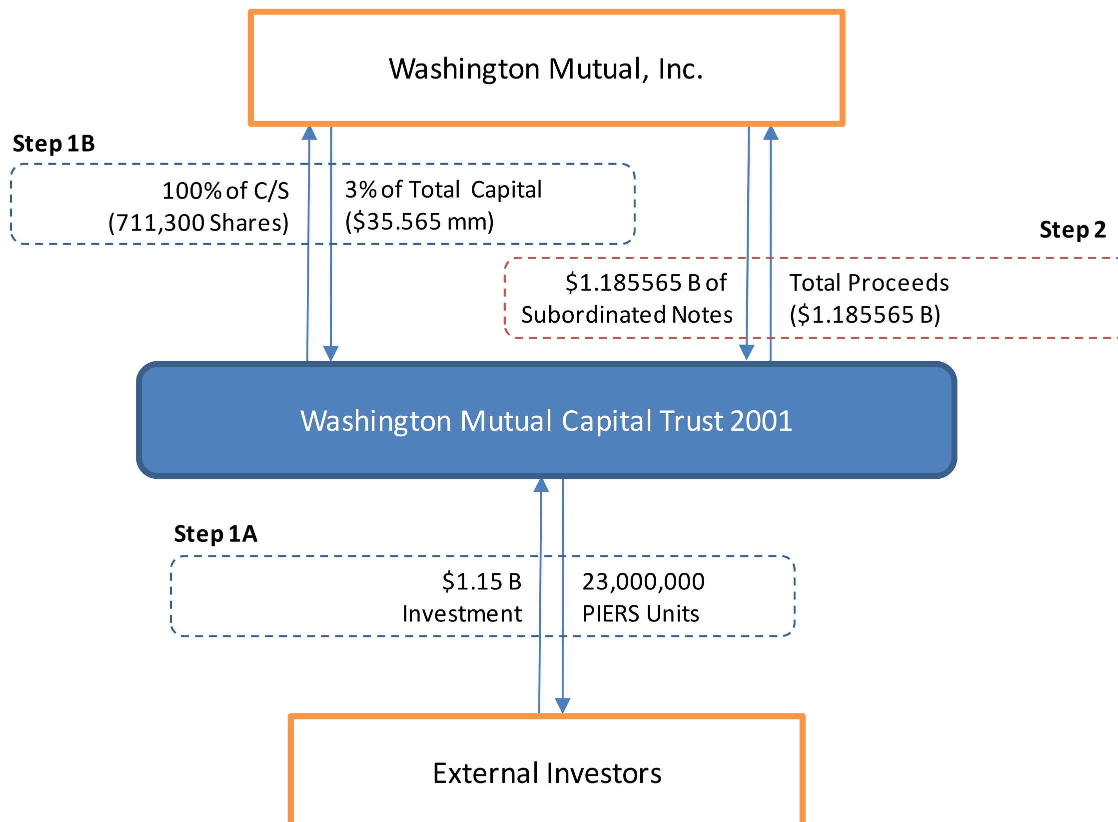
In the second quarter of 2001, WMCT 2001 issued 23 million PIERS Units, with a total price of $1.15 billion to investors, and 711,300 PIERS Common Securities to WMI, with a face value of approximately $35 million. See Hr'g Tr. 7/14/2011 at 21:19-22:2; Conf DX 289 – WMCT 2001 Form S-3, filed 6/27/2001; Conf DX 290 – WMCT 2001 Amendment No. 1 to Form S-3, filed 7/13/2001; Conf DX 291 – WMCT 2001 Form S-3, filed 8/20/2001; Conf DX 292 – WMCT 2001 Amendment No. 1 to Form S-3, filed 8/31/2001. Each PIERS Unit consists of a preferred security (referred to as a "PIERS Preferred Security") having a stated liquidation preference of $50.00 and a stated coupon of 5.375%, in addition to a detachable warrant to purchase 1.2081 shares of common stock of WMI at any time prior to the close of business on May 3, 2041. See Hr'g Tr. 7/14/2011 at 23:17-25 (Goulding Direct). The PIERS Units were issued at an initial purchase price of $50.00, with $32.33 allocated to the PIERS Preferred Securities and the balance ($17.67) attributable to "original issue discount" related to the value of the aforementioned warrant. Id. The PIERS Preferred Securities were issued at a substantial discount and WMI made monthly accounting entries to accrete the discount and increase the balance over time. See Hr'g Tr. 7/14/2011 at 31:21-32:3 (Goulding Direct). Pursuant to Section 5.1 of that certain Guarantee Agreement, dated as of April 30, 2001, as amended by

Amendment No. 1 to the Guarantee Agreement, dated as of May 16, 2001, the PIERS Preferred Securities issued by WMCT 2001 were guaranteed by WMI to the extent WMCT 2001 fails to satisfy its obligations to holders of the PIERS Preferred Securities. See Conf DX 298 – Guarantee Agreement; Conf DX 299 – Amendment No. 1 to Guarantee Agreement; Hr'g Tr. 7/14/2011 at 24:11-25:5 (Goulding Direct).

The proceeds from the issuance of the PIERS Preferred Securities, together with the proceeds of the related issuance of PIERS Common Securities, were invested by WMCT 2001 in junior subordinated deferrable interest debentures issued by WMI (the "Junior Subordinated Debentures"), pursuant to the Junior Subordinated Notes Indenture. See Conf DX 300 – Junior Subordinated Notes Indenture; Conf DX 297 – First Supplemental Indenture; Hr'g Tr. 7/14/2011 at 21:19-22:2 (Goulding Direct). Pursuant to such investment, WMCT 2001 acquired approximately $1.185 billion of 5.375% Junior Subordinated Debentures, due in 2041. Hr'g Tr. 7/14/2011 at 21:19:22:2 (Goulding Direct). The Junior Subordinated Debentures are subordinated in right of payment to the prior payment in full of all senior indebtedness, as defined in the Junior Subordinated Notes Indenture. See Hr'g Tr. 7/14/2011 at 25:9-17 (Goulding Direct); Conf DX 297 – First Supplemental Indenture at 18-19 ("The Company covenants and agrees, and each Holder, by such Holder's acceptance thereof, likewise covenants and agrees, that *the indebtedness represented by the Debentures* and payment of the principal of and interest on each and all of the Debentures is hereby expressly subordinated and junior, to the extent and in the manner set forth and as set forth in this Section 6.1, in right of payment to the prior payment in full of all Senior Indebtedness. (a) In the event of any distribution of assets of the Company upon any . . . reorganization of the Company, . . . the holders of all Senior Indebtedness shall be entitled first to receive payment of the full amount due thereon in respect

of all such Senior Indebtedness . . . before the Holders are entitled to receive any payment or distribution . . . on account of *the principal of or interest on the indebtedness evidenced by the Debentures*." (emphasis added)).

A schematic of the foregoing transaction is as follows:



Upon the issuance of the PIERS Units, and as reflected in WMI's Annual Report for the fiscal year ended December 31, 2001 ("2001 Form 10-K"), WMI credited approximately $750 million to the Junior Subordinated Debenture account for the PIERS Preferred Securities, and credited approximately $400 million to the equity account with respect to the warrants portion of the PIERS Units (minus costs). See Conf DX 293 – WMI 2001 Form 10-K, filed 3/19/2002, at 65, 91. Specifically, in such 10-K, (i) the Consolidated Statements of Stockholders' Equity and Comprehensive Income show an entry of $398 million for the warrants issued, net of costs; and (ii) in the Notes to Consolidated Financial Statements, the Junior

Subordinated Debentures are documented in the "Other Borrowings" category (with the sub-heading "Trust Preferred Securities Due in 2041") and show a $730 million entry (net of discounts and issuance costs incurred) with an interest rate of 5.375%. See id. at 65, 91. Further, WMI's Annual Report for the fiscal year ended December 31, 2007 ("2007 Form 10-K") (the most recent 10-K available), again reflects the Junior Subordinated Debentures in the "Other Borrowings" category. See Conf DX 294 – WMI 2007 Form 10-K, filed 2/29/2008, at 168 (noting that WMI's "Other Borrowings" include "$741 million at December 31, 2007 of junior subordinated notes relating to trust preferred securities"). Likewise, treating the Junior Subordinated Debentures as debt and the holders of the PIERS Preferred Securities as the beneficial owners thereof is also consistent with the understanding of WMI and investors from and after the time of issuance. See Hr'g Tr. 7/14/2011 at 26:25-27:6 (Goulding Direct); Conf DX 289 – WMCT 2001 Form S-3, filed 6/27/2001, at 8 ("Purchasers of preferred securities will be treated as owning an undivided beneficial ownership interest in the debentures and *the debentures will be treated as debt* . . . ." (emphasis added)); id. at 70 (stating that "*the debentures will be classified*, for United States federal income tax purposes, as *indebtedness of Washington Mutual*" under section titled "Classification of the Debentures" (emphasis added)).

Consistent with the foregoing, on January 28, 2010, the Court entered an order reducing and allowing the PIERS Claims as Unsecured Claims in the amount of $765,674,199.63, with respect to the PIERS Preferred Securities, and $23,679,306.87, with respect to the PIERS Common Securities. Conf DX 286 – Order Granting Debtors' Objection to Proof of Claim Number 2134 Filed by Wells Fargo Bank, National Association, as Indenture Trustee, dated 1/28/2010 [D.I. 2262] (the "PIERS Order").

Pursuant to the Modified Plan, no value is being distributed to holders of PIERS Units on account of the warrant component of the PIERS Units. See Hr'g Tr. 7/14/2011 at 32:4-9 (Goulding Direct); Conf DX 253 – Supplemental Disclosure Statement § I.I. Further, the accretion of the original issue discount of the Junior Subordinated Debentures does not represent a return on account of the warrant component of the PIERS Unit. Hr'g Tr. 7/14/2011 at 32:4-9 (Goulding Direct), 97:2-100:23 (Goulding Cross). Rather, the accretion is akin to interest on the PIERS Preferred Securities. Id. at 32:4-9.[8]

Section 1123(a)(2)

Section 31.1 of the Modified Plan specifies that Class 1 (Priority Non-Tax Claims), Class 4 (WMI Medical Plan Claims), and Class 7 (Qualified Plan Claims) are unimpaired under the Modified Plan within the meaning of section 1124 of the Bankruptcy Code. Conf DX 255 – Modified Plan § 31.1; Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(a)(3)

Articles VI, VII, IX, X, XII through XXVI, and Section 31.1 of the Modified Plan designate Class 2 (Senior Notes Claims), Class 3 (Senior Subordinated Notes Claims), Class 5 (JPMC Rabbi Trust/Policy Claims), Class 6 (Other Benefit Plan Claims), Class 8 (WMB Vendor Claims), Class 9 (Visa Claims), Class 10 (Bond Claims), Class 11 (WMI Vendor Claims), Class 12 (General Unsecured Claims), Class 12A (Late-Filed Claims), Class 13 (Convenience Claims), Class 14 (CCB-1 Guarantees Claims), Class 15 (CCB-2 Guarantees Claims), Class 16 (PIERS Claims), Class 17A (WMB Senior Notes Claims), Class 17B (WMB Subordinated Notes Claims), Class 18 (Subordinated Claims), Class 19 (REIT Series), Class 20 (Preferred Equity Interests), Class 21 (Dime Warrants), and Class 22 (Common Equity Interests) as impaired

[8] Notably, WMI is not retaining any payment it receives on account of the PIERS Common Securities. See Hr'g Tr. 7/14/2011 at 32:16-33:23 (Goulding Direct); Conf DX 255 – Modified Plan § 20.1.

within the meaning of section 1124 of the Bankruptcy Code and specify the treatment of the Claims and Equity Interests in those Classes. Conf DX 255 – Modified Plan Arts. VI, VII, IX, X, XII through XXVI, § 31.1; Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(a)(4)

Pursuant to the Modified Plan, the treatment of each Claim against or Equity Interest in the Debtors, in each respective Class, is the same as the treatment of every other Claim or Equity Interest in such Class, except to the extent that a particular holder has elected different treatment. See Conf DX 374 – Goulding Decl. at ¶ 23. Specifically, certain creditor Classes were provided with the option to elect to receive Reorganized Common Stock as part of their distribution. See Conf DX 255 – Modified Plan §§ 6.2, 7.2, 16.1, 18.2, 19.2, 20.2. Consistent with the Opinion, pursuant to Section 27.3 of the Modified Plan and the Supplemental Disclosure Statement Order, holders of Disputed Claims and Dime Warrants had the option to elect to receive Reorganized Common Stock if their Claims were ultimately allowed as General Unsecured Claims in Class 12. See Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 255 – Modified Plan § 27.3; Conf DX 265 – Opinion at 85, 101. Pursuant to the "Right of Election" provisions in the Modified Plan, to the extent that a holder of an Allowed Claim receives Reorganized Common Stock as part of such holder's recovery, such holder's distribution of Creditor Cash or Cash to be received on account of Liquidating Trust Interests is reduced on a dollar-for-dollar basis by the value of the Reorganized Common Stock (valued as of the Effective Date). See, e.g., Conf DX 255 – Modified Plan §§ 6.2, 7.2, 16.1, 18.2, 19.2, 20.2, 27.3.

In addition, holders of Claims and Equity Interests were provided with the opportunity to elect not to grant the releases set forth in Section 43.6 of the Modified Plan (in which case, such non-releasing holders are not entitled to receive a distribution). See id. § 43.6; Conf DX 374 – Goulding Decl. at ¶ 23. To the extent that holders of REIT Series in Class 19

elected to grant the releases, such holders also are entitled to receive a distribution from JPMC. See Conf DX 255 – Modified Plan § 2.1(h); Conf DX 255H, 402, 422 – Global Settlement Agreement (as amended) § 2.24.

Section 1123(a)(5)

The Modified Plan and the various documents and agreements set forth in the Plan Supplement provide the means for implementation of the Modified Plan, including (i) the creation of a Liquidating Trust, pursuant to Article XXVIII of the Modified Plan, (ii) the transfer of certain property of the Debtors' estates to the JPMC Entities, the FDIC Receiver, and the Liquidating Trust, as set forth more fully in the Modified Plan and Global Settlement Agreement, (iii) the issuance and distribution of Creditor Cash, Reorganized Common Stock, and Liquidating Trust Interests, as set forth in Articles XXXII through XXXIII of the Modified Plan, (iv) the retention by the Reorganized Debtors of all remaining property of the Debtors' estates, (v) the cancellation of all documents, agreements, and instruments evidencing Claims or Equity Interests in the Debtors, except as provided in Section 33.4 of the Modified Plan, (vi) the surrender of all instruments or notes, pursuant to Section 33.6 of the Modified Plan, (vii) the curing of defaults with respect to assumed executory contracts and leases, pursuant to Article XXXVI of the Modified Plan, (viii) the adoption and filing of the Reorganized Debtors Certificates of Incorporation and the Reorganized Debtors By-Laws, each consistent with Delaware state law, as set forth in the First Supplemental Notice (collectively, the "Delaware Organizational Documents"), and the adoption and filing of the Reorganized WMI Articles of Incorporation and the Reorganized WMI By-Laws each consistent with Washington state law, as set forth in the Second Supplemental Notice (collectively, the "Washington Organizational Documents," and together with the Delaware Organizational Documents, the "Organizational Documents") as set forth in Article XLII of the Plan and the Plan Supplement; and (ix) the

inclusion of Section 8.2 of the form Liquidation Trust Agreement, which, consistent with the Opinion, provides that the Liquidating Trustee may be removed by a majority vote of the members of the Trust Advisory Board. See Conf DX 255 – Modified Plan Arts. XXVIII, XXXII-III, XXXVI, §§ 33.4, 33.6; Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 259 – Plan Supplement; Conf DX 405 – First Supplemental Notice; Second Supplemental Notice.

Section 1123(a)(6)

Section 42.3 of the Modified Plan provides that, as of the Effective Date or upon reincorporation thereafter, as the case may be, the articles of incorporation and by-laws of the Debtors shall be amended to provide substantially as set forth in the Organizational Documents, as applicable, which prohibit the issuance of nonvoting equity securities. Conf DX 255 – Modified Plan § 42.3; Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 405 – First Supplemental Notice, Exhibits 3, 5; Second Supplemental Notice, Exhibits 1, 2.

Section 1123(a)(7)

Section 42.4 of the Modified Plan provides that the board of directors of each of the Reorganized Debtors (to the extent applicable) shall consist of at least two (2) persons (but not more than seven (7) persons) selected by the Creditors' Committee. See Conf DX 255 – Modified Plan § 42.4; Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 405 – First Supplemental Notice, Exhibit 3; Second Supplemental Notice, Exhibit 1. Such initial directors of the Reorganized Debtors have been disclosed. See Conf DX 405 – First Supplemental Notice, Exhibit 7. Pursuant to Section 42.5 of the Modified Plan, the boards of directors of the Reorganized Debtors shall elect officers of the Reorganized Debtors as of or after the Effective Date. See Conf DX 255 – Modified Plan § 42.5; Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(b)(1)

Pursuant to Articles V through XXVI and Section 31.1 of the Modified Plan, Class 1 (Priority Non-Tax Claims), Class 4 (WMI Medical Plan Claims), and Class 7 (Qualified Plan Claims), are unimpaired and Class 2 (Senior Notes Claims), Class 3 (Senior Subordinated Notes Claims), Class 5 (JPMC Rabbi Trust/Policy Claims), Class 6 (Other Benefit Plan Claims), Class 8 (WMB Vendor Claims), Class 9 (Visa Claims), Class 10 (Bond Claims), Class 11 (WMI Vendor Claims), Class 12 (General Unsecured Claims), Class 12A (Late-Filed Claims), Class 13 (Convenience Claims), Class 14 (CCB-1 Guarantees Claims), Class 15 (CCB-2 Guarantees Claims), Class 16 (PIERS Claims), Class 17A (WMB Senior Notes Claims), Class 17B (WMB Subordinated Notes Claims), Class 18 (Subordinated Claims), Class 19 (REIT Series), Class 20 (Preferred Equity Interests), Class 21 (Dime Warrants), and Class 22 (Common Equity Interests) are impaired. See Conf DX 255 – Modified Plan Arts. V-XXVI, § 31.1; Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(b)(2)

Article XXXVI of the Plan and the Plan Supplement provide for the assumption, rejection, or assignment of executory contracts and unexpired leases of the Debtors not previously rejected. Conf DX 255 – Modified Plan Art. XXXVI; Conf DX 259 – Plan Supplement, Exhibit D; Conf DX 374 – Goulding Decl. at ¶ 23. As set forth in the Plan Supplement, the Debtors intend to assume and assign certain agreements to the Liquidating Trust, and others to JPMC. Conf DX 259 – Plan Supplement, Exhibit D. Pursuant to the Cure Notice (which is incorporated by reference in the First Supplemental Notice), the Debtors provided notice of any defaults to be cured with respect to each agreement to be assumed or assumed and assigned by the Debtors. Conf DX 392 – Cure Notice; Conf DX 405 – First Supplemental Notice. Specifically, there are no defaults to be cured with respect to the contracts

to be assigned to JPMC. Conf DX 392 – Cure Notice. As a significant national bank with over $2 trillion in assets, JPMC, as assignee of certain of the contracts to be transferred, is financially sound and able to provide adequate assurances of future performance under such contracts. Moreover, the Debtors have analyzed the relative value to the Debtors post-Effective Date of the agreements that JPMC will obtain pursuant to the Modified Plan and determined, based upon the exercise of their reasonable business judgment, that the transfer of such contracts is warranted and in the best interests of the estate. See, e.g., Conf DX 150 – Notice of Refiling Declarations, Exhibit C (Goulding Decl.) at ¶¶ 37, 89-90.

Section 1123(b)(3)

The Modified Plan is premised upon the Global Settlement Agreement, which settles and compromises certain Claims and Causes of Action among the Debtors, the JPMC Entities, and the FDIC. See Conf DX 255H, 402, 422 – Global Settlement Agreement (as amended); Conf DX 374 – Goulding Decl. at ¶ 23. In addition, the Debtors or the Liquidating Trust, as applicable, are retaining certain Claims and Causes of Action, such as potential Claims against directors and officers, auditors, underwriters, and investment bankers arising from or relating to the demise and ultimate seizure of WMB. See Conf DX 374 – Goulding Decl. at ¶ 23. Pursuant to Sections 29.1 and 43.11 of the Modified Plan and that certain Stipulation Authorizing Official Committee of Unsecured Creditors to Bring Certain Causes of Action on Behalf of the Debtors' Estates, dated September 9, 2010 [D.I. 5416], the Liquidating Trustee or the Creditors' Committee, as applicable, shall have the right and power to litigate any Claim or Cause of Action that constitutes an Asset of the Debtors or Debtors in Possession that is not otherwise settled or released pursuant to the Modified Plan, including, without limitation, any avoidance or recovery action under section 541, 542, 544, 545, 547, 548, 549, 550, 551, or 553 of the Bankruptcy Code and any other cause of action, right to payment, or claim that may be

pending on the Effective Date or instituted by the Debtors or Debtors in Possession thereafter. See Conf DX 255 – Modified Plan §§ 29.1, 43.11; Conf DX 374 – Goulding Decl. at ¶ 23. In order to preserve such claims, the Creditors' Committee entered into certain tolling agreements (many of which were countersigned by the Equity Committee), and continues to execute additional tolling agreements. See infra pp. 70-71.

Section 1123(b)(4)

Although the Debtors are transferring certain assets to JPMC pursuant to the Modified Plan and Global Settlement Agreement, such transfer does not constitute a sale of all or substantially all of the Debtors' property. Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(b)(5)

The Modified Plan modifies the rights of holders of Claims in Classes 2, 3, 5, 6, 8, 9, 10, 11, 12, 12A, 13, 14, 15, 16, 17A, 17B and 18, and Equity Interests in Classes 19, 20, 21, and 22, and leaves unaffected the rights of holders of Claims in Classes 1, 4 and 7. Conf DX 255 – Modified Plan Arts. V-XXVI; Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(b)(6)

The Modified Plan contains release, injunction and exculpation provisions in Sections 43.5 through 43.8 of the Modified Plan—including releases by the Debtors, consensual releases by holders of Claims and Equity Interests (to the extent they affirmatively elect to grant such releases and are entitled to receive a distribution pursuant to the Modified Plan), and a customary exculpation provision (which provision has, as discussed above, been modified consistent with the Opinion). Conf DX 255 – Modified Plan §§ 43.5-43.8. Such provisions are consistent with the Opinion and the Court's statements at the January 20 Status Conference, see supra pp. 11-17, are an integral component of the complex compromises underlying the Modified Plan and the Global Settlement Agreement, are necessary for the Debtors'

reorganization and the realization of value for stakeholders, are the product of extensive arm's-length negotiations, were necessary to the formation of consensus to support the Global Settlement Agreement and the Modified Plan, and are, in light of the foregoing, appropriate. See, e.g., Conf DX 265 – Opinion at 58-60. In addition, the third party releases set forth in Section 43.6 of the Modified Plan are completely consensual and only are binding against consenting Entities who receive a distribution from the estate. Conf DX 255 – Modified Plan § 43.6. Furthermore, the exculpation provision in Section 43.8 of the Plan is limited to a qualified immunity for acts of negligence, does not relieve any party of liability for gross negligence or willful misconduct, and provides exculpation only to the Debtors, the estates' professionals, the Creditors' Committee and the Equity Committee and their respective members, and the Debtors' directors and officers (with a further carve-out for the activities of the Debtors' directors and officers in connection with the Dime Warrant Litigation). Id. § 43.8.

Section 1123(c)

The Debtors are not "individuals" (as that term is defined in the Bankruptcy Code) and, accordingly, section 1123(c) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases. Conf DX 374 – Goulding Decl. at ¶ 23.

Section 1123(d)

Section 36.4 of the Modified Plan provides for the satisfaction of default claims associated with each executory contract and unexpired lease to be assumed pursuant to the Modified Plan in accordance with section 365(b)(1) of the Bankruptcy Code. Conf DX 255 – Modified Plan § 36.4. All cure amounts are set forth in the Cure Notice, as incorporated pursuant to the First Supplemental Notice, and were determined in accordance with the underlying agreements and applicable bankruptcy and nonbankruptcy law. Conf DX 374 –

Goulding Decl. at ¶ 23; Conf DX 392 – Cure Notice; Conf DX 405 – First Supplemental Notice. No party has objected to the Cure Notice.

Compliance with Section 1129(a)(2) of the Bankruptcy Code

Except as otherwise provided for or permitted by orders of the Court, the Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, the Prior Disclosure Statement Order (with respect to Classes 17A and 19), and the Supplemental Disclosure Statement Order (with respect to all other Classes) in transmitting the Solicitation Packages and in tabulating the votes and elections with respect to the Modified Plan. Conf DX 6 - Disclosure Statement Order; Conf DX 272 – Supplemental Disclosure Statement Order; Conf DX 403 – Klamser Decl. at ¶ 3; Conf DX 377 – Sharp Decl. at ¶ 3; Conf DX 18 – Klamser Declaration for the Sixth Amended Plan at ¶ 3; Conf DX 19 – Sharp Declaration for the Sixth Amended Plan at ¶ 3.

Compliance with Section 1129(a)(3) of the Bankruptcy Code

Pursuant to the Opinion, the Court determined that the Sixth Amended Plan was proposed in good faith. Conf DX 265 – Opinion at 106. Because (i) the Modified Plan is premised on the Sixth Amended Plan, (ii) the only substantive changes to the Modified Plan (as compared to the Sixth Amended Plan) were to amend certain deficiencies identified by this Court in the Opinion, and (iii) no party has presented new, convincing evidence to the contrary (including with respect to allegations of inequitable conduct directed at certain creditors and the Debtors), the Court's good faith determination in the Opinion applies equally to the Modified Plan. See Conf DX 374 – Goulding Decl. at ¶ 25.

Specifically, the Modified Plan achieves not only a reorganization of the Debtors, but also the equitable distribution of value to stakeholders for amounts owing based upon their respective priorities, including through the enforcement of certain parties' contractual

subordination rights and implementation of parties' elections with respect to distributions. Conf DX 374 – Goulding Decl. at ¶ 26. The Modified Plan was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates, and to maximize distributions to all creditors. Conf DX 150 – Notice of Refiling Declarations, Exhibit A (Kosturos Decl.) at ¶ 94; id. at Exhibit C (First Goulding Decl.) at ¶ 151; Hr'g Tr. 12/2/2010 at 62:22-63:2, 63:12-15, 93:9-18, 118:7-9, 126:16-19, 135:25-136:4, 137:24-138:3 (Kosturos Direct & Cross); Conf DX 374 – Goulding Decl. at ¶ 25. Claims against JPMC and the FDIC were investigated and pursued and, after the filing of multiple lawsuits in multiple courts and over a year of litigation, the Debtors pursued contentious, multi-party settlement negotiations that spanned more than eighteen months and resulted in a compromise that will allow the estates to distribute in excess of $7 billion in value in accordance with the priorities of the Bankruptcy Code. Conf DX 150 – Notice of Refiling Declarations, Exhibit A (Kosturos Decl.) at ¶¶ 19, 26-27, 30-31. The Modified Plan and the Global Settlement Agreement (including all other documents necessary to effectuate the Modified Plan) are the result of these extensive arm's-length negotiations, Conf DX 374 – Goulding Decl. at ¶ 26; see also Hr'g Tr. 7/21/2011 at 158:1-12 (Kosturos Cross), in which the Debtors, the Creditors' Committee, the indenture trustees for the funded debt instruments, the Settlement Note Holders, JPMC, the FDIC, and their respective professionals participated. See Hr'g Tr. 7/21/2011 at 158:1-12 (Kosturos Cross).

There is no evidence that the Settlement Note Holders or any other particular constituency dominated or controlled this process, "engineered" it to favor their interests at the expense of other stakeholders, or purposefully settled at an amount that provides payment in full for creditors but no distribution to equity. See, e.g., Conf DX 265 – Opinion at 60 ("The fact that the recovery may not reach shareholders is not enough to find [the Global Settlement

Agreement] unreasonable . . . ."). In fact, the Debtors did not seek the input of the Settlement Note Holders (or other stakeholders) on "many major issues." Hr'g Tr. 7/21/2011 at 157:12-14 (Kosturos Cross). Furthermore, as discussed at length below, there is no basis for concluding that the Settlement Note Holders traded on the basis of material, non-public information or that the Debtors were complicit in any way with respect to any such alleged improper trading activity. See infra pp. 42-70, Section III.C.2

Contrary to the Equity Committee's allegations that the Modified Plan is a "sham," the Modified Plan provides for a reorganization (and not merely a liquidation) of the Debtors. Pursuant to the Modified Plan, the Debtors are reorganizing around WMMRC, whose current business activities consist of managing certain assets and paying liabilities under certain outstanding insurance policies, along with collecting and distributing dividends. See Conf DX 374 – Goulding Decl. at ¶ 27; Hr'g Tr. 7/14/2011 at 141:21-142:4, 7-10 (Goulding Cross). The new owners of the Reorganized Debtors may expand WMMRC's business after the Effective Date through the injection of capital, the incurrence of financing, and the acquisition of new businesses. Conf DX 374 – Goulding Decl. at ¶ 27; see also Hr'g Tr. 7/14/2011 at 143:3-6 (Goulding Cross).

In addition, the provision of releases to certain non-debtor third parties pursuant to Section 43.6 of the Modified Plan is not evidence of bad faith, as alleged by the Equity Committee. Consistent with the Court's statements in the Opinion, the Debtors specifically excluded from the releases the Debtors' directors and officers and the Settlement Note Holders, among others. See Conf DX 253C – Chart of Modifications to Modified Sixth Amended Plan; supra pp. 12-13.

Similarly, the Debtors have acted in good faith in investigating and analyzing potential claims against WMI's directors and officers, as well as, among others, auditors, underwriters, and investment bankers. At the urging of the Court, the Debtors shared privileged and confidential information and attorney-work product with the Equity Committee's advisors, and the Debtors also discussed potential claims against third parties with counsel for the Equity Committee and the Creditors' Committee. Hr'g Tr. 7/21/2011 at 206:25-207:6 (Kosturos Cross). In order to preserve potential claims, with the support and assistance of the Debtors, the Creditors' Committee entered into tolling agreements with approximately one hundred fifty (150) directors, officers, employees and unreleased third parties, many of which agreements were countersigned by the Equity Committee. Id. at 207:7-13 and 208:12-24; see also Conf DX 429 – Fishman Tolling Agreement; Conf DX 430 – Killinger Tolling Agreement. Efforts to obtain tolling agreements are ongoing, and tolling agreements have been entered with all nine (9) postpetition directors. Hr'g Tr. 7/21/2011 at 208:12-17, 208:22-209:4 (Kosturos Cross). Moreover, the Debtors have retained special litigation counsel to continue to investigate and analyze these potential claims (against not only directors and officers, but also unreleased third parties) and the relative strengths and weaknesses thereof, including, without limitation, the availability of insurance proceeds and resulting indemnification obligations. Hr'g Tr. 7/21/2011 at 208:3-11, 220:6-21 (Kosturos Cross); Order Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014 Authorizing the Employment and Retention of Klee, Tuchin, Bogdanoff & Stern LLP as Special Litigation Counsel to WMI, Nunc Pro Tunc to 6/24/2011, dated 7/26/11 [D.I. 8316] ("Order Appointing Klee Tuchin"). Whatever their worth, these claims and causes of action will become assets of the Liquidating Trust on the Effective Date, to be pursued (or not) by the Liquidating Trustee for the benefit of holders of Liquidating

Trust Interests, the proceeds of which will be paid pursuant to the "waterfall" set forth in the Modified Plan. See id. at 207:14-17.

Compliance with Section 1129(a)(4) of the Bankruptcy Code

Pursuant to the interim compensation procedures established in these Chapter 11 Cases and Sections 3.2, 32.12 and 43.18 of the Modified Plan, any payment made or to be made by the Debtors for services or expenses pursuant to sections 328, 330, 331, or 503(b) of the Bankruptcy Code in connection with these Chapter 11 Cases, or in connection with the Modified Plan and incident to these Chapter 11 Cases, including all fees and expenses incurred through the Effective Date, has been approved by, or is subject to the approval of, the Court as reasonable. Conf DX 255 – Modified Plan §§ 3.2, 32.12, 43.18; Conf DX 374 – Goulding Decl. at ¶ 28.

Compliance with Section 1129(a)(5) of the Bankruptcy Code

The identity and affiliations of the persons proposed to serve as the initial directors and officers of the Reorganized Debtors, as Liquidating Trustee, and as members of the Trust Advisory Board after confirmation of the Modified Plan have been fully disclosed to the extent such information is available, and the appointment to, or continuance in, such offices of such persons is consistent with the Opinion as well as the interests of holders of Claims against and Equity Interests in the Debtors and with public policy. Specifically, as set forth in Section 42.4 of the Modified Plan and the Plan Supplement, on the Effective Date, the new board of directors of each of the Reorganized Debtors shall each consist of the following two (2) persons: Arnold Kastenbaum and Charles Edward Smith. Conf DX 255 – Modified Plan § 42.4; Conf DX 405 – First Supplemental Notice, Exhibit 7. Pursuant to Section 42.5 of the Modified Plan, the boards of directors shall elect officers of the Reorganized Debtors as of or after the Effective Date. Conf DX 255 – Modified Plan § 42.5. Each director and officer will serve in accordance with the terms and subject to the conditions of the Organizational Documents, and

other relevant organizational documents, each as applicable. Conf DX 405 – First Supplemental Notice, Exhibits 3, 5; Second Supplemental Notice, Exhibits 1, 2. In addition, as set forth in the Modified Plan, the form Liquidating Trust Agreement attached to the First Supplemental Notice as Exhibit 1, and the List of Prospective Appointment of Directors of the Reorganized Debtors and Members of the Trust Advisory Board attached to the First Supplemental Notice as Exhibit 7, William C. Kosturos shall serve as the Liquidating Trustee of the Liquidating Trust and Michael Embler, Jeffrey Brodsky, Wells Fargo Bank, N.A. (each nominated by the Creditors' Committee), and Michael Willingham (nominated by the Equity Committee) shall serve on the Trust Advisory Board. Conf DX 405 – First Supplemental Notice, Exhibits 1, 7.

Compliance with Section 1129(a)(6) of the Bankruptcy Code

The Modified Plan does not provide for rate changes by any of the Reorganized Debtors.

Compliance with Section 1129(a)(7) of the Bankruptcy Code

Recoveries pursuant to the Modified Plan are equal to or in excess of those that would be available if the Debtors were liquidated pursuant to chapter 7 and, therefore, the Modified Plan satisfies the "best interests" test set forth in section 1129(a)(7) of the Bankruptcy Code.

Converting to Chapter 7 Would Result in Delay, Added Costs, and Loss of Value

Conversion of the Chapter 11 Cases to chapter 7 would result in substantial additional delay and expense, as well as lost asset value. Given the complexity of the cases, there likely would be an estimated four (4) to eight (8) month delay associated with a chapter 7 trustee getting up to speed and then effectuating a liquidation. Conf DX 375 – Updated Liquidation Analyses (as amended); Hr'g Tr. 7/14/2011 at 45:2-9 (Goulding Direct). In addition, the estates would bear additional costs in the approximate amount of $37 million in

professionals' fees, $3 million in operational expenses, and $37 million for the chapter 7 trustee fee. Conf DX 375 – Updated Liquidation Analyses (as amended); Hr'g Tr. 7/14/2011 at 45:15-18 (Goulding Direct), 125:7-11, 17-23 (Goulding Cross). Further, based upon the loss of tax attributes and the likelihood of lower bids in a forced sale environment, liquidation of WMMRC pursuant to a chapter 7 "fire sale" would yield only approximately $50 million. Conf DX 375 – Updated Liquidation Analyses (as amended); Hr'g Tr. 7/14/2011 at 45:19-46:5 (Goulding Direct), 88:22-89:19, 144:9-18 (Goulding Cross). This estimate is supported by solicited advice from investment bankers as well as unsolicited bids for WMMRC early in the Chapter 11 Cases, all of which suggested that a sale of WMMRC likely would not result in receipt of fair market value. See Hr'g Tr. 7/14/2011 at 46:6-12-47:22 (Goulding Direct); Conf DX 391 – WMMRC Update, Review of Indicative Bid.

Moreover, although the Updated Liquidation Analyses assume that the Global Settlement Agreement would still exist in a chapter 7 liquidation, there is no guarantee that a chapter 7 trustee would be able to execute a global settlement agreement on at least as favorable terms as the current agreement, resulting in a significant increase in claims against the estates of at least $54 billion and a corresponding reduction in recoveries. Hr'g Tr. 7/14/2011 at 133:19-134:1, 134:18-136:6 (Goulding Cross); Conf DX 265 – Opinion at 95 ("[T]he chapter 7 trustee may elect to pursue some of the Debtors' claims rather than accept the Global Settlement in toto."); id. at 96 ("[W]hen the additional $54 billion in claims held by the FDIC and JPMC is considered, the court concludes that the recovery under chapter 7 even without the releases would be less than the recovery under the Debtors' plan.").

Contrary to certain objecting parties' assertions, for the reasons discussed below, see infra pp. 117-23, the Updated Liquidation Analyses are credible, notwithstanding the fact

that they do not contain a valuation of potential claims held by the Debtors against directors, officers, employees, and other third parties. Any potential claims that the Debtors' estates may have against directors, officers, or other third parties would exist in both a chapter 7 or chapter 11 scenario and, therefore, (for these and other reasons) were excluded from the Updated Liquidation Analyses. Hr'g Tr. 7/14/2011 at 147:13-18, 23-148:2 (Goulding Cross) ("Presumably, the recovery would be similar under an 11 or 7 in the pursuit of those [claims] . . . ."). In addition, the proposed evidence submitted by the TPS Consortium regarding the alleged value of such claims is insufficient and misleading. During the Confirmation Hearing, the TPS Consortium offered the report of the Senate Permanent Subcommittee on Investigations (the "Senate PSI") entitled Wall Street and the Financial Crisis: Anatomy of a Financial Collapse (the "Senate PSI Report") for admission as an exhibit and inclusion in the record. See Hr'g Tr. 7/21/2011 at 225:15-243:8. The Debtors objected to the admission on several grounds, including that the Senate PSI Report contains hearsay and, similar to the position espoused by the TPS Consortium with respect to the admission of the Examiner's report at the First Confirmation Hearing, the Debtors had never been afforded the opportunity to examine any of the witnesses or documents referred to in the Senate PSI Report. Id. at 233:7–234:12, 236:4-9, 237:5-12. While expressing doubt as to the relevance of the Senate PSI Report to the value of the estates' claims, see, e.g., id. at 231:15-24, 238:11-25, 239:5-8, the Court nonetheless permitted the TPS Consortium to submit a ten page summary with excerpts of the Senate PSI Report. Id. at 241:12-22. On July 26, 2011, the TPS Consortium filed its submission [D.I. 8312] (the "Submission"), to which it attached certain excerpts (the "TPS Excerpts") of the Senate PSI Report. On July 29, 2011, the Debtors filed a response to the Submission [D.I. 8345] ("Debtors' Response to the Submission"). On August 3, 2011, the FDIC Receiver filed the FDIC Receiver's (i) Response to

TPS Consortium's Submission for Inclusion in the Record of Excerpts of the Senate PSI Report and (ii) Statement in Support of Plan Confirmation, dated 8/3/2011 [D.I. 8371] (the "FDIC Response"). As discussed in more detail below, the Submission is irrelevant and should be disregarded. See infra at 118-23.

Based upon the foregoing, recoveries pursuant to the Modified Plan are greater than what estimated recoveries would be pursuant to a chapter 7 liquidation (except with respect to Classes receiving no distribution pursuant to the Modified Plan, which would receive no distribution in either scenario). Hr'g Tr. 7/14/2011 at 47:23-49:8 (Goulding Direct); Conf DX 375 – Updated Liquidation Analyses (as amended).[9] This is consistent with the Court's Opinion. See Conf DX 265 – Opinion at 96. This is true even if the Court applies the federal judgment rate to postpetition interest claims. Hr'g Tr. 7/14/2011 at 49:9-16, 50:3-17 (Goulding Direct); Conf DX 375 – Updated Liquidation Analyses (as amended).

There Is No Evidence of Inequitable Conduct or Other Equitable Reason Justifying Reducing the Applicable Rate of Postpetition Interest

Several parties objected to the Modified Plan on the basis that the best interests test in section 1129(a)(7) cannot be satisfied unless the Court lowers the applicable rate of postpetition interest to the federal judgment rate because, among other things, the Settlement Note Holders allegedly engaged in insider trading, which was allegedly fostered or condoned by the Debtors. Although the Settlement Note Holders did obtain certain material, non-public information through their participation in the negotiation of the Global Settlement Agreement,

[9] Any such delay in particular would impact the recoveries of junior creditors subject to contractual subordination provisions who are obligated to "pay-up" to senior creditors until such senior creditors' claims are paid in full, including postpetition interest that would continue to accrue. Accordingly, as set forth in the Updated Liquidation Analyses, holders of PIERS Claims will recover substantially more value under the proposed Modified Plan than they would through a chapter 7 liquidation. Hr'g Tr. 7/14/2011 at 48:17-49:8 (Goulding Direct); Conf DX 375 – Updated Liquidation Analyses (as amended).

such holders halted trading while they were in possession of such information and, to the extent such information was material, it was publicly disclosed prior to the recommencement of trading.

The negotiation of the Global Settlement Agreement was a lengthy, complex and evolving process. Although there were a number of negotiations and term sheets exchanged among various parties throughout 2009 and the early part of 2010, the Debtors were never close to reaching an agreement with JPMC and the FDIC until just before the agreement was actually executed. William Kosturos, the lead negotiator for the Debtors, testified that the parties were "very far apart throughout most of the period when [they] were negotiating." Hr'g Tr. 7/21/2011 at 97:11-13 (Kosturos Direct). Indeed, as described more fully below, during all of 2009, the parties were hundreds of millions, if not many billions, of dollars apart.[10]

In addition, although the Debtors and JPMC engaged in a number of bilateral discussions, it became clear to the Debtors that none of these discussions standing alone—regardless of the number of term sheets exchanged or the positions taken therein—could lead to a deal until the negotiations evolved from a two-way negotiation between the Debtors and JPMC into a four-way negotiation involving the Debtors, JPMC, the FDIC and holders of bonds issued by WMB (the "Bank Bondholders"). Hr'g Tr. 7/21/2011 at 97:4-17 (Kosturos Direct); see also id. at 146:12-15 (Kosturos Cross) ("[N]o deal would be acceptable between [the Debtors] and JPMorgan" unless the parties "could figure out a way to get the FDIC and the bank bondholders on board . . . .").

[10] See Hr'g Tr. 7/21/2011 at 112:23-113:1 (Kosturos Direct) (the final proposals made in the March Confidentiality Period (as defined infra) placed the parties apart by "well over three billion dollars"), 129:19-130:7 (Kosturos Direct), 182:2-8 (Kosturos Cross) (the parties had not reached agreement at the end of the November Confidentiality Period (as defined infra) regarding a settlement structure that would address the claims of the FDIC and the Bank Bondholders (as defined infra), who were "mak[ing] allegations that they owned the [$2.6 billion] second NOL via the FDIC receivership").

The negotiation of the Global Settlement Agreement can be divided into five periods:

(1) the period from the Commencement Date through March 9, 2009;

(2) the period from March 9, 2009, when the Debtors entered into confidentiality agreements with the Settlement Note Holders and certain other noteholders, through May 8, 2009, when the March confidentiality agreements expired (the "March Confidentiality Period");

(3) the period from May 8, 2009 through mid-November 2009;

(4) the period from mid-November 2009, when the Debtors entered into a second set of confidentiality agreements with the Settlement Note Holders, through December 30, 2009, when the second confidentiality agreement expired (the "November Confidentiality Period"); and

(5) the period following the expiration of the second confidentiality agreement.

Negotiations from the Commencement Date through March 9, 2009

Negotiations during the first period were preliminary. Shortly after the Debtors filed their chapter 11 petitions, "JPMorgan had purchased the [Debtors'] banking assets from the FDIC." Hr'g Tr. 7/21/2011 at 98:19-23 (Kosturos Direct). As a result, the Debtors had "lots of conversations with JPMorgan in this period" in which the parties tried to "sort out assets" and "financial reporting issues," "negotiated an information sharing agreement," and met for the purpose of "just trying to get the debtor organized" and able to "understand its financial records." Id. at 98:24-99:6 (Kosturos Direct). On February 23, 2009, the FDIC organized a meeting among the Debtors, JPMC, the Creditors' Committee, and attorneys from Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank") and White & Case LLP ("White & Case"), who represented the interests of certain groups of creditors, including the Settlement Note Holders. Id. at 99:7-16 (Kosturos Direct). At the meeting, the Debtors and JPMC started to talk about the

parties' positions on issues pertaining to the Debtors. Id. at 99:19-23 (Kosturos Direct) ("The FDIC had called the meeting. They wanted to see if the parties couldn't get together and start discussing issues between them. . . . And we really started to talk about what we believed some of the differences and issues were that revolved around the debtor.").

The Debtors did not give "any documents or materials to the settlement noteholders" during the period before March 9, 2009. Id. at 99:24-100:3 (Kosturos Direct). The Debtors did provide information to Fried Frank and White & Case. To protect the confidentiality of such information, the Debtors entered into confidentiality agreements with such counsel.[11] Id. at 100:7-13 (Kosturos Direct). These agreements, which last for the duration of the Chapter 11 Cases and, therefore, were applicable during all periods at issue in the Confirmation Hearing, require shared information "to be kept confidential and not to be shared with anyone," id. at 100:17-25 (Kosturos Direct), including their noteholder clients:

> Fried Frank hereby agrees that all Confidential Information and the existence thereof will be held and treated in confidence, will not be disclosed in any manner whatsoever, in whole or in part, to any party, including the Holders or any of their respective representatives, except as provided herein.

Conf DX 408 – Fried Frank Confidentiality Agreement at 2. Pursuant to these agreements, information could only be shared by Fried Frank and White & Case with their clients (or anyone else) if such parties agreed to keep the information confidential. See, e.g., id. ("Fried Frank may share confidential information…with other parties (including, without limitation, any of the Holders) that execute a confidentiality agreement on substantially similar terms and conditions as set forth herein, subject to approval by counsel for the Debtors."). Thus, from the Debtors' perspective, information shared with Fried Frank and White & Case was not information being

[11] Under these agreements, the Debtors were not responsible for policing information that went from counsel for the Settlement Note Holders to their clients. See Hr'g Tr. 7/21/2011 at 101:1-4 (Kosturos Direct).

shared with such firms' clients, including the Settlement Note Holders, absent a separate confidentiality agreement with such noteholders.

Negotiations During the March Confidentiality Period

During the March Confidentiality Period, the Settlement Note Holders sought through their counsel to become directly involved in the negotiations with JPMC. Hr'g Tr. 7/21/2011 at 101:17-102:3 (Kosturos Direct). The Debtors required, however, that any noteholder wishing to participate in negotiations enter into confidentiality agreements to protect any confidential information disclosed during the negotiations. Id. at 102:4-8 (Kosturos Direct). Although the Debtors and Mr. Kosturos at all times controlled the decisions of the Debtors with respect to negotiations with JPMC, id. at 137:13-14 ("[T]he Debtor led the negotiations; the settlement noteholders did not.")[12], the Debtors believed that the Settlement Note Holders' involvement would be helpful to the negotiation process because they were "major constituency creditors who [held] very large positions in the case." Id. at 101:22-102:3 (Kosturos Direct).

The Debtors and the Settlement Note Holders thus entered into confidentiality agreements on March 9, 2009. AU Ex. 16 – Aurelius March Confidentiality Agreement; EC Ex. 141 – Owl Creek March Confidentiality Agreement; EC Ex. 24 – Appaloosa March Confidentiality Agreement; EC Ex. 111 – Centerbridge March Confidentiality Agreement. The agreements (the terms of which were substantially similar) "had a duration of sixty days" and provided that "any information that was shared with [the Settlement Note Holders] was to be kept confidential for the period of [the] confidentiality agreement." Hr'g Tr. 7/21/2011 at 102:9-

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[12] See also Hr'g Tr. 7/20/2011 at 80:1-10 (Bolin Direct) ("[I]f you look at the facts of the case, [Appaloosa was] not bashful in expressing [its] opinions to the debtor. More often than not, fortunately or unfortunately, [the Debtor] did what they wanted. A classic example was the turnover action[.] [W]e were pressing for that action to be brought to judgment, and the debtor kept putting it off over our objection. That was their judgment. The deal that was struck that . . . became the global settlement agreement was struck between the debtor, the FDIC, and JPMorgan, and it was handed to us as a fait accompli.").

17 (Kosturos Direct); AU Ex. 16 – Aurelius Confidentiality Agreement at 2, 5; EC Ex. 141 – Owl Creek March Confidentiality Agreement at 2, 5; EC Ex. 24 – Appaloosa March Confidentiality Agreement at 2, 5; EC Ex. 111 – Centerbridge March Confidentiality Agreement at 2, 5. The agreements also required the Debtors, at the end of the confidentiality period, to "make public disclosure . . . of a fair summary . . . of any Confidential Information that constitutes material non-public information under U.S. federal securities laws." AU Ex. 16 – Aurelius Confidentiality Agreement at 2, 5; EC Ex. 141 – Owl Creek March Confidentiality Agreement at 2, 5; EC Ex. 24 – Appaloosa March Confidentiality Agreement at 2, 5; EC Ex. 111 – Centerbridge March Confidentiality Agreement at 2, 5. The agreements did not require that *all* confidential information shared with the Settlement Note Holders be disclosed by the Debtors upon termination of the confidentiality agreement – *only material, non-public confidential information*. See generally AU Ex. 16 – Aurelius Confidentiality Agreement; EC Ex. 141 – Owl Creek March Confidentiality Agreement; EC Ex. 24 – Appaloosa March Confidentiality Agreement; EC Ex. 111 – Centerbridge March Confidentiality Agreement.

On March 10, 2009, after the confidentiality agreements were in place, representatives (and counsel) of, among others, the Debtors, JPMC, the FDIC, the Creditors' Committee, and the Settlement Note Holders attended a meeting at the offices of Sullivan & Cromwell LLP ("Sullivan & Cromwell"), counsel to JPMC. Hr'g Tr. 7/21/2011 at 101:11-16 (Kosturos Direct). Each of the parties initially was situated in its own conference room. Id. at 102:22-103:4. At the start of the meeting, the Debtors met with Fried Frank, White & Case, their respective clients, and the Creditors' Committee to discuss "items that might be included in a potential term sheet that would be prepared and delivered to JPMorgan." Id. at 103:7-11. To facilitate this discussion, the Debtors provided the Settlement Note Holders and their counsel

with a draft term sheet prepared by the Debtors' counsel, Weil, Gotshal & Manges LLP ("Weil"), dated March 5, 2011. See Hr'g Tr. 7/19/2011 at 129:17-131:7 (Krueger Direct); EC Ex. 140 – WMI Term Sheet (WGM Draft), dated 3/5/2011 at 1. During this discussion, the Settlement Note Holders asked the Debtors questions regarding, among other things, the Debtors' financial status. Hr'g Tr. 7/21/2011 at 104:8-12 (Kosturos Direct). Even though confidentiality agreements were in place with each of these creditors, the Debtors did not respond to all inquiries. Id. at 104:13-23 (Kosturos Direct); see also Hr'g Tr. 7/18/2011 at 65:19-66:1 (Gropper Direct) ("There were some . . . questions we asked Mr. Kosturos about the estate, some of which he answered but frankly, most of which he said he would not answer because he . . . didn't want to be in a position where he had to disclose the answer to those questions at the end of the confidentiality period. So he was quite careful about what he did and did not say to us at that meeting.").

At the end of a lengthy discussion, "certain of the creditors of the White & Case group as well as the unsecured creditors' committee . . . coalesced around an offer that they would like to present to JPMorgan." Hr'g Tr. 7/21/2011 at 103:22-104:4 (Kosturos Direct). The offer contemplated (1) the Debtors' receipt of approximately $4.5 billion on deposit in accounts that JPMC had control over upon its purchase of WMB, (2) JPMC's retention of the Trust Preferred Securities, and (3) the Debtors' receipt of the first $500 million in tax refunds, followed by a split of remaining tax refunds on a 60/40 basis in favor of the Debtors and an 80/20 split of any tax refunds received as a result of the anticipated passage of five-year carryback legislation (the "White & Case Proposal"). See AU Ex. 18 – Debtors' Proposed Term Sheet and Email at 4; Hr'g Tr. 7/21/2011 at 105:11-23 (Kosturos Direct). Although this offer was more aggressive than the proposal that the Debtors initially suggested making to JPMC,

"after much discussion," the Debtors decided, with input from the Creditors' Committee, that it would be appropriate to present the White & Case Proposal. Hr'g Tr. 7/21/2011 at 104:1-7 (Kosturos Direct). This decision was based on the conviction that, even though "the offer was a little more aggressive" than the offer that the Debtors had in mind, "JPMorgan was [not] going to accept any of the two offers out of the gate." Id. at 106:7-14. In recognition of the importance of having "consensus with the unsecured creditor's committee and with the noteholders and the major creditors," the Debtors agreed that the offer was an appropriate starting point in negotiations. Id. at 106:14-17. Attorneys from White & Case verbally communicated the offer to JPMC, whose representatives reacted "[v]ery badly" to the proposal and immediately terminated the meeting. Id. at 105:24-106:6 (noting that JPMC "excused [the parties] from the premises" quickly after the proposal was made).

After the meeting at Sullivan & Cromwell's offices, "[t]he debtors' attorney . . . put the verbal offer in writing," and it was "delivered . . . in writing to JPMorgan" on March 12, 2009. Id. at 106:18-107:13; see AU Ex. 18 – Debtors' Proposed Term Sheet and Email at 1; EC Ex. 142 – 3/12/2009 Email from M. Walsh to H. Feldstein attaching WMI Draft Term Sheet; EC Ex. 143 – WMI Term Sheet (WGM Draft). JPMC responded to this offer with a so-called counterproposal embodied in a term sheet dated March 18, 2009. Hr'g Tr. 7/21/2011 at 107:16-108:3 (Kosturos Direct); see EC Ex. 145 – 4/24/2009 WMI/JPMC Settlement Term Sheet (S&C Draft), dated 3/18/2009 at 1-4. The JPMC proposal was a very aggressive, one-sided proposal that the Debtors regarded as a "poor offer." Hr'g Tr. 7/21/2011 at 108:14-19 (Kosturos Direct).[13]

[13] Daniel Gropper of Aurelius Capital Management, L.P. characterized this term sheet from JPMC as a "non-response response" that was "more of a position statement than a counterproposal." Hr'g Tr. 7/18/2011 at 68:22-69:3 (Gropper Direct). This sentiment was shared by other Settlement Note Holders. See, e.g., Hr'g Tr. 7/19/2011 at 135:1-11 (Krueger Direct) ("My reaction in getting [the March 18, 2009] term sheet was that it seemed clear to me that JPMorgan Chase did not have any intention of approaching . . . the bargaining table. You know, looking at the tax bullet point on page 2 of the document, you see that their idea of a settlement was to take all of the tax refunds, which was obviously a non-starter for us as creditors."); Hr'g Tr. 7/20/2011 at 51:9-14 (Bolin Direct)

Indeed, "[i]ncluding the value of the second [net operating loss]," JPMC's and the Debtors' "offers were *over four billion dollars apart* from each other." Id. at 108:20-24 (emphasis added). As such, the JPMC proposal embodied in the March 18, 2009 term sheet was "light-years apart" from the Debtors' proposal of March 12. Hr'g Tr. 7/18/2011 at 69:16-19 (Gropper Direct).

The JPMC term sheet is separated into three columns. See EC Ex. 145 – WMI/JPMC Settlement Term Sheet (S&C Draft), dated 3/18/2009. The first lists each item to be negotiated. See id. The second and third columns list side-by-side the proposals by JPMC and the Debtors with respect to each item in the first column. See id. The fact that "agreed" is used in relation to any particular deal point does not signify a final agreement on such issue. As Mr. Kosturos explained: "This [was] an offer that need[ed] to be taken in its whole" and "unless [a party] agree[d] to the entire offer, [a party was] not agreeing really to anything in these proposals."[14] Hr'g Tr. 7/21/2011 at 109:8-18 (Kosturos Direct); see also Hr'g Tr. 7/18/2011 at 71:22-72:9 (Gropper Direct) ("The items [on the March 18, 2009 term sheet] where there is quote, unquote agreement are miniscule in the context of this case. . . . [A]ll of these issues in total don't compare at all to the box called tax. So a one percent move in the box called tax could obviate the agreeds on this page."); Hr'g Tr. 7/20/2011 at 202:8-14 (Bolin Direct) ("[A]greed statements were conditioned on agreeing to . . . all items in the term sheet, including the agreement on the tax splits."); id. at 268:23-269:7 (Melwani Cross) ("I don't think [JPMC was] offering to [award the deposit accounts to the Debtors] short of having an agreement on

("[JPM's March 18, 2009 counterproposal] was a petulant, if not disingenuous proposal. They clearly were upset at the proposal they received. It was, in effect, a nose thumbing at the bondholders.").

[14] Indeed, "JPMorgan was only willing to give up the deposit [accounts] . . . if . . . WMI would agree to give over a hundred percent of the three billion in taxes that WMI itself probably owned and agree[] to settle six-and-a-half billion in fraudulent conveyances for zero and agree[] to settle 400 million dollars of preferences for zero[.]" Hr'g Tr. 7/18/2011 at 158:24-159:13 (Gropper Cross). JPMC's ostensible "agreement" to give the Debtors the deposit accounts was, therefore, "a meaningless input." Id. at 159:13.

every term in [the March 18, 2009] proposal.").[15] In other words, until the parties reached agreement on every element of an integrated settlement, the parties were free to change—and during the course of negotiations did change—certain items that had previously been agreed to. For example, despite a representation in a term sheet, dated April 24, 2009, that the Debtors and JPMC had "agreed" that WMI would "transfer [all Visa B shares] to JPMC with associated liabilities," see EC Ex. 11 – 4/24/2009 WMI/JPMC Settlement Position Overview Draft at 3, a later exchange of offers indicates that the Debtors were seeking "to retain VISA shares," see AU Ex. 28 – Debtors' Term Sheet, dated 11/23/2009 at 2, and that JPMC was seeking for "VISA shares to be released to JPMC." See EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1.[16] The parties' ability to drastically change the terms of their proposals over the course of the negotiations is likewise underscored by the wild fluctuations in proposals pertaining to the tax refunds, particularly JPMC's demand that it receive 100% of the first net operating loss ("NOL"), see EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1, after it had provided a prior term sheet to the Debtors, on April 24, 2009, seeking an 85/15 split. Compare EC Ex. 11 – 4/24/2009 WMI/JPMC Settlement Position Overview Draft at 1-2 (proposing that "[t]ax refunds, including amounts already received post-receivership . . . be split 85/15" in favor of JPMC) with EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1 (proposing that JPMC receive "100% of the tax refunds already received and future refunds,

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[15] As Mr. Melwani went on to testify, the March 18, 2009 term sheet was "a package" and the negotiations reflected in it were similar to "going in to buy a car and the guy saying if . . . we agree on the car I'll give you a new set of tires. If I don't buy the car I'm not walking out of there with the tires." Hr'g Tr. 7/20/2011 at 269:21-25 (Melwani Cross).

[16] See also Hr'g Tr. 7/18/2011 at 72:1-4 (Gropper Direct) (noting that, despite an indication on a term sheet dated March 18, 2009 (AU Ex. 19) that the allocation of rabbi trusts had been "agreed" upon, "the issue of the Rabbi trust moved around every successive draft of every settlement agreement that was ever publicly filed in this case. So that wasn't really agreed until quite recently.").

except for the 'additional NOLs' created by the new legislation"). Indeed, despite writing the word "agreed" in the column suggesting that the deposit accounts should go to the Debtors, JPMC "filed a suit in this case on [March 24, 2009] alleging that [JPMC] owned the deposit accounts." Hr'g Tr. 7/21/2011 at 110:3-5 (Kosturos Direct); see Conf DX 41 - Washington Mutual, Inc., et al. v. JPMorgan Chase Bank, N.A., Adv. Proc. No. 09-50934 (MFW). The filing of this suit is a strong indication that JPMC certainly did not "agree" that the deposit accounts should go to the Debtors, and led the Debtors to conclude that "there was no agreement on any items" included in the March 18, 2009 term sheet. Hr'g Tr. 7/21/2011 at 110:14-20 (Kosturos Direct).

JPMC's filing of the lawsuit against the Debtors "put a chill into the negotiations" and temporarily stopped the flow of information between the Debtors and JPMC. Hr'g Tr. 7/21/2011 at 110:21-111:3 (Kosturos Direct).[17] Negotiations did not resume until mid-April 2009, when Mr. Kosturos reached out to Donald McCree of JPMC with respect to information access issues, who indicated that JPMC was interested in pursuing negotiations. Id. at 111:4-10. The Debtors then prepared a term sheet, which was sent to JPMC in mid-April 2009. Id. at 111:10-12. JPMC responded to this proposal in a term sheet, dated April 24, 2009. See EC Ex. 11 – WMI/JPMC Settlement Position Overview Draft. Once again, JPMC's counterproposal placed the parties apart by "well over three billion dollars." Hr'g Tr. 7/21/2011 at 112:23-113:1 (Kosturos Direct).

There were no further exchanges of settlement offers between the Debtors and JPMC during the March Confidentiality Period. Id. at 113:2-5. Thus, at the conclusion of the

[17] As a result of the commencement of this litigation, the Debtors hired Quinn Emanuel Urquhart & Sullivan, LP ("Quinn Emanuel") as conflicts counsel in early April of 2009 to address issues with JPMC. Hr'g Tr. 7/21/2011 at 116:4-16 (Kosturos Direct).

March Confidentiality Period, the parties stood "extremely far apart." See Hr'g Tr. 7/19/2011 at 138:17-18 (Krueger Direct) ("[N]o agreement had been reached [at the end of the March confidentiality period]. You know, the parties at that point in time were extremely far apart . . . ."); see also Hr'g Tr. 7/21/2011 at 112:23-113:1 (Kosturos Direct).

On May 6, 2009 – two days before the end of the March Confidentiality Period – Quinn Emanuel met with the Debtors and certain of the Settlement Note Holders, along with their counsel, to discuss the progress of the Debtors' litigation efforts. Id. at 116:17-24. At the outset of the meeting, the Debtors made it clear that "no non-public information would be exchanged" at this meeting. Id. at 117:4-7. The Settlement Note Holders in attendance not only "agreed to that" ground rule, id. at 117:8, but also indicated that they "did not want any material non-public information" to be disclosed. Hr'g Tr. 7/18/2011 at 79:7-10 (Gropper Direct). Although Quinn Emanuel had prepared a written presentation for the meeting, it was not distributed or discussed. Hr'g Tr. 7/21/2011 at 117:18-24 (Kosturos Direct). Instead, the primary purpose of the meeting was for the Settlement Note Holders and their counsel to provide Quinn Emanuel with their thoughts on litigation strategy with JPMC. As Mr. Gropper testified: "[T]he debtors were really in a listening mode at this meeting and allow[ed] [the Settlement Note Holders] to transmit . . . [their] view of the various causes of action and how to maximize value on behalf of the estate." Hr'g Tr. 7/18/2011 at 78:3-5 (Gropper Direct). Thus, the Settlement Note Holders and their counsel proceeded to express "their displeasure with the debtor over negotiations with JPMorgan" (Hr'g Tr. 7/21/2011 at 117:10-11 (Kosturos Direct)) – chiefly that they thought the Debtors should be litigating aggressively with JPMC instead of negotiating. Hr'g Tr. 7/18/2011 at 78:6-12 (Gropper Direct) ("[W]e at Aurelius had pushed the debtors to assiduously pursue litigation against JPMorgan from very early on in the case. The debtors had

not heeded that advice. The debtors chose to take a different tack. It's their case. And so we at Aurelius had expressed a view that had not been followed, but we wanted to continue to express our opinion, as did the other creditors who were present [at the May 6, 2009 meeting]."). The Settlement Note Holders and their counsel then "went into a discussion about some of the litigation items that they would like the debtor and its counsel to pursue and also . . . commented on the timing of some of that litigation as well." Hr'g Tr. 7/21/2011 at 117:14-17 (Kosturos Direct). The Debtors did not share any non-public information with the Settlement Note Holders at this meeting. Id. at 117:25-118:5.

On April 30, 2009, the Debtors filed their March Monthly Operating Report ("MOR") with the SEC under Form 8-K and simultaneously filed the March MOR with the Court. Id. at 113:18-24; see also Conf DX 427 – WMI Form 8-K, dated 4/30/2009; EC Ex. 25 – March 2009 MOR. Consistent with the Debtors' obligation under the March Confidentiality Agreements to publicly disclose all material non-public information provided to the Settlement Note Holders during the confidentiality period, the March MOR disclosed material and certain other information that had been shared with the Settlement Note Holders during the March Confidentiality Period, including:

(1) restricted cash and cash equivalents;

(2) approximately $178 million in unsecured notes receivable from WMB or JPMC held by certain non-debtor subsidiaries;

(3) a $274 million accrued liability; and

(4) the Debtors' estimated total of approximately $2.6-$3.0 billion in tax refunds.

Conf DX 427 – WMI Form 8-K, dated 4/30/2009 at 13-14; see also EC Ex. 25 – March 2009 MOR at 8-9; Hr'g Tr. 7/21/2011 at 114:21-115:13 (Kosturos Direct). The determination by the Debtors as to what information needed to be disclosed was made carefully. The Debtors

consulted counsel. See Hr'g Tr. 7/21/2011 at 115:18-20 (Kosturos Direct) ("The debtor and its advisors and attorneys determined that there was no additional material non-public information that needed to be disclosed"). After consultation with counsel, the Debtors concluded that the terms of the various term sheets did not need to be disclosed. Indeed, the Settlement Note Holders and their counsel independently confirmed that they did not believe the term sheets between the Debtors and JPMC were material. See Hr'g Tr. 7/18/2011 at 82:1-2 (Gropper Direct) ("[Aurelius] did [its] own analysis to determine that we were not in possession of material non-public information."); Hr'g Tr. 7/19/2011 at 138:18-21 (Krueger Direct) (Owl Creek determined that the "term sheets [exchanged during the March Confidentiality Period] . . . could not be considered material non-public information."); Hr'g Tr. 7/20/2011 at 53:6-8 (Bolin Direct) ("I . . . discussed the matter with my internal counsel [at Appaloosa] and we made the decision that we were, in fact, unrestricted [at the end of the March Confidentiality Period]."), 233:12-20 (Melwani Direct) ("[Centerbridge] . . . made an independent assessment"—it "considered the facts and circumstances of what [it] had received, and [it] confirmed that what [it] viewed as material non-public information was in the [March] MOR."). The Settlement Note Holders therefore did not challenge the Debtors' determination as to what needed to be disclosed in the March MOR, nor did the Settlement Note Holders make any disclosure of additional information that they considered material. Hr'g Tr. 7/21/2011 at 115:21-116:3 (Kosturos Direct).

Negotiations From May 8, 2009 through Mid-November 2009

Between the March Confidentiality Period and the November Confidentiality Period "there was not much negotiation going on" between the Debtors and JPMC. Hr'g Tr. 7/21/2011 at 118:11-12 (Kosturos Direct). Rather, during this period, JPMC and the Debtors

engaged actively in litigation. As Mr. Kosturos described it, throughout "most of the summer of 2009," there were "lots of motions being filed back and forth between JPMorgan and [the Debtors]," and "[m]any hearings in front of" this Court. Id. at 118:16-20.

Unbeknownst to the Debtors at the time, Appaloosa and Centerbridge engaged in direct negotiations with JPMC during this period. Only in mid-September 2009 did the Debtors learn that these negotiations had occurred. Id. at 118:21-119:3. Despite having exchanged term sheets with JPMC during this period, Appaloosa and Centerbridge did not have "any ability to make a deal and bind the debtor." Id. at 119:14-18.[18] Moreover, any information obtained by Appaloosa and Centerbridge from these direct negotiations with JPMC was not the Debtors' confidential information. JPMC was not bound by any confidentiality agreement and was free to discuss its negotiating positions with any creditor (or non-creditor) of the Debtors. These negotiations did not result in a deal and, at their conclusion, JPMC indicated that it "wanted to let the litigation go a couple of more rounds," "did not want . . . to have further discussions," and "had withdrawn" its offer. Hr'g Tr. 7/20/2011 at 59:1-10 (Bolin Direct).

Also during this period, and again, unbeknownst to the Debtors at the time, the "Paulson Group," a large group of creditors of both WMI *and* WMB represented by Paulson & Co., began negotiations with JPMC. See Hr'g Tr. 7/21/2011 at 119:19-120:3. The Paulson Group proposal contemplated, among other things, the Bank Bondholders' receipt of "a 400 million dollar secured claim as well as a 700 million dollar unsecured claim," id. at 119:25-120:10, against the Debtors in connection with certain bonds issued by WMB. The Paulson Group proposal was very detrimental to the Debtors' negotiations with JPMC. According to Mr. Kosturos, this proposal "set negotiations backwards on a couple of fronts" because it indicated to

[18] See also Hr'g Tr. 7/20/2011 at 55:5-7 (Bolin Direct) ("Q. In your view, would it have been possible to have a settlement agreement in this case without the debtors involved? A. No.").

JPMC that certain of the Debtors' creditors would agree to "a lower number for a tax split" than had been contemplated in prior negotiations between JPMC and the Debtors and because "it enabled the bank bondholders to think that they had a seat at the table" that would allow them to "negotiate a $1.1 billion claim in [the Debtors'] estate." Id. at 120:11-20.

Toward the end of this period, Congress enacted legislation that "extended the ability to carry back net operating losses from two years to five years." Id. at 121:11-18. This had the effect of creating a new potential asset for the parties in the negotiations—namely, a second tax refund attributable to the lengthened NOL, which the Debtors estimated at the time to be worth approximately $2.6 billion. See Conf DX 428 – WMI Form 8-K, dated 12/30/2009, at 13 n.5; EC Ex. 39 – November 2009 MOR at 12 n.5; Hr'g Tr. 7/21/2011 at 127:24-128:6 (Kosturos Direct). As Mr. Kosturos testified, this legislation led to heightened expectations regarding the magnitude of recovery. See Hr'g Tr. 7/21/2011 at 171:7-12 (Kosturos Cross) ("[I]t became very obvious after the new tax law had been implemented and the bondholders' expectations had been set to very, very high levels that this was no longer a two-way agreement[.] [T]his was going to have to be at least a three-way agreement to either include the bank bondholders or the FDIC.").

The Debtors did not share any confidential information with the Settlement Note Holders during this period. Id. at 122:8-11. Moreover, the negotiations between the Debtors and JPMC were very far apart both as a matter of dollars and because all of the necessary parties – including the FDIC and the Bank Bondholders – had not yet become fully engaged. Id. at 121:19-122:7.

Negotiations During the November Confidentiality Period

In light of the legislation that created a potential multi-billion asset that would be the subject of negotiations, among other things, in November of 2009, counsel to the Settlement Note Holders again approached the Debtors and requested that their clients be allowed to participate in the negotiations. See id. at 123:1-5 (Kosturos Direct). The Debtors agreed to allow the Settlement Note Holders to participate as long as they each signed another confidentiality agreement. See id. at 122:12-123:5.

The Debtors therefore entered into confidentiality agreements with the Settlement Note Holders in mid-November 2009. See AU Ex. 27 – Aurelius November Confidentiality Agreement; EC Ex. 148 – Owl Creek November Confidentiality Agreement; EC Ex. 37 – Appaloosa November Confidentiality Agreement; EC 117 – Centerbridge November Confidentiality Agreement; Hr'g Tr. 7/21/2011 at 122:12-17 (Kosturos Direct). The November 2009 confidentiality agreements were similar to the confidentiality agreements executed in March. See Hr'g Tr. 7/21/2011 at 122:21-23 (Kosturos Direct); compare AU Ex. 27 - Aurelius November Confidentiality Agreement; EC Ex. 148 - Owl Creek November Confidentiality Agreement; EC Ex. 37 – Appaloosa November Confidentiality Agreement; EC Ex. 117 – Centerbridge November Confidentiality Agreement, with AU Ex. 16 – Aurelius March Confidentiality Agreement; EC Ex. 141 – Owl Creek March Confidentiality Agreement; EC Ex. 24 – Appaloosa March Confidentiality Agreement; EC Ex. 111 – Centerbridge March Confidentiality Agreement. The agreements covered the period from November 16, 2009 to December 31, 2009. See Hr'g Tr. 7/21/2011 at 122:23-24 (Kosturos Direct); AU Ex. 27 – Aurelius November Confidentiality Agreement at 1, 5; EC Ex. 148 – Owl Creek November Confidentiality Agreement at 1, 5; EC Ex. 37 – Appaloosa November Confidentiality Agreement

at 1, 5; EC Ex. 117 – Centerbridge November Confidentiality Agreement at 1, 5. Among other things, the agreements again required the Debtors at the end of the confidentiality period to publicly disclose any material non-public information provided to the Settlement Note Holders during this period. AU Ex. 27 – Aurelius November Confidentiality Agreement at 5-6; EC Ex. 148 – Owl Creek November Confidentiality Agreement at 5-6; EC Ex. 37 – Appaloosa November Confidentiality Agreement at 5-6; EC Ex. 117 – Centerbridge November Confidentiality Agreement at 5-6.

On November 20, 2009, shortly after the November Confidentiality Period began, Mr. McCree indicated in an email to Mr. Kosturos that JPMC "was ready to engage in substantive negotiations at a 30/70 split" of tax refunds. EC Ex. 118 – 11/30/2009 Email from J. Bolin to B. Kosturos re Tax Split Negotiations. Although on its face the statement by JPMC appeared to bring the parties closer to a settlement, in fact, JPMC and the Debtors were still billions of dollars apart and not close to a deal. As Mr. Kosturos explained, this proposal was unsatisfactory to the Debtors because JPMC was seeking "a two-way agreement" that would enable JPMC to "wash [its] hands of the bank bondholder problems and the FDIC problems and say good luck, those are [the Debtors'] issues now." Hr'g Tr. 7/21/2011 at 172:6-9 (Kosturos Cross). In essence, a two-way deal with JPMC would leave the Debtors open to billions of dollars of claims by the FDIC and the Bank Bondholders, which would have left the estates with billions of dollars less than the Debtors were seeking.[19] The Debtors "would not enter into an

[19] As Mr. Kosturos testified, during the November Confidentiality Period, the Bank Bondholders were "mak[ing] allegations that they owned the [$2.6 billion] second NOL via the FDIC receivership." Hr'g Tr. 7/21/2011 at 129:19-130:7 (Kosturos Direct); see also Hr'g Tr. 7/21/2011 at 190:3-13 (Kosturos Cross) ("[The Debtors] had met with the bank bondholders in December . . . [during which] their new law firm, Boies, . . . explain[ed] to [the Debtors] that it was their position that the FDIC receivership owned the second NOL, and it did not sell the second NOL to JPMorgan and that they were going to proceed with litigation and that they wanted a significant portion of that NOL . . . or that tax refund which would be in excess of two billion dollars and . . . I believe that they had said that they had begun lobbying in efforts to make sure that [the Debtors] [were] unable to get the second NOL [themselves]."

agreement with [JPMC] at this level" because at this point in the negotiations, any successful proposal "[had] to be broadened into a three-way or a four-way" discussion in order to assure that the Debtors would realize sufficient value from any settlement. See id. at 125:24-126:2, 172:9-10, 173:1-2 (A settlement would have to "bring in the bank bondholders and hopefully the FDIC such that [the Debtors] could have certainty to the estate . . . and then be able to project what the return would be back to creditors.").

In late November 2009, recognizing the need for a settlement to account for the claims of the FDIC and the Bank Bondholders, the Debtors made a proposal to JPMC. Id. at 123:13-17; see also EC Ex. 119 – 11/23/2009 Email from B. Kosturos to V. Melwani, et al., attaching WMI Term Sheet, dated 11/23/2009. The proposal contemplated a 61/39 split of existing tax refunds in favor of JPMC, with the second tax refund attributable to the extended NOL to be split 50/50 between the Debtors and JPMC. Hr'g Tr. 7/21/2011 at 123:24-124:7 (Kosturos Direct); see also EC Ex. 119 – 11/23/2009 Email from B. Kosturos to V. Melwani, et al., attaching WMI Term Sheet, dated 11/23/2009. "[T]he most important part of [this] term sheet" was a provision requiring the Debtors and JPMC divide equally the cost of any settlement with the Bank Bondholders out of tax refunds received as a result of the second NOL. Hr'g Tr. 7/21/2011 at 124:7-11 (Kosturos Direct) ; see also EC Ex. 119 – 11/23/2009 Email from B. Kosturos to V. Melwani, et al., attaching WMI Term Sheet, dated 11/23/2009.

On November 30, 2009, JPMC responded to this proposal. See EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal. The email transmitting the JPMC proposal acknowledged that the parties "remain[ed] fairly far apart," and that acknowledgement was an understatement. See id. JPMC's email proposed that JPMC "receive a hundred percent of the existing tax refunds," amounting to $2.6 to $3 billion, and that

the Debtors "receive a hundred percent of the additional NOLs received" due to "the new legislation" permitting five-year carrybacks of NOLs. Hr'g Tr. 7/21/2011 at 124:18-125:1 (Kosturos Direct); see also EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1. JPMC further proposed that it "take a significant amount of assets" that the Debtors believed belonged to the Debtors, namely the VISA Shares and the American Savings goodwill litigation. Hr'g Tr. 7/21/2011 at 125:2-3 (Kosturos Direct); see also EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1. The JPMC proposal also required that the Debtors shoulder the burden of a settlement with the Bank Bondholders in an amount not to exceed $500 million. Hr'g Tr. 7/21/2011 at 125:4-7 (Kosturos Direct); see also EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1.

The JPMC proposal was a non-starter. See Hr'g Tr. 7/21/2011 at 125:8-11 (Kosturos Direct). In a contemporaneous email to Appaloosa and Centerbridge, dated November 30, 2009, Mr. Kosturos characterized JPMC's proposal as "resetting the bookends," by which he meant that JPMC's offer completely changed the economics and structure of previous offers – all to the detriment of the Debtors. Id. at 125:20-126:2; EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1. For example, the JPMC proposal kept 100% of the more certain first refund for itself and provided the Debtors with the more risky second refund, from which the Debtors were expected to satisfy the Bank Bondholders' claims. See EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1. Not surprisingly, the Debtors "found this proposal to be really nonresponsive."[20] Hr'g Tr.

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[20] See also Hr'g Tr. 7/18/2011 at 108:15-109:4 (Gropper Direct) ("Mr. Kosturos remarked upon receiving this proposal as he forwarded it to Mr. Bolen [sic] and Mr. Melwani, quote, they are resetting the bookends, because JPMorgan's proposal was a departure from the structure that had been proposed by the debtor. And it just goes to show you that when you're in a negotiation and don't have an agreement . . . that the parties decide to kind of play

7/21/2011 at 126:2-8 (Kosturos Direct). As Mr. Gropper explained, JPMC's November 30, 2009 proposal "completely changed the risk profile" of the negotiations because it contemplated the Debtors' receipt of "NOLs that were from a bill that had been passed three weeks earlier, where the federal government had never paid a dollar in tax refunds under this bill ever." Hr'g Tr. 7/18/2011 at 109:10-14 (Gropper Direct). Mr. Gropper further explained that "approval of this tax refund was going to be required by the Joint Congressional Committee on Taxation," and it was unknown "whether Congress was going to have a problem with approving a multi-billion dollar tax refund that was going to go to bonds that were primarily held by private investment firms." Id. at 109:15-20. Additionally, JPMC's offer entailed significantly greater risk for the Debtors as compared to prior proposals because "there was a provision in the bill . . . that did not allow TARP recipients to benefit from the passage of that bill," "[s]o if it were deemed that JPMorgan [a TARP recipient] actually owned the tax refund," the JPMC proposal would result in "a zero to WMI." Id. at 109:21-24. As such, this proposal "represented a dramatic, dramatic shift in the risk allocation in the proposal," even before additional "multi-hundred million dollar issues" such as Visa Shares, goodwill litigation, and intercompany claims were considered. Id. at 109:24-110:4.

On December 8, 2009, notwithstanding the distance between previous offers between JPMC and the Debtors, the Debtors submitted an additional offer to JPMC.[21] Hr'g Tr.

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fifty-two card pick-up, and changed the terms . . . all around, and that's really what JPMorgan was doing in this counter. I'd also note on the top of the next page that Mr. McCree in his transmittal said, 'We conclude we remain fairly far apart in our views.' So it was both in JPMorgan's state of mind and in WMI's mind that the parties were far apart, which of course, they were.").

[21] Mr. Gropper recalled being involved in discussions regarding the offer, but Messrs. Krueger and Bolin had no recollection of having been provided with a copy of the December 8, 2009 term sheet, see Hr'g Tr. 7/19/2011 at 186:3-13 (Krueger Cross); Hr'g Tr. 7/20/2011 at 179:10-24 (Bolin Cross), and Mr. Melwani did not know that the Debtors were making a proposal on December 8, 2009. Hr'g Tr. 7/20/2011 at 251:24-252:11(Melwani Direct), 293:6-10 (Melwani Cross). Mr. Kosturos recalled on direct examination that the term sheet was not shared with the Settlement Note Holders. Hr'g Tr. 7/21/2011 at 126:23-127:2 (Kosturos Direct).

7/21/2011 at 126:15-22 (Kosturos Direct); see EC Ex. 305 – 12/8/2009 Email from C. Smith to D. McCree re Revised Term Sheet. This offer contemplated a 70/30 split of existing tax refunds in favor of JPMC, with tax refunds realized as a result of additional NOLs to be split evenly between JPMC and the Debtors. See id. Like the Debtors' proposal in November, this proposal also contemplated an even split between JPMC and the Debtors of any settlement reached with the Bank Bondholders, with a cap of $500 million. See id. As Mr. Kosturos testified, this term sheet was "conditioned upon a further negotiation with the bank bondholders" which the parties "ultimately . . . were not able to get done" during the November Confidentiality Period. Hr'g Tr. 7/21/2011 at 181:20-182:8 (Kosturos Cross).

Although JPMC and the Debtors had moved closer, they remained very far apart from agreeing to a deal at the conclusion of the November Confidentiality Period. As Mr. Kosturos explained:

> Well, I would say that it's not just JPMorgan that we needed to reach agreement with. The . . . term sheet had a clause in there that we had to reach agreement also with the bank bondholders as well as the FDIC. The Bank bondholders at this point in time had decided that they were going to make allegations that they owned the second NOL via the FDIC receivership. So they . . . were making very large requests of the share of the second NOL. So with all that said, we were very far apart on the term sheet that we had been discussing with JPMorgan.

Id. at 129:23:130:7 (Kosturos Direct).[22] On December 30, 2009, the Debtors filed their November MOR with the SEC under Form 8-K and simultaneously filed it with the Bankruptcy Court. Id. at 127:3-18; see Conf DX 428 – WMI Form 8-K, dated 12/30/2009; EC Ex. 39 – November 2009 MOR. Consistent with the Debtors' obligation under the November

[22] See also Hr'g Tr. 7/20/2011 at 72:23-25 (Bolin Direct) (noting that Appaloosa's "basis for determining [the back and forth between the parties] wasn't material" was that "[t]here was no deal, there were no active terms, and there was no telling exactly what was going to happen subsequently" at the end of the November Confidentiality Period).

Confidentiality Agreements to publicly disclose all material non-public information provided to the Settlement Note Holders, the November MOR disclosed the size of the second tax refund. Specifically, the MOR stated that under the "Worker, Homeownership and Business Assistance Act of 2009," the Debtors estimated that their potential NOL "could result in additional [tax] refunds of up to approximately $2.6 billion," which would be subject to "competing claims of ownership." See Conf DX 428 – WMI Form 8-K, dated 12/30/2009 at 13 n.5; EC Ex. 39 – November 2009 MOR at 12 n.5. Although the November Confidentiality Period was set to expire on December 31, 2009, one or more of the Settlement Note Holders requested that the Debtors agree to terminate the agreement a day early – on December 30, 2009. See Hr'g Tr. 7/21/2011 at 129:6-11 (Kosturos Direct). The Debtors agreed and filed the November MOR on that day, after determining that the November MOR included all required disclosures. See id. at 128:25-129:18.

As with the earlier March Confidentiality Period, the Debtors acted carefully in deciding what information needed to be disclosed in the November MOR. The Debtors consulted counsel. See id. at 128:15-24 (Kosturos Direct) ("The debtor, in connection with its advisors and lawyers, determined that there was not any [additional] material non-public information that needed to be disclosed" at that time). Once again, after consultation with counsel, the Debtors concluded that the terms of the various term sheets between JPMC and the Debtors did not need to be disclosed. Id. And once again, the Settlement Note Holders and their counsel independently confirmed that they did not believe the term sheets between the Debtors and JPMC were material See Hr'g Tr. 7/18/2011 at 113:25-114:7 (Gropper Direct) ("[Aurelius] did [its] own analysis . . . . [T]he only information we had was a failed back and forth with JPMorgan in which the parties were extremely far apart. There was no semblance of a deal. . . .

No one thought that a deal was eminent [sic], so we concluded independently that we were not in possession of material non-public information [at the end of the November Confidentiality Period]."); Hr'g Tr. 7/19/2011 at 142:23-143:1 (Krueger Direct) ("[Owl Creek] spoke internally about . . . the facts that [it] knew at the [end of the November Confidentiality Period]; made sure that all of the information that we thought could be material non-public information had been disclosed through that process."); Hr'g Tr. 7/20/2011 at 71:9-13 (Bolin Direct) (noting that Appaloosa "lifted [its trading] restriction in January" following discussions between "[Mr. Bolin] and [Appaloosa's] general counsel"); Hr'g Tr. 7/20/2011 at 252:22-23 (Melwani Direct) ("[Centerbridge] made [its] own independent assessment that [the offers exchanged during the November Confidentiality Period] were not material."). The Settlement Note Holders did not challenge the Debtors' determination as to what needed to be disclosed in the November MOR, nor did they make any disclosure of additional information that they considered material.

Negotiations from December 30, 2009 through January 7, 2011

During the period following the expiration of the November confidentiality agreements, the Settlement Note Holders "did not know anything of the substance of the negotiations" between JPMC and the Debtors, "[a]nd in fact…[Aurelius] pushed the debtors during that [period] . . . to proceed on a litigation path," which was "advice that [the Debtors] did not heed." Hr'g Tr. 7/19/2011 at 59:10-16 (Gropper Cross). On January 12, 2010, the Debtors met with certain of the Settlement Note Holders and their counsel. The purpose of this meeting was for the Settlement Note Holders to discuss with the Debtors their thoughts on the structure of a potential plan of reorganization. Hr'g Tr. 7/21/2011 at 130:17-20 (Kosturos Direct). The plan ideas that were discussed at the meeting were solely those of the Settlement Note Holders. See id. ("[A]t that meeting, the settlement noteholders and Fried Frank discussed an idea that *they*

had for a potential plan of reorganization should we reach an agreement ever with JPMorgan." (emphasis added)). The Debtors "really didn't have much interest in" this proposal, id. at 130:21-131:2, and later rejected it. Id. at 133:4-10. Importantly, no confidential information was shared by the Debtors at this meeting. The Debtors began the meeting by declaring "that the debtor would not be producing or discussing . . . non-public information," id. at 130:14-17, and there is no evidence in the record to suggest otherwise. See id. at 131:4-7.

On February 25, 2010, the Debtors held another meeting at Weil's offices with the Settlement Note Holders and their counsel. Id. at 133:11-22; see also EC Ex. 126 – 2/25/2010 Email from B. Rosen to M. Roose re 2/25/2010 Meeting Agenda. At this meeting, as well as in an email sent to counsel for the Settlement Note Holders beforehand, see EC Ex. 126 – 2/25/2010 Email from B. Rosen to M. Roose re 2/25/2010 Meeting Agenda, the Debtors indicated that "the debtor would not be talking about any non-public information since the noteholders were not going to become restricted." Hr'g Tr. 7/21/2011 at 133:23-134:2 (Kosturos Direct); see also EC Ex. 126 – 2/25/2010 Email from B. Rosen to M. Roose re 2/25/2010 Meeting Agenda. Thus, after a brief discussion of public information, the Settlement Note Holders were excused from the meeting, and discussion continued between the Debtors and counsel to the Settlement Note Holders, who remained subject to a separate confidentiality agreement. Hr'g Tr. 7/21/2011 at 134:2-13 (Kosturos Direct); see also Hr'g Tr. 7/20/2011 at 73:19-21 (Bolin Direct) ("[Appaloosa was] asked to leave, and . . . the lawyers continued with the meeting."). All of the information that was shared with the Settlement Note Holders at this meeting was public in nature. Hr'g Tr. 7/21/2011 at 134:23-24 (Kosturos Direct).

On March 1, 2010, at the request of Appaloosa's counsel, the Debtors set up a meeting between James Bolin of Appaloosa (and his counsel at Fried Frank), the Debtors, and

JPMC. Id. at 196:10-24 (Kosturos Cross). The purpose of the meeting was for Mr. Bolin to let JPMC know that "if there was something happening . . . and the FDIC was involved, that was now a three-way deal, not a two-way . . . and [Appaloosa was] making [an] appeal to not bear the burden of adding a third party to the mix." Hr'g Tr. 7/20/2011 at 96:12-20 (Bolin Cross). Mr. Bolin "didn't have any details" of the negotiations that were occurring between the parties at this time. Id. at 96:21-25.

At this time, without any involvement of the Settlement Note Holders, the Debtors were moving closer to a deal with JPMC, the FDIC and the Bank Bondholders. On March 4, 2010, Debtors' counsel announced to the Court that the Debtors, JPMC, and the FDIC had "been in dialogue over the last few weeks . . . to try and resolve the issues . . . between the parties in the respective litigations." AOC Ex. 57 – Hr'g Tr. 3/4/2010 at 11:13-21. In light of the "momentum" behind settlement talks, the Debtors' counsel requested that the Court adjourn the rendering of any decision on important motions in connection with the litigations between JPMC, the FDIC and the Debtors. See id. at 11:13-12:11.

On March 12, 2010, Debtors' counsel read into the record the terms of a settlement to which the Debtors, JPMC and the FDIC had agreed in principle. See AOC Ex. 58 – Hr'g Tr. 3/12/2010 at 18:14-26:1. This agreement, which included, among other things, a settlement of the FDIC's claims, "bore no resemblance" to the potential terms shared with the Settlement Note Holders during settlement negotiations in November of 2009. Hr'g Tr. 7/18/2011 at 121:1-5 (Gropper Direct). As Mr. Kosturos testified, the Settlement Note Holders had no involvement in the negotiation of the settlement because "there wasn't any need to involve them" and the Debtors were exercising their responsibility "to determine what . . . is in the best interests of the debtor." Hr'g Tr. 7/21/2011 at 136:18-23 (Kosturos Direct).

The Global Settlement Agreement ultimately was executed on terms different from those read into the record on March 12 because, following the announcement, "[t]he FDIC had . . . withdrawn from the deal." Hr'g Tr. 7/20/2011 at 205:3-6 (Bolin Redirect). After further negotiation, the parties executed a settlement agreement on May 21, 2010. See Conf DX 7 – Initial Global Settlement Agreement (prior to amendments thereto). Mr. Kosturos made the decision to enter into this agreement, and WMI's board ratified his decision. Hr'g Tr. 7/21/2011 at 136:24-137:1 (Kosturos Direct). The Debtors, not the Settlement Note Holders, led the negotiation of the final agreement with the participation of the Creditor's Committee. Id. at 137:9-15. "[U]ltimately, the debtor exercised its judgment, its sole judgment in entering into the global settlement agreement." Id. at 137:15-17.

Throughout their involvement with negotiation of the Global Settlement Agreement and the Modified Plan, as well as their participation in these Chapter 11 Cases, the Settlement Note Holders were not acting as fiduciaries of the Debtors' estates. These creditors were included in settlement discussions because they hold significant portions of WMI debt. Hr'g Tr. 7/21/2011 at 101:17-102:3 (Kosturos Direct). Recognizing that the Settlement Note Holders were not an official committee with fiduciary duties to the estates, the Debtors required that each Settlement Note Holder execute a confidentiality agreement to preclude disclosure of any confidential information that might be exchanged in the course of the settlement negotiations. See id. at 170:8-13 (Kosturos Cross). The Settlement Note Holders did not supplant the role of the Creditors' Committee in negotiations, nor did the Debtors view the Settlement Note Holders as a substitute for the Creditors' Committee. See id. at 158:1-4. The Creditors' Committee itself participated directly, along with other constituencies. See id. at 102:22-103:11, 137:14-15. The Debtors also did not view the Settlement Note Holders as acting

in a representative capacity for other creditors. See id. at 158:5-12; see also Conf DX 265 – Opinion at 69. The Debtors did not take direction from the Settlement Note Holders and, in fact, at critical points in the negotiations the Debtors did not include the Settlement Note Holders in discussions or share information with them. See Hr'g Tr. 7/21/2011 at 132:6-12, 136:10-23 (Kosturos Direct), 157:7-14 (Kosturos Cross). Importantly, the Debtors' view of the role of the Settlement Note Holders in the settlement negotiations is consistent with that expressed by the Court in its Opinion: "The Settlement Noteholders were not acting in this case in any fiduciary capacity; their actions were taken solely on their own behalf, not others." Conf DX 265 – Opinion at 69. It also is consistent with the view of the Equity Committee itself, which stated its view last December that the Settlement Note Holders had no duty to obtain or improve recoveries for equity, and particularly not at the risk of delay to creditors:

> In fact, if anything, the creditors committee and the settling noteholders have a fiduciary duty to go for this quick and clean settlement that pays off creditors but leaves equity with nothing.

Hr'g Tr. 12/7/2010 at 155:3-6 (Equity Committee Closing Argument). Indeed, the Debtors, who owe a fiduciary duty to *all* stakeholders in these Chapter 11 Cases—creditors and equity security holders alike—led and conducted the negotiations and, in doing so, endeavored to achieve the greatest recovery possible for the Debtors' estates. See Hr'g Tr. 7/21/2011 at 137:2-17 (Kosturos Direct) (explaining that the Debtors led negotiations of the Global Settlement Agreement and ultimately exercised their sole judgment in entering that settlement).

The Debtors' estates have benefited from participation of the Settlement Note Holders, Creditors' Committee and other significant creditor constituencies in negotiating the Global Settlement Agreement and the Modified Plan. See id. at 156:12-157:2 (Kosturos Cross). The participation by major stakeholders in chapter 11 cases is common, see id. at 157:3-6, and,

as evident here, often yields positive results. The very settlement agreement that these creditors helped negotiate was determined by this Court to be fair and reasonable, Conf DX 265 – Opinion at 2, to "provide[] a reasonable return in light of the possible results of the litigation," id. at 60, and will expedite these cases. By contrast, actions by the Equity Committee to insist on the appointment of an examiner, dispute every conclusion the examiner reached, and engage in frivolous litigation has caused delay and the expenditure or loss of significant value to the estates.

Based upon the Debtors' valuation of assets and estimation of the ultimate amount of Allowed General Unsecured Claims, even if the Court were to rule that the federal judgment rate should apply, there still would be a shortfall of approximately $90 million to $100 million payable to holders of PIERS Claims before any funds could be distributed to holders of Subordinated Claims and then Equity Interests. Hr'g Tr. 7/14/2011 at 174:10-175:1 (Goulding Cross).

Based upon the foregoing, as well as the legal arguments set forth herein, it is clear that none of the Settlement Note Holders or the Debtors engaged in conduct warranted a reduction of the rate of postpetition interest and, in fact, the equities of the case suggest that payment at the contract rate is appropriate.

Compliance with Section 1129(a)(8) of the Bankruptcy Code

As set forth in the Modified Plan and in the Voting Certifications, Classes 1, 4 and 7 are unimpaired pursuant to the Modified Plan and, therefore, are conclusively presumed to have accepted the Modified Plan pursuant to section 1126(f) of the Bankruptcy Code. Conf DX 255 – Modified Plan §§ 5.1, 8.1, 11.1; Conf DX 403 – Klamser Decl. at ¶ 17. Thirteen (13) impaired Classes (Class 2 (Senior Notes Claims), Class 3 (Senior Subordinated Notes Claims), Class 5 (JPMC Rabbi Trust/ Policy Clams), Class 6 (Other Benefit Plan Claims), Class 10 (Bond

Claims), Class 11 (WMI Vendor Claims), Class 12 (General Unsecured Claims), Class 12A (Late-Filed Claims), Class 13 (Convenience Claims), Class 14 (CCB-1 Guarantees Claims), Class 15 (CCB-2 Guarantees Claims), Class 16 (PIERS Claims), and Class 17A (WMB Senior Notes Claims)) eligible to vote have voted to accept the Modified Plan in accordance with section 1126 of the Bankruptcy Code. See Conf DX 403 – Klamser Decl. at ¶ 24; Conf DX 377 – Sharp Decl. at ¶ 24; Conf DX 18 – Klamser Decl. for the Sixth Amended Plan at ¶ 29.

Compliance with Section 1129(a)(9) of the Bankruptcy Code

Sections 3.1 and 3.2 of the Modified Plan provide that, on the later to occur of (i) the Effective Date and (ii) the date on which an Administrative Expense Claim becomes an Allowed Claim, the Disbursing Agent shall (a) pay to each holder of an Allowed Administrative Expense Claim, in Cash, the full amount of such Allowed Administrative Expense Claim. Conf DX 255 – Modified Plan §§ 3.1, 3.2. Section 5.1 of the Modified Plan provides that, unless otherwise mutually agreed upon by the holder of an Allowed Priority Non-Tax Claim and the Debtors, on the later of (i) the Effective Date and (ii) the date such Allowed Priority Non-Tax Claim becomes an Allowed Priority Non-Tax Claim, or as soon thereafter as is practicable, the Disbursing Agent shall pay to each holder of an Allowed Priority Non-Tax Claim, in Cash, the full amount of such Allowed Priority Non-Tax Claim. Conf DX 255 – Modified Plan § 5.1. Section 3.3 of the Modified Plan, and as set forth in the Priority Tax Claim Election Notice (which is incorporated by reference in the First Supplemental Notice), each holder of an Allowed Priority Tax Claim shall receive, in satisfaction, release, and exchange of such holder's Allowed Priority Tax Claim, payment in full, in Cash on or as soon as reasonably practicable following the later to occur of (a) the Effective Date and (b) the date on which such claim becomes an Allowed Claim. Conf DX 255 – Modified Plan § 3.3; Conf DX 393 – Priority Tax Claim

Election Notice; Conf DX 405 – First Supplemental Notice; Conf DX 374 – Goulding Decl. at ¶¶ 34-37.

Compliance with Section 1129(a)(10) of the Bankruptcy Code

Thirteen (13) Classes of impaired Claims entitled to vote affirmatively accepted the Modified Plan. See Conf DX 403 – Klamser Decl. at ¶ 24; Conf DX 377 – Sharp Decl. at ¶ 24; Conf DX 18 – Klamser Declaration for the Sixth Amended Plan at ¶ 29.

Compliance with Section 1129(a)(11) of the Bankruptcy Code

The Liquidating Trustee will have sufficient funds—currently proposed to be up to $75 million, see Hr'g T. 7/14/2011 at 115:8-9 (Goulding Cross)—to manage the Liquidating Trust, maintain the Liquidating Trust Assets, and make payments to Liquidating Trust Beneficiaries. See Hr'g Tr. 7/14/2011 at 34:4-16 (Goulding Direct); Conf DX 255 – Modified Plan §§ 1.127, 28.3; Conf DX 374 – Goulding Decl. at ¶ 40. To the extent that the Liquidating Trustee determines not to pursue any litigation claims currently budgeted for, money allocated to fund the pursuit of such abandoned potential claims will be distributed to holders of Liquidating Trust Interests. See Hr'g Tr. 7/14/2011 at 174:2-9 (Goulding Cross); see also Hr'g Tr. 7/21/2011 at 224:12-18 (Kosturos Cross).

In addition, the Reorganized Debtors will have sufficient funds to continue to manage their assets and satisfy their liabilities. Based upon updated financial projections—which assume that WMMRC will continue operating in runoff mode—the Reorganized Debtors will be able to satisfy their obligations as they come due. Hr'g Tr. 7/14/2011 at 37:8-38:12 (Goulding Direct); Conf DX 340 – Updated Financial Projections. While based on a variety of estimates and assumptions, the projected balance sheets of the Reorganized Debtors indicate that, as of December 31, 2011, the Reorganized Debtors will have total assets of approximately $297

million and total liabilities of approximately $96 million. See Conf DX 253 – Supplemental Disclosure Statement at 46.

Compliance with Section 1129(a)(12) of the Bankruptcy Code

Pursuant to Section 43.14 of the Modified Plan, all fees currently payable pursuant to section 1930 of title 28, United States Code, as determined by the Bankruptcy Code, have been or will be paid on or before the Effective Date, thereafter as and when they become due, or otherwise pursuant to an agreement between the Reorganized Debtors and the United States Department Justice, Office of the United States Trustee. See Conf DX 255 – Modified Plan § 43.14; Conf DX 374 – Goulding Decl. at ¶ 43.

Compliance with Section 1129(a)(13) of the Bankruptcy Code

Pursuant to Section 36.7 of the Modified Plan, from and after the Effective Date, the Debtors, the Reorganized Debtors, and the Liquidating Trustee, as the case may be, shall (a) continue to perform any and all of their administrative obligations under the Benefit Plans and (b) continue to make any required minimum funding and insurance premium payments, until such time as the Debtors or the Liquidating Trustee, as the case may be, decides to terminate any such Benefit Plan in accordance with the terms and provisions of the documents and instruments relating thereto and applicable law. Conf DX 255 – Modified Plan § 36.7; Conf DX 374 – Goulding Decl. at ¶ 44.

Compliance with Section 1129(a)(14) of the Bankruptcy Code

The Debtors are not subject to any domestic support obligations and, accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases. See Conf DX 374 – Goulding Decl. at ¶ 45.

Compliance with Section 1129(a)(15) of the Bankruptcy Code

The Debtors are not "individuals" (as that term is defined in the Bankruptcy Code) and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases. See Conf DX 374 – Goulding Decl. at ¶ 46.

Compliance with Section 1129(a)(16) of the Bankruptcy Code

The Debtors are each a moneyed, business, or commercial corporation and, accordingly, section 1129(a)(16) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases. See Conf DX 374 – Goulding Decl. at ¶ 47.

Compliance with Section 1129(b) of the Bankruptcy Code

Classes 9,[23] 18, 19 and 20 voted to reject the Modified Plan (or, in the case of Class 19, voted to reject the Sixth Amended Plan and, thus, is deemed to have rejected the Modified Plan as well) and Classes 17B, 21, and 22 are not receiving any distribution under the Modified Plan and, thus, are deemed to reject the Modified Plan. Conf DX 374 – Goulding Decl. at ¶ 48; Conf DX 403 – Klamser Decl. at ¶¶ 17, 24; Conf DX 377 – Sharp Decl. at ¶¶ 16, 24; Conf DX 19 – Sharp Decl. for Sixth Amended Plan at ¶ 30. Accordingly the "cram down" requirements of section 1129(b) of the Bankruptcy Code must be satisfied.

No Unfair Discrimination

Class 9 (Visa Claims) are of a different nature and priority than General Unsecured Claims because JPMC is paying the holders of the Visa Claims, which Claims are to be paid in full, in Cash, on the Effective Date. Conf DX 374 – Goulding Decl. at ¶ 52; Conf DX 255 – Modified Plan §§ 13.1, 16.1. The Subordinated Claims in Class 18 also are of a different nature and priority than General Unsecured Claims. Conf DX 374 – Goulding Decl. at ¶ 49.

[23] Class 9 voted to reject the Modified Plan despite the fact that it is being paid in full. See Conf DX 403 – Klamser Decl. at ¶ 24.

With respect to Class 17B (WMB Subordinated Notes), there are no Allowed Claims in that Class because, except to the extent that they are Section 510(b) Subordinated WMB Notes Claims, the Claims in this Class are derivative in nature and the Debtors provided a distribution on account of such Claims to the FDIC Receiver pursuant to the Global Settlement Agreement. Id.

Classes 19, 20, 21 and 22 each are comprised of preferred and common Equity Interests, as the case may be. Id. at ¶ 50. These Classes differ in legal nature and priority from all other Classes of Claims and, as between one another, also are dissimilar in certain respects. Id. Specifically, Classes 19 (REIT Series) and 20 (Preferred Equity Interests), are senior in priority to the Common Equity Interests classified in Classes 21 (Dime Warrants) and 22 (Common Equity Interests). Id. As between each other, Classes 19 and 20 are not receiving disparate treatment from the Debtors. The Debtors have provided holders of REIT Series and Preferred Equity Interests in Class 19 and Class 20, respectively, with the opportunity to receive redistributions of Liquidating Trust Interests, with the same priority, in the event that all Allowed Claims and Postpetition Interest Claims in respect of Allowed Claims are paid in full. See id.; see also Conf DX 255 – Modified Plan §§ 23.1, 24.1; Conf DX 265 – Opinion at 102 ("To the extent that the REIT Holders are receiving anything more than other preferred shareholders, they are receiving it directly from JPMC in exchange for releases."). Notwithstanding this, separate classification is justified because, pursuant to the Global Settlement Agreement, outside of whatever distribution holders of REIT Series in Class 19 may be entitled to pursuant to the Modified Plan, JPMC has agreed to provide such holders with their pro rata shares of $50 million (in Cash or shares of common stock of JPMC), to the extent such holders previously agreed to grant the releases provided in Section 43.6 of the Sixth Amended Plan. See Conf DX

255H, 402, 422 – Global Settlement Agreement (as amended) § 2.24; Conf DX 255 – Modified Plan § 23.1. This consideration from JPMC is in resolution of certain claims and causes of action unique to the REIT Series holders, which are not at issue with respect to the other Preferred Equity Interests classified in Class 20. Conf DX 374 – Goulding Decl. at ¶ 50. Consistent with the Court's ruling at the March 21, 2011 disclosure statement hearing, the resolicitation of Class 19 was not required. See Hr'g Tr. 3/21/2011 at 168:7-14; Conf DX 272 – Supplemental Disclosure Statement Order at 5.

Classes 21 and 22 contain Common Equity Interests, and are receiving the same treatment from the Debtors, but separate classification is justified based upon the different nature of such interests. See Conf DX 374 – Goulding Decl. at ¶ 51.

Fair and Equitable

Except to the extent waived, no holder of a Claim or Equity Interest junior to each of the Claims classified in Classes 9, 17B and 18 will receive or retain any property pursuant to the Modified Plan, unless and until such Classes are paid in full. Id. at ¶¶ 52, 53 n.12. Class 9 is being paid in full on the Effective Date so stakeholders junior to Class 9 may receive distributions pursuant to the Modified Plan. Id. at ¶ 52. With respect to Class 17B (WMB Subordinated Notes Claims), because there are no Allowed Claims in that Class (as set forth above), indeed no Claims at all, it does not matter that Classes junior to such Class may receive or retain property on account of the Claims or Equity Interests classified therein. Id. at ¶ 53 n.12.

To the extent that holders of REIT Series shares in Class 19 receive distributions from JPMC (either directly or through the Debtors), this payment is not being made on account of their Equity Interests, but instead is a separate compromise with JPMC and, therefore, is not implicated by the absolute priority rule. Id. at ¶ 53; Conf DX 265 – Opinion at 102. Further, Classes 19 and 20 only are entitled to redistributions of Liquidating Trust Interests if Allowed

Claims and Postpetition Interest Claims are paid in full. See Conf DX 255 – Modified Plan §§ 23.1, 24.1.

Furthermore, there are no Equity Interests junior to the Equity Interests in Classes 19, 20, 21 and 22 that are receiving or retaining any property under the Modified Plan on account of such junior interests, and no holder of a Claim or Equity Interest in a Class senior to such Classes is receiving more value than its respective Claim or Equity Interest. See Conf DX 374 – Goulding Decl. at ¶ 54. Specifically, the Modified Plan provides for payment of Allowed Claims and, if appropriate, Postpetition Interest Claims on account of Allowed Claims. Conf DX 374 – Goulding Decl. at ¶ 55. Distributions to claimants will be made in Cash, Liquidating Trust Interests that represent the right to receive future Cash distributions from the Liquidating Trust and, in certain circumstances, Reorganized Common Stock. Id. Based upon the valuation analysis prepared by Blackstone, the Debtors and their advisors calculated estimated percentage recoveries for each Class in the Modified Plan. Id. As set forth in Section II.B.5 of the Prior Disclosure Statement and pages 4-5 of Exhibit D to the Supplemental Disclosure Statement, no Class is projected to recover more than one hundred percent (100%) on account of the Claims or Equity Interests, as the case may be, classified in each Class. Id. In addition, the Modified Plan provides that, to the extent distributions to a particular class are in excess of one hundred percent (100%) of the Allowed Claims in that Class, such excess value must flow to the next junior class in the waterfall. See Conf DX 255 – Modified Plan §§ 6.3, 7.3, 16.3, 18.3, 19.3, 20.3, 22.2. Pursuant to the Third Plan Modification, and in response to stated concerns that recoveries for preferred shareholders could exceed their $7.5 billion fixed liquidation preference, the Debtors clarified that no holder of a REIT Series or Preferred Equity Interest in Classes 19 and 20, respectively, can receive, pursuant to the Modified Plan, distributions in excess of 100% of such

holder's interest (excluding any separate distribution received from JPMC) and, to the extent any such excess value exists, Liquidating Trust Interests shall be redistributed to holders of Common Equity Interests in Classes 21 and 22. See Third Plan Modification at ¶¶ 1-2.

In particular, Section 20.3 of the Modified Plan provides for the redistribution of value from holders of Allowed PIERS Claims to holders of Allowed Claims or Equity Interests if Allowed PIERS Claims are paid in full. Conf DX 255 – Modified Plan § 20.3. Thus, if the distributions of Reorganized Common Stock, Creditor Cash, and Cash made to holders of Allowed PIERS Claims exceed one hundred percent (100%) of such holder's Allowed PIERS Claim and Postpetition Interest Claim, then Liquidating Trust Interests will be redistributed to holders of Allowed Claims or Equity Interests in accordance with the Subordination Model attached to the Modified Plan as Exhibit G. See Hr'g Tr. 7/14/2011 at 41:14-25 (Goulding Direct).

Compliance with Section 1129(c) of the Bankruptcy Code

Other than with respect to prior plans of reorganization filed in these cases such as the Sixth Amended Plan, the Modified Plan is the only plan filed in each of these cases. Conf DX 374 – Goulding Decl. at ¶ 57.

Compliance with Section 1129(d) of the Bankruptcy Code

The principal purpose of the Modified Plan is not the avoidance of taxes or the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to confirmation of the Modified Plan on any such grounds. Id. at ¶ 58.

Compliance with Section 1129(e) of the Bankruptcy Code

The Chapter 11 Cases are not "small business cases" as defined in the Bankruptcy Code. Conf DX 374 – Goulding Decl. at ¶ 59.

Compliance with Section 1127 of the Bankruptcy Code

The Plan Modifications and revisions made to the Modified Plan at or subsequent to the Confirmation Hearing, including those set forth in the Third Plan Modification, do not adversely change the treatment of the claim of any creditor or the interest of any equity security holder.

The Debtors' Valuation is Fair and Proper

WMMRC's Business

Under the Modified Plan, WMMRC will be Reorganized WMI's sole operating entity. Conf DX 255 – Modified Plan § 1.171; Conf DX 253 – Supplemental Disclosure Statement at 59; Hr'g Tr. 7/13/2011 at 248:14-19 (Zelin Direct). WMMRC is a captive reinsurance company, domiciled in Hawaii, which was created to reinsure certain risks associated with residential mortgages that were originated or acquired by WMB. Conf DX 253 – Supplemental Disclosure Statement at 23; Hr'g Tr. 7/13/2011 at 97:19-23 (Carreon Direct), 250:25-251:16 (Zelin Direct).

Historically, and as required by applicable law, WMMRC has had no independent source of obtaining reinsurance business. Hr'g Tr. 7/13/2011 at 251:25-252:12 (Zelin Direct). WMMRC has not written any new business since September 2008 and is currently in run-off. Conf DX 253 – Supplemental Disclosure Statement at 59; Hr'g Tr. 7/13/2011 at 97:20-23 (Carreon Direct), 250:25-251:16 (Zelin Direct); Conf DX 341 – Updated Blackstone Report at 35. WMMRC's run-off business generates taxable income by collecting reinsurance premiums under its existing contracts. Hr'g Tr. 7/13/2011 at 252:13-23 (Zelin Direct); Conf DX 341 – Updated Blackstone Report at 42-47. WMMRC has no employees. Hr'g Tr. 7/13/2011 at 251:23-24 (Zelin Direct). WMMRC does not have a business plan that contemplates the investment of additional equity. Hr'g Tr. 7/13/2011 at 277:21-278:24 (Zelin Direct), 165:24-

166:2 (Anderson Cross); Hr'g Tr. 7/15/2011 at 75:21-23 (Maxwell Cross). Further, WMMRC does not have a management team, and has no current means of originating business. Hr'g Tr. 7/13/2011 at 277:21-278:24 (Zelin Direct), 165:11-23 (Anderson Cross); Hr'g Tr. 7/15/2011 at 71:12-17, 75:24-76:1 (Maxwell Cross).

WMMRC will not have any financing upon WMI's emergence from bankruptcy. Hr'g Tr. 7/13/2011 at 276:13-278:24 (Zelin Direct); Hr'g Tr. 7/15/2011 at 76:2-5 (Maxwell Cross). The Modified Plan contemplates that WMMRC will continue to operate as a run-off reinsurance business post-emergence. Conf DX 253 – Supplemental Disclosure Statement at 59; Hr'g Tr. 7/13/2011 at 248:20-25 (Zelin Direct).

Additional facts relevant to valuation issues are discussed in Section V, infra.

Based upon the foregoing facts and the legal arguments set forth below, the Debtors submit that (i) this Court has jurisdiction to approve and implement the Global Settlement Agreement and Modified Plan, (ii) the Court's prior ruling that the Initial Global Settlement Agreement was fair and reasonable should apply equally to the Global Settlement Agreement, (iii) the Modified Plan complies with section 1129 of the Bankruptcy Code and should be confirmed, and (iv) the Debtors' valuation of Reorganized WMI is fair and proper.

ARGUMENT

I.
THE COURT HAS JURISDICTION TO APPROVE AND IMPLEMENT THE GLOBAL SETTLEMENT AGREEMENT AND THE MODIFIED PLAN

Contrary to the objections raised by the TPS Consortium, its appeal of the TPS Summary Judgment Opinion does not divest this Court of jurisdiction to approve and implement the Global Settlement Agreement and confirm the Modified Plan. Similarly, the recent, narrowly crafted decision by the Supreme Court of the United States in Stern v. Marshall, 131 S. Ct. 2594

(2011) does not suggest that this Court lacks constitutional and statutory authority to approve the Global Settlement Agreement and confirm the Modified Plan.

A. The Court Has Jurisdiction to Implement the TPS Summary Judgment Opinion and Related Order

In the bankruptcy context, an appeal does not divest a bankruptcy court of its jurisdiction to adjudicate *all* matters that may relate to such appeal. Bankruptcy Rule 8005 explicitly recognizes a court's power to continue proceedings pending an appeal. It provides, in pertinent part, that "the bankruptcy judge may suspend *or order the continuation of other proceedings in the case under the Code* or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." Fed. R. Bankr. P. 8005 (emphasis added); see also id., Advisory Committee's Note ("The second sentence of the rule is derived from § 39(c) of the Bankruptcy Act [former § 67(c) of this title] and confers on the bankruptcy judge discretion respecting the stay or continuation of other proceedings in the case while an appeal is pending."); Hagel v. Drummond (In re Hagel), 184 B.R. 793, 798-99 (B.A.P. 9th Cir. 1995) (observing that Bankruptcy Rule 8005 "does not provide that the bankruptcy court *must* stay all other proceedings" and holding that the court had discretion to stay the proceedings). In fact, this Court has ordered the continuation of the Chapter 11 Cases notwithstanding the pendency of the appeal of the TPS Summary Judgment Opinion by approving the Supplemental Disclosure Statement, authorizing solicitation of the Modified Plan, and proceeding with the Confirmation Hearing. Conf DX 272 – Supplemental Disclosure Statement Order at 8. Until filing their objection on May 13, 2011, the TPS Consortium never suggested this Court lacked jurisdiction and never moved for a stay.

Absent a stay affirmatively granted, courts have routinely recognized that an appeal does not tie the hands of a lower court, and that the court that originally issued an un-

stayed order has continuing jurisdiction to implement such order notwithstanding a pending appeal.

> Courts have held that absent a stay pending appeal, they may retain jurisdiction to decide issues and proceedings different from and collateral to those involved in the appeal. . . . They may also enforce the order or judgment appealed [] because in implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review.

In re VII Holdings Co., 362 B.R. 663, 666 n.3 (Bankr. D. Del. 2007) (internal quotations and citations omitted); see also In re Petition of the Bd. of Dir. of Hopewell Int'l Ins. Ltd., 258 B.R. 580, 583 (Bankr. S.D.N.Y. 2001) (noting that matters that continued before the bankruptcy court were collateral to the issues on appeal and that, in the absence of a stay, the bankruptcy court may continue to administer the contested matter that is on appeal). The decision of the Ninth Circuit Appellate Panel in Dardashti v. Golden (In re Dardashti), No. CC-07-1311, 2008 Bankr. LEXIS 4678, at *16 (B.A.P. 9th Cir. Feb. 12, 2008), states:

> While an appeal of an order is pending, the trial court retains jurisdiction to implement or enforce the order. This is true because in implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review. Accordingly, courts have recognized a distinction between *acts undertaken to enforce the judgment, which are permissible*, and acts which expand upon or alter it, which are prohibited.

Id. (internal quotation marks omitted) (emphasis added); see also Hagel, 184 B.R. at 798 (holding that the bankruptcy court retained jurisdiction to dismiss a chapter 13 case pending an appeal of an order denying confirmation of a plan). Additionally, courts have held that divestiture of jurisdiction pending the appeal of an issue should only occur in limited circumstances, and "should not be applied when to do so would defeat its purpose of achieving judicial economy." Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988).

This case falls squarely within the Court's discretion under Bankruptcy Rule 8005 and the long line of authority holding that a bankruptcy court may implement its own judgments absent a stay pending appeal. Confirmation of the Modified Plan and the issuance of an order in furtherance thereof will only implement the Court's original TPS Summary Judgment Opinion and order, and will not expand or alter it. Pursuant to the TPS Summary Judgment Opinion, the Court determined that the Trust Preferred Securities are not the property of the TPS Consortium[24] and that "the certificates held by the TPS holders are no longer TPS but are deemed to be Depositary Shares tied to WMI Preferred Shares." Conf DX 267 – TPS Summary Judgment Opinion at 13. Confirmation of the Modified Plan does not require the Court to now revisit the issues in the TPS Action. If the Court confirms the Modified Plan, the TPS Consortium can appeal from entry of a confirmation order and seek a stay of that order pending the outcome of its appeal, if it can meet the requirements for such relief.[25] Moreover, divesting this Court of jurisdiction would result in no judicial economy—the Court already has completed the Confirmation Hearing.

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[24] The TPS Consortium urges the Court to put the Trust Preferred Securities in escrow pending the outcome of the appeal. There are three fundamental problems with this approach. First, the Global Settlement Agreement is conditioned on the transfer of the Trust Preferred Securities, and such an escrow would defeat the purpose of the agreement. Conf DX 255H – Global Settlement Agreement § 7.2. Second, the TPS Consortium lost on summary judgment, and escrowing the Trust Preferred Securities would allow them to obtain a stay pending appeal without following the proper procedures of Bankruptcy Rules 7062 and 8005. Third, if the Trust Preferred Securities are escrowed, a condition precedent to the Effective Date of the Modified Plan will fail. Conf DX 255 – Modified Plan § 39.1. The entire case potentially could be halted if this approach is taken, which would jeopardize the entire plan and over $7 billion in value for stakeholders.

[25] The risk of mootness because the TPS Consortium has not sought a stay, as explained in more detail below, rests squarely on the TPS Consortium. See 10 Collier on Bankruptcy P. 8005.02 ("However, as a practical matter, it may be beyond the power of either the appellate or bankruptcy courts to undo certain actions even if the judgment is reversed. In such case, *seeking a stay becomes mandatory*. Otherwise, the appeal may be dismissed as moot.") (emphasis added).

The TPS Consortium's reliance on In re Whispering Pines Estates, 369 B.R. 752 (B.A.P. 1st Cir. 2007), misses the mark.[26] In Whispering Pines, the bankruptcy court approved a plan of reorganization proposed by a secured creditor, which provided for a specific process by which the debtor would sell its property. The debtor then appealed the confirmation order. Following confirmation, the secured creditor sought relief from the automatic stay to foreclose on the property. The bankruptcy court approved the secured creditor's motion for relief from the automatic stay, contradicting the sale process provided in the confirmed plan. Id. at 759. The bankruptcy court in Whispering Pines thus modified its confirmation order—the very order that was on appeal—an action plainly contrary to the general rule that a court may not modify an order once appellate jurisdiction has vested. The case before this Court is completely different. The Debtors are not asking the Court to contradict or modify the TPS Summary Judgment Opinion in any way. The Modified Plan only pertains to the distribution and treatment of the assets, liabilities and equity interests of the Debtors, and does not in any way address the issues set forth in the TPS Summary Judgment Opinion and related order. Approval of the Modified

[26] The other cases cited in support of the TPS Consortium's divestiture theory are distinguishable. In In re DeMarco, the court did determine that it lacked jurisdiction to confirm a chapter 13 debtor's plan because of a pending appeal. See In re DeMarco, 258 B.R. 30, 36 (M.D. Fla. 2000). In that case, however, to approve the proposed plan the court would have been required to revisit the issue of whether a tax claim was valid, which was the very same issue the court previously decided and was pending on appeal. See id. at 32. Here, the holders of Trust Preferred Securities will not be similarly affected by confirmation of the Modified Plan because the Court is not revisiting its original opinion. The three other non-controlling cases cited—In re Bialac, 694 F.2d 625 (9th Cir. 1982); In re Urban Dev. Ltd., Inc., 42 B.R. 741 (Bankr. M.D. Fla. 1984); and In re Emergency Beacon Corp., 58 B.R. 399 (Bankr. S.D.N.Y. 1986)—each ignore the express language in Bankruptcy Rule 8005 permitting the continuation of other proceedings pending an appeal and, therefore, are not persuasive authority. Moreover, in In re Bergman, the court determined that it did have jurisdiction notwithstanding the filing of a notice of appeal. 397 B.R. 348, 352 (Bankr. E.D. Va. 2008) ("[I]f the bankruptcy court were divested of all jurisdiction, its ability to administer its cases in a timely manner would be severely hampered." (citing In re Sullivan Cent. Plaza I, Ltd., 935 F.2d 723 (5th Cir. 1991)). Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985), is also inapposite here, as that case deals with motions to reconsider under Rule 60 of the Federal Rules of Civil Procedure and the decision does not address the myriad of situations under which a bankruptcy court would retain jurisdiction to enforce its own orders. In fact, as noted above, Bankruptcy Rule 8005 explicitly grants bankruptcy courts the authority to decide whether matters in a bankruptcy case should be continued pending an appeal.

Plan, which provides treatment for the Preferred Equity Interests of the TPS Consortium, does not alter the Summary Judgment Opinion.

B. The TPS Consortium Is Attempting to Seek a Stay Without Meeting the Requirements of the Bankruptcy Rules

The TPS Consortium's jurisdictional objection is a transparent attempt to obtain a stay pending appeal without following the proper procedures under the Bankruptcy Rules. Following entry of a final order, parties to a contested matter or adversary proceeding have the right to file a notice of appeal and may seek a stay of such order pending appeal, either through Bankruptcy Rule 8005 (applicable generally in the bankruptcy cases) or Bankruptcy Rule 7062 (making Federal Rule of Civil Procedure 62 applicable to an adversary proceeding). Both rules are permissive, providing that the court may stay execution of a judgment if the appellant meets the requirements for a stay. The act of seeking a stay is legally significant and has a bearing on the parties' rights with respect to the original ruling:

> Once a bankruptcy court order, judgment or decree has been entered, and subject to the 'automatic stay' of Bankruptcy Rule 7062, the prevailing party is free to execute upon or otherwise seek to enforce it. However, the losing party is permitted to seek a stay of the judgment to maintain the status quo pending an appeal. A party who desires to appeal is not obligated to seek a stay of the judgment pending appeal. *However, if no stay is in effect, the prevailing party may treat the judgment of the bankruptcy court as final, notwithstanding that an appeal is pending*.

10 Collier on Bankruptcy P. 8005.01 (2011) (emphasis added); see also In re Kahihikolo, 807 F.2d 1540, 1542 (11th Cir. 1987) (absent a stay, litigants may treat an order as final). As a result, the rules recognize that the party seeking an appeal must post a *supersedeas* bond in order to stay the order that is on appeal. Fed R. Civ. P. 62(d) ("If an appeal is taken, the appellant may obtain a stay by *supersedeas* bond . . . ."); see also 10 Collier on Bankruptcy P. 8005.03 (2011) ("When Rules 8005 and 7062 are read together, the procedure mandates that an appellant

desiring the stay of a [judgment] determining an interest in property should present to the bankruptcy court a *supersedeas* bond in an amount adequate to protect the appellee; an appellant desiring the stay of a judgment that may not be stayed as of right should present to the bankruptcy court a motion for a stay, stating reasons why the court should exercise its discretion to grant the stay."). The bond "protect[s] the interests of the judgment creditor who is being stayed from execution pending the outcome of the appeal." 12 Moore's Federal Practice-Civil, 62.03 (2011).

The Court issued the TPS Summary Judgment Opinion and related order over six months ago. Since then, the TPS Consortium *has not* sought any stay pending appeal. That choice has consequences. Courts have routinely recognized that a party who waives stay rights pending appeal bears the risk that the appeal may become moot.[27] See Ingles Mkts., Inc. v. Henderson Investors, Ltd. (In re Rose's Stores, Inc.), No. 94-2011, 1995 U.S. App. Lexis 8090, at *10 (4th Cir. Apr. 12, 1995) ("Dismissal for mootness is especially appropriate when . . . a party, seeking a return to the status quo ante, sits idly by and permits intervening events to extinguish old rights and create new ones.") (quoting Cent. States, Se. and Sw. Areas Pension Fund v. Cent. Transp., Inc., 841 F.2d 92, 93 (4th Cir. 1988)). Here, the Court is presented with just that situation—implementing an order that has not been stayed. Instead of moving for a stay of the original decision, the TPS Consortium filed a confirmation objection, which essentially

[27] The TPS Consortium also recognized these risks. Specifically, in a motion to the District Court seeking a waiver of the mandatory mediation requirement under the local rules, the TPS Consortium stated that, "[i]n light of the Bankruptcy Court's imminent consideration of WMI's revised plan (which *hinges* on a determination of the ownership of the Trust Preferred Securities), time is of the essence." Black Horse Capital LP v. JPMorgan Chase Bank, N.A. (In re Washington Mutual, Inc.), Adv. Proc. No. 11-124-GMS (D. Del. Feb. 17, 2011), Appellant's Emergency Motion: (A) For Relief From Requirement to Mediate Appeal; and (B) For Leave to Exceed Briefing Page Limits at ¶ 5 (emphasis added); see also id. at ¶ 23 ("[E]xpeditious resolution of the questions presented on appeal is critical in this case. [The Modified Plan] is currently set for resumed confirmation hearings on May 2, 2011. The unwarranted delay associated with hopeless mediation would merely act as a speed bump in a path to that resolution."). The TPS Consortium thus fully recognized that confirmation of the Modified Plan would affect their rights, but never sought a stay of the order implementing the TPS Summary Judgment Opinion.

seeks a stay of the proceedings before the Court. The objection does not satisfy any of the requirements of Bankruptcy Rule 8005 or Bankruptcy Rule 7062 (including the requirement of posting a bond) and should not be used as an end run around those rules.

C. This Court Has the Constitutional and Statutory Authority to Approve the Global Settlement Agreement and Confirm the Modified Plan

The TPS Consortium argued that, based upon the recent decision by the Supreme Court of the United States in Stern, this Court lacks constitutional authority to approve the Global Settlement Agreement and, thus, cannot confirm the Modified Plan. The TPS Consortium's argument misapplies the narrowly-tailored decision in Stern and is without merit. The Court's consideration of confirmation of the Modified Plan, and the Global Settlement Agreement upon which it is based, are core proceedings "arising in a bankruptcy case or under Title 11," as set forth in 28 U.S.C. § 157(b) and Stern, 131 S. Ct. at 2596, 2601, and thus, are squarely within the constitutional exercise of this Court's jurisdiction. Stern dealt with bankruptcy court jurisdiction over state common law counterclaims falling outside Congress's power to make uniform laws on the subject of bankruptcies under Article I, Section 8 of the Constitution. See id. at 2611. In contrast, nothing could fall more squarely within this authority than confirmation of a plan of reorganization; the Constitution plainly allows Congress to designate an Article I bankruptcy court as the forum for confirmation of a chapter 11 plan.

1. The TPS Consortium Misconstrues the Narrow Decision in Stern

In Stern, the Supreme Court held that the bankruptcy court lacked the constitutional authority to enter a final judgment on a state common law counterclaim by the bankruptcy estate where the resolution of the counterclaim was not linked in any way to determination of the underlying proof of claim at issue. Stern, 131 S. Ct. at 2601. The Stern court expressly emphasized that its holding was a narrow one. See id. at 2620 (noting that

Congress had exceeded Article III's limitation "*in one isolated respect*" finding that the "Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim") (emphasis added); see also id. (noting that question presented is a "narrow" one). In one more desperate effort to derail confirmation of the Modified Plan, the objectors here distort Stern far beyond its narrow holding.

2. The Bankruptcy Court Has Constitutional Authority Under Article I of the Constitution to Approve the Global Settlement Agreement and Confirm the Modified Plan

Article I of the Constitution provides Congress with the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4. Pursuant to its Article I powers, Congress enacted the Bankruptcy Code and established a system of bankruptcy courts to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b).

Article III of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Under Article III's restriction, "Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" Stern, 131 S. Ct. at 2597 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)). "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." Id. (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)). Thus, Congress has the constitutional power to assign to bankruptcy courts the responsibility to

adjudicate all matters relating to the rights and responsibilities created under the Bankruptcy Code. The Court's approval of the Global Settlement Agreement and confirmation of the Modified Plan under the Bankruptcy Code is precisely within this Court's core jurisdiction and is not the type of traditional action requiring adjudication by an Article III court.

In examining whether a bankruptcy court has the constitutional authority to enter a final judgment in an action, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Stern, 131 S. Ct. at 2618; see also Miller v. Greenwich Capital Fin. Prods., Inc. (In re Am. Bus. Fin. Servs., Inc.), Adv. No. 06-50826, 2011 WL 3240596, at *2 (Bankr. D. Del. July 28, 2011) (Walrath, J.) (observing that the Stern decision is narrow and concluding that the bankruptcy court had jurisdiction to hear matters that "directly stem from the bankruptcy case"). If so, it is constitutionally permissible for Congress to confer jurisdiction on the bankruptcy court. The Modified Plan and Global Settlement Agreement here meet both parts of this test. Approval of the Modified Plan and Global Settlement Agreement stems from the bankruptcy itself and, in any event, the claims and counterclaims resolved by the Global Settlement Agreement would necessarily be resolved in the bankruptcy claims process. Cf. Conf DX 265 – Opinion at 59 (noting that, absent resolution pursuant to the Global Settlement Agreement, significant claims against the Debtors would need to be resolved).

3. The Bankruptcy Court Has Clear Statutory Authority to Approve the Global Settlement Agreement and Confirm the Modified Plan

Section 1334 provides the district court with "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Through section 157, "Congress has divided bankruptcy proceedings into three categories: those that 'aris[e] under title 11'; those that 'aris[e] in' a title 11 case; and those that are 'related to a case under title 11.'" Stern, 131 S. Ct.

at 2603 (quoting 28 U.S.C. § 157(a)). District courts may refer any or all such proceedings to "the bankruptcy judges of their district." Id. In this District, chapter 11 cases are automatically referred to the judges of the bankruptcy court. See Order, In re Referral of Title 11 Proceedings to the United States Bankruptcy Judges for this District (D. Del. Sept. 6, 2001).

"Bankruptcy judges may hear and enter final judgment in 'all core proceedings arising under title 11, or arising in a case under title 11.'" Stern, 131 S. Ct. at 2603 (quoting 28 U.S.C. § 157(b)(1)). In Stern, the Supreme Court held that "core proceedings are those that arise in a bankruptcy case or under Title 11" and "[t]he detailed list of core proceedings in [28 U.S.C.] § 157(b)(2) provides courts with ready examples of such matters." Id. at 2605.[28]

There can be no serious dispute that the Court's approval of a global settlement agreement underlying a plan of reorganization is a core proceeding "arising in a bankruptcy case or under Title 11" within the meaning of 28 U.S.C. § 157(b). Sections 363(b) and 1123(b)(3) of the Bankruptcy Code, and Bankruptcy Rule 9019, explicitly provide for the bankruptcy court's approval of a plan based upon a settlement of claims and interests belonging to the estate. Moreover, the Supreme Court has recognized that "[c]ompromises are 'a normal part of the process of reorganization.'" Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (Bankruptcy Act decision) (quoting Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939)). Nothing in the Stern decision alters this Court's authority to confirm a plan involving settlement of litigation. The approval of the Global Settlement Agreement arises directly from a federal statutory scheme—the Bankruptcy Code—and is not an exercise of the "judicial power of the United States" requiring approval by an

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[28] Although the Supreme Court stated that section 157(b)(2)(C)'s designation of all "counterclaims by [a debtor's] estate against persons filing claims against the estate" raised "serious constitutional concerns," see id. at 2605, the Supreme Court's decision did not address any other category of core proceedings.

Article III court. See, e.g., In re Okwonna-Felix, No. 10–31663–H4–13, 2011 WL 3421561, at *4 (Bankr. S.D. Tex. Aug. 3, 2011) (finding Stern inapplicable to a bankruptcy court's approval of a settlement under Bankruptcy Rule 9019 "because the resolution of the [Bankruptcy Rule 9019] Motion is not based on state common law, but entirely on federal bankruptcy law (both the Rule and the case law instructing how to apply the Rule).").

4. Approval of the Global Settlement Agreement Is Not a Final Judgment on the Merits of the Underlying Claims and Does Not Require Adjudication by an Article III Court

The TPS Consortium erroneously asserts that, "[w]hen a Court issues a ruling on a settlement agreement, it has the same effect as adjudicating the settled claims at trial." Second Supplemental Objection of the Consortium of Trust Preferred Security Holders to Confirmation of the Modified Sixth Amended Plan of Reorganization, dated July 7, 2011, [D.I. 8100] (the "Second Supplemental Objection") at ¶ 27. To the contrary, a bankruptcy court's authorization of a settlement is not a "final judgment on the merits." Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544, 1549 (11th Cir. 1990) ("[A] bankruptcy court's order authorizing the settlement of a claim cannot constitute a final judgment on the merits for purposes of former adjudication . . . [t]herefore, the bankruptcy court's order authorizing the settlement of [certain parties'] claim cannot be given preclusive effect as a final judgment on the merits.").[29]

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[29] Courts also have held that that an order rejecting a settlement agreement is not a final order. See H&C Dev. Grp., Inc. v. First Vt. Bank & Trust Co. (In re Miner), 222 B.R. 199, 203 (B.A.P. 2d Cir. 1998) (holding that a bankruptcy court order rejecting a settlement between a debtor and creditor was not a "final order"); Providers Benefit Life Ins. Co. v. Tidewater Grp., Inc. (In re Tidewater Grp., Inc.), 734 F.2d 794, 796 (11th Cir. 1984) (holding that "an order disapproving a compromise . . . is not final. It determines no rights and settles no issues. It merely leaves the question open for future adjudication."); Tonkoff v. Synoground (In re Merle's Inc.), 481 F.2d 1016, 1018 (9th Cir. 1973) (stating that "[a]n order disapproving a compromise, however, is not final. It determines no rights and settles no issues. It merely leaves the question open for future adjudication."); Royal Bank & Trust Co. v. Pereira (In re Lady Madonna Indus., Inc.), 76 B.R. 281, 285 (S.D.N.Y. 1987) ("[T]he order clearly does not finally determine the rights of the parties."). It is nonsensical to argue, as the TPS Consortium appears to do, that a bankruptcy court has the jurisdiction to reject a settlement agreement, because such order is not final, but lacks jurisdiction to approve a settlement agreement because such order is final for purposes of appeal.

In considering the Modified Plan in light of its prior finding that the global settlement is a fair and reasonable compromise, the Court is not adjudicating the underlying claims on the merits, nor is it determining the prevailing party on such claims; the Court is determining whether the parties' voluntary settlement is fair to the estate, a task squarely within the core jurisdiction of the bankruptcy court and quite different than fact-finding in a traditional adjudication.[30] Indeed, a bankruptcy court would be unable to adjudicate the merits of the underlying claim in a Rule 9019 hearing because, among other things, the adverse parties to the underlying action are not the adverse parties in a Rule 9019 hearing. Thus, the bankruptcy court could not, consistent with the justiciability requirement of the Constitution, adjudicate the merits of the underlying claim in connection with a Rule 9019 hearing because its ruling would be an advisory opinion.

As support for its erroneous assertion that approval of a settlement is effectively an adjudication of the merits of the underlying claims, the TPS Consortium relies on two inapposite lines of authority. The first line of cases holds that an order approving a settlement agreement is final for purposes of appeal.[31] The second line of cases holds that an order

[30] See In re Key3Media Group, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (holding that in considering a settlement under Bankruptcy Rule 9019 "'it is not necessary for a bankruptcy court to conclusively determine claims subject to a compromise, nor must the court have all the information necessary to resolve the factual dispute, for by so doing, there would be no need of settlement'") (quoting In re Martin, 212 B.R. 316, 319 (B.A.P. 8th Cir. 1997)); see also Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983) (holding that, on a motion to approve a settlement, a court does not decide underlying questions of law or fact); In re Energy Coop., Inc., 886 F.2d 921, 927 n.6 (7th Cir. 1989) (in approving a bankruptcy settlement "the [bankruptcy] court need not—indeed, should not—decide the merits of the dispute" (citation omitted)); In re Teligent, Inc., 417 B.R. 197, 211 (Bankr. S.D.N.Y. 2009) ("On a motion to approve a settlement, a court does not decide underlying questions of law or fact." (citing Cosoff, 699 F.2d at 599)); In re Commercial Loan Corp., 316 B.R. 690, 697 (Bankr. N.D. Ill. 2004) (in approving a bankruptcy settlement "the [bankruptcy] court need not—indeed, should not—decide the merits of the dispute."(quoting Energy Coop., 886 F.2d at 927 n.6)); In re Purofied Down Prods. Corp., 150 B.R. 519, 522-23 (S.D.N.Y. 1993) ("[L]ittle would be saved by the settlement process if bankruptcy courts could approve settlements only after an exhaustive investigation and determination of the underlying claims.").

[31] See Second Supp. Obj. at ¶ 26 (citing Rosenberg v. XO Commc'ns, Inc. (In re XO Commc'ns, Inc.), 330 B.R. 394, 451 (Bankr. S.D.N.Y. 2005); Beaulac v. Tomsic (In re Beaulac), 294 B.R. 815, 818 (B.A.P. 1st Cir. 2003); In re Drexel Burnham Lambert Grp., Inc., 960 F.2d 285 (2d Cir. 1992)).

approving a settlement is res judicata and the issue may not be re-litigated.[32] The fact that an order approving a settlement is final and appealable or has a preclusive effect on a subsequent lawsuit does not mean that such order is an adjudication of the underlying claims requiring approval by an Article III court.

Many bankruptcy court orders governing matters that plainly arise under title 11 have preclusive effect, such as orders allowing a proof of claim, and orders confirming a plan of reorganization.[33] Based upon the TPS Consortium's argument, such routine bankruptcy court orders would exceed the constitutional authority of the bankruptcy courts and both 28 U.S.C. § 157(b)(2)(B) and (L) would be unconstitutional, a result in no way contemplated or required by the narrow holding of the Stern decision, as the Supreme Court itself recognized. See Stern, 131 S. Ct. at 2620 ("We do not think the removal of [state law] counterclaims . . . from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute."); see also In re Am. Bus. Fin. Servs., 2011 WL 3240596, at *2.

Section 1123(b)(3) of the Bankruptcy Code explicitly allows for the voluntary settlement of claims belonging to the debtor. See 11 U.S.C. § 1123(b)(3) ("[A] plan may . . . provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."). Section 157(b)(2)(L) explicitly provides that the "confirmations of plans" is a core proceeding to be heard and determined by a bankruptcy judge. 28 U.S.C. § 157(b)(2)(L). If, as

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[32] See Second Supp. Obj. at ¶ 27 (citing In re Pac. Gas & Elec. Co., 304 B.R. 395, 414 (Bankr. N.D. Cal. 2004); In re Mal Dun Assocs., Inc., 406 B.R. 622 (Bankr. S.D.N.Y. 2009); United States v. Kellogg (In re West Texas Mktg. Corp.), 12 F.3d 497, 499 (5th Cir. 1994)).

[33] See Ries v. Paige (In re Paige), 610 F.3d 865, 871 (5th Cir. 2010) (holding that an order allowing a proof of claim is considered a final judgment for res judicata purposes (citing In re Baudoin, 981 F.2d 736, 742 (5th Cir. 1993))); see also CoreStates Bank, N.A. v. Huls Am. Inc., 176 F.3d 187, 205 (3d Cir. 1999) ("It is settled that orders of a bankruptcy judge rejecting objections and confirming a plan of reorganization are final judgments to which the doctrine of claim preclusion applies."); Celli v. First Nat'l Bank of N. New York (In re Layo), 460 F.3d 289, 293-94 (2d Cir. 2006) (same).

the TPS Consortium argues, a ruling by a bankruptcy court approving a settlement agreement as part of a plan has the same effect as adjudicating underlying claims at trial, then section 1123(b)(3) would be unconstitutional and only a district court could confirm a plan of reorganization that includes a settlement. The TPS Consortium's arguments take Stern far beyond its expressly narrow boundaries and would transform the decision into a fundamental reallocation of responsibilities for adjudication of bankruptcies. The Stern decision in no way requires that result, holding only that adjudication of state-law counterclaims of the estate under section 157(b)(2)(C) was "one isolated respect" in which Congress exceeded the Article III limitation in the Bankruptcy Code. Stern, 131 S. Ct. at 2620.

5. The Claims Underlying the Global Settlement Agreement Necessarily Would be Resolved in the Claims Allowance Process

In Stern, the Supreme Court held that "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Id. at 2618 (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989)). As set forth above, approval of the Global Settlement Agreement and confirmation of the Modified Plan stem directly from the Bankruptcy Code. Nonetheless, assuming *arguendo* the Court were to find that the approval of the Global Settlement Agreement requires consideration of matters beyond direct application of the Bankruptcy Code, Article III jurisdiction is not applicable because, if not resolved consensually under the Global Settlement Agreement, all the claims and counterclaims addressed by the Global Settlement Agreement "would necessarily be resolved in the claims allowance process."

As set forth more fully in the Supplemental Disclosure Statement and the Prior Disclosure Statement, in the wake of the seizure and sale of WMB, a multitude of disputes arose

among the Debtors, JPMC and the FDIC, including (i) the D.C. Action, (ii) the JPMC Action, and (iii) the Turnover Action. See Conf DX 253 – Supplemental Disclosure Statement at 3; Conf DX 253A – Prior Disclosure Statement at 2.[34] All of the claims and counterclaims asserted in these actions arise from the same operative facts—the seizure of WMB and the FDIC's sale of its assets to JPMC. The Global Settlement Agreement resolves the claims and counterclaims among these parties. See Conf DX 253 – Supplemental Disclosure Statement at 3-4; Conf DX 253A – Prior Disclosure Statement at 2-9.

The claims and counterclaims asserted in the D.C. Action, the JPMC Action and the Turnover Action each involve the same set of core disputes, including: (i) ownership of the Trust Preferred Securities; (ii) ownership of tax-related obligations and tax refunds; (iii) disputed intercompany amounts, including the deposit accounts; (iv) ownership of certain "goodwill litigation" judgments; (v) ownership of certain rabbi trusts; (vi) ownership of certain pension and 401(k) plans; (vii) ownership of certain bank-owed life insurance policies; (viii) ownership of the VISA Shares; and (iv) ownership of certain intangible assets, including trademarks, patents and copyrights. Conf DX 253A – Prior Disclosure Statement at 2-7. Unlike the counterclaim in Stern, where there was "never reason to believe that the process of ruling on [the creditor's] proof of claim would necessarily result in the resolution of [the debtor's] counterclaim," Stern, 131 S. Ct. at 2617-18, the mirror image counterclaims asserted by the Debtors' estates, which will be resolved through the Global Settlement Agreement, would necessarily be resolved in the process of ruling on the proofs of claim filed by JPMC and the FDIC.[35]

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[34] In addition, JPMC filed over forty (40) proofs of claim against the Debtors' chapter 11 estates. Conf DX 253A – Prior Disclosure Statement at 14. The FDIC also filed a proof of claim asserting an unliquidated claim against the Debtors and the Debtors' estates. Conf DX 154 – Proof of Claim #2140 filed by the FDIC Receiver.

[35] Even if the approval of the Global Settlement Agreement did not arise out of the Bankruptcy Code, and even if the adjudication of the underlying claims on their merits were otherwise subject to Article III, the Supreme Court has recognized a "public rights" exception to Article III jurisdiction where "the claim at issue derives from a federal

II. THE GLOBAL SETTLEMENT AGREEMENT IS FAIR AND REASONABLE AND IS NOT SUBJECT TO RELITIGATION

The Modified Plan is premised on the Global Settlement Agreement. The core economic and other aspects of the Global Settlement Agreement have not been altered in relation to the Initial Global Settlement Agreement, and the settling parties remain committed to implementing the terms thereof. See FDIC Response at ¶ 6. Nevertheless, as outlined above, these documents have been revised to conform to this Court's directions in the Opinion and at the January 20 Status Conference. See supra at pp. 11-17. This Court already determined that the compromise and settlement embodied in the Initial Global Settlement Agreement and the transactions contemplated therein are fair, reasonable, and in the best interests of the Debtors, the Debtors' creditors, and the Debtors' chapter 11 estates. Conf DX 265 – Opinion at 2, 60. This determination, which should apply equally to the Global Settlement Agreement, constitutes the law of the case and is not subject to relitigation or reconsideration.

> THE COURT: As one example. But in concept, with respect to those items that I did decide, they're not going to be relitigated.
> MR. SARGENT: Correct.
> THE COURT: Okay. It's law of the case, basically.
> MR. SARGENT: We would agree with that.

Hr'g Tr. 1/20/2011 at 51:22-52:3; see also Hr'g Tr. 3/21/2011 at 99:11-12, 100:25-101:1; Hr'g Tr. 2/8/2011 at 87:3-5.

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regulatory scheme" or "flows from a federal statutory scheme." Stern, S. Ct. at 2597-98 (internal citations omitted). Many of the claims and counterclaims resolved by the Global Settlement Agreement arise out of a federal statutory and regulatory scheme, namely the federal banking laws and regulations, because each of the claims and counterclaims derive from the seizure of WMB, the OTS's appointment of the FDIC Receiver, and the FDIC's sale of the assets of WMB to JPMC. Therefore, the claims and counterclaims resolved by the Global Settlement Agreement fall within the "category of cases involving 'public rights' that Congress could constitutionally assign to 'legislative' courts for resolution." Id. at 2597; see also Turner v. First Cmty. Credit Union, No. 10-32706-H4-13, 2011 WL 2708907, at *5 (Bankr. S.D. Tex. July 11, 2011) (applying Stern and holding that "[d]isputes over rights created by the Bankruptcy Code itself as part of the public bankruptcy scheme also fall within the 'public rights' exception" (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593 (1985))); In re Okwonna-Felix, 2011 WL 3421561, at *5 (finding that the bankruptcy court "may exercise authority over essential bankruptcy matters under the 'public rights' exception").

It is well-settled that a "fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." Arizona v. California, 460 U.S. 605, 619 (1983) (citations omitted). Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." In re AmeriServe Food Distribution, Inc., 315 B.R. 24, 36 (Bankr. D. Del. 2004). This rule of practice "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Id. (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)).

The limited exceptions to the law of the case doctrine recognized by the United States Court of Appeals for the Third Circuit do not alter this conclusion and are, in any case, inapplicable here. First, a successor judge may entertain a timely motion to reconsider the conclusions of an unavailable predecessor. Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3d Cir. 1982). This exception obviously is not applicable here. Second, a court can reconsider a previous ruling when a supervening decision has changed an applicable rule of law. Id. That exception too is inapplicable here. Third, a court may depart from the law of the case and revisit an issue when new evidence is available. Id.; AmeriServe, 315 B.R. at 36. No new evidence has been presented warranting any such departure.

Many of the objecting parties in their submissions in response to confirmation of the Modified Plan simply rehashed the same arguments raised with respect to the strengths and weaknesses of the claims resolved pursuant to the Global Settlement Agreement as were extensively considered and determined by this Court pursuant to the Opinion. See Conf DX 265 – Opinion at 23-57. The Equity Committee's allegations regarding the Settlement Note Holders' alleged insider trading are based on evidence, including term sheets and other settlement

correspondence, that the Equity Committee had access to before the First Confirmation Hearing, which, in many circumstances, the Equity Committee introduced into evidence at the First Confirmation Hearing, and which was discussed during testimony in connection with the First Confirmation Hearing. See, e.g., Hr'g Tr. 12/02/2010 at 93:19-94:10; id. at 99:12-102:4 (discussing EC Ex. 36 (2010) – Draft WMI/JPMC Settlement Term Sheet, dated 3/18/09[36]); id. at 127:7-128:15 (Kosturos Cross); id. at 139:2-19 (Kosturos Cross) (discussing EC Ex. 48 (2010) – WMI Term Sheet); id. at 133:1-134:1 (Kosturos Cross); id. at 149:1-10 (Kosturos Cross); Hr'g Tr. 12/03/2010 at 211:5-212:24 (Simms Cross); Conf DX 150 – Notice of Refiling Declarations, Exhibit A (Kosturos Decl.) at ¶ 35. Similarly, as set forth in the chart below, each of the other objections to approval of the Global Settlement Agreement now raised by the Equity Committee were previously raised and argued during the First Confirmation Hearing:

Objection to Modified Plan	Objection to Sixth Amended Plan
The Debtors were "hostile" to equity constituents, as purportedly evidenced by their opposition to the formation of an equity committee and assertion that the estates were "hopelessly insolvent." Equity Committee Objection at ¶ 32.	"It is difficult to imagine a stronger evidence of the debtors' utter disregard for equity. At the same time it was negotiating a deal to pay off creditors virtually in full. It argued that the equity committee should be disbanded because there was no way the debtors would recover sufficient assets." Hr'g Tr. 12/7/2010 at 155:16-20 (Equity Committee Closing Argument).
The Debtors demonstrated "disregard for equity" by settling for an amount that brings "precisely enough value into the estate to pay off almost every creditor in full while leaving equity nothing." Equity Committee Objection at ¶ 32.	"What have we learned from the facts as developed here? We know that from the very first time the debtors began thinking about confirmation, they have tried for a settlement that in their words 'resolves things cleanly.' The goal was not to figure out the actual worth and value of the claims, but rather to propose a settlement that pays off creditors virtually in full." Hr'g Tr. 12/7/2010 at 150:24-151:5 (Equity Committee Closing Argument).

[36] The exhibits filed by the Equity Committee in connection with confirmation of the Sixth Amended Plan are designated herein with the modifier "(2010)".

The outcome of the Global Settlement Agreement was predetermined from the outset. Equity Committee Objection at ¶ 32.	"The facts have shown that the proposed settlement has been a setup from the very beginning. The debtors only cared about trying to recover a sufficient recovery to pay off creditors regardless of the underlying strength and valuation of the various assets. That was their plan from as early as Mr. Kosturos could remember. It is what the proposed settlement looks like now. There has been no thought given to equity interests. Hr'g Tr. 12/7/2010 at 148:11-18 (Equity Committee Closing Argument); see also Hr'g Tr. 12/2/2010 at 93:22-99:11 (Kosturos Cross).
The Debtors ceded control of the negotiation process and acceded to a settlement that was "brokered" by the Settlement Note Holders to serve their own purposes. Equity Committee Objection at ¶ 36.	"[T]he evidence shows that throughout the entire time frame of these negotiations, the debtors essentially turned over the negotiations to the creditors and especially the settling noteholders. This Court just heard from the settling noteholders' lawyers who candidly admits that they were, quote, 'the co-architects of this plan.'" Hr'g Tr. 12/7/2010 at 155:7-12 (Equity Committee Closing Argument).
The Modified Plan and Global Settlement Agreement improperly give the Settlement Note Holders "control of Reorganized WMI" so they can "shelter income for their own benefit." Equity Committee Objection at ¶ 36.	"The debtors have now filed a notice making clear that the settling noteholders, the four hedge funds who also control the PIERS, will control reorganized WMI. And these board members are senior members of these funds. It is no large leap to think that these most sophisticated investors will try to extract maximum value from this company. Indeed, the evidence shows that the creditors specifically have discussed taking a large NOL and putting new business into the company." Hr'g Tr. 12/7/2010 at 160:11-19 (Equity Committee Closing Argument).

The Court considered these arguments, but ultimately rejected them in ruling on the reasonableness of the Initial Global Settlement Agreement. See, e.g., Conf DX 265 – Opinion at 60 ("Because the Global Settlement only results in a recovery for creditors . . . the Plan Objectors argue that the Global Settlement must be rejected as unreasonable. . . . The fact that the recovery

may not reach shareholders is not enough to find it unreasonable . . . ."). Parties should not be allowed to re-litigate this issue again and again.

The objecting parties' request for reconsideration of the Court's prior findings also is not permitted under Bankruptcy Rule 9024, which incorporates Federal Rule of Civil Procedure 60(b), because this rule permits only reconsideration of a "final judgment, order or proceeding," and the Court's findings with respect to the Initial Global Settlement Agreement were not incorporated into any *final* judgment. 12-60 Moore's Federal Practice – Civil § 60.23 ("[A]ll courts readily agree that a 'final' judgment is needed to support a Rule 60(b) motion."). Similarly, reconsideration of the Court's decision pursuant to Bankruptcy Rule 9023, which incorporates Federal Rule of Civil Procedure 59, is not appropriate because that rule expressly requires that a motion for a new trial be made "no later than 14 days after entry of judgment."[37] No party sought reconsideration within this timeframe. Nor is there any excuse for the delay.

As set forth above, the objections to the Global Settlement Agreement raised by the Equity Committee and others are all based on information available at or shortly after the First Confirmation Hearing. In addition, the Equity Committee's allegations regarding the involvement of the Settlement Note Holders in the negotiation of the Initial Global Settlement Agreement and the Modified Plan were largely included in the objection to the Sixth Amended Plan filed by Nate Thoma on November 19, 2010 [D.I. 6058].

[37] Although, pursuant to Bankruptcy Rule 7054, which incorporates Federal Rule of Civil Procedure 54(b), the Court has discretion to revise a non-final decision prior to entry of a final judgment, the standard governing reconsideration under Bankruptcy Rule 9023 are equally applicable to modification of an interlocutory order under Bankruptcy Rule 7054. Calyon New York Branch v. Am. Home Mortg. Corp., 383 B.R. 585, 589 (Bankr. D. Del. 2008) ("The policy underlying the standards governing a motion to alter or amend a final order under Rule 59(e) is equally applicable to a motion to alter or amend an interlocutory order under Rule 54(b)—'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'").

Further, reconsideration of the Court's determination regarding the Global Settlement Agreement based upon the recent ruling by the United States Circuit Court for the District of Columbia (the "D.C. Circuit Court") with respect to the Texas Litigation is unwarranted. In that decision, the D.C. Circuit Court determined that the jurisdictional bar of section 1821(d)(13)(D) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") does not apply to bar the plaintiffs' claims in the Texas Litigation because their complaint does not assert a "claim" under FIRREA nor constitute an action for payment from or seeking a determination with respect to the assets of the WMB receivership. See Am. Nat. Ins. Co. v. F.D.I.C., 642 F.3d 1137, 1142 (D.C. Cir. 2011). A procedural decision along those lines does not warrant reconsideration of the Court's determination that the Debtors' release of claims against JPMC pursuant to the Global Settlement Agreement is fair and reasonable. The D.C. Circuit Court merely held that FIRREA does not prevent the third party, individual plaintiffs from pursuing such claims. This has no bearing on the Debtors. Moreover, the Court here previously determined that FIRREA may not bar the Debtors' assertion of such claims. Hr'g Tr. 6/24/2009 at 93:18-94:18 (finding that "the FIRREA jurisdictional bar is limited" and holding, based on Third Circuit law, that "FIRREA only bars claims against a receiver or institution in receivership"). As such, the Court's decision that the release of potential claims against JPMC as part of the Global Settlement Agreement was a fair and reasonable aspect of the overall compromise was not premised on the application of FIRREA to such claims. Importantly, there are other potential weaknesses to such claims and the authority is split as to whether FIRREA applies.[38] Accordingly, the release of the business tort claims pursuant to the Global Settlement Agreement remains appropriate.

[38] Compare Disibio v. Mission Nat'l Bank, 127 Fed. Appx. 950 (9th Cir. 2005), with Rosa v. Resolution Trust Co., 938 F.2d 383 (3d Cir. 1991), and Hudson United Bank v. Chase Manhattan Bank of Connecticut, N.A., 43 F.3d 843

III.
THE MODIFIED PLAN COMPLIES WITH SECTION 1129 OF THE BANKRUPTCY CODE

The Debtors have demonstrated, by a preponderance of the evidence, that the Modified Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code. See Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd., II), 994 F.2d 1160, 1165 (5th Cir. 1993); In re Armstrong World Indus., Inc., 348 B.R. 111, 119-20 (D. Del. 2006). In the Opinion, the Court determined that the Sixth Amended Plan complied with many of the requirements of section 1129 of the Bankruptcy Code. See Conf DX 265 – Opinion at 106-07. The Modified Plan, which is largely premised on the Sixth Amended Plan, similarly meets such requirements. In addition, many of the provisions of section 1129 (listed below) are uncontested. The facts to support the Debtors' compliance with such uncontested subsections are addressed above in the Facts Section. This memorandum of law does not address the legal argument with respect to such uncontroverted provisions; instead, they are addressed in the Debtors' prior Confirmation Brief on the pages referenced below:

(1) 1129(a)(2) – Conf DX 424 – Confirmation Brief at 44-51;[39]

(2) 1129(a)(4) – Id. at 54-55;

(3) 1129(a)(5) – Id. at 56-57;

(4) 1129(a)(8) – Id. at 73-74;

(3d Cir. 1994), and FDIC v. McFarland, 243 F.3d 876, 887 n.42 (5th Cir. 2001).

[39] Although not specifically an objection to section 1129(a)(2) or the Debtors' compliance with the procedures set forth in the Supplemental Disclosure Statement Order, certain holders of Dime Warrants objected that Section 32.6(c) of the Modified Plan unfairly forces holders of Dime Warrants to decide, within one year of the Effective Date of the Modified Plan, whether to grant the releases set forth in Section 43.6 of the Modified Plan. These holders also complained that the procedures set forth in the Supplemental Disclosure Statement Order restricting trading with respect to holders of Dime Warrants who elected to grant the releases and/or receive stock are improper [D.I. 8067]. The Debtors' responses to these absurd objections, certain of which were raised and addressed during the hearing to consider the Supplemental Disclosure Statement, are set forth in more detail in the Debtors' Omnibus Response. See Conf DX 425 – Omnibus Response, Exhibit A at 1-4.

(5) 1129(a)(9) – Id. at 74-77;

(6) 1129(a)(10) – Id. at 77;

(7) 1129(a)(11) – Id. at 77-79;

(8) 1129(a)(13) – Id. at 80; and

(9) 1129(d) – Id. at 88.

The remaining elements of section 1129, which were contested by one or more objecting parties, are addressed in detail herein.

A. Section 1129(a)(1) – The Modified Plan Complies with Applicable Provisions of the Bankruptcy Code

Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) indicates that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); see also In re Nutritional Sourcing Corp., 398 B.R. 816, 824 (Bankr. D. Del. 2008); In re Johns-Manville Corp., 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

As demonstrated below, the Modified Plan fully complies with the requirements of sections 1122, 1123, and all other applicable provisions of the Bankruptcy Code.

1. The Modified Plan Complies with Section 1122 of the Bankruptcy Code

Section 1122 of the Bankruptcy Code provides as follows:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

In large part, the Modified Plan's compliance with Section 1122 of the Bankruptcy Code is uncontested. As set forth in the Facts Section above, see supra pp. 20-26, and in the Confirmation Brief, see Conf DX 424 – Confirmation Brief at 14-17, the Modified Plan contains twenty-four (24) Classes of Claims and Equity Interests, and the Claims or Equity Interests included in each Class are similar to one another. To the extent similar Claims or Equity Interests are separately classified, valid business, factual, and legal reasons exist for doing so, and such classification, does not unfairly discriminate between such holders. Moreover, the definition and classification of Class 13 Convenience Claims is reasonable and necessary for administrative convenience. Conf DX 374 – Goulding Decl. at ¶23.

Certain parties did, however, assert limited objections to the Modified Plan's compliance with section 1122. First, the WMB noteholders represented by Drinker Biddle & Reath LLP (the "DBR Group") objected that the classification of both direct and derivative Claims related to the WMB Senior Notes places dissimilar claims in the same Class, in violation of section 1122(a). See [D.I. 7483]. This mischaracterizes the Modified Plan. The Debtors have sought to subordinate all derivative Claims related to WMB Senior Notes pursuant to section 510(b) of the Bankruptcy Code and, accordingly, classify such Claims in Class 18. See Adv. Proc. 10-53420, [D.I. 3]. More significantly, certain parties have objected to the classification of the PIERS Claims as debt. This objection is without merit.[40]

[40] It must be noted that, despite the apparent open nature of this issue, pursuant to the PIERS Order, this Court already allowed the PIERS Claims as Unsecured Claims against the Debtors. See Conf DX 286 – PIERS Order.

The holders of the PIERS Claims are the holders of the common and preferred securities issued by WMCT 2001, which is an independent trust that purchased from WMI the Junior Subordinated Debentures. See Conf DX 295 – Amended and Restated Declaration of Trust of WMCT 2001; Conf DX 401 – Certificate of Good Standing of WMCT 2001; Hr'g Tr. 7/14/2011 at 20:17–22:2 (Goulding Direct); Conf DX 300 – Junior Subordinated Notes Indenture; Conf DX 297 – First Supplemental Indenture. The PIERS Preferred Securities issued by WMCT 2001 (as part of a "PIERS Unit") were guaranteed by WMI to the extent WMCT 2001 fails to satisfy its obligations to holders of the PIERS Preferred Securities. See Conf DX 298 – Guarantee Agreement; Conf DX 299 – Amendment No. 1 to Guarantee Agreement; Hr'g Tr. 7/14/2011 at 24:11-25:5 (Goulding Direct).

Since their issuance, WMI has reflected the PIERS Preferred Securities as debt in WMI's public filings. See Conf DX 293 – WMI 2001 Form 10-K, filed 3/19/2002, at 65, 91; Conf DX 294 – WMI 2007 Form 10-K, filed 2/29/2008, at 168 n.3 (noting that WMI's "Other Borrowings" include "$741 million at December 31, 2007 of junior subordinated notes relating to trust preferred securities"). Moreover, treating the Junior Subordinated Debentures as debt and the holders of the PIERS Preferred Securities as the beneficial owners thereof is also consistent with the understanding of WMI and investors from and after the time of issuance. See, e.g., Hr'g Tr. 7/14/2011 at 26:25-27:6 (Goulding Direct); Conf DX 289 – WMCT 2001 Form S-3, filed 6/27/2001, at 8 ("Purchasers of preferred securities will be treated as owning an undivided beneficial ownership interest in the debentures and *the debentures will be treated as debt* . . . ." (emphasis added)); id. at 70 (stating that "*the debentures will be classified*, for United

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Further, as discussed below, the PIERS Preferred Securities historically have been treated as debt in accordance with various agreements and public filings associated with the issuance of such instruments.

States federal income tax purposes, as *indebtedness of Washington Mutual*" under section titled "Classification of the Debentures" (emphasis added)).

Further, despite qualifying for Tier 1 Capital treatment, the Junior Subordinated Debentures are not equity—they constitute subordinated indebtedness and are treated as such pursuant to GAAP, as reflected on WMI's audited financial statements filed with the SEC. See Hr'g Tr. 7/14/2011 at 22:15-18, 23:7-9, 26:25-27:20 (Goulding Direct); Conf DX 294 – WMI 2007 Form 10-K, filed 2/29/2008, at 168 n.3 (reflecting the Junior Subordinated Debentures in the "Other Borrowings" category). The PIERS Preferred Securities are merely undivided interests in the Junior Subordinated Debentures and are, accordingly, also properly treated as indebtedness. See Hr'g Tr. 7/14/2011 at 23:10-13 (Goulding Direct).

Additionally, and despite unsupportable statements made to the contrary by various objectors, no value is being distributed to holders of PIERS Preferred Securities on account of the warrant component of the PIERS Units they hold. See Hr'g Tr. 7/14/2011 at 32:4-9 (Goulding Direct); Conf DX 253 – Supplemental Disclosure Statement § I.I. Further, and despite the efforts of some to mischaracterize the clear and consistent understanding and application, the accretion of the original issue discount of the Junior Subordinated Debentures does not represent a return on account of the warrant component of the PIERS Unit. See Hr'g Tr. 7/14/2011 at 32:4-9 (Goulding Direct), 97:2-100:23 (Goulding Cross). Rather, the accretion is akin to interest on the PIERS Preferred Securities. Id. at 32:4-9.

For all these reasons, the PIERS Claims are properly classified and treated as debt pursuant to the Modified Plan. Accordingly, the Debtors submit that the proposed classification of Claims and Equity Interests in the Modified Plan is reasonable, appropriate, and within the

Debtors' discretion, and satisfies the requirements of sections 1122(a) and (b) of the Bankruptcy Code.

2. The Modified Plan Complies with Section 1123(a) of the Bankruptcy Code

Section 1123(a) of the Bankruptcy Code sets forth seven (7) requirements with which every chapter 11 plan must comply. The Modified Plan satisfies these requirements. Specifically, the Modified Plan designates twenty-four (24) different Classes of Claims and Equity Interests, specifies which of these classes are unimpaired, provides for the treatment of Impaired Classes, provides adequate means for implementation of the Modified Plan, prohibits the issuance of non-voting securities, and complies with the requisite standard for selecting officers and directors of the Reorganized Debtors. See Conf DX 255 – Modified Plan Arts. VI, VII, IX, X, XII - XXVIII, XXXVI, XLII, §§ 31.1, 33.4, 33.6, 42.3, 42.4, 42.5; Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 259 – Plan Supplement; Conf DX 405 – First Supplemental Notice; Second Supplemental Notice. Except with respect to section 1123(a)(4) (as discussed below), no party has raised an objection with respect to the Modified Plan's compliance with section 1123(a).[41]

Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Modified Plan, the treatment of each Claim against or Equity Interest in the Debtors, in each respective Class, is the same as the treatment of every other Claim or Equity Interest in such Class, except

[41] Although not specifically couched as an objection pursuant to section 1123(a)(3), certain holders of Dime Warrants objected that the treatment of holders of Dime Warrants pursuant to the Modified Plan is "improperly vague" because the phrase "or as otherwise determined by the Bankruptcy Court" in Section 1.209 of the Modified Plan suggests that the Dime Warrants could be classified in a Class other than Class 12 if the Court determines that the Dime Warrants constitute Claims (rather than Equity Interests) [D.I. 8067]. This language is necessary to account for the possibility that the Bankruptcy Court determines that the Dime Warrants represent Claims against the Debtors, but that such Claims should be subordinated pursuant to section 510(b) of the Bankruptcy Code.

to the extent that a particular holder has elected to receive Reorganized Common Stock or has elected to not grant the releases set forth in Section 43.6 of the Modified Plan (in which case, such holder is not entitled to receive a distribution). See Conf DX 374 – Goulding Decl. at ¶ 23. These exceptions do not violate section 1123(a)(4), as the elections, consistent with the Opinion, have been made available to all holders within the Class, including holders of Disputed Claims and Dime Warrants. See Conf DX 265 – Opinion at 85, 101; Conf DX 255 – Modified Plan § 27.3.

Although there is little case law analyzing whether a plan of reorganization that distributes different *types* of consideration to members of the same class violates the "same treatment" rule under section 1123(a)(4), see 7 Lawrence P. King, Collier on Bankruptcy § 1123(a)(4) (15th ed. 2009) ("[N]either the Code nor its legislative history precisely defines the standards of "equal treatment."), courts have interpreted section 1123(a)(4) as permitting different ultimate forms of recovery to creditors in the same class, as long as the plan offers the same *options* to each creditor within the class (even if they do not all choose the same treatment option). See In re Federal-Mogul Global Inc., No. 01-10578 (JKF), 2007 WL 4180545, at *19 (Bankr. D. Del. Nov. 16, 2007) (holding the "same treatment" rule was satisfied by a plan that offered all creditors in a particular class the option to elect to receive their distributions under the plan in reorganized common stock or cash). Thus, the fact that some, but not all, creditors within a particular Class will receive Reorganized Common Stock does not violate the "same treatment" requirement in section 1123(a)(4) because all creditors in those Classes were provided with the option of electing to receive stock and, ultimately, each claimant's ultimate percentage recovery—whether or not they chose to receive stock—will be the same. See Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 255 – Modified Plan §§ 6.2, 7.2, 16.1, 18.2, 19.2, 20.2, 27.3

(providing that, to the extent that a holder of an Allowed Claim receives Reorganized Common Stock, such holder's distribution of Creditor Cash or Cash to be received on account of Liquidating Trust Interests is reduced on a dollar-for-dollar basis by the value of the Reorganized Common Stock valued as of the Effective Date). This includes holders of Disputed Claims and Dime Warrants, who were provided with the option to elect to receive Reorganized Common Stock if their Claims ultimately are allowed as General Unsecured Claims in Class 12. See Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 255 – Modified Plan § 27.3. This provision addresses the Court's concern, as set forth in the Opinion, that holders of these claims would receive disparate treatment as compared to other unsecured creditors, if they are ultimately determined to hold Allowed General Unsecured Claims. See Conf DX 265 – Opinion at 101-02.

In addition, any argument that the Modified Plan violates section 1123(a)(4) of the Bankruptcy Code because certain stakeholders within a Class are giving up more than others by agreeing to the releases, or that the Modified Plan treats holders of Claims and Equity Interests within a Class differently based upon whether they opt out of the releases, was specifically rejected by this Court in the Opinion, where it found that "[p]roviding different treatment to a creditor who agrees to settle instead of litigating is permitted by section 1123(a)(4)." Id. at 85. This applies equally to holders of REIT Series who are eligible to receive an additional distribution from JPMC to the extent such holders voted to accept the Sixth Amended Plan and agreed to grant the releases. Moreover, because this Court previously held that the Debtors need not resolicit Class 19, the TPS Consortium's argument that this results in disparate treatment between Classes 19 and 20 is without merit. See Conf DX 272 – Supplemental Disclosure Statement Order.

3. The Modified Plan Complies with Section 1123(b) of the Bankruptcy Code

Section 1123(b) sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. As set forth in more detail in the Facts Section herein, and in the Confirmation Brief, see Conf DX 424 – Confirmation Brief at 30-43, each provision of the Modified Plan is consistent with section 1123(b) of the Bankruptcy Code, and no party has objected otherwise. Specifically, the Modified Plan impairs certain Claims and Equity Interests, but leaves unimpaired certain Claims. See Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 255 – Modified Plan Arts. V-XXVI § 31.1. The filing and service of the Modified Plan and Plan Supplement provide adequate notice of the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases. Conf DX 255 – Modified Plan Art. XXXVI; Conf DX 259 – Plan Supplement, Exhibit D; Conf DX 374 – Goulding Decl. at ¶ 23. All counterparties to all executory contracts and unexpired leases assumed and assigned pursuant to Article XXXVI of the Modified Plan and the Plan Supplement have been provided with notice of any defaults to be cured and adequate assurance of future performance pursuant to section 365(f) of the Bankruptcy Code. Conf DX 392 – Cure Notice; Conf DX 405 – First Supplemental Notice at 2. The transfers of certain contracts to JPMC are an exercise of the Debtors' reasonable business judgment and should be approved pursuant to section 365 of the Bankruptcy Code. See infa pp. 30-31. The Modified Plan is premised upon the Global Settlement Agreement, which settles and compromises certain Claims and Causes of Action among the Debtors, the JPMC Entities, and the FDIC, see Conf DX 255H, 402, 422 – Global Settlement Agreement (as amended); Conf DX 374 – Goulding Decl. at ¶ 23, which this Court has determined is a fair and reasonable compromise in the best interests of all creditors. See Conf DX 265 – Opinion at 2, 60. In addition, the Debtors or the Liquidating Trust, as applicable, are retaining certain Claims and Causes of Action, such as potential Claims against directors and

officers, auditors, underwriters, and investment bankers arising from or relating to the demise and ultimate seizure of WMB. See Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 255 – Modified Plan §§ 29.1, 43.11. Pursuant to the Modified Plan and Global Settlement Agreement, although the Debtors are conveying or otherwise transferring certain assets to JPMC, this transfer does not constitute a sale of all or substantially all of the Debtors' property and, therefore, section 1123(b)(4) of the Bankruptcy Code is inapplicable. See Conf DX 374 – Goulding Decl. at ¶ 23. Further, the Modified Plan modifies the rights of holders of Claims in Classes 2, 3, 5, 6, 8, 9, 10, 11, 12, 12A, 13, 14, 15, 16, 17A, 17B and 18, and Equity Interests in Classes 19, 20, 21, and 22. See id.; Conf DX 255 – Modified Plan Arts. V-XXVI.

In addition, in accordance with section 1123(b)(6) of the Bankruptcy Code, the Modified Plan contains release, injunction and exculpation provisions in Sections 43.5 through 43.8 of the Modified Plan—including releases by the Debtors, consensual releases by holders of Claims and Equity Interests (to the extent they affirmatively elect to grant such releases and are entitled to receive a distribution), and a customary exculpation provision—all of which comply with applicable law, the dictates of the Opinion, and the Court's statements at the January 20 Status Conference. See Conf DX 255 – Modified Plan §§ 43.5-43.8; Conf DX 265 – Opinion at 58-60, 64, 67; see also supra pp. 12-15.[42] Importantly, the third party releases set forth in

[42] Certain lead plaintiffs, on behalf of the members of their respective putative securities classes, objected that the Modified Plan should not discharge claims they hold against the Debtors. See [D.I. 7478, 7479]. The Debtors submit there is no basis to limit the discharge provided in Section 43.2(a) of the Modified Plan, which discharge is statutorily provided by, and consistent with, section 1141(d) of the Bankruptcy Code. Similarly, the plaintiffs' contention that the stays and injunctions set forth in the Modified Plan should not extend beyond the Confirmation Date or Effective Date ignores the fact that this is necessary to protect the Liquidating Trustee from parties seeking to assert claims and causes of action against the Liquidating Trust. Plus, this is consistent with the procedures established in other large, complex chapter 11 cases involving liquidating trusts where similar extensions were provided. See, e.g., In re Motors Liquidation Co., No. 09-50026 (REG) (Bankr. S.D.N.Y. Mar. 29, 2011) [D.I. 9941]; In re Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. July 15, 2004) [D.I. 19759].

Section 43.6 of the Modified Plan are consensual and only bind consenting entities who receive a distribution from the Debtors. Conf DX 255 – Modified Plan § 43.6.

4. The Modified Plan Complies with Section 1123(c) of the Bankruptcy Code

The Debtors are not "individuals" (as that term is defined in the Bankruptcy Code) and, accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases. See Conf DX 374 – Goulding Decl. at ¶ 46.

5. The Modified Plan Complies with Section 1123(d) of the Bankruptcy Code

Section 1123(d) of the Bankruptcy Code provides that, "if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Section 36.4 of the Modified Plan provides for the satisfaction of default claims associated with each executory contract and unexpired lease to be assumed pursuant to the Modified Plan in accordance with section 365(b)(1) of the Bankruptcy Code, and all cure amounts, as set forth in the Cure Notice (as incorporated pursuant to the First Supplemental Notice), were determined in accordance with the underlying agreements and applicable bankruptcy and nonbankruptcy law. Conf DX 255 – Modified Plan § 36.4; see Conf DX 374 – Goulding Decl. at ¶ 23; Conf DX 392 – Cure Notice; Conf DX 405 – First Supplemental Notice at 2. Importantly, no party has objected to the Cure Notice. Accordingly, and as no party has contested, the Modified Plan complies with section 1123(d) of the Bankruptcy Code.

B. Section 1129(a)(3) – The Modified Plan Was Proposed in Good Faith

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." The Third Circuit has found that good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11. See Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon

Corp.), 200 F.3d 154, 165 (3d Cir. 1999) (citation omitted); see also Kane v. Johns-Manville Corp., 843 F.2d at 649 (citing Koelbl v. Glessing (In re Koelbl), 751 F.2d 137, 139 (2d Cir. 1984) (interpreting the standard as requiring a showing that "the plan was proposed with honesty and good intentions")). Moreover, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." In re Sun Country Dev., Inc., 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. Id.

This Court previously determined that the Sixth Amended Plan was proposed in good faith. Conf DX 265 – Opinion at 106. This determination should apply with equal force to the Modified Plan, which is largely the same, and no party has presented new, persuasive evidence to the contrary (including with respect to allegations of misconduct). See Conf DX 374 – Goulding Decl. at ¶ 25. Specifically, the Modified Plan achieves a reorganization of the Debtors and the equitable distribution of value to stakeholders, based upon their respective priorities, for amounts owing. See Pereira v. Foong (In re Ngan Gung Rest.), 254 B.R. 566, 570 (Bankr. S.D.N.Y. 2000) (stressing the importance of payment of creditors in chapter 11 cases); Conf DX 374 – Goulding Decl. at ¶ 26. The Modified Plan was proposed with the goal of maximizing value, and accomplishes this largely through implementation of the Global Settlement Agreement, which is a fair and reasonable compromise that is the result of extensive arm's-length negotiations among, and with substantial input from, a large number of independent parties and their respective professionals. See Conf DX 150 – Notice of Refiling Declarations, Exhibit A (Kosturos Decl.) at ¶ 94; Conf DX 150 – Notice of Refiling Declarations, Exhibit C (First Goulding Decl.) at ¶ 151; Hr'g Tr. 12/2/2010 at 62:22-63:2, 63:12-15, 93:9-18, 118:7-9,

126:16-19, 135:25-136:4, 137:24-138:3; Conf DX 374 – Goulding Decl. at ¶ 25-26; Hr'g Tr. 7/21/2011 at 158:1-12 (Kosturos Cross).

As discussed in detail herein, there is no basis for concluding that the Settlement Note Holders or any other party engaged in any wrongdoing or inequitable conduct with respect to the negotiation or proposal of the Global Settlement Agreement or the Modified Plan. See infra pp. 124-38. Further, the involvement of the Settlement Note Holders in the plan formulation process does not suggest a lack of good faith. See In re Lincolnshire Campus, LLC, 441 B.R. 524, 530 (Bankr. N.D. Tex. 2010) (finding that the proposed chapter 11 plan, which was developed after many months of analysis and arms-length negotiations among representatives of debtors, bond trustees, and other creditor constituencies, and which "resulted in substantial value being brought to [the debtors'] Estates," satisfied the good faith requirement); see also In re Leslie Fay Cos., Inc., 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (determining that a plan—proposed by the debtors and their creditors—was proposed in good faith, and that such plan dealt "fairly with the creditors"). Rather, in complex chapter 11 cases, it is typical for "a debtor to seek the views of significant creditors on important issues that affect the estate." Hr'g Tr. 7/21/2011 at 157:3-6 (Kosturos Cross). In fact, Congress expressly contemplated that debtors would negotiate with their creditors and other parties in interest during the plan formulation process. See H.R. Rep. No. 95-595, at 401 (1977). In formulating the Modified Plan, the Debtors negotiated with multiple stakeholders in addition to the Settlement Note Holders, including, among others, the Creditors' Committee, the indenture trustees, certain holders of Senior Notes, the FDIC, JPMC, and other creditor constituents. See Hr'g Tr. 7/21/2011 at 158:1-12 (Kosturos Cross).

Further, the Equity Committee's contention that the Debtors had an obligation to reject a settlement merely because it does not provide enough value to reach shareholders already has been rejected by this Court in this case, see Conf DX 265 – Opinion at 66-67, 106, as well as other courts:

> Nothing in the Bankruptcy Code requires a debtor to seek a distribution to the shareholders of a company that lacks equity value in excess of outstanding debt. Rather, section 1129(a)(3) commands only that the debtor strive in good faith and by proper means to effect a plan that satisfies the requirements of the Bankruptcy Code.

In re Bush Indus., Inc., 315 B.R. 292, 303-04 (Bankr. W.D.N.Y. 2004). And, there is no evidence that the Debtors, Settlement Note Holders or any other constituency controlled the negotiation process and structured it in a way to purposefully provide for payment in full of creditors but no distribution to equity. See Conf DX 265 – Opinion at 60.

The Equity Committee's other objections to the good faith proposal of the Modified Plan also are baseless. The Modified Plan provides for a true business reorganization around WMMRC, not merely a liquidation. See Conf DX 374 – Goulding Decl. at ¶ 27; Hr'g Tr. 7/14/2011 at 141:22-142:4, 7-10, 174:9-22 (Goulding Cross).[43] In addition, the release of certain third parties is not evidence of bad faith, and, in fact, the scope of the third party releases in Section 43.6 of the Modified Plan is consistent with the Opinion. See Conf DX 253C – Chart of Modifications to Modified Sixth Amended Plan; supra pp. 12-13.

The Equity Committee's allegation that the Debtors ignored claims against WMI's directors and officers is equally meritless. As the evidence showed, the Debtors have worked with the Creditors' Committee and the Equity Committee itself to preserve potential

[43] Similarly, because the Debtors, as reorganized entities, will continue to engage in business after consummation of the Modified Plan, the exception to discharge provided in section 1141(d)(3) of the Bankruptcy Code, to which the Equity Committee points, by its terms does not apply.

claims against WMI's directors and officers and other third parties (such as auditors, underwriters, investment bankers, and ratings agencies) through the execution of tolling agreements. Hr'g Tr. 7/21/2011 at 206:25-207:13, 208:12-209:4 (Kosturos Cross); Conf DX 429 – Fishman Tolling Agreement; Conf DX 430 – Killinger Tolling Agreement. Counsel for the Equity Committee participated in weekly calls regarding such claims, and the substantial majority of the tolling agreements were executed *by the Equity Committee*. Hr'g Tr. 7/21/2011 at 206:22-207:17 (Kosturos Cross); see, e.g., Conf DX 429 – Fishman Tolling Agreement; Conf DX 430 – Killinger Tolling Agreement. Despite its fiduciary duties, the Equity Committee failed to conduct its own investigation into potential claims against directors, officers, and other third parties, never made a demand on the Debtors to bring such claims, and never sought standing to do so on its own. See Hr'g Tr. 7/21/2011 at 210:4-10 (Kosturos Cross). In addition, the Debtors have retained special litigation counsel to continue to investigate, analyze and, if requested, potentially prosecute these potential claims. Id. at 208:3-11, 220:6-21 (Kosturos Cross); see Order Appointing Klee Touchin [D.I. 8316]. Such claims and causes of action—whatever their value—will become assets of the Liquidating Trust on the Effective Date, to be pursued (or not) by the Liquidating Trustee for the benefit of stakeholders. See id. at 207:14-17.

Belatedly, the TPS Consortium employed a "grandstand play" by seeking the admission of the Senate PSI Report in order to shock the Court by asserting that a multitude of claims and causes of action against directors and officers exist. However, the mere assertion does not convert such claims and create viability. As discussed in more detail below, the Debtors have researched and understand the difficulties associated with commencing civil actions of this kind. In this regard, while the Debtors recognize the heightened standard associated with criminal charges, it is worth noting that the Department of Justice recently closed

its investigation and decided to not bring charges against directors and officers with respect to the failure of WMB. See infra p. 121 n.6.

Thus, the Debtors have met their good faith obligation pursuant to the Bankruptcy Code and, accordingly, have satisfied section 1129(a)(3) of the Bankruptcy Code.

C. Section 1129(a)(7) – The Modified Plan Satisfies the Best Interests Test

The Modified Plan satisfies the "best interests test" in section 1129(a)(7) of the Bankruptcy Code because each impaired holder of a Claim or Equity Interest that voted to reject the Modified Plan will receive at least as much value pursuant to the Modified Plan as such holder would receive if the Debtors were liquidated pursuant to chapter 7. See 11 U.S.C. § 1129(a)(7); Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 (1999).

1. Based Upon Delay, Costs and Reduced Asset Value, Recoveries Under to the Modified Plan Exceed Recoveries in a Hypothetical Chapter 7 Liquidation

Based upon the delay, expense, and lost asset value that would result from a conversion of these cases to chapter 7, recoveries in a chapter 7 liquidation would be significantly less than the projected recoveries pursuant to the Modified Plan (except with respect to those Classes that are not receiving any distribution, in which case they would receive no distribution in either scenario). See Conf DX 375 – Updated Liquidation Analyses; Hr'g Tr. 7/14/2011 at 45:4-9, 45:15-49:8 (Goulding Direct), 88:22-89, 125:2, 144:9-18 (Goulding Cross); Conf DX 391 – WMMRC Update, Review of Indicative Bid. This is particularly true if the chapter 7 trustee is unable or unwilling to execute a settlement agreement or similar terms as the Global Settlement Agreement, in which case, there would be a significant increase in claims against the estates. Hr'g Tr. 7/14/2011 at 133:19-134:1, 134:18-136:6 (Goulding Cross); Conf DX 265 – Opinion at 95-96. This is true even if the Court applies the federal judgment rate to

postpetition interest claims. Hr'g Tr. 7/14/2011 at 49:9-16, 50:3-17 (Goulding Direct); Conf DX 375 – Updated Liquidation Analyses (as amended).

Contrary to arguments raised by certain objecting parties, it was not an error to exclude the estate's potential claims against directors, officers, and other third parties from the Updated Liquidation Analyses. Litigation recoveries are speculative and may be excluded from such analyses. See In re Charter Commc'ns, 419 B.R. 221, 262-63 (Bankr. S.D.N.Y. 2009), (rejecting creditors' objection to debtor's plan, which objection was based on expert's speculative analysis of various "add-on" sources of recovery, including alleged preference and avoidance actions, where creditors failed to "present any evidence that there would or could be any actual significant recoveries on account of the 'add-ons'"), appeal dismissed, 449 B.R. 14 (S.D.N.Y. 2011). The TPS Consortium's Submission does nothing to value such recoveries and, therefore, should be disregarded. The TPS Consortium argued that the conclusions and findings in the Senate PSI Report are relevant to "the Court's evaluation of the viability of estate claims and causes of action to be vested in the liquidating trust to be formed under the Plan," which itself is critical to "the required assessment of the value of interests in the liquidating trust that will be vested with, and will pursue, such claims and causes of action." Submission at ¶ 4. Notwithstanding the stated purpose for the Submission, the TPS Consortium has failed to provide any information relating to the "value" of such alleged claims and cites to no analysis as to the Debtors' ability to collect on alleged claims.[44] Consequently, the Submission and the Senate PSI report offer nothing of probative value to assist the Court with *any* determination related to confirmation of the Modified Plan. Moreover, the "value" of interests in the

[44] Instead, the TPS Consortium assigned to the Court the task of determining whatever value these speculative claims may have. See Hr'g Tr. 7/21/2011 at 239:9-10 (Counsel to TPS Consortium) ("I think Your Honor needs it to assess – to make an assessment as to the value of the claims.").

Liquidating Trust has no relevance to the Court's determination of whether the Modified Plan meets confirmation requirements. The only valuation issue disputed in connection with confirmation is the value of Reorganized WMI, but the assets of the Liquidating Trust are separate from the value of Reorganized WMI and the Court is not required to place a value on those assets. Nevertheless, their value, whatever it may prove to be, will be distributed to stakeholders in accordance with the waterfall established by the Modified Plan in accordance with the priority scheme established by the Bankruptcy Code, and the Modified Plan has built-in provisions to ensure that no Class will receive more than the full value of its Allowed Claims or Equity Interests.[45]

The Submission fails to identify a single claim that could be brought by the Debtors and, upon consummation of the Modified Plan, the Liquidating Trust, much less make an assessment of the value of any such claims. Instead, the Submission includes paragraphs that discuss, among other things, the lending practices of WMB—matters that have nothing to do with WMI. As the Debtors noted at the Confirmation Hearing on July 21, 2011 and in the Debtors' Response to the Submission, because the TPS Excerpts relate to an investigation of WMB, and not WMI, it is not at all clear whether the Debtors' estates could realize any value pursuing the claims and causes of action allegedly supported by the Senate PSI Report. Hr'g Tr. 7/21/2011 at 227:24-228:11 (Kosturos Cross). Indeed, the FDIC Receiver asserts specifically that any such claims, causes of action, and related recoveries belong to the FDIC Receiver, not the Debtors or their bankruptcy estates, and will not vest in the Liquidating Trust. See FDIC Response at ¶¶ 2-3 (asserting that, upon appointment as receiver for WMB, "the FDIC-Receiver was granted ownership of all claims for harm caused to Washington Mutual Bank, including harm caused by its officers and directors" and "[o]nly the FDIC-Receiver may assert claims for

[45] See infra Section VI.

recovery based on such harm." (citing 12 U.S.C. § 1821(d)(1)(A)(i); Lubin v. Skow, 382 Fed. App'x 866, 870-71 (11th Cir. 2010); Brandt v. Basset (In re Se. Banking Corp.), 827 F. Supp. 742, 746 (S.D. Fla. 1993))).

Neither the Senate PSI Report nor the Submission discusses the myriad of protections afforded to directors and officers under Washington state law, or WMI's articles of incorporation, by-laws and other corporate documents. All of these would be critical if one were truly interested in ascertaining the "value" of any claims. For example, Washington state law permits the elimination or limitation of "personal liability of a director to the corporation or its shareholders for monetary damages for conduct as a director." Wash. Rev. Code § 23B.08.320. As authorized by Washington state law, Article XII of WMI's Amended and Restated Articles of Incorporation (the "Articles of Incorporation") provides that a "director of the Company shall not be personally liable to the Company or its shareholders for monetary damages for conduct as a director" except in the case of intentional misconduct, knowing violation of the law or self-dealing. Conf DX 105 – Articles of Incorporation at Art. XII. Washington state law further provides that no liability can be imposed against a director or officer absent proof that the director failed to act in good faith and reasonably for the best interests of WMI. Wash. Rev. Code §§ 23B.08.300 (directors) and 23B.08.420 (officers). In discharging their duties, directors and officers of a Washington corporation are entitled to rely on information, opinions, reports or statements, if prepared or presented by officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented, provided that the director does not have knowledge making such reliance unwarranted. Wash. Rev. Code §§ 23B.08.300(3)-(4) (directors) and 23B.08.420(2)-(3) (officers). The fact that the FDIC has determined to pursue only three former officers of WMI with respect to the types of actions

addressed in the Senate PSI Report certainly provides a countervailing data point regarding the potential value of these claims.[46] See FDIC v. Killinger, et al., Case No. 2:11-cv-00459 (MJP) (W.D. Wash.) (the "D&O Action").

Washington law also provides for the indemnification of directors and officers absent intentional misconduct or knowing violation of the law. Wash. Rev. Code §§ 23B.08.560 (directors) and 23B.08.570 (officers). As authorized by Washington law, and subject to limited exceptions, Article IX of WMI's Articles of Incorporation provides that WMI:

> [S]hall indemnify any individual made a party to a proceeding because that individual is or was a director of the Company and shall advance or reimburse the reasonable expenses incurred by such individual in advance of final disposition of the proceeding, without regard to the limitations in RCW 23.B.510 through 23.B.08.550 of the Washington Business Corporations Act.[47]

Conf DX 105 – Articles of Incorporation at Art. IX. Likewise, the Restated Bylaws of WMI (the "Bylaws") provide for the indemnification of directors, officers, employees and agents of WMI. Conf DX 104 – Bylaws §§ 8.1, 8.6.[48] Thus, any claim that may be asserted against WMI's

[46] As another data point relating to the potential value of such claims, following the failure of WMB, the United States Attorney's Office for the Western District of Washington conducted an extensive multi-agency investigation led by the Department of Justice, including "hundreds of interviews and the review of millions of documents relating to the operations and the subsequent failure, of Washington Mutual Bank" including reviewing "reports generated during investigations conducted by other government bodies, including by the United States Senate Permanent Subcommittee on Investigations." On August 5, 2011, the Department of Justice concluded that "the evidence does not meet the exacting standards for criminal charges in connection with the bank's failure" and closed the investigation without bringing charges. Press Release, United State's Attorney's Office, Western District of Washington, Department of Justice Closes Washington Mutual Investigation With No Criminal Charges (Aug. 5, 2011), available at http://www.justice.gov/usao/waw/press/2011/aug/WAMU.html.

[47] Wash. Rev. Code § 23B.08.560(1) permits a corporation, through its articles of incorporations, a bylaw adopted or ratified by the shareholders, or a resolution adopted or ratified by shareholders, to in effect opt out of the statutory prohibition in Wash. Rev. Code § 23B.08.510(4) against indemnifying a director in connection with a proceeding "by or in the right of the corporation in which the director was adjudged liable to the corporation."

[48] Certain directors and officers have filed proofs of claim asserting unliquidated claims for indemnification and advancement of defense and other litigation costs under WMI's articles of incorporation, by-laws, other corporate documents and indemnification agreements. These claimants include Stephen J. Rotella (Claim No. 2108); Anne V. Farrell (Claim No. 2240); Phillip D. Matthews (Claim No. 2241); Willis B. Wood, Jr. (Claim No. 2246); Orin C. Smith (Claim No. 2247); Michael K. Murphy (Claim No. 2248); Charles M. Lillis (Claim No. 2604); Margaret Osmer Mcquade (Claim No. 2606); William G. Reed, Jr. (Claim No. 2629); Stephen I. Chazen (Claim No. 2631);

directors on behalf of the estates likely would give rise to a counterclaim which, if successful, would offset any recovery dollar-for-dollar.

Regardless, it is by no means clear that such claims would survive the numerous defenses that have already been asserted by certain directors and officers in the D&O Action, including that (a) the Business Judgment Rule insulates officers from lawsuits alleging negligent business decisions taken in good faith, and (b) because such negligence-based claims must fail, then related breach of fiduciary duty claims and other remedial claims must also fail.[49] Defendants have also asserted that the D&O Action is a "shameless blame-shifting exercise" that is "designed to deflect criticism away from the FDIC," noting that the FDIC has been "under fire for its regulatory failures with respect to [WMB] and refuses to take any responsibility for its central role in the financial crisis." Rotella & Schneider Mot. to Dismiss [D&O Action, D.I. 53] at 7-8.[50] Defendants further assert that "the real cause of the losses in the Bank's held-for-investment portfolio was the gross negligence of two appraisal companies" named as defendants in two lawsuits filed by the FDIC just weeks after filing the D&O Action. Id. at 8-9. These and

James H. Stever (Claim No. 2633); Regina T. Montoya (Claim No. 2634); Stephen E. Frank (Claim No. 2635); Mary E. Pugh (Claim No. 2636); Thomas C. Leppert (Claim No. 2637); Deanna Oppenheimer (Claim No. 3242); Thomas W. Casey (Claim No. 2687); David Schneider (Claim No. 2681); Debora D. Horvath (Claim No. 2683); Al Brooks (Claim No. 2159); Todd H. Baker (Claim No. 2274); John P. McMurray (Claim No. 2543); Kerry K. Killinger (Claim No. 3266); David Beck (Claim No. 3194); Rolland Jurgens (Claim No. 3196); Diane Novak (Claim No. 3197); and Richard Careaga (Claim No. 3198).

[49] Copies of the motions to dismiss filed in the D&O Action are attached as Exhibit A to the Debtors' Response to the Submission.

[50] Similarly, the Senate PSI recognized regulatory failures as a contributing factor to the financial collapse. See Senate PSI Report at 1 ("The investigation found that the crisis was not a natural disaster, but the result of high risk, complex financial products; undisclosed conflicts of interest; *and the failure of regulators, the credit ratings agencies and the market itself to rein in the excesses of Wall Street*"); id. at 161 (finding that "WaMu's collapse marked one of the most spectacular failures of federal bank regulators in recent history" and "OTS . . . failed to respond with meaningful enforcement action, choosing instead to continue giving the bank inflated ratings for safety and soundness").

other defenses would have to be taken into account to determine the "value" of potential claims against directors and officers, if they have any value at all.

For all of the foregoing reasons, the Submission by the TPS Consortium is irrelevant to the decision before the Court and should be given no weight. Even if the Court affords any weight to the potential claims that the Debtors' estates may have against third parties, such claims would exist in either a chapter 7 or chapter 11 scenario and, thus, would appear on both sides of the "balance sheet." Hr'g Tr. 7/14/2011 at 147:13-18, 23-148:2 (Goulding Cross) ("Presumably, the recovery would be similar under an 11 or 7 in the pursuit of those [claims] . . . .").

2. Payment of Postpetition Interest at the Contract Rate Is Appropriate

Certain of the objecting parties have asserted that the Debtors cannot satisfy section 1129(a)(7) because the Modified Plan provides for payment of postpetition interest at the contract rate, rather than the federal judgment rate. Such objections are wrong on several levels.

Pursuant to applicable law, and as recognized in the Opinion, there is a presumption that, in a solvent debtor case, postpetition interest should be paid at the contract rate, unless there is a sufficient showing that equitable reasons warrant otherwise. Conf DX 265 – Opinion at 92-94; Official Committee of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.), 456 F.3d 668, 679 (6th Cir. 2006) (noting presumption that unsecured creditors of a solvent estate are entitled to receive the contract default rate of interest, and stating that "absent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights"); In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 791 F.2d 524, 530 (7th Cir. 1986) ("[W]hen the debtor is solvent the judicial task is to give each creditor the measure of his contractual claim."); In re Coram Healthcare Corp., 315 B.R. 321, 346 (Bankr. D. Del. 2004) (concluding that the court has

discretion to determine the appropriate rate of interest based upon the specific facts of each case); In re Dow Corning Corp., 244 B.R. 678, 686 (Bankr. E.D. Mich. 1999) ("[A] creditor's contractual right to interest retains validity during the pendency of chapter 11 reorganization."); In re Schoeneberg, 156 B.R. 963, 972 (Bankr. W.D. Tex. 1993) (holding that, where there is a prepetition contract between parties that provides for interest, the contract rate should be applied to determine the amount of postpetition interest that the creditor is entitled to receive). The objecting parties' attempts to construe the applicable case law otherwise fail, if for no other reason than because the Court's ruling on this issue in the Opinion constitutes the "law of the case" and is not subject to relitigation or reconsideration at this time. In re Cont'l Airlines, Inc., 279 F.3d 226, 233 (3d Cir. 2002) ("The Court has defined the law of the case as a precept that posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." (internal citations and quotations omitted); see also Conf DX 424 – Confirmation Brief at 63-66 (rebutting cases cited to by objecting parties). Based upon this standard, no party has presented any evidence or argument sufficient to overcome the presumption that payment of interest at the contract rate is appropriate.

(i) The Legal Standard To Assess Materiality

The Equity Committee contends that the Settlement Note Holders engaged in inequitable conduct by trading in the securities of the Debtors on the basis of material non-public information in violation of section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The Equity Committee attempts to support this argument by asserting that the Settlement Note Holders traded while in possession of the terms of certain preliminary offers that were sent back and forth between JPMC and the Debtors during 2009 and

that the terms of these offers were "material." As explained more fully below, the terms of various offers sent between the Debtors and JPMC in 2009 were not "material" because, among other things, the parties were always very far apart in negotiations—billions of dollars apart—and, in 2009, none of the term sheets included the FDIC and Bank Bondholders, parties that were critical to any settlement. Under these circumstances, the Debtors (after consultation with their counsel) and each of the Settlement Note Holders independently made a good-faith determination that the term sheets were not material. Accordingly, there is no basis for a finding of inequitable conduct.

Information is "material" for the purposes of the securities laws only if it "significantly alter[s] the 'total mix' of information made available." See, e.g., TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). This standard for materiality is sometimes recast as whether there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. See, e.g., Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000) ("Material information is 'information that would be important to a reasonable investor in making his or her investment decision.'" (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997)). Where, as here, information concerns "contingent or speculative information or events," "materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" Basic, Inc. v. Levinson, 485 U.S. 224, 238 (1988) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)). "Those in business routinely discuss and exchange information on matters which may or may not eventuate in some future agreement," and "[n]ot every such business conversation gives rise to legal obligations." Taylor v. First Union Corp. of S.C., 857 F.2d 240, 244 (4th Cir. 1988). As

such, for example, "[i]nformation of speculative and tentative discussions is of dubious and marginal significance to" a reasonable investor's investment decisions and, accordingly, can rarely constitute "material" information. Id. at 245.

The Debtors suspect that the Equity Committee will continue to attempt to rely on cases regarding the materiality of merger negotiations to support its position regarding the materiality of settlement negotiations between the Debtors and JPMC. These merger cases do not suggest that back and forth offers between parties are material where, as here, the parties are far apart in their negotiations and not all of the parties necessary for an agreement are involved in the offers. Merger discussions are viewed by courts as a uniquely critical event in a company's history and therefore have a prominent place in securities law cases,[51] but, even these cases indicate that discussions of a tentative and speculative nature are not material. Indeed, in Taylor, the court declined to find merger discussions material where "the discussions at issue . . . were preliminary, contingent, and speculative," "[t]here was no agreement as to the price or structure of the deal," and "neither the factual nor the legal predicates for a merger were in place." Id. at 244. As the Taylor court went on to observe:

> The materiality of information concerning a proposed merger is directly related to the likelihood the merger will be accomplished; the more tentative the discussions the less useful such information will be to a reasonable investor in reaching a decision. Information of speculative and tentative discussions is of dubious and marginal significance to that decision. To hold otherwise would result in endless and bewildering guesses as to the need for disclosure, operate as a deterrent to the legitimate conduct of corporate operations, and threaten to "bury the shareholders in an avalanche of trivial information"; the very perils that the limit on disclosure imposed by the materiality requirement serves to avoid.

[51] See, e.g., Mill Bridge V, Inc. v. Benton, No. 08-2806, 2010 WL 5186078, at *11 (E.D. Pa. Dec. 21, 2010) (noting that "because a merger is one of the most important events that can occur for a company, insider information regarding a merger 'can become material at an earlier stage than would be the case as regards lesser transactions.'" (quoting Basic, Inc., 485 U.S. at 238)).

Id. at 244-45 (quoting TSC Indus., 426 U.S. at 448). Thus, in the context of merger negotiations, courts have held that discussions unlikely to lead to a merger and activities relating to the prospect of a merger are not material under section 10(b) and Rule 10b-5. See Filing v. Phipps, No. 5:07CV1712, 2010 WL 3789539, at *5-6 (N.D. Ohio Sept. 24, 2010) (finding that merger talks were not material where parties had a "get acquainted" meeting and had proposed entering into a confidentiality agreement with one another); Levie v. Sears Roebuck & Co., 676 F. Supp. 2d 680, 688 (N.D. Ill. 2009) (noting that "[t]he materiality of information concerning a proposed merger is directly related to the likelihood that the merger would be accomplished," and finding that merger discussions that were preliminary in nature at time of challenged transaction were not "material" for purposes of a 10(b) claim).[52]

Moreover, the securities laws do not prohibit trading by persons on purely confidential or non-public information; public companies typically have undisclosed negotiations and internal matters which are confidential and non-public. In order for trading to be prohibited, the non-public information must also be "material." See, e.g., SEC v. Butler, C.A. No. 00-1827, 2005 WL 5902637, at *2 (W.D. Pa. Apr. 18, 2005) (concluding that an insider in possession of company's "confidential" information was not liable for insider trading where the "non-public information he allegedly relied upon to make certain transactions in stock options was not material as that term has been defined in the antifraud provisions of the securities laws."). As such, even if the Settlement Note Holders knew of the terms of the negotiations, and assuming

[52] Notably, SEC v. Thrasher, 152 F.Supp.2d 291 (S.D.N.Y. 2001), which the Equity Committee relied upon in its prior submission, does not hold that discussions regarding a merger are always material. Indeed, contrary to the Equity Committee's representation, Thrasher does not address the materiality of merger negotiations where significant obstacles might prevent parties from reaching a deal. The case instead simply rejects a defendant-tippee's claim that his tipper was of dubious reliability and therefore that information provided by the tipper was immaterial even if it turned out to be partially true. See id. at 299-300.

that the information was confidential and non-public, trading would only be prohibited if that information were also material.[53]

(ii) The Terms of the Various Offers Between the Debtors and JPMC Were Not Material Non-Public Information

The evidence introduced at the Confirmation Hearing establishes that the Debtors only provided the Settlement Note Holders with information concerning the negotiations with JPMC during the two periods when they had executed confidentiality agreements in place—i.e., the March Confidentiality Period and the November Confidentiality Period. See supra pp. 42-70. As Mr. Kosturos testified, information concerning the negotiations with JPMC was not shared with the Settlement Note Holders during the period prior to the March Confidentiality Period or the period between the March and November confidentiality periods. Hr'g Tr. 7/21/2011 at 99:24-100:3 (Kosturos Direct) (testifying that the Debtors did not give "any documents or materials to the settlement noteholders" concerning discussions with JPMC and the FDIC prior to the March Confidentiality Period); id. at 122:8-11 (testifying that the Debtors did not share any confidential information with the Settlement Note Holders between the March and November confidentiality periods). Instead, during these periods, information regarding the terms of settlement conversations with JPMC was shared only with counsel to the Settlement Note Holders, who had executed confidentiality agreements requiring all shared information

[53] No. 84 Emp'r Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp., 320 F.3d 920 (9th Cir. 2003), relied upon by the Equity Committee in its prior submission, does not suggest a different result. Teamster Joint Council does not establish that facts relating to settlement negotiations should be deemed material. Rather, the case involved a company's affirmative misrepresentations regarding its ability to comply with the terms of a *finalized, publicly disclosed* settlement agreement without suffering "a material adverse effect on the Company's operations or financial results." Id. at 933. Indeed, to the extent that the court addressed information that arose during settlement negotiations at all, it did not express a view as to whether information relating to the settlement itself was material, and concluded only that representations regarding the company's potential liabilities made by a regulatory counterparty (the FAA) during settlement negotiations established that the defendants had acted with scienter in misrepresenting their ability to comply with the final settlement agreement without incurring a material adverse consequence. See id. at 944-45.

covered by the agreements "to be kept confidential and not to be shared with anyone," including their clients. Id. at 100:7-25; see also Conf DX 408 – Fried Frank Confidentiality Agreement.[54]

The evidence introduced at the Confirmation Hearing establishes that negotiations between the Debtors and JPMC were too tentative and the parties were too far apart for the terms of the offers exchanged during the March Confidentiality Period to be material. Following an exchange of term sheets in March 2009, JPMC and the Debtors remained approximately "four billion dollars apart from each other." Hr'g Tr. 7/21/2011 at 108:20-24 (Kosturos Direct). Moreover, the parties understood that the term sheets reflected an integrated deal as a whole and that, until all of the pieces were agreed to, there was no agreement on any piece. As Mr. Kosturos testified, the offers "need[ed] to be taken in [their] whole" and "unless [a party] agree[d] to the entire offer, [a party was] not agreeing . . . to anything . . . ." Id. at 109:8-18; see also Hr'g Tr. 7/18/2011 at 71:22-72:9 (Gropper Direct) ("The items [on the March 18, 2009 term sheet] where there is quote, unquote agreement are miniscule in the context of this case. . . . [A]ll of these issues in total don't compare at all to the box called tax. So a one percent move in the box called tax could obviate the agreeds on this page."); Hr'g Tr. 7/20/2011 at 202:8-12 (Bolin Redirect) ("[A]greed statements [reflected in an August 17, 2009 term sheet] were conditioned on agreeing to . . . all items in the term sheet, including the agreement on the tax splits."); id. at 268:23-269:7 (Melwani Cross) ("I don't think [JPMC] were offering to [award the deposit accounts to the Debtors] short of having an agreement on every term in [the March 18, 2009] proposal."). As such, JPMC's proposal in the March 18, 2009 term sheet was "a meaningless input," Hr'g Tr. 7/18/2011 at 159:13 (Gropper Cross), was "more of a position

[54] The fact that the Debtors were not responsible for policing information that went from counsel for the Settlement Note Holders to their clients likewise supports the conclusion that the Debtors did not engage in inequitable conduct. See Hr'g Tr. 7/21/2011 at 101:1-4 (Kosturos Direct).

statement than a counterproposal," id. at 68:22-69:3 (Gropper Direct), and indicated that "JPMorgan Chase did not have any intention of approaching . . . the bargaining table," Hr'g. Tr. 7/19/2011 at 135:1-11 (Krueger Direct).

At the Confirmation Hearing, the Equity Committee attempted to make much out of the fact that JPMC indicated on certain term sheets that it had "agreed" with the Debtors' position on certain issues. Yet, as noted above, the testimony concerning these term sheets was consistent that there was no agreement between the parties on any issue until all of the issues had been resolved, and parties were always free to change, modify or alter their positions. Indeed, the parties at later times in the negotiations, in fact, changed and altered positions taken in these terms sheets – at times seemingly backtracking from prior positions. For example, despite a representation in a term sheet dated April 24, 2009 that the Debtors and JPMC had "agreed" that WMI would "transfer [all Visa B shares] to JPMC with associated liabilities," see EC Ex. 11 – 4/24/2009 WMI/JPMC Settlement Position Overview Draft at 3, a later exchange of offers indicates that WMI was seeking "to retain VISA shares" and that JPMC was seeking for "VISA shares to be released to JPMC." See AU Ex. 28 – Debtors' November 2009 Term Sheet at 2; EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1.[55] Further, as Mr. Kosturos testified, JPMC's demand that it receive 100% of the first NOL after it had provided a prior term sheet to the Debtors seeking an 85/15 split on April 24, 2009 effectively "reset[] the bookends" of the negotiations, completely changing the economics and structure of previous offers to the detriment of the Debtors. Hr'g Tr. 7/21/2011 at 125:20-126:2 (Kosturos Direct); see also EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V.

[55] See also Hr'g Tr. 7/18/2011 at 72:1-4 (Gropper Direct) (noting that, despite an indication on a term sheet, dated March 18, 2009, AU Ex. 19, that the allocation of rabbi trusts had been "agreed" upon, "the issue of the Rabbi trust moved around every successive draft of every settlement agreement that was ever publicly filed in this case. So that wasn't really agreed until quite recently.").

Melwani re JPMC Proposal at 1; EC Ex. 11 – 4/24/2009 WMI/JPMC Settlement Position Overview Draft at 1-2.

In addition, the fact that there was no agreement between the parties regarding any of the issues on the March 18, 2009 term sheet was underscored by JPMC's filing of a lawsuit six days later on March 24, 2009 alleging that they owned the deposit accounts. Hr'g Tr. 7/21/2011 at 110:3-5 (Kosturos Direct). As Mr. Kosturos testified, the Debtors considered the act of filing a lawsuit plainly contrary to the term sheet's indication that JPMC had "agreed" that those accounts belonged to the Debtors. Id. at 110:14-20.

During the March Confidentiality Period, it is undisputed that the Settlement Note Holders received confidential and non-public information from the Debtors. Thus, at the end of the March Confidentiality Period, the Debtors filed their March MOR with the Court as well as under Form 8-K, in which they disclosed information pertaining to restricted cash and cash equivalents, unsecured notes receivable held by non-Debtor subsidiaries, an accrued liability, and the estimated $2.6 billion to $3 billion total amount of tax refunds—all of which had been shared with the Settlement Note Holders during the March Confidentiality Period. See Ex. DX 427 – WMI Form 8-K, dated 4/30/2009, at 13-14; EC Ex. 25 – Debtors' March MOR at 9; Hr'g Tr. 7/21/2011 at 114:21-115:13 (Kosturos Direct). After careful consideration, including consultation with experienced securities counsel, the Debtors concluded that there "was no additional material non-public information that needed to be disclosed," Hr'g Tr. 7/21/2011 at 115:18-20 (Kosturos Direct), including the terms of the offers that had been exchanged with JPMC. The Settlement Note Holders independently reached the same conclusion. See Hr'g Tr. 7/18/2011 at 82:1-2 (Gropper Direct); Hr'g Tr. 7/19/2011 at 138:18-21 (Krueger Direct); Hr'g Tr. 7/20/2011 at 53:6-8 (Bolin Direct), 233:12-20 (Melwani Direct).

The evidence introduced at the Confirmation Hearing further confirms that the terms of the offers between the Debtors and JPMC were not material during the November Confidentiality Period either. The negotiations during this period were marked by heightened expectations by all parties, including the Bank Bondholders, regarding the magnitude of recovery in a settlement due to, *inter alia*, (i) the circulation of a term sheet by the Paulson Group that contemplated, among other things, granting the Bank Bondholders a $1.1 billion claim in the Debtors' estates, Hr'g Tr. 7/21/2011 at 119:19-120:20 (Kosturos Direct); and (ii) Congress' passage of the Workers, Homeowner and Business Assistance Act of 2009, which extended the Debtors' ability to carry back NOLs from two years to five, and thereby greatly increased the potential amount of tax refunds. Id. at 121:11-18, 171:7-12.

Moreover, during the November Confidentiality Period, JPMC had made an offer that "reset the bookends" of the negotiations. See EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1. In an email, dated November 30, 2009, JPMC proposed that JPMC receive 100% of the first tax refund while the Debtors receive only tax refunds arising out of the new five-year carryback legislation and shoulder the burden of any settlement with the Bank Bondholders themselves. Hr'g Tr. 7/21/2011 at 124:18-125:7 (Kosturos Direct). When it made this proposal, JPMC noted that the parties remained far apart in their positions. See EC Ex. 120 – 11/30/2009 Email from B. Kosturos to J. Bolin, V. Melwani re JPMC Proposal at 1. The Debtors found this proposal, which contemplated the Debtors' assumption of considerable risks associated with tax refunds under the new legislation while JPMC assumed no risk in retaining tax refunds that had already been received, "to be really nonresponsive" and to have "changed the whole dynamics and constructs of what [the parties] had been talking about previously," placing the parties "[v]ery far apart" with respect to the final

terms of a settlement agreement. Hr'g Tr. 7/21/2011 at 126:2-8 (Kosturos Direct); see also Hr'g Tr. 7/18/2011 at 109:10-24 (Gropper Direct).

On December 8, 2009, the Debtors submitted another offer to JPMC that called for, among other things, a 70/30 split of the first NOL, a 50/50 split of the second NOL, and a sharing of any amount to be paid to the Bank Bondholders as part of a settlement, all conditioned upon further negotiations and agreement with the Bank Bondholders. See Hr'g Tr. 7/21/2011 at 181:20-182:8 (Kosturos Cross). Although JPMC had indicated in an email to the Debtors that it was willing to consider an offer based on a 70/30 tax split, EC Ex. 118 – 11/20/2009 Email from J. Bolin to B. Kosturos re Tax Split Negotiations, and the Debtors submitted an offer that called for a 70/30 tax split on the first (but not the second) NOL, EC Ex. 305 – 12/8/2009 Email from C. Smith to D. McCree re Revised Term Sheet at 2, even after this offer, JPMC and the Debtors remained far apart and a deal was not close.[56] Hr'g Tr. 7/18/2011 at 113:25-114:7 (Gropper Direct) (noting that, following the November Confidentiality Period, "the parties were extremely far apart" and "[t]here was no semblance of a deal."); Hr'g Tr. 7/20/2011 at 72:23-25 (Bolin Direct) ("There was no deal, there were no active terms, and there was no telling exactly what was going to happen subsequently" at the end of the November Confidentiality Period).

As Mr. Kosturos explained in his testimony, given the absence of any agreement—or even any serious negotiation—with the Bank Bondholders and the FDIC, a deal between JPMC and the Debtors was not near. Hr'g Tr. 7/21/2011 at 129:19-130:7 (Kosturos

[56] Furthermore, there is no evidence in the record establishing that the Debtors shared the specific terms of this offer with the Settlement Note Holders at the time that it was made. While Mr. Gropper recalled being involved in discussions regarding the offer, Messrs. Krueger and Bolin had no recollection of having been provided with a copy of the December 8, 2009 term sheet, see Hr'g Tr. 7/19/2011 at 186:3-13 (Krueger Cross), Hr'g Tr. 7/20/2011 at 179:10-24 (Bolin Cross); and Mr. Melwani did not know that the Debtors were making a proposal on December 8, 2009. Hr'g Tr. 7/20/2011 at 251:24-252:11 (Melwani Direct), 293:6-10 (Melwani Cross). This testimony is consistent with Mr. Kosturos' recollection on direct examination that the term sheet was not shared with the Settlement Note Holders. Hr'g Tr. 7/21/2011 at 126:23-127:2 (Kosturos Direct).

Direct). Moreover, JPMC and the Debtors stood hundreds of millions, if not billions, of dollars apart since, among other things, there was no agreement to share the amounts needed to satisfy the FDIC or the Bank Bondholders, who were "mak[ing] allegations that they owned the [$2.6 billion] second NOL via the FDIC receivership." Id. Accordingly, the actual terms of the various offers exchanged during the November Confidentiality Period between the Debtors and JPMC were not material.

During the November Confidentiality Period, it is undisputed that the Settlement Note Holders received material confidential and non-public information from the Debtors. Thus, at the end of the November Confidentiality Period, the Debtors filed their MOR with the Court and with the SEC under Form 8-K, and disclosed the existence of a potential NOL that "could result in tax refunds of up to 2.6 billion dollars of which we also disclosed that there could be competing claims of ownership." Id. at 127:24-128:6; Conf DX 428 – WMI Form 8-K, dated 12/30/2009, at 13 n.5; EC Ex. 39 – November 2009 MOR at 12 n.5. After careful consideration, including consultation with experienced securities counsel, the Debtors concluded that the information disclosed in the November MOR was the only material non-public information that they shared with the Settlement Note Holders during this period. Hr'g Tr. 7/21/2011 at 128:15-24 (Kosturos Direct). The Settlement Note Holders each independently reached the same conclusion. See Hr'g Tr. 7/18/2011 at 113:25-114:7 (Gropper Direct); Hr'g Tr. 7/19/2011 at 142:23-143:1 (Krueger Direct); Hr'g Tr. 7/20/2011 at 71:9-13 (Bolin Direct), 252:22-23 (Melwani Direct).

(iii) Other Arguments Made by the Equity Committee Do Not Establish Inequitable Conduct

The Equity Committee attempted at the Confirmation Hearing to suggest that Appaloosa and Centerbridge somehow acted inequitably by trading with knowledge of their own

negotiations conducted with JPMC. This suggestion is unavailing. First, these discussions were no more material than the other offers exchanged between the Debtors and JPMC; the parties remained far apart with no real prospect for a deal. Indeed, the discussions were followed by a refortification of JPMC's litigation posture. As James Bolin of Appaloosa testified, JPMC indicated at the end of the discussions that JPMC "wanted to let the litigation go a couple of more rounds," "did not want . . . to have further discussions," and "had withdrawn" its offer. Hr'g. Tr. 7/20/2011 at 59:1-10 (Bolin Direct). Second, such discussions were not material because Appaloosa and Centerbridge could not bind the Debtors; Appaloosa and Centerbridge simply did not have "any ability to make a deal and bind the debtor." Hr'g Tr. 7/21/2011 at 119:14-18 (Kosturos Direct); see also Hr'g. Tr. 7/20/2011 at 55:5-7 (Bolin Direct) ("Q. In your view, would it have been possible to have a settlement agreement in this case without the debtors involved? A. No."). Third, there is nothing wrong with a party trading on its own information. This was not the Debtors' material non-public information, but was rather Appaloosa's and Centerbridge's own information upon which they were free to act as they chose.[57] JPMC was not subject to a confidentiality restriction and was free at all times to share information pertaining to the negotiations with any creditor or non-creditor. As such, direct negotiations by Appaloosa and Centerbridge with JPMC cannot support a finding of inequitable conduct.

[57] The fact that corporate outsiders are not prohibited from trading based on their own information is deeply imbedded in the securities laws. For example, the securities laws prohibit trading on information that others have acquired from offering persons, but do not prohibit offering persons themselves from acquiring stock (subject to section 13(d) obligations) while in possession of the non-public information that they are contemplating a tender offer. See, e.g., Casey's Gen. Stores, Inc. v. Alimentation Couche-Tard, Inc., No. 4:10–cv–00265, 2010 WL 3604097, at *1 n.2 (S.D. Iowa Sept. 8, 2010) ("Section 14(e) of the Exchange Act and Rule 14e–3 promulgated thereunder allows offering persons, owning less than 5 percent beneficial ownership of outstanding shares, to buy and sell shares prior to announcing a tender offer.").

(iv) Practical Issues Confirm That Disclosure Is Unwarranted

Putting aside the legal authority that supports the conclusion that the term sheets exchanged between JPMC and the Debtors were not material, the Equity Committee's pre-confirmation submission does not identify the precise information that it suggests was material and therefore needed to be disclosed. The Equity Committee has not pinpointed such information for good reason: disclosure of the various and lengthy terms in terms sheets would be unwieldy, imprecise and confusing. The Equity Committee can hardly be suggesting that the Debtors should have disclosed each and every offer they made or received from JPMC, the FDIC or the Bank Bondholders. Yet, there is no line drawn by the Equity Committee as to what should have been disclosed and when.

For example, during the Confirmation Hearing, the Equity Committee suggested, on cross examination of witnesses, that in the March Confidentiality Period, the fact that JPMC wrote on its term sheet that it "agreed" with many of the Debtors' positions needed to be disclosed. Yet, given that any actual deal required agreement on all terms, disclosure of certain agreed points would have required the disclosure into the market of each subsequent offer. Similarly, regarding the November Confidentiality Period, the Equity Committee asked questions of witnesses that suggested that the Equity Committee believed that JPMC's email stating that it would be willing to consider a deal based on a 70/30 split of the tax refunds was material. Yet, the disclosure of that isolated term would have been meaningless without disclosure of the complete terms of competing offers—all of which were hundreds of millions of dollars apart. Thus, under the Equity Committee's theory of disclosure, the Debtors would have been forced to negotiate with JPMC in the public domain, with each successive offer disclosed to the public, making a deal difficult, if not impossible, to achieve. As the court recognized in Taylor, requiring disclosure as suggested by the Equity Committee here would lead to "endless

and bewildering guesses as to the need for disclosure, operate as a deterrent to the legitimate conduct of corporate operations, and threaten to 'bury the shareholders in an avalanche of trivial information' . . . ." 857 F.2d at 245 (quoting TSC Indus., 426 U.S. at 448).

(v) The Settlement Note Holders Are Not Fiduciaries

Further, the Equity Committee's assertion that the Settlement Note Holders were acting as fiduciaries to other creditors, equity holders, or the estates generally is incorrect in law and fact. No fiduciary obligation can be imputed to the Settlement Note Holders by virtue of their participation in the settlement and plan negotiations. The communication of confidential information does not by itself create a fiduciary relationship. Walton v. Morgan Stanley & Co., Inc., 623 F.2d 796, 799 (2d Cir. 1980). Nor does the signing of a confidentiality agreement between two parties. In re Am. Bus. Fin. Servs., 2011 WL 3240596, at *3 (finding that a confidentiality agreement alone does not establish a fiduciary relationship between parties (citing City Solutions v. Clear Channel Commc'ns, Inc., 201 F.Supp.2d 1048, 1049 (N.D. Cal. 2002))); see also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 767 F. Supp. 1220, 1231 (S.D.N.Y. 1991) ("[T]he existence of a fiduciary duty is not coterminous with a contractual obligation."), rev'd on other grounds, 967 F.2d 742 (2d Cir. 1992). Where, as here, the confidentiality agreement arose out of arm's-length commercial dealings between sophisticated parties, no fiduciary relationship may be found. Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C., No. 05-6882, 2009 WL 362118, at *7 (S.D.N.Y. Feb. 9, 2009) ("[T]he Confidentiality Agreement was executed by parties on equal footing, as part of a purely commercial relationship, one in which courts will not impose fiduciary obligations on either contracting party.") (internal quotation marks omitted), aff'd, 355 F. App'x 516 (2d Cir. 2009); see also Clear Channel Commc'ns, 201 F. Supp. 2d at 1049 ("[I]t makes great sense not to

impose fiduciary duties concomitantly with confidentiality agreements. The existence of a detailed confidentiality agreement suggests arm's-length dealings between co-equals.").

The Settlement Note Holders were included in settlement discussions because they hold substantial portions of WMI debt, not because they were viewed as representing any other creditors. Hr'g Tr. 7/21/2011 at 101:17-102:3 (Kosturos Direct), 158:5-12 (Kosturos Cross); see also Conf DX 265 – Opinion at 69. They participated in such discussions *in addition to, and not instead of* the Creditors' Committee, Hr'g Tr. 7/21/2011 at 102:22-103:11, 137:14-15 (Kosturos Direct), 158:1-4 (Kosturos Cross), and, at times, the Settlement Note Holders actually were excluded from negotiations. See id. at 132:6-12, 136:10-23 (Kosturos Direct), 157:7-14 (Kosturos Cross).[58] As commonly occurs in many chapter 11 cases, the Debtors required that the Settlement Note Holders execute confidentiality agreements as a condition to participating in any discussions, to protect disclosure of any confidential information. See id. at 170:8-13 (Kosturos Cross). This should not in any way be deemed to create any fiduciary duty or obligation on their part.

(vi) Equity Warrants Application of the Contract Rate

Likewise, the equities of the case, including the years of delay in creditors receiving distributions caused by out-of-the-money litigants, warrants application of the contract rate of interest. See Coram, 315 B.R. at 346. The Debtors and their chapter 11 estates have benefited from participation of the Settlement Note Holders, the Creditors' Committee and other significant creditor constituencies in negotiating the Global Settlement Agreement and the Modified Plan, see Hr'g Tr. 7/21/2011 at 156:12-157:2 (Kosturos Cross), and Congress expressly contemplated this result. See 11 U.S.C. §§ 1102 (providing for the formation of

[58] Certainly, and as stated by the Equity Committee itself, the Settlement Note Holders had no duty to obtain or improve recoveries for equity. See Hr'g Tr. 12/7/2010 at 155:3-6 (Equity Committee Closing Argument).

official committees), 1103 (conferring on official committees the authority to, among other things, consult with the debtor regarding administration of the case and participate in the formulation of a plan), 1109(b) (providing all parties in interest with the ability to appear and be heard on any issue in a chapter 11 case). This Court already found that the Global Settlement Agreement is fair and reasonable, see Conf DX 265 – Opinion at 2, and that it "provides a reasonable return in light of the possible results of the litigation," id. at 60, notwithstanding the fact that recoveries will not reach equity holders. See id. at 60.

Based upon the Debtors' valuation of assets and estimation of the ultimate amount of Allowed General Unsecured Claims, even if the Court were to rule that federal judgment rate should apply, there still would be a shortfall of approximately $90 million to $100 million payable to holders of PIERS Claims, and no funds would be distributed to holders of Subordinated Claims or Equity Interests. See, e.g., Hr'g Tr. 7/14/2011 at 174:10-175:1 (Goulding Cross).

(vii) Other Considerations

Notwithstanding the foregoing, in the event the Court exercises its discretion and determines that the appropriate rate of postpetition interest is the federal judgment rate (and the Debtors submit that this is not an option), the federal judgment rate should be determined *as of the Commencement Date*. See, e.g., In re Evans, 10-80446C, 2010 WL 2976165, at *2 (Bankr. M.D.N.C. July 28, 2010) ("The date on which the applicable federal judgment rate is to be determined for purposes of section 726(a)(5) is the federal judgment rate in effect on the petition date."); In re Gulfport Pilots Ass'n, Inc., 434 B.R. 380, 392-93 (Bankr. S.D. Miss. 2010) (stating that if the debtor became solvent, a creditor would be entitled to postpetition interest at the federal judgment rate in effect on the petition date); In re Best, 365 B.R. 725, 727 (Bankr. W.D. Ky. 2007) (holding that the legal rate "mean[s] the federal judgment interest rate at the date the

petition is filed"); In re Chiapetta, 159 B.R. 152, 161 (Bankr. E.D. Pa. 1993) (holding that "since a claim is like a judgment entered at the time of the bankruptcy filing, the applicable rate should be the federal judgment rate in effect at the time of the bankruptcy filing"); In re Melenyzer, 143 B.R. 829, 833 (Bankr. W.D. Tex. 1992) ("[F]or purposes of 11 U.S.C. § 726(a)(5), the federal judgment rate selected should be that in effect as of the date of filing, as opposed to the date of distribution. . . . Setting the legal rate of interest as of the date of distribution thus makes little sense."). Further, pursuant to the Indentures and the Guarantee Agreements, the Debtors are contractually obligated to pay compound interest. See, e.g., Conf WMI NG 1 – First Supplemental Senior Notes Indenture § 5.3 (providing for payment of, "to the extent that payment of such interest shall be legally enforceable, interest on any overdue principal (and premium, if any) and on any overdue interest . . . .").

3. Conditioning the Payment of Distributions Upon the Grant of Third Party Releases Does Not Violate Section 1129(a)(7)

As this Court previously held, section 1129(a)(7) permits the Modified Plan to condition receipt of distributions on stakeholders' agreements to the releases set forth in Section 43.6 of the Modified Plan. Conf DX 265 – Opinion at 95-96. Although stakeholders would not be required to release claims against third parties in a chapter 7 liquidation (and, thus, would retain the value of such claims), there would be an additional $54 billion in claims owed to JPMC and the FDIC and, therefore, creditor recoveries would decrease. Id.; Hr'g Tr. 7/14/2011 at 134:18-135:4, 135:7-19 (Goulding Cross).[59]

[59] On a related note, the Debtors' discharge provided in Section 43.2 of the Modified Plan should not be conditioned on parties receiving distributions. Section 1141(d) of the Bankruptcy Code – which is the statute that provides chapter 11 debtors with a discharge from prepetition obligations, and is the provision on which Section 43.2 of the Modified Plan is premised – does not contemplate any such condition. Indeed, section 1141(d) specifically states that a confirmation order discharges a debtor from prepetition claims "whether or not . . . such claim is allowed under section 502" of the Bankruptcy Code. Thus, Section 43.2 of the Modified Plan is consistent with the Bankruptcy Code.

4. Postpetition Interest Claims Must Be Paid Ahead of Subordinated Claims

Contrary to certain objecting parties' assertions, the Modified Plan appropriately provides that Postpetition Interest Claims are paid ahead of Allowed Subordinated Claims in Class 18. Postpetition interest may be paid in a solvent debtor case pursuant to section 726 of the Bankruptcy Code, which is made applicable by the best interests test in section 1129(a)(7). Pursuant to section 726(a) of the Bankruptcy Code, which begins with the key phrase, "except as provided in section 510 of this title," interest under section 726(a)(5) must be paid prior to paying anything to subordinated creditors. See In re Air Safety Int'l, LC (GMGRSST, Ltd. v. Menotte), 336 B.R. 843, 856-57 (S.D. Fla. 2005); In re Rago, 149 B.R. 882, 889 (Bankr. N.D. Ill. 1992). This proviso is included because the basic tenets of subordination provide that a subordinated creditor is not to receive any payments until the parties ahead of it have been paid in full. Conf DX 265 – Opinion at 89 ("The priority of distributions established under section 726(a), however, is expressly subject to subordination under section 510." (citing 11 U.S.C. § 726(a))). The policy underlying section 510(b) is highlighted in case law, which provides that postpetition interest must be paid so as to avoid a windfall to junior parties. See Coram, 315 B.R. at 343-45; see also Hr'g Tr. 12/7/2010 at 110:11-115:4.[60]

D. Section 1129(b) – The Modified Plan Satisfies the "Cramdown" Requirements

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where not all impaired classes of claims and equity interests accept a plan. This mechanism is known colloquially as "cram down." Section 1129(b) provides in pertinent part:

[60] Contrary to the assertion of the DBR Group, this same proviso mandates that Allowed Late-Filed Claims are paid ahead of claims subordinated pursuant to section 510 of the Bankruptcy Code.

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b); see also Kane v. Johns-Manville Corp., 843 F.2d at 650.

Classes 9,[61] 18, 19, and 20 voted to reject the Modified Plan (or, in the case of Class 19, voted to reject the Sixth Amended Plan and, thus, is deemed to have rejected the Modified Plan as well), and Classes 17B, 21, and 22 are not receiving any distribution under the Modified Plan and, thus, are deemed to reject the Modified Plan. Conf DX 374 – Goulding Decl. at ¶ 48; Conf DX 403 – Klamser Decl. at ¶¶ 17 and 24; Conf DX 377 – Sharp Decl. at ¶¶ 16 and 24; Conf DX 19 – Sharp Decl. for Sixth Amended Plan at ¶ 30. Accordingly, the Debtors must satisfy section 1129(b) with respect to these Classes.

1. The Modified Plan Does Not Discriminate Unfairly

The unfair discrimination standard of section 1129(b) ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes. In re Barney & Carey Co., 170 B.R. 17, 25 (Bankr. D. Mass 1994). Section 1129(b)(1) does not prohibit all discrimination between classes; it prohibits only discrimination that is unfair. In re 11,111, Inc., 117 B.R. 471, 478 (Bankr. D. Minn. 1990). The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment. See In re

[61] Class 9 voted to reject the Modified Plan despite the fact that it is being paid in full. See Conf DX 403 – Klamser Decl. at ¶ 24.

Buttonwood Partners, Ltd., 111 B.R. 57, 63 (Bankr. S.D.N.Y. 1990); In re Furlow, 70 B.R. 973, 978 (Bankr. E.D. Pa. 1987) ("[D]ifferent treatment is permissible if and only if the debtor is able to prove a reasonable basis for the degree of discrimination contemplated by the Plan."); In re Johns-Manville Corp., 68 B.R. at 636. Accordingly, as between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, see, e.g., id., or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment. See, e.g., In re Buttonwood Partners, 111 B.R. at 63; In re Rivera Echevarria, 129 B.R. 11, 13 (Bankr. D.P.R. 1991). In addition, courts in this jurisdiction have adopted the Dow Corning test, which requires a materially different distribution before finding "unfair discrimination" between classes. See In re Armstrong World Indus., 348 B.R. at 121-22; In re Lernout & Hauspie Speech Prods., N.V., 301 B.R. 651, 661 (Bankr. D. Del. 2003); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 231 (Bankr. D.N.J. 2000).

Here, the dissenting Classes of Claims are sufficiently unique from other Classes of Claims such that separate classification and treatment is warranted, given the unique nature of such claims. See Conf DX 374 – Goulding Decl. at ¶¶ 49, 52; Conf DX 255 – Modified Plan §§ 13.1, 16.1.

The rejecting Classes of Equity Interests differ in legal nature and priority from all Classes of Claims and, as between one another, also are dissimilar in legal priority and rights. See Conf DX 374 – Goulding Decl. at ¶ 50. To the extent they contain similar interests, there is no discrimination because they are entitled to the same treatment from the Debtors. See id. at ¶¶ 50-51. In particular, although Classes 19 and 20 contain somewhat similar interests, they are not receiving disparate treatment from the Debtors, and separate classification is justified in these

circumstances. Id. at ¶ 50; Conf DX 255 – Modified Plan §§ 23.1, 24.1; Conf DX 255H, 402, 422 – Global Settlement Agreement (as amended) § 2.24; Conf DX 265 – Opinion at 102 ("To the extent that the REIT Holders are receiving anything more than other preferred shareholders, they are receiving it directly from JPMC in exchange for releases."). Similarly, Classes 21 and 22 contain Common Equity Interests that stem from separate security issuances and, in any event, receive identical treatment pursuant to the Modified Plan, as amended by the Third Plan Modification. Conf DX 374 – Goulding Decl. at ¶ 51; see Third Plan Modification at ¶¶ 1-4.

Accordingly, based upon the foregoing, there is no unfair discrimination with respect to any of the rejecting Classes. See id.

2. The Modified Plan is Fair and Equitable

Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" as follows, as applicable:

- As to a class of unsecured claims that rejects a plan: Either (a) each holder of a claim in such class will receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim or (b) the holder of any claim or interest that is junior to the claims of such class will not receive or retain any property under the plan. 11 U.S.C. § 1129(b)(2)(B).
- As to a class of equity interests: Either (a) each holder of an equity interest in such class will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled, or the value of the interest or (b) the holder of an interest that is junior to the interests of such class will not receive or retain any property under the plan. 11 U.S.C. § 1129(b)(2)(C).

This often is referred to as the "absolute priority rule."

The Modified Plan is fair and equitable with respect to Classes 9, 17B and 18 because, except to the extent waived, no holder of a Claim or Equity Interest junior to each of the Claims classified in these Classes will receive or retain any property pursuant to the Modified

Plan, unless and until such Classes are paid in full. Conf DX 374 – Goulding Decl. at ¶ 52. To the extent that holders of REIT Series shares in Class 19 receive distributions from JPMC (either directly or through the Debtors), such payment is not being made by the Debtors on account of their Equity Interests, but instead is a separate compromise with JPMC and, therefore, is not implicated by the absolute priority rule. Conf DX 374 – Goulding Decl. at ¶ 53; Conf DX 265 – Opinion at 102. Further, Classes 19 and 20 are entitled to redistributions of Liquidating Trust Interests only if Allowed Claims and Postpetition Interest Claims are paid in full. See Conf DX 255 – Modified Plan §§ 23.1, 24.1.[62]

In addition, the "fair and equitable" rule is satisfied as to the holders of Equity Interests in Classes 19, 20, 21 and 22 because (i) there are no Equity Interests junior to the Equity Interests in these Classes that are receiving or retaining any property under the Modified Plan on account of such junior interests and (ii) no holder of a Claim or Equity Interest in a Class senior to such Classes is receiving more value than its respective Claim or Equity Interest. See Conf DX 374 – Goulding Decl. at ¶¶ 54-55; Conf DX 255 – Modified Plan §§ 6.3, 7.3, 16.3, 18.3, 19.3, 20.3, 22.2, 20.3 (providing for the redistribution of Liquidating Trust Interests from holders of Allowed PIERS Claims to holders of Allowed Claims or Equity Interests if Allowed PIERS Claims are paid in full); Third Plan Modification at ¶¶ 1-2; Hr'g Tr. 7/14/2011 at 41:14-25 (Goulding Direct). Accordingly, the Modified Plan satisfies section 1129(b)(2) of the Bankruptcy Code.

[62] With respect to Class 17B (WMB Subordinated Notes Claims), because there are no Allowed Claims in that Class, it does not matter that Classes junior to such Class may receive or retain property on account of the Claims or Equity Interests classified therein.

IV.
THE MODIFIED PLAN SATISFIES THE REQUIREMENTS OF SECTION 1127

Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code and the proponent of the modification complies with section 1125 of the Bankruptcy Code. In addition, with respect to modifications made after acceptance but prior to confirmation, Bankruptcy Rule 3019 provides, in relevant part:

> [A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Fed. R. Bankr. P. 3019.

The Modified Plan's compliance with section 1127 of the Bankruptcy Code is uncontested. The Debtors made no plan modifications after solicitation began on the Modified Plan, except those set forth in the Third Plan Modification, which are intended to address certain objections raised at the Confirmation Hearing,[63] correct certain technical errors, and revise the procedures for deeming certain distributions undeliverable in order to comply with the Dodd-Frank Act. Conf DX 374 – Goulding Decl. at ¶ 24; Third Plan Modification at ¶¶ 1-8. Such modifications are not anticipated to have a negative (if any) impact on the treatment of any Claims or Equity Interests and, thus, pursuant to Bankruptcy Rule 3019, all acceptances of the

[63] In particular, the Debtors have added a "Limitation on Recovery" provision to each of Classes 19 and 20 to address the absurd objection raised by the TPS Consortium.

Modified Plan should also be deemed acceptances of the Modified Plan as modified by the Third Plan Modification.

V.
THE EVIDENCE CONFIRMS THAT THE DEBTORS' VALUATION OF REORGANIZED WMI IS FAIR AND PROPER

In the Equity Committee Objection, the Equity Committee asserted that the evidence would show that the Debtors "have undervalued Reorganized WMI, both as a run-off company and as it will actually be used in the hands of the Settlement Note Holders who will take control of the company." Equity Committee Objection at 38. Contrary to the Equity Committee's assertion (which the Equity Committee's own expert disagrees with), the evidence, including testimony from the Equity Committee's own experts, confirms that (i) the Debtors' valuation of Reorganized WMI is fair and proper, (ii) the Debtors have not undervalued Reorganized WMI and (iii) the Equity Committee has failed to offer a credible alternative valuation of Reorganized WMI on which the Court can rely.

A. The Amount of NOLs Available to Reorganized WMI is Limited

1. Pre-2011 Loss Carryforward Potentially Available to Reorganized WMI While WMB Is Part of the Tax Group

Contrary to the assertions of various objecting parties, Reorganized WMI will not have $17.7 billion in NOLs available to it. James Carreon, WMI's Interim Tax Manager, confirmed that, prior to the Effective Date, approximately $17.7 billion in NOLs are potentially available to the WMI Tax Group (the "Tax Group"), based on the Tax Group's operations and activities through December 31, 2010, and before taking into account the proposed abandonment of WMB stock (the "Pre-2011 Loss Carryforward"). Hr'g Tr. 7/13/2011 at 102:10-17 (Carreon Direct). Upon implementation of the Modified Plan (and absent abandonment), however, the estimated $17.7 *billion* NOL would be subject *in its entirety* to an approximately $7 *million*

annual limitation imposed by section 382 of the Internal Revenue Code of 1986, as amended (the "IRC"). Id. at 104:4-17; Conf DX 253 – Supplemental Disclosure Statement at 55 n.24; 26 U.S.C. § 382.[64]

Because the entire Pre-2011 Loss Carryforward will be limited under section 382 of the IRC, rather than maintain ownership of WMB's stock and use the *limited* Pre-2011 Loss Carryforward, it is in the best interests of the Debtors' estates, as Mr. Carreon testified (based on an Effective Date on or about August 31, 2011), to abandon the stock of WMB prior to the Effective Date and take a worthless stock deduction, which will generate substantial *non-limited* NOLs for 2011. Hr'g Tr. 7/13/2011 at 104:18-105:5 (Carreon Direct).[65] Importantly, the Equity Committee's own tax expert agreed that "it makes sense in terms of tax planning for the [D]ebtors to abandon their stock in WMB prior to the Effective Date" and that, "from a federal income tax perspective, having a roughly two billion dollar available net operating loss is more valuable than maintaining the stock interest in WMB." Id. at 164:13-16, 165:2-6 (Anderson Cross).

2. Debtors' 2011 Limited and Non-Limited Portions of NOL Pursuant to Section 382

By abandoning WMI's equity interest in WMB prior to the Effective Date and, thus, recognizing the resulting stock loss prior to the Effective Date, the resulting NOL for the year (inclusive of the stock loss) would be allocated between the pre- and post-Effective Date portions of the taxable year based on a daily pro-ration method under section 382. Hr'g Tr. 7/13/2011 at 104:18-105:21 (Carreon Direct); Conf DX 424 – Confirmation Brief at 92; Conf

[64] Moreover, virtually all of the $17.7 billion NOL would cease to be available upon the earlier of when (i) the FDIC distributes all of the WMB receivership assets to WMB creditors, or (ii) WMI abandons its stock interest in WMB. Hr'g Tr. 7/13/2011 at 104:18-105:5 (Carreon Direct); Conf DX 253 – Supplemental Disclosure Statement at 55.

[65] The Equity Committee's tax expert, Kevin D. Anderson, does not dispute the Debtors' analysis with respect to section 382 of the IRC. Hr'g Tr. 7/13/2011 at 141:1-142:8 (Anderson Redirect).

DX 253 – Supplemental Disclosure Statement at 55; Treas. Reg. §§ 1.382-6, 1.1502-91. Mr. Carreon testified that a worthless stock deduction would result in a NOL of at least approximately $5.4 billion. Hr'g Tr. 7/13/2011 at 106:4-8 (Carreon Direct). He further testified that current year activity (taking into account the implementation of the Modified Plan and the Debtors' valuation) is expected to generate a NOL of approximately $600 million, after a reduction for cancellation of indebtedness under the Modified Plan. Id. at 106:9-20. Based on an August 31, 2011 Effective Date, approximately $4 billion of the current year NOL would be pre-change and subject to the section 382 annual limitation of $7 million per year. Id. at 108:17-109:13; Conf DX 424 – Confirmation Brief at 92. Conversely, approximately $2 billion of the current year NOL would be post-change and not limited under section 382. Hr'g Tr. 7/13/2011 at 109:14-110:2 (Carreon Direct).

Further, Mr. Carreon testified that there could be an additional section 382 limitation if Reorganized WMI were to undergo another ownership change in the future, post-Effective Date. Id. at 110:12-21. Moreover, the NOLs could be completely disallowed under section 269 if the IRS determines that the principal purpose of the acquisition of control by the creditors under the Modified Plan was tax avoidance, as discussed further below. Id. at 113:5-114:18. Thus, any assertion by objecting parties that greater NOLs are available to the estates is unfounded speculation unsupported by any evidence. The evidence shows that the Debtors have acted appropriately to preserve, to the greatest extent possible, all tax attributes of the estates for the benefit of all stakeholders.

B. Blackstone's Valuation of Reorganized WMI is Fair and Proper

1. Summary of Valuation

Steven Zelin of Blackstone, the Debtors' valuation expert, calculated Reorganized WMI's total enterprise value as the sum of three components. Hr'g Tr. 7/13/2011 at 259:18-

261:7 (Zelin Direct). The first component of Mr. Zelin's valuation is the value of Reorganized WMI, excluding NOLs. Mr. Zelin performed a discounted cash flow analysis ("DCF") of the projected dividend stream (based on the reinsurance run-off business of WMMRC)[66] payable to holders of Reorganized WMI, excluding NOLs. Id. The DCF analysis reflects the present value of Reorganized WMI today and gives an "inherent view of the intrinsic value of the asset, really the value of the cash flow generating capability of the asset . . . ." Id. at 261:8-20; 269:18-270:17. Mr. Zelin also considered a precedent transaction analysis, but used DCF as his primary methodology,[67] because "there really haven't been many transactions and acquisitions of reinsurance companies, let alone mortgage reinsurance companies in the last few years." Id. at 267:10-268:2; see also id. at 261:8-20. Based upon these analyses, Mr. Zelin calculated the value of Reorganized WMI, excluding NOLs, as $115 to $140 million. Id. at 269:18-270:17; Conf DX 341 – Updated Blackstone Report at 8.

Second, Mr. Zelin calculated the value of the NOLs related to sheltering the taxable income of WMMRC's existing reinsurance business. Mr. Zelin performed a DCF of the projected dividend stream payable to holders of Reorganized WMI, including NOLs. Taking the difference between the two DCF analyses, one excluding NOLs and one including NOLs, gives rise to a $10 to $20 million value of the portion of the NOLs of Reorganized WMI that may be used to shelter the taxable income (approximately $70 million over 9 years) to be generated by the existing run-off business (without discounting for the risk of disallowance under section

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[66] As discussed above, pursuant to the Modified Plan, WMMRC (i) will be Reorganized WMI's sole operating entity; (ii) has no track record of independently sourcing reinsurance business and has no current means of originating new business; (iii) has not written any new business since September 2008: (iv) is currently operating in run-off mode; (v) does not have an existing business plan that contemplates sources of new taxable income; (vi) has no management team (vii) has no employees; and (viii) will not have any financing upon emergence from bankruptcy. See supra pp. 79-80.

[67] Mr. Maxwell also attributed more weight to the DCF analysis than a precedent transactions analysis. See Hr'g Tr. 7/15/2011 at 105:5-10 (Maxwell Cross).

269). Hr'g Tr. 7/13/2011 at 274:24-275:19 (Zelin Direct); Conf DX 341 – Updated Blackstone Report at 8; Conf DX 424 – Confirmation Brief at 89. Taken together, the first two components represent the value of Reorganized WMI based on the taxable income generated from the existing run-off business and the tax shelter from the NOLs. Hr'g Tr. 7/13/2011 at 259:18-261:7 (Zelin Direct). These two components total $125 million to $160 million.[68] Conf DX 341 – Updated Blackstone Report at 8.

Third, Mr. Zelin performed a DCF analysis to value the NOLs potentially available to Reorganized WMI based on additional taxable income generated by raising and investing new capital post-Effective Date (the "Corporate Opportunity"), and estimated that the value of the Corporate Opportunity is $10 million to $25 million. Hr'g Tr. 7/13/2011 at 259:18-261:7, 287:6-23 (Zelin Direct); Conf DX 424 – Confirmation Brief at 89.[69] Adding the three components of the valuation together, Mr. Zelin calculated Reorganized WMI's total enterprise value to be approximately $135 to $185 million, with a mid-point of $160 million. Hr'g Tr. 7/13/2011 at 259:18-261:7 (Zelin Direct); Conf DX 341 – Updated Blackstone Report at 8.

2. Corporate Opportunity NOL Value

Mr. Zelin recognized that the existing reinsurance run-off business only needed approximately $70 million of NOLs to shelter its limited existing projected taxable income, but that Reorganized WMI could potentially have at least approximately $2 billion in NOLs unlimited by section 382. Hr'g Tr. 7/13/2011 at 273:12-274:5, 276:13-25 (Zelin Direct). To estimate any value for those NOLs, Mr. Zelin had to assume that Reorganized WMI would raise money to generate taxable income. Id. at 277:1-20. Both Mr. Zelin and the Equity Committee's

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[68] As discussed in Section V.C.2, infra, Mr. Maxwell essentially agrees with Blackstone's valuation of the reinsurance run-off business.

[69] The Corporate Opportunity NOL value is discussed in greater detail in the following section.

valuation expert, Anders J. Maxwell, agree that the *only* unique opportunity that Reorganized WMI presents is a large NOL. Id. at 287:24-288:14 (Zelin Direct); Hr'g Tr. 7/15/2011 at 75:14-17, 153:18-22 (Maxwell Cross).

Relying on the advice of independent tax counsel, Richard L. Reinhold of Willkie Farr & Gallagher LLP, Mr. Zelin necessarily and properly considered the tax risks that would arise from any capital raise. Hr'g Tr. 7/13/2011 at 277:21-280:9 (Zelin Direct); Conf DX 424 - Confirmation Brief at 89 n.32. Indeed, as discussed in the Debtors' Confirmation Brief, this Court has previously recognized that, where there are risks associated with NOLs, it is appropriate to discount the value of such NOLs. See Coram, 315 B.R. at 342 (holding that because the "IRS could successfully challenge the Debtors' tax positions," the Court "[r]ecognize[ed] that there is a level of risk associated with the NOLs" and "conclude[d] that it is proper to value them" at the "risk adjusted present value"); see also Conf DX 424 – Confirmation Brief at 89 n.32.

Courts in other districts similarly have held that the valuation of NOL carryforwards must take into account the *risk* of disallowance under section 269 of the IRC. See In re Jartran, Inc., 44 B.R. 331, 379-80 (Bankr. N.D. Ill. 1984) (holding that, although the Debtor had "substantial net operating loss carryforwards" and "[w]hile such additional value may exist, it should also be observed that the realization of the tax savings is subject to a number of contingencies, including continuation in effect of relevant tax provisions, potential challenge under section 269 of the Internal Revenue Code, and possible recapture of benefits utilized. Accordingly, even if the tax benefits accruing to [the purchaser of 92% of Debtors' stock] were quantified, a *substantial discount* would be required because of the foregoing contingencies." (emphasis added)); see also In re Imperial "400" Nat'l Inc., 374 F. Supp. 949, 954-55 (D.N.J.

1974) (holding that "the value of the net operating loss carryforward, while existing, is *speculative*" and "it is appropriate to *substantially discount* the alleged value of the net operating loss carryforward" based on factors including, *inter alia*, the fact that "[n]ot every proponent may be able to take advantage of the net operating loss carryforward" and that "[t]he preservation of a pre-proceedings net operating loss carryforward to offset post-proceedings profits is *seldom allowed* by [the] Internal Revenue Service or the courts" (emphasis added)); Chaim J. Fortgang & Thomas M. Mayer, Valuation in Bankruptcy, 32 UCLA L. Rev. 1061, 1130 (1985) ("Uncertainties in preserving the NOL increase the discount.").

Section 269 of the IRC was intended to prevent "trafficking in tax attributes, principally net operating losses," Hr'g Tr. 7/13/2011 at 192:9-15 (Reinhold Direct) and provides that the IRS may disallow the subsequent use of a corporation's losses following an acquisition of control of a corporation by one or more persons if "the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance" which such person(s) or corporation would not otherwise enjoy. See 26 U.S.C. § 269; Hr'g Tr. 7/13/2011 at 113:5-11 (Carreon Direct), 137:13-16 (Anderson Direct); Conf DX 253 – Supplemental Disclosure Statement at 58; Treas. Reg. § 1.269-5(b). As discussed in the Debtors' Confirmation Brief, and as the retained experts agree, the determination of the principal purpose for an acquisition is based on "scrutiny of the entire circumstances in which the transaction or course of conduct occurred, in connection with the tax result claimed to arise therefrom." Conf DX 424 - Confirmation Brief at 93; see also Hr'g Tr. 7/13/2011 at 137:22-138:8 (Anderson Direct); 173:13-18 (Anderson Cross); 193:25-195:25 (Reinhold Direct); Treas. Reg. § 1.269-3(a). In scrutinizing the entire circumstances of a transaction or course of conduct, Messrs. Reinhold and Zelin properly considered the relevant

acquisition of control for purposes of section 269 of the IRC to be the creditors' acquisition of the stock of Reorganized WMI under the Modified Plan, rather than a post-emergence acquisition of control by, or of, Reorganized WMI. Hr'g Tr. 7/13/2011 at 193:16-24 (Reinhold Direct), 279:3-280:23 (Zelin Direct); Conf DX 404 – Expert Report of Richard L. Reinhold at 4, 6, 7; Conf DX 341 – Updated Blackstone Report at 34-36; Conf DX 253E – Supplemental Disclosure Statement, Exhibit E, Valuation Analysis at 3.

Consistent with the principal purpose test articulated by the courts, Mr. Reinhold identified the principal factors that are indicative of a tax avoidance motive:

(1) The amount of a NOL "in relation to the value of the company's other assets";

(2) The "nature of the business that the company carries on, with particular reference to the degree of activity involved in that business";

(3) The "non-tax commercial motivations for acquiring the company";

(4) "The awareness of the acquirer of the availability of [] tax attributes"; and

(5) Residual reasons that "might be relevant in a particular case."

Hr'g Tr. 7/13/2011 at 194:17-195:25 (Reinhold Direct); Conf DX 404 – Expert Report of Richard L. Reinhold at 5-7; see also Conf DX 424 – Confirmation Brief at 93-94 (identifying similar factors and citing cases in support). In his tax analysis, Mr. Reinhold considered the facts and circumstances of the creditor parties' acquisition of control of Reorganized WMI under the Modified Plan, including principally that:

(1) Reorganized WMI could potentially have over $2 billion of NOLs, which is substantially greater than the value of its non-tax assets;

(2) WMMRC is currently in run-off and is "not a very active business";

(3) Reorganized WMI's assets-on-hand are sufficient for its run-off

business but that "if more cash is put into the company, it's strongly suggestive that that purpose . . . is to generate earnings that could then be sheltered by the net operating loss carryovers";

(4) The creditor parties were involved in formulating the Modified Plan and were aware of the NOLs potentially available to Reorganized WMI; and

(5) Most of the stock of Reorganized WMI will be distributed to non-historic creditors.

Hr'g Tr. 7/13/2011 at 196:1-198:11 (Reinhold Direct); Conf DX 404 – Expert Report of Richard L. Reinhold at 5-7; see also Hr'g Tr. 7/13/2011 at 282:22-284:5 (Zelin Direct); Conf DX 424 – Confirmation Brief at 95. Thus, if "a subsequent investment into [R]eorganized WMI were too large . . . the court might find that the acquisition of control pursuant to the [P]lan had as its principal purpose tax avoidance." Hr'g Tr. 7/13/2011 at 293:12-294:10 (Zelin Direct); 200:1-201:7 (Reinhold Direct); Conf DX 404 – Expert Report of Richard L. Reinhold at 4, 6, 7; Conf DX 341 – Updated Blackstone Report at 34 n.2, 35 n.1; Conf DX 253E – Supplemental Disclosure Statement, Exhibit E, Valuation Analysis at 3.

After considering these facts and circumstances, Mr. Reinhold concluded that, in order for him to give an opinion that it was "more likely than not that section 269 would not apply," Reorganized WMI could not raise more capital than the value of its non-tax assets – $127.5 million (based on the midpoint of the value of Reorganized WMI's existing run-off business, excluding NOLs). See Hr'g Tr. 7/13/2011 at 200:1-201:7 (Reinhold Direct), 281:1-282:8 (Zelin Direct); Conf DX 404 - Expert Report of Richard L. Reinhold at 6-8; Conf DX 341 – Updated Blackstone Report at 34-37; Section V.B.1.[70] In Mr. Reinhold's opinion, raising

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[70] Owl Creek, for instance, also independently determined that there are risks associated with investing significant capital to attempt to utilize Reorganized WMI's NOLs. See Hr'g Tr. 7/19/2011 at 213:17-23 (Krueger Redirect) ("To inject five billion dollars into a shell company that has a hundred million or so of assets is *a tremendous red flag*. I mean, everybody in this room at this point, I'm sure, understands all the *various regulations that prevent things like trafficking in NOLs* and prevent things exactly like what this page shows.") (emphasis added); id. at 214:9-22 (Krueger Redirect) (stating that while Owl Creek had started with "high hopes" to utilize the NOL, after

capital beyond this amount would significantly increase the risk that a court would find that the acquisition of stock was "principally tax motivated." Hr'g Tr. 7/13/2011 at 200:1-201:7 (Reinhold Direct). Mr. Anderson's claim that Blackstone imposed a "per se" limit on the size of a post-emergence capital raise is inaccurate and mischaracterizes Mr. Reinhold's legal advice. Hr'g Tr. 7/13/2011 at 202:15-203:9 (Reinhold Direct), 293:12-294:10 (Zelin Direct); Conf DX 404 – Expert Report of Richard L. Reinhold at 8; Conf DX 369 – Second Supplemental Expert Report of Kevin D. Anderson at 3.

Based on Mr. Reinhold's tax advice, Mr. Zelin considered in his valuation the incremental value of a $127.5 million capital raise (the mid-point of the value of Reorganized WMI, excluding NOLs). Hr'g Tr. 7/13/2011 at 285:4-7 (Zelin Direct).[71] He then applied a 25% to 35% discount rate to determine the present value of the assumed tax savings generated by the Corporate Opportunity. Id. at 286:10-24. These discount rates reflect the cost of equity capital, the risks generally associated with investing in any start-up company and the rates of return that an investor would expect in order to invest in a start-up. Id. ("this was in essence going to be a startup of a brand new company, not a restart of an existing company . . . ."); Conf DX 341 – Updated Blackstone Report at 34; cf. Hr'g Tr. 7/15/2011 at 108:17-22 (Maxwell Cross) (applying a lower discount rate based on the unrealistic assumption that Reorganized WMI becomes a going concern). The discount rates do not account for the time, costs and section 269 risk associated with investing in Reorganized WMI. Hr'g Tr. 7/13/2011 at 287:6-288:14 (Zelin

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speaking to a lot of tax experts, such hope was "extinguished to the place where we are today . . . as is shown in the disclosure statement, the NOLs can be used in a limited extent to shield income that's generated by the WMMRC assets," such that Owl Creek does not believe that there is any "huge home run as we would have hoped at one time there might be").

[71] Mr. Zelin assumed that Reorganized WMI would raise equity, rather than debt, because debt has an interest cost that is a tax shield and would result in using less NOLs in earlier years (with respect to which present values are higher). Hr'g Tr. 7/13/2011 at 284:10-16 (Zelin Direct); Conf DX 341 – Updated Blackstone Report at 34 n.1.

Direct). Mr. Zelin also properly applied a further adjustment to account for execution and tax risks that are specific to investing in Reorganized WMI (which are not reflected in the discount rate), including:

(1) Reorganized WMI's lack of an existing management team with experience and related infrastructure to implement the Corporate Opportunity;

(2) Reorganized WMI's lack of a business plan that contemplates sources of new taxable income;

(3) Reorganized WMI's lack of an independent source of obtaining reinsurance business during its historical operations;

(4) The uncertainty of raising capital and the availability of portfolios to be acquired;

(5) The time required to build a management team, source acquisitions and operationally execute in order to generate taxable income; and

(6) The risk that the NOLs are disallowed under section 269 given that Reorganized WMI "in and of itself is not such a unique asset that one would want to own it, other than in the context of making use of or trying to obtain the benefit of the net operating losses."

Id. at 251:25-252:12, 287:6-288:14, 333:24-335:2; Conf DX 341 – Updated Blackstone Report at 35.

While the discount rates account for expected returns by investors in any start-up company, the adjustment accounts for the time, costs, and tax risks associated with a $127.5 million capital raise. Id. at 287:6-288:14 ("[W]e applied an adjustment to reflect the fact that in essence, this value is nothing more than an option value that . . . given all the uncertainty about actually going out and executing on the capital raise and making use of the NOLs, and the fact that there is still some tax risk inherent . . . ."). As Mr. Zelin explained, "[i]t may take as much as a year or year and a half to put an infrastructure in place, to incur costs of building a business and building a management team here before any acquisition gets made. . . . But the time and

the cost between today and when you can actually effectuate that acquisition is reflected in this incremental adjustment." Id. at 333:24-335:2 (Zelin Cross). Therefore, the adjustment properly takes into account the time value of money with respect to realizing the Corporate Opportunity. Further, the adjustment accounts for the risk that the IRS still could disallow the use of Reorganized WMI's NOLs even assuming a capital raise limited to $127.5 million. Id. at 287:6-288:14. After applying the adjustment to reflect these additional risks, Mr. Zelin valued the tax savings generated by the Corporate Opportunity at between $10 million to $25 million. Id. at 287:6-23; Conf DX 341 – Updated Blackstone Report at 37; see supra pp. 151-53 (citing cases approving substantial discounts to the value of NOLs). Thus, Mr. Zelin performed a fair and proper valuation of Reorganized WMI (including a valuation of the NOLs potentially available to Reorganized WMI based on the Corporate Opportunity), which reflects the present value of Reorganized WMI today, in contrast to Mr. Maxwell's purely hypothetical "scenario" of Reorganized WMI assuming a better, rosy future years down the road.

C. The Court Should Grant the Debtors' Motion in Limine and Exclude Maxwell's Report and Testimony with respect to the Hypothetical Value of Reorganized WMI

The Equity Committee has proffered the "critique" and testimony of Anders J. Maxwell on the valuation of Reorganized WMI.[72] Mr. Maxwell's testimony confirms, however, that, aside from his opinion that the value of the reinsurance run-off business of Reorganized WMI is $130 million to $135 million, which falls squarely within the range of the Debtors' valuation of Reorganized WMI, Mr. Maxwell has failed to offer any actual opinion on valuation that meets the requirements of Federal Rule of Evidence ("FRE") 702. Hr'g Tr. 7/15/2011 at 68:9-13 (Maxwell Cross). Rather, Mr. Maxwell's "critique" includes highly speculative

[72] Maxwell's "Residual Washington Mutual Inc., Valuation Critique" is not cited herein, as the Court reserved ruling on its admission into evidence.

scenarios that do not reflect the actual value of Reorganized WMI, relies on a number of admittedly baseless assumptions, and, by Mr. Maxwell's own admission, lacks all hallmarks of the traditional methodology required of valuations, thus rendering his opinion and testimony unreliable, irrelevant and inadmissible. Specifically, and as set forth in more detail below, Mr. Maxwell makes up a $140 million equity raise with a debt raise of $56 million, *plus* another debt raise of $160 million at a 15% rate of return with only 6% cost of debt, *plus* billions of dollars in additional capital that somehow successfully generates hundreds of millions of dollars to be shielded by NOLs, all without even accounting for *any* of the pertinent, realistic risks, costs or likelihood of Reorganized WMI actually transforming into a "going concern" or any of the risks, costs or time to execute the hypothetical "scenarios." Id. at 83:15-17, 97:16-23, 99:18-100:8; see also infra, Section V.D.1.ii (discussing Maxwell's failure to account for any risks, costs or time). Sections 5-7 and Appendices B and C of Mr. Maxwell's "critique" and the related testimony regarding the valuation of Reorganized WMI should thus be excluded under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

1. The Equity Committee Has Failed To Establish Admissibility Under Daubert

As previously set forth in the Debtors' Memorandum of Law in Support of Their Motion In Limine to Exclude Certain Portions of the Expert Reports and the Testimony of the Equity Committee's Expert Witnesses Anders J. Maxwell and Kevin D. Anderson, dated July 11, 2011 [D.I. 8161] (the "Motion In Limine Brief")[73] (filed under seal), FRE 702 governs the admissibility of expert evidence and provides that expert testimony is admissible if: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the

[73] The Motion in Limine Brief was filed in support of the Debtors' Motion In Limine to Exclude Certain Portions of the Expert Reports and the Testimony of the Equity Committee's Expert Witnesses Anders J. Maxwell and Kevin D. Anderson, dated July 11, 2011 [D.I. 8159] (the "Debtors' Motion in Limine").

facts of the case." Fed. R. Evid. 702; see also Motion in Limine Brief at 4. As the proponent of Mr. Maxwell's "critique" and testimony, the Equity Committee bears the burden of establishing admissibility by a preponderance of the evidence. In re Nellson Nutraceutical, Inc., 356 B.R. 364, 372 (Bankr. D. Del. 2006) (quoting Daubert, 509 U.S. at 592 n.10). The Equity Committee has failed to meet its burden.

The Equity Committee is required to surpass "the trilogy of restrictions on expert testimony: qualification, reliability and fit." Calhoun v. Yamaha Motor Corp., 350 F.3d 316, 321 (3d Cir. 2003) (internal quotation marks omitted); see also Motion in Limine Brief at 4. "First, the witness must be qualified to testify as an expert," such that he or she "possess[es] specialized expertise." Calhoun, 350 F.3d at 321 (internal quotation marks omitted). Next, the witness's testimony must be reliable. Id. Lastly, "the expert testimony must fit, meaning the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact." Id. (citation and internal quotation marks omitted).[74] Furthermore, "if the factual basis of an expert's opinion is so fundamentally unsupported because the expert fully relies on altered facts and speculation, or fails to consider relevant facts in reaching a conclusion, the expert's opinion can offer no assistance to the trier of fact, and is not admissible on relevance grounds." In re Nellson, 356 B.R. at 373; see also Motion in Limine Brief at 6.

The Third Circuit applies the factors set forth in In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994) ("Paoli II") to determine whether an expert's opinion meets the requirements for reliability.[75] In addition, an expert's opinion is "reliable if it is based on the

[74] With respect to the "fit" element, "evidence must first be relevant to be admissible. Relevant evidence is evidence that helps the trier of fact to understand the evidence or to determine a fact in issue." Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3d Cir. 2000) (citation and internal quotations omitted); see also Motion in Limine Brief at 6.

[75] The Paoli II factors are:

methods and procedures of science rather than on subjective belief or unsupported speculation . . . ." Elcock v. Kmart Corp., 233 F.3d 734, 745 (3d Cir. 2000) (internal quotation marks omitted).

Indeed, the Third Circuit has ruled that opinions based only on the expert's belief or unsupported speculation do not satisfy FRE 702 and should be excluded. See Oddi, 234 F. 3d at 158 (holding that "[a]n expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation" and excluding expert testimony where the expert "used little, if any, methodology beyond his own intuition" (internal quotation marks omitted)).[76] As discussed below, Mr. Maxwell's hearing testimony highlights the unreliability of the opinions contained in his "critique."

2. Maxwell's Testimony Established That His Reliance on Hypothetical Scenarios and Unrealistic Assumptions Renders His Critique Regarding Reorganized WMI Highly Speculative and Unreliable

Mr. Maxwell's testimony confirms that, rather than offering an expert opinion, he simply "speculates" as to the value of Reorganized WMI as a going concern and "postulates scenarios."

> Q. Okay. You are postulating scenarios going forward should the new owners choose to manage reorganized WMI as a going concern, right?
> A. That is correct.

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Paoli II, 35 F.3d at 742 n.8; see also Motion in Limine Brief at 5.

[76] See generally Fed. R. Evid. 702, Advisory Notes (2000) ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted.").

*   *   *

> Q. Now, you'll agree with me that your report speculates as to the value of reorganized WMI as a going concern, correct?
> A. That is correct.

Hr'g Tr. 7/15/2011 at 82:7-10, 83:13-15 (Maxwell Cross). Mr. Maxwell admitted that, in making the assumption that Reorganized WMI will be managed as a going concern, as opposed to a captive reinsurance company in run-off, he is "not speaking at all to the current Plan," id. at 74:16-18, and is not opining on the likelihood that this transformation to a going concern will ever occur. Id. at 75:5-13. Moreover, as Mr. Maxwell agreed, his "critique" is merely a "*plausible scenario* reflective of the *potential* for incremental value." Hr'g Tr. 7/15/2011 at 72:24-73:2 (Maxwell Cross) (emphasis added). In addition, as previously set forth in the Motion in Limine Brief, the Maxwell "critique" is equally speculative and replete with words such as "possibly," "may," "could," and "assuming," which further indicate the unreliability of his scenarios. Motion in Limine Brief at 10. The Third Circuit has held that the word "possibility" may "indicate the level of confidence the expert has in the expressed opinion." Schulz v. Celotex Corp., 942 F.2d 204, 208-209 (3d Cir. 1991) (excluding expert testimony that is "speculative, using such language as 'possibility'"); see also Motion in Limine Brief at 9. Indeed, "the whole point of Daubert is that experts can't speculate." DePaepe v. Gen. Motors Corp., 141 F.3d 715, 720 (7th Cir. 1998); see also Motion in Limine Brief at 9.

While it is not inappropriate for a valuation expert to make certain assumptions regarding the performance of the business in question, the testimony at the Confirmation Hearing exposed the flimsiness of the fundamental assumption in Mr. Maxwell's scenarios—that Reorganized WMI will be transformed into a going concern. Hr'g Tr. 7/15/2011 at 74:9-15 (Maxwell Cross). Mr. Maxwell recognized that "the principal asset of Reorganized WMI will be the stock of [WMMRC] under the plan" and that "WMMRC's only asset is the reinsurance run-

off portfolio." Id. at 73:16-22. He also conceded, as he must, that WMMRC has no current business plan, no current means of originating business, no financing arranged for after emergence from bankruptcy, and no ongoing relationship with customers or vendors. Id. at 75:18-76:9. Further, Mr. Maxwell admitted that "there are *many steps* that would have to be taken before Reorganized WMI could become a going concern":

> Q. For instance, it would need to find a manager, right?
> A. Correct.
> Q. And it would need to develop a business plan?
> A. Yes.
> Q. And it would need to arrange some credit facility or financing facility, right?
> A. Absolutely.
> Q. And it would need to perform an equity raise of some form, correct?
> A. Yes.
> Q. And it would need to develop an implementation plan to turn the business plan into an operating entity, right?
> A. That is correct.
> Q. And other steps as well that it would need to take, correct?
> A. I readily acknowledge that.

Id. at 78:18-79:13 (Maxwell Cross). Notwithstanding this recognition, Mr. Maxwell admitted that he did *not* account for the risks or costs inherent in these steps or the risk that attempting to convert Reorganized WMI into a going concern might fail. Id. at 80:11-14 ("Q. All right. But back to my question, your critique does not account for the costs of converting reorganized WMI to a going concern, correct? A. That is correct."); id. at 80:23-81:7 ("Q. Okay. If I could direct you to your deposition, please, Mr. Maxwell, page 91. A. Yes. Q. Page 91, line 12, and you also – 'you haven't endeavored to account for the risks involved in converting this to a going concern, the fact that it might not work? A. I think that's a fair characterization.' Did I read that correctly, Mr. Maxwell? A. Yes, you did."); id. at 81:20-24 ("Q. Okay. And in this portion of your report, this additional potential value, you don't discount this value for any of the risks

associated with converting reorganized WMI to a going concern, correct? A. That – I think that's correct.").

Mr. Maxwell admitted that he did not "know of anyone who was interested or able to infuse capital into reorganized WMI." Id. at 83:25-84:3. Notably, there is no evidence in the record that the Settlement Note Holders, or anyone else, currently intends to invest capital in Reorganized WMI. Indeed, the Settlement Note Holders, who are slated to receive a substantial portion of the Reorganized Common Stock on account of their holdings in Class 16, see Hr'g Tr. 7/14/2011 at 39:15-17 ("Q. And what percentage of the stock will be received by the PIERS? A. Approximately seventy-seven percent.") (Goulding Direct); Hr'g Tr. 7/18/2011 at 201:7-10 ("The [Settlement Note Holders] together owned about three-quarters of the subordinated bonds and the [PIERS]."), specifically testified that they have no intention of injecting additional capital into the company. See Hr'g Tr. 7/19/2011 at 111:18-112:14 (Gropper Redirect) (stating that Aurelius elected to receive cash, rather than Reorganized Common Stock, and did not participate in the prior Rights Offering because it "did not want to purchase additional stock"), id. at 213:17-23, 214:9-22 (Krueger Redirect) ("[I]nject[ing] five billion dollars into a shell company that has a hundred million or so of assets is a tremendous red flag" for taxing authorities given the "various regulations that prevent things like trafficking in NOLs."); see also Hr'g Tr. 7/14/2011 at 187:14-23 (Goulding Redirect) (confirming that the amount of the Rights Offering pursuant to the Sixth Amended Plan was approximately $100 million, but that only about $33 million of this was subscribed). Mr. Maxwell's testimony further confirmed that his assumption that Reorganized WMI will be managed as a going concern is baseless because it was not informed by the goals, objectives and intentions of the Settlement Note Holders, who will potentially own significant interests in Reorganized WMI. Hr'g Tr. 7/15/2011 at 70:19-22

(Maxwell Cross) (conceding that he "can't speak to the goals, objectives and intentions of the Settlement Note Holders concerning how Reorganized WMI will actually be used").[77] Moreover, Mr. Maxwell made no effort to determine what the Settlement Note Holders would do if they were to inherit the business.[78]

The entire premise of Mr. Maxwell's theory is that investors would choose to put vast sums of money into a captive mortgage reinsurer with no history of independently generating new business, no management team, no business plan, no special technology or business methods, and no means of generating any income other than that which will come from the runoff of its existing contracts.[79] In sum, WMMRC has no characteristics to distinguish itself from any other investment opportunity other than its tax attributes. Thus, Mr. Maxwell's grand assumption that Reorganized WMI will be managed as a going concern is speculative and ignores the facts of this case, he fails to opine on the likelihood of any of his scenarios even occurring, and his "critique" is unreliable. Motion in Limine Brief at 12 (citing Coated Sales, Inc. v. First E. Bank, N.A. (In re Coated Sales), 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992) ("[F]air market valuation entails a hypothetical sale, *not* a hypothetical *company*." (emphasis added))); Gretz v. Inner Spirits, Inc. (In re Gretz), No. 09–10069 (BLS), 2011 WL 1048635, at

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[77] Hr'g Tr. 7/15/2011 at 82:7-10, 82:18-19 (Maxwell Cross).

[78] Id. at 83:4-83:8 (Q. And what prevented you from talking to them was your confidentiality agreement with the equity committee; is that correct? A. Under the circumstances, I didn't even approach the prospect of addressing this with the settlement noteholders.); id. at 88:15-18 (Q. Did you read the deposition transcripts of the noteholders? A. No, I did not. I would not have had those available at the time I did the report.).

[79] To the extent the Equity Committee is arguing that the Debtors failed to maximize the value of the estates by not investing in WMMRC during the Chapter 11 Cases to turn it into a going concern, that contention is meritless. The Debtors are unaware of any example of a bankrupt holding company investing its limited assets in an effort to create, out of whole cloth, an active mortgage reinsurance business. Indeed, the Debtors can only imagine the reaction of creditors and this Court had the Debtors sought court permission to retain the managers, consultants and other professionals necessary to do so or sought authorization under section 363 of the Bankruptcy Code to use estate assets for this purpose. Furthermore, in the year and a half it has existed, the Equity Committee has never suggested doing so.

*4 (Bankr. D. Del. Mar. 18, 2011) (rejecting a valuation hypothesizing that an un-renovated property with no rental income was a fully-renovated income-producing property because it was "simply too far removed from the facts on the ground for the Court to be able to confidently rely upon it."))); see also S.E.C. v. Novus Techs., L.L.C., No. 2:07–CV–235–TC, 2010 WL 3516347, at *2 (D. Utah, Sept. 2, 2010) (excluding expert report and testimony where expert "use[d] a layer of *unsupported assumptions to speculate* about an unrealistically high estimate of the value of [the defendant's] claims" (emphasis added)); Boltar, L.L.C. v. C.I.R., No. 25954-08, 2011 WL 1314445, *10 (U.S. Tax Ct. Apr. 5, 2011) (finding expert report not relevant "because it *assumes scenarios* that are *unrealistic* in view of the facts of the case" (emphasis added)).

3. Maxwell's Methodology for Valuing the Incremental Present Value of Capital Raises is Fatally Flawed

"[A]ny step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." Paoli II, 35 F.3d at 745 (emphasis removed); see also Motion in Limine Brief at 13. Furthermore, assumptions "must be sufficiently grounded in sound methodology, and reasoning to allow the conclusion it supports to clear the reliability hurdle." In re TMI Litig., 193 F.3d 613, 677 (3d Cir. 1997); see also Motion in Limine Brief at 13. If the assumptions are not grounded in sound methodology and reasoning, they can "hardly be relied upon as 'good science.'" TMI Litig., 193 F.3d at 677. Because Mr. Maxwell *admittedly* strays from sound valuation methodology while relying upon unrealistic assumptions, his capital raise scenarios are "castles made of sand" and are inadmissible. Elcock, 233 F.3d at 755 (internal quotation marks omitted); see also Motion in Limine Brief at 13.

Mr. Maxwell's testimony confirms that he departed from appropriate valuation methodology when considering the incremental present value of his hypothetical equity capital

and debt raises: (1) an equity raise of $140 million with a debt raise of $56 million *and* (2) an additional debt raise of $160 million.[80] Hr'g Tr. 7/15/2011 at 83:12-17, 97:16-23 (Maxwell Cross). First, Mr. Maxwell acknowledged that his critique "speculates as to the value of Reorganized WMI," and, while his scenarios "require a substantial investment of additional capital," he is "not opining on the likelihood that capital will be raised." Id. 83:15-24. He further agreed that he is "*not* in a position to tell the Court the likelihood of placing the debt or the equity" and that he is "*not* in a position to substantiate whether the company today could raise $160 million in debt." Id. at 97:24-98:8 (emphasis added). Moreover, Mr. Maxwell agreed that, in the "scenario" he put forward, he is "creating a whole new business and taking credit for all the value that [he] assume[s] could be created." Id. at 110:19-21. Mr. Maxwell further admitted that more than two-thirds of his hypothetical value of Reorganized WMI as a going concern is attributable to the new start-up business he simply created by his hypothetical capital raises – and not attributable to the NOL, which he admits is the "unique" attribute of Reorganized WMI and the "driving differentiating factor." Id. at 154:8-154:17, 155:1-13.

Notably, he also admitted that his "critique" is *not* a valuation as the term is normally used, and is *not* a valuation normally relied upon by a Court. Id. at 73:10-15. In fact, Mr. Maxwell testified that he does not offer a "conventional valuation," id. at 70:23-71:2, and agreed that all he offers the Court is a "hypothetical." Id. at 120:10-19. Thus, it is evident from Mr. Maxwell's testimony that here, as in In re Innkeepers USA Trust, et al., Case No. 10-13800-scc (Bankr. S.D.N.Y. 2010), he "hedges" and failed to offer a true valuation. Id. at 115:22-

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[80] In addition, as discussed in Section V.C.4, infra, Mr. Maxwell's consideration of the potential value of Reorganized WMI's NOLs is purely hypothetical and, therefore, fatally flawed.

116:11. As a result, Mr. Maxwell's testimony in this case, as in Innkeepers, is "well short of an expert opinion on which [the Court] can rely."[81] Id. at 117:3-7.

Furthermore, Mr. Maxwell presented a critique that lacks the "considerably greater diligence" that would have been done in an *actual* valuation report:

> Q. And if you were doing a valuation report, it would've been done with considerably greater diligence that you did here, correct?
> A. That is correct.
> Q. And if you're doing a valuation report, you would've incorporated values reflective of what you thought were comparable companies, correct?
> A. To the extent that I could divine adequate comparables, that is correct.
> Q. Okay. And if you were doing a valuation report, you would've had the benefit of a business plan that would substantiate the projections for the business, correct?
> A. As well as a management team in place that I could gauge as part of that business plan and their abilities to implement that business plan, that is correct.
> Q. And you have done a fairly in-depth study of the future prospects of the business well beyond what you did here, correct?
> A. Well beyond what I was able to do here, that is correct.

Id. at 71:3-21.

In addition to various technical errors in his methodology (discussed below),[82] including assuming a "rosy" future ten years down the road that is better and "materially different than is reflected in the precedent transactions that he looked at," id. at 96:5-13, Mr. Maxwell unreasonably assumed full and immediate implementation of his debt and equity raise "scenarios" on day one, and admitted that, if he had a "realistic business plan," he would account

[81] While Mr. Maxwell contended that his valuation in Innkeepers "wasn't far off," Hr'g Tr. 7/15/2011 at 116:12-117:2 (Maxwell Cross), even if the value he attributed to the properties was ultimately realized, the only reason that those values were realized was because of a substantial recovery in the market *after* Mr. Maxwell's report was submitted. The fact that the market might have ultimately rebounded did not make Mr. Maxwell's "opinions" more defensible at the time he proffered them in Innkeepers or in this case, where he baselessly assumes a wholly different company and a better, rosy future down the road.

[82] See infra Section V.D.1.

for (i) the timing of when capital would come in; (ii) how long it would take to invest the capital; and (iii) the timing of when revenues would start to come in. Id. at 100:24-101:8. Because Mr. Maxwell admittedly applied unsound methodology, his "scenarios" are inadmissible, and his "critique" and testimony should be excluded.

4. Maxwell's Testimony Confirms That His Consideration of the Potential Value of Reorganized WMI's NOLs is Purely Hypothetical

As previously set forth in the Motion in Limine Brief, Mr. Maxwell considers the "potential value" of the NOLs in Reorganized WMI by simply *assuming* that Reorganized WMI magically raises billions of dollars of capital and generates hundreds of millions of dollars per year sufficient to fully utilize a $2.725 billion NOL, at a constant rate of approximately $136 million to $273 million per year, starting with the very first year after emergence. Motion in Limine Brief at 15. Mr. Maxwell, however, admitted in his testimony that viewing the NOLs in this manner does *not* reflect on the actual value of the NOLs to Reorganized WMI. First, he acknowledged that a "substantial investment of additional capital" would be required for Reorganized WMI to somehow utilize a $2.725 billion NOL:

> Q. If you take a quick look at page 8 of your report, which we discussed earlier, you discuss additional potential value of NOLs, correct?
> A. Yes.
> Q. And this is premised on a substantial additional investment capital, right?
> A. And I acknowledge that I think in my concluding sentence.
> Q. And without the substantial investment of additional capital, the potential value will not be achieved, correct?
> A. Within this context, that's correct.

Hr'g Tr. 7/15/2011 at 84:10-19 (Maxwell Cross). Yet, at the Confirmation Hearing, Mr. Maxwell offered no view on the likelihood that that additional capital would or could be raised or from where it would come:

> Q. Okay. And your scenarios require a substantial investment of additional capital, right?
> A. As they said, 140 million dollars of equity capital.
> Q. And you're not opining on the likelihood that additional capital will be raised, correct?
> A. I believe it can be raised, but I haven't endeavored to place a probability on that likelihood.
> Q. So you are not opining on the likelihood it'll be raised, correct?
> A. That is correct.
> Q. Okay. And you don't know of anyone who was interested or able to infuse capital into reorganized WMI, correct?
> A. I do not know sitting here today a qualified investor who is interested today in investing in reorganized WMI.

Id. at 83:15-84:3. Mr. Maxwell also admitted that it was *not* his expert opinion that the NOLs should be *valued* at the amounts listed in his report. Id. at 86:16-18 ("Q: Right. It's not your expert opinion that the net operating losses have the values discussed on page 8, correct? A. That is correct.").

Because Mr. Maxwell's assumed investments are wholly speculative and hypothetical, his testimony is of no relevance and no assistance to the Court in determining the actual value of Reorganized WMI for purposes of confirmation of the Modified Plan.[83] For the foregoing reasons, Mr. Maxwell's scenario speculating on potential value of the NOLs is inadmissible under FRE 702. Accordingly, the Debtors respectfully request that the Court (i)

[83] In its Opposition to the Debtors' Motion in Limine, the Equity Committee mistakenly relies on Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 413 (3d Cir. 2002) for the proposition that "Federal Rule of Evidence 705, together with Rule 703, 'places the burden of exploring the facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination.'" The Official Committee of Equity Security Holders' Opposition to Debtors' Motion in Limine, dated July 12, 2011 [D.I. 8201], at 3. Contrary to the facts of this case, in Stecyk, "the record reflect[ed] a factual foundation sufficient to support [the expert's] opinion." 295 F.3d at 414. The Stecyk court made clear that it was only "[o]nce [the] expert met the foundational requirements for admissibility" that "the burden shifted to [the opposing party] to explore any deficiencies in the expert's sources." Id. Furthermore, the Stecyk court explicitly stated that "[i]t is an abuse of discretion to admit expert testimony which is based on assumptions lacking any factual foundation in the record." Id. Here, Maxwell's admissions that his scenarios are based on numerous unrealistic assumptions and that his assumptions do not reflect in any way the actual value of Reorganized WMI, confirm that his opinion is too far removed from the facts of this case to meet the foundational requirements for admissibility.

exclude Sections 5-7 and Appendices B and C of the Maxwell "critique" and (ii) strike all related testimony thereto.

D. The Equity Committee's Experts Failed to Put Forth a Credible Alternative Valuation

Alternatively, if the Court admits Mr. Maxwell's "critique" and related testimony into evidence, the Court should ascribe no weight to it because it is completely speculative and replete with numerous errors as further discussed below. The Court should also ascribe no weight to Mr. Anderson's expert reports and testimony regarding section 269 of the IRC, because he performed the wrong analysis. Due to the fatal mistakes in both the Maxwell and Anderson reports, the Equity Committee ultimately has failed to present a credible alternative valuation of Reorganized WMI on which the Court can rely.

1. Maxwell's "Critique" Is Speculative and Replete with Errors

By Mr. Maxwell's own admission, his "critique" is *not* a valuation of the type normally relied on by a Court. Hr'g Tr. 7/15/2011 at 73:13-15 (Maxwell Cross). Mr. Maxwell's hearing testimony confirmed that he proffered no alternative valuation or expert testimony on which the Court could rely, and, in fact, he conceded that he *disagrees* with the Equity Committee's allegation that the Debtors "undervalued" Reorganized WMI both as a run-off company and as it will actually be used in the hands of the new owners. Id. at 69:16-70:4. Indeed, as discussed supra, Mr. Maxwell essentially agrees with Blackstone's valuation of the reinsurance run-off business. See supra, Section V.C.2

Mr. Maxwell's rank speculation and hypothetical scenarios do not aid the Court and deserve no weight. See Conf DX 424 – Confirmation Brief at 96; see also supra, Section V.C.2. It is clear that Mr. Maxwell did not present an objectively reasonable opinion that reflects in any way the value of Reorganized WMI upon emergence; he presented a speculative,

theoretical value under a "scenario" assuming investment of hundreds of millions, if not billions, of dollars of capital into a run-off reinsurance business with no distinguishing characteristics other than its tax attributes. He is thus an advocate for creating a new hypothetical company without any basis in the facts.[84]

Valuations in bankruptcy are intended to determine the debtor's value at the time of confirmation. See Conf DX 424 – Confirmation Brief at 97 (citing Coram, 315 B.R. at 337-38, 341). Mr. Maxwell's testimony is therefore of no help to the Court, as his opinion with respect to the value of Reorganized WMI is pure speculation based on a completely hypothetical "scenario" that assumes Reorganized WMI will be morphed into a going concern. Hr'g Tr. 7/15/2011 at 82:7-10, 83:12-14 (Maxwell Cross); see also supra, Section V.C.2. Thus, as discussed below, Mr. Maxwell's "scenario" in no way reflects the value that a potential investor would attribute to Reorganized WMI upon emergence.

Although as shown in Section V.C.2, supra, Mr. Maxwell could not even assess the likelihood of a $356 million capital raise, and he then assumed *an additional* capital raise of *at least* $1 billion, id. at 85:23-86:1, notwithstanding the fact that the Settlement Note Holders themselves, who stand to receive a substantial portion of the Reorganized Common Stock, have no present intention of making any such investment. See supra p. 164.[85] Mr. Maxwell

[84] Maxwell has previously been criticized for being an advocate instead of a disinterested neutral. See Hr'g Tr. 7/15/2011 at 113:18-114:20 (Maxwell Cross) (discussing In re Mirant Corp., 334 B.R. 800 (Bankr. N.D. Tex. 2005).

[85] The Equity Committee referred to spreadsheets prepared by Owl Creek in an attempt to suggest that it and other creditors were contemplating "very large investments" in Reorganized WMI in order to utilize the NOLs. Hr'g Tr. 7/13/2011 at 305:11-306:23 (Zelin Cross). However, Mr. Maxwell himself testified that whatever investors may be modeling at any point, "what they think the following morning . . . would be pure conjecture on my part." Hr'g Tr. 7/15/2011 at 88:1-14 (Maxwell Cross). Importantly, Daniel Krueger of Owl Creek testified that the spreadsheets "make a lot of assumptions across a wide range of possible scenarios," are "just a collection of formulas that one of the analysts put together probably in twenty or twenty-five minutes," and do not account for any risk under section 269. Hr'g Tr. 7/19/2011 at 191:7-10, 192:20-25, 193:13-19 (Krueger Cross). Mr. Krueger explained that the spreadsheets input, not output, a value for Reorganized WMI because they are "what if" analyses for "illustrative purposes." Id. at 190:25-191:2 (Krueger Cross), 202:10-18; 209:11-210:2 (Krueger Redirect), 212:10-18 (Krueger Redirect) ("Q. Was this meant to reflect what assessment Owl Creek had of the likelihood that these maximum

calculated the "potential" present value of the NOL based on the income generated by this "substantial additional investment," id. 84:14-16, but then admitted that it was not his expert opinion that the NOLs should be *valued* at the amounts listed in his report. Id. at 86:16-18 ("Q: Right. It's not your expert opinion that the net operating losses have the values discussed on page 8, correct? A. That is correct.").

(i) Maxwell's Report is Replete With Mistakes that Inflate the Value of Reorganized WMI

Despite the fact that Mr. Maxwell agrees with the Debtors' experts that the *only* unique investment opportunity presented by Reorganized WMI is the possibility of utilizing the NOL, Hr'g Tr. 7/15/2011 at 155:10-17 (Maxwell Recross), he admitted that he also includes in his "critique" the "value added by a future owner, rather than value inherent today," in his hypothetical scenarios involving Reorganized WMI. Id. at 153:9-22, 75:14-17. Mr. Maxwell conceded that he made various additional mistakes, all of which *increase* the total value he purportedly ascribes to Reorganized WMI,[86] including, but not limited to:

(1) Mr. Maxwell assumed a better, "rosy" future ten years down the road that is "materially different than is reflected in the precedent transactions that he looked at." Id. at 96:5-13.

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values would be achieved? A. No. As I said earlier, this page doesn't analyze anything at all having to do with the *much more relevant issues of whether or not you can 'monetize' an NOL*. This is, as I said, just formulas on a page; that the hard work, the really time intensive work is done talking to tax lawyers and tax experts *and trying to figure out within the confines of IRS regulations whether you can use the NOL at all*." (emphasis added)); see also id. at 111:18-112:14 (Gropper Redirect) (testifying that Aurelius elected to receive cash, rather than stock of Reorganized WMI, and that Aurelius did not participate in the prior rights offering because it "did not want to purchase additional stock").

[86] This is not the first case in which Mr. Maxwell's errors grossly inflated the value of the asset at issue. Specifically, in In re Mirant, Maxwell used an EBIT instead of an EBITDA multiple, which grossly inflated his valuation by over $1 billion. See Hr'g Tr. 7/15/2011 at 112:8-20 (Maxwell Cross) ("Q. Okay. If we could go to page 3986 of the transcript, line 23, I believe it is to the next page. There's a question: 'And the use of a 2005 EBIT number increases your valuation over EBITDA by some 1.3 billion dollars; is that right?' And your answer was, 'Well, arithmetically that's correct. That is not the reason it's included on that page.' Do you recall that testimony in Mirant? A. No, I don't. Q. Do you have any reason to think it didn't happen? A. No, I have no reason at all. But again, I mean, I was, you know, testifying for six days. *This is the least of my problems*." (emphasis added)).

(2) Mr. Maxwell used a precedent transaction multiple, which includes a control premium for the terminal value multiple in his DCF. Although he is not assuming a transaction whereby a group of investors seek and gain control of the company, Mr. Maxwell did *not* back out the acquisition and control premium from his terminal value multiple. Id. at 96:20-97:4.

(3) Mr. Maxwell calculated the cost of debt based on a double-B rated security although the comparable reinsurance companies listed in his critique have B-minus or C-plus ratings.[87] Id. at 92:6-9.

(4) Mr. Maxwell agreed that *none* of the comparable companies he used were reinsurance run-offs. Id. at 91:12-18.

(5) Mr. Maxwell inaccurately assumed full and immediate implementation of the "scenario involving the debt and equity raise" on day one. Id. 100:14-23.

(6) Mr. Maxwell agreed that his weighting of the precedent transactions is "rather high." Id. at 105:5-10.

(ii) Maxwell Admits that He Failed to Account for the Risks and Costs Inherent in His Scenario

Despite the fact that it is the key assumption of his "critique," Mr. Maxwell does not opine on the likelihood that Reorganized WMI will be transformed into a going concern. Id. at 74:13-15, 74:19-75:13 (Maxwell Cross); see supra, Section V.C.2. And, as discussed above in Section V.C.2, he further fails to account for the costs and risks of conversion, id. at 80:11-81:7, or the risk that the conversion might fail. Id. at 81:20-24. Instead, Mr. Maxwell unreasonably assumed full and immediate implementation of his hypothetical scenario involving a massive

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[87] In fact, recent earnings releases resulted in additional negative ratings actions by the rating agencies with respect to PMI Group Inc. and Genworth Financial Inc., two of the companies Mr. Maxwell lists as comparable, further calling into question Mr. Maxwell's assumption that Reorganized WMI's cost of debt will be based on a double-B rated security. See Standard & Poor's Global Credit Portal Ratings Direct (Aug. 4, 2011), www.standardandpoors.com/ratingsdirect (lowering PMI Group Inc.'s rating to 'CCC-'); see also Fitch Places Genworth Life Insurance Company on Rating Watch Negative (July 21, 2011), http://www.streetinsider.com/Press+Releases/Fitch+Places+Genworth+Life+Insurance+Company+on+Rating+Watch+Negative/6652371.html.

debt and equity raise on day one, despite admitting that if he had a realistic business plan, he would have accounted for various delays in implementation.[88]

In addition, while Mr. Maxwell admitted that there are various execution risks associated with his "scenario,"[89] he failed to account for any of these risks in calculating the hypothetical additional value of the tax savings resulting from utilization of the NOL. Id. at 107:15-108:16. Mr. Maxwell further failed to account for *any* section 269 risk under the IRC. Id. at 107:2-5. Despite Mr. Anderson's failure to consider the section 269 risk for the relevant transaction, which will be addressed further below, Mr. Maxwell relied on Mr. Anderson's review of his report. Notably, Mr. Anderson admitted that, although he was aware of the hypothesized numbers for debt and equity raises the Maxwell report, he did not focus on those numbers and did not consider himself "to have approved those numbers from a tax perspective." Hr'g Tr. 7/13/2011 at 160:2-10 (Anderson Cross). Mr. Maxwell's testimony and "critique" therefore incorporate Mr. Anderson's mistake. Hr'g Tr. 7/15/2011 at 107:2-8 (Maxwell Cross) ("Q. Okay. And your report, your critique doesn't account at all for any Section 269 risks under the Internal Revenue Code, correct? A. That is correct. Q. Okay. A. But again, as I said in my deposition, my report was reviewed by the committee's tax advisor.").

[88] Hr'g Tr. 7/15/2011 at 100:14-101:8 (Maxwell Cross) ("Q. And you assume full and immediate implementation of the scenario involving the debt and equity raise, as of the first day of the first year, correct? A. That is correct. We haven't endeavored to defer this. It is a ten period analysis --on the investment without deferral. Q. And you agree that the assumption of full and immediate implementation on day one is inaccurate, right? A. That would have some impact, yes. Q. If you had a realistic business plan, you would account for the timing of when capital would come in, for instance, right? A. That is correct. Q. And you would account for how long it would take to invest the capital, right? A. That is correct. Q. And you would account for the timing of when revenues would start to come in, right? A. That is correct.").

[89] Mr. Maxwell admitted that the execution risks in this case include the lack of an existing management team, the nature of the historical business in which all reinsurance assets were sourced from a former affiliate, uncertainty surrounding the availability of capital and the deterioration in Reorganized WMI's existing portfolio. Id. at 107:15-108:16.

2. Anderson Failed to Perform the Relevant Section 269 Analysis

Notwithstanding his acknowledgment that section 269 of the IRC could apply to the creditors' acquisition of stock under the Modified Plan, Hr'g Tr. 7/13/2011 at 166:4-13 (Anderson Cross), Mr. Anderson failed to account for any section 269 risks, as related to the value of Reorganized WMI. Rather, as discussed below, Mr. Anderson only focused on potential future acquisitions by Reorganized WMI post-emergence. Mr. Anderson's analysis therefore failed to consider that a capital raise necessary to effectuate a potential future acquisition of another company by Reorganized WMI post-emergence could potentially increase the risk of IRS scrutiny of the creditors' *initial acquisition* of stock under the Modified Plan. See id. at 287:6-288:14 (Zelin Direct); Conf DX 341 – Updated Blackstone Report at 34-35. As discussed above, a significant capital raise or even a capital raise equal to the midpoint of the value of Reorganized WMI's non-tax assets could increase the potential for IRS scrutiny of the creditors' initial acquisition of stock under the Modified Plan and could lead to assertions by the IRS that a subsequent acquisition by Reorganized WMI post-emergence should be viewed as confirmation that the principal purpose of the creditors' acquisition of control of Reorganized WMI was to obtain the potential benefit of the NOLs. See supra, Section V.B.1; Conf DX 341 – Updated Blackstone Report at 34-35. Thus, Mr. Anderson's failure to consider the creditors' acquisition of stock under the Modified Plan renders his section 269 analysis inaccurate, unhelpful and inapplicable.

(i) Anderson Conceded that the Materials He Reviewed Refer to the Creditors' Acquisition of Stock Under the Modified Plan

As discussed in the Confirmation Brief and above, the relevant acquisition of control for purposes of considering the applicability of section 269 of the IRC is the creditors' acquisition of stock under the Modified Plan, *not* a post-emergence acquisition of control. See

Conf DX 424 – Confirmation Brief at 89-90, 92-96 (discussing the potential applicability of section 269 to the creditors' acquisition of stock under the Modified Plan); see also supra Section V.B.2 (discussing Messrs. Reinhold and Zelin's consideration of the acquisition of control under the Modified Plan). Indeed, Mr. Anderson admitted that documents he reviewed in connection with preparing his expert reports focus on the tax risks posed by the creditors' acquisition of stock under the Modified Plan. See Hr'g Tr. 7/13/2011 at 155:17-20, 156:4-11, 156:23-157:8 (Anderson Cross). First, Mr. Anderson conceded that the Updated Blackstone Report refers to the acquisition of stock under the Modified Plan. See Hr'g Tr. 7/13/2011 at 156:4-11 (Anderson Cross); see also Conf DX 341 – Updated Blackstone Report at 36 ("Blackstone has been advised that Section 269 of the Internal Revenue Code could potentially apply to the *acquisition of the stock pursuant to the Plan by the creditors* thus disallowing Reorganized WMI's future use of any NOLs." (emphasis added)); id. ("[S]ection 269 may apply to the Reorganized WMI Plan if the principal purpose of the acquisition is tax avoidance.").

Second, Exhibit E (Valuation Analysis) to the Supplemental Disclosure Statement expressly states that "Blackstone believes that raising materially more capital than the estimated amount . . . unreasonably raises the likelihood of IRS scrutiny of the *initial acquisition of Reorganized WMI* that could eliminate any use of the NOLs." Conf DX 253E – Supplemental Disclosure Statement, Exhibit E, Valuation Analysis at 3 (emphasis added). Mr. Anderson admitted that he reviewed the Supplemental Disclosure Statement in preparing his report. See Hr'g Tr. 7/13/2011 at 156:12-14, 156:20-25 (Anderson Cross). Tellingly, Mr. Anderson also admitted that it was clear that the Supplemental Disclosure Statement refers to the *initial acquisition* of Reorganized WMI by the creditors, not potential post-emergence acquisitions:

> Q. And Mr. Mastando read you a sentence that says, "Therefore, Blackstone believes that raising materially more capital than the estimated amount below

unreasonably raises the likelihood for IRS scrutiny of the initial acquisition of reorganized WMI that could eliminate any use of the NOLs," do you see that?

* * *

Q. I was wondering *if it was clear to you whether the initial acquisition refers to the acquisition by the creditors through the plan* or whether that applies to the initial acquisition post emergence?

A. Well, the language of this sentence is that *it refers to the initial acquisition of reorganized WMI*. And so in context, I think *that that refers to the effects of confirmation and emergence from bankruptcy*.

Hr'g Tr. 7/13/2011 at 185:1-20 (Anderson Redirect) (emphasis added); id. at 157:1-8 (Anderson Cross). Further, Mr. Anderson specifically agreed that section 269 potentially could apply to the *creditors' acquisition* of stock under the Modified Plan.[90] Thus, the Equity Committee cannot dispute that the relevant acquisition for purposes of the tax analysis of the valuation of Reorganized WMI's NOLs is the creditors' acquisition of stock under the Modified Plan.

(ii) Anderson Only Focused on Reorganized WMI's Potential Acquisitions Post-Emergence Instead of the Creditors' Acquisition of Stock Under the Modified Plan

Despite his agreement on this point, Mr. Anderson performed the wrong analysis. Instead of analyzing whether the creditors' acquisition of stock under the Modified Plan posed a section 269 risk, he only focused on whether section 269 might apply to Reorganized WMI's potential *future acquisitions* of other companies after the Effective Date:

(1) Mr. Anderson "advised the Equity Committee that Section 269 would not be a significant impediment to *subsequent acquisitions of ongoing business*," but he did not discuss with the Equity

[90] See Hr'g Tr. 7/13/2011 at 147:16-23 (Anderson Direct) ("Q. And in terms of periods of time, you know, emergence and post-emergence, are there different acquisitions of control that one could consider in assessing the Section 269 risk? A. Yes, there are. *One is an acquisition of control that occurs simply because upon emergence the creditors will acquire control of the corporation*, but then separately, there might be future acquisitions of control by reorganized WMI of other corporations." (emphasis added)); Hr'g Tr. 7/13/2011 at 166:4-13 (Anderson Cross) ("An acquisition of control is one of the conditions for applying Section 269, correct? A. That is one of the ways in which Section 269 can be invoked, yes. Q. It's one of the factors for Section 269, right? A. One of the criteria. Q. Okay. And *the creditor's potential acquisition of control of reorganized WMI* following emergence could satisfy that criteria of Section 269, correct? A. Yes." (emphasis added)).

Committee whether the *creditors' "acquisition of the stock of Reorganized WMI under the plan* posed a Section 269 risk." Hr'g Tr. 7/13/2011 at 151:10-17 (Anderson Cross) (emphasis added).

(2) Mr. Anderson admitted that *none* of his *three* reports discuss section 269 with respect to the creditors' potential acquisition of control under the Modified Plan. Hr'g Tr. 7/13/2011 at 151:22-152:1, 152:14-18, 153:2-5 (Anderson Cross).[91]

(3) Mr. Anderson's June 30, 2011 Second Supplemental Report refers to *acquisitions* of assets or control of another corporation being obtained by Reorganized WMI *post-emergence* from bankruptcy. See Hr'g Tr. 7/13/2011 at 153:21-154:9 (Anderson Cross); id. at 145:14-15 (Anderson Direct); Conf DX 369 – Second Supplemental Report of Kevin D. Anderson at 2.

(4) Mr. Anderson concluded that "Section 269 would likely not apply to an *acquisition of control of some subsequent profitable operations* . . . ." Hr'g Tr. 7/13/2011 at 143:1-8 (Anderson Direct) (emphasis added).

(5) Mr. Anderson also admitted that he did not advise Maxwell on section 269 with respect to the creditors' acquisition of control of Reorganized WMI under the Modified Plan. Hr'g Tr. 7/13/2011 at 151:18-21 (Anderson Cross).[92]

As discussed above, however, the relevant acquisition for purposes of valuing Reorganized WMI is the creditors' initial acquisition of control of Reorganized WMI pursuant to the Modified Plan.

(iii) Anderson Acknowledged that the Application of Section 269 Depends on the Principal Purpose Test, But Failed to Apply Such Test to the Relevant Acquisition

Mr. Anderson agreed that, in order to determine whether section 269 applies, one needs to apply the principal purpose test and that "the principal purpose under Section 269 has to be tax avoidance or tax evasion." Hr'g Tr. 7/13/2011 at 166:25-167:6 (Anderson Cross); id. at

[91] See generally Conf DX 367 – Expert Report of Kevin D. Anderson; Conf DX 368 – Supplemental Expert Report of Kevin D. Anderson; Conf DX 369 – Second Supplemental Expert Report of Kevin D. Anderson.

[92] Mr. Anderson further conceded that, although he was aware of the numbers for debt and equity raises hypothesized by Mr. Maxwell's report, he did not focus on those numbers and did not consider himself "to have approved those numbers from a tax perspective." Hr'g Tr. 7/13/2011 at 160:2-10 (Anderson Cross). Given this failure, it is not surprising that, as discussed supra, Section V.D.1.ii, Mr. Maxwell failed to account for any section 269 risks in his scenarios.

138:2-5 (Anderson Direct) ("[T]here must be the principal purpose for the acquisition to secure the benefits of a loss, or deduction, or other allowance, and the principal purpose is evasion or avoidance through that means."); see supra, Section V.B.2. Mr. Anderson also acknowledged that the section 269 regulation provides examples of acquisitions of control that are ordinarily "indicative of a principal purpose of tax avoidance." See Hr'g Tr. 7/13/2011 at 171:11-172:1 (Anderson Cross).[93] Additionally, Mr. Anderson conceded that the section 269 regulation indicates that "the transfer of the profitable business, which has the [e]ffect of using net operating loss carryovers to offset gains of a business unrelated to that which produced the losses, indicates that the principal purpose for which the acquisition of control was made, is evasion or avoidance of federal income tax." See Hr'g Tr. 7/13/2011 at 172:25-173:7; see also 26 C.F.R. 1.269-3, Treas. Reg. § 1.269-3(b).

Further, consistent with the applicable case law, Mr. Anderson testified that the principal purpose test is a facts and circumstances determination in which the IRS and the courts "have looked at a variety of factors including whether the parties were aware of the tax benefits, whether there were alternative forms for acquiring the business, whether the business being acquired was an ongoing business, or as some authorities say, merely a shell corporation, would consider whether there were alternative forms for doing the transaction that what [sic] might produce different increased or decreased levels of tax benefits." Hr'g Tr. 7/13/2011 at 144:15-145:6 (Anderson Direct); id. at 173:13-18 (Anderson Cross) (conceding that "the determination

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[93] See also 26 C.F.R. 1.269-3, Treas. Reg. § 1.269-3(b) ("Example. Individual A acquires all of the stock of L Corporation which has been engaged in the business of operating retail drug stores. At the time of the acquisition, L Corporation has net operating loss carryovers aggregating $100,000 and its net worth is $100,000. After the acquisition, L Corporation continues to engage in the business of operating retail drug stores but the profits attributable to such business after the acquisition are not sufficient to absorb any substantial portion of the net operating loss carryovers. Shortly after the acquisition, individual A causes to be transferred to L Corporation the assets of a hardware business previously controlled by A which business produces profits sufficient to absorb a substantial portion of L Corporation's net operating loss carryovers.").

of the purpose for which an acquisition was made requires a scrutiny of the entire circumstances in which the transaction or course of conduct occurred"); Conf DX 424 – Confirmation Brief at 93-95; see supra, Section V.B.2. Moreover, Mr. Anderson agreed that looking at "all the facts and circumstances of a particular situation," includes present intention, which "can be corroborated by future actions." Hr'g Tr. 7/13/2011 at 167:7-18 (Anderson Cross). Thus, the Equity Committee cannot dispute that a court may consider future actions, such as capital raises by Reorganized WMI post-emergence, as indicative of the principal reason that the creditors acquired the stock of Reorganized WMI under the Modified Plan. Yet, Mr. Anderson failed to apply the factors for the principal purpose test to the relevant acquisition of control. See Hr'g Tr. 7/13/2011 at 145:24-146:6 (Anderson Direct) (stating that section 269 would likely not apply to potential *future acquisitions*); id. at 154:20-155:4 (Anderson Cross) (admitting that he does not have a view on the principal purpose test with respect to the creditors' potential acquisition of control under the Modified Plan). Mr. Anderson further admitted that he did not attempt to "scrutinize the entire circumstances that would apply to the creditors' potential acquisition of control" under the Modified Plan. Hr'g Tr. 7/13/2011 at 173:19-174:7 (Anderson Cross).

In contrast, Mr. Zelin and Blackstone's tax counsel properly took into account all the facts and circumstances to date to account for, and determine, the potential applicability of section 269 to the creditors' acquisition of stock under the Modified Plan. Hr'g Tr. 7/13/2011 at 200:1-202:9, 202:15-203:9 (Reinhold Direct); id. at 281:4-282:8 (Zelin Direct); see supra, Section V.B.2. Because Mr. Anderson failed to apply the requisite section 269 analysis to the relevant acquisition, his reports and testimony are irrelevant and unhelpful for purposes of

valuing Reorganized WMI.[94] Accordingly, the Court should give no weight to Mr. Anderson's reports or testimony regarding section 269.

VI.
EXCESS VALUE OF THE ESTATES WILL BE DISTRIBUTED TO JUNIOR CLASSES

If the Court determines the Debtors undervalued Reorganized WMI and/or that the estates hold valuable claims against directors, officers, and other third parties, the Modified Plan and the "waterfall" contained therein are structured such that creditors will not be paid more than in full and any excess value identified by this Court will flow to junior stakeholders. The "Right of Election" provision in the Modified Plan applicable to each Class that has the option of receiving Reorganized Common Stock provides that, to the extent that a holder in such Class receives Reorganized Common Stock as part of its distribution, such holder's distribution of Creditor Cash or Cash to be received on account of Liquidating Trust Interests will be reduced on a dollar-for-dollar basis by the value of the stock received, *valued as of the Effective Date*. Conf DX 255 – Modified Plan §§ 6.2, 7.2, 16.1(b), 18.2, 19.2, 20.2. Thus, to the extent that the Court determines the value of Reorganized WMI is greater than $160 million, the Debtors will use this increased value when accounting for stock distributed to creditors, and will make a corresponding deduction to the other forms of distribution such creditors are to receive. So, while much effort—as misguided as it was—was employed by the Equity Committee, the Modified Plan provides for the possibility that the Court may reach an independent conclusion.

The value of Claims or Causes of Action the Debtors hold against third parties are not included in the value of Reorganized WMI. As of the Effective Date, such claims will be held by the Liquidating Trust for the benefit of holders of Liquidating Trust Interests. Conf DX

[94] Notably, in the approximately thirty years that Mr. Anderson has been a tax advisor, section 269 issues were *never* "front and center" in his matters. See Hr'g Tr. 7/13/2011 at 130:17-24, 131:3-6, 132:5-22, 133:6-17 (Anderson Voir Dire).

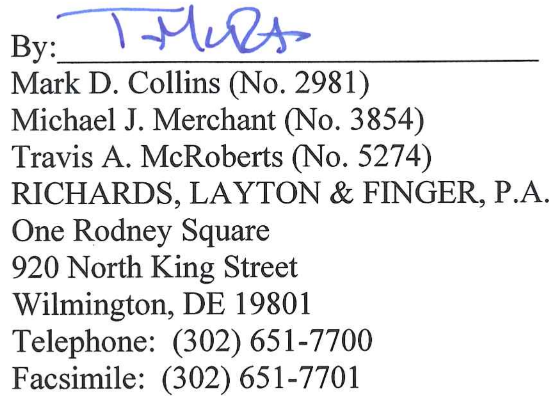
374 – Goulding Decl. at ¶ 23; Conf DX 255 – Modified Plan § 29.1 (vesting the Liquidating Trustee with the authority to litigate all Claims and Causes of Action of the Debtors and directing that the net proceeds of any such litigation (or settlement thereof) be transferred to the Liquidating Trust for distribution in accordance with the Modified Plan and Liquidating Trust Agreement); see also Conf DX 255 – Modified Plan § 43.11 (confirming that nothing set forth in the Modified Plan shall waive or otherwise limit the Liquidating Trustee's ability to prosecute such claims). To ensure that no creditor is paid more than in full and that any excess value – from either the value of the Reorganized Common Stock or the proceeds of claims against third parties – flows down the waterfall to subordinated creditors and then shareholders, the Modified Plan includes a "Limitation on Recovery" provision applicable to all creditor Classes (except those being paid in full, in Cash on the Effective Date) and Classes 19 and 20, and provides for a redistribution of Liquidating Trust Interests first to subordinated creditors in Class 18, then to holders of REIT Series and Preferred Equity Interests in Classes 19 and 20, and then to holders of Common Equity Interests in Classes 21 and 22. Conf DX 255 – Modified Plan §§ 6.3, 7.3, 16.3, 18.3, 19.3, 20.3, 22.2 (providing that, to the extent that distributions and redistributions to a holder are equal to or in excess of 100% of such holder's claim, then the Cash on account of Liquidating Trust Interests to be distributed to such holder in excess of such 100% is deemed redistributed to holders of Allowed Claims and Equity Interests in accordance with the Subordination Model); id. at §§ 22.1, 23.1, 24.1 (providing for a redistribution of Liquidating Trust Interests in the event all Allowed Claims and related Postpetition Interest Claims are paid in full); Third Plan Modification at ¶¶ 1-2.

CONCLUSION

The Modified Plan complies with and satisfies all of the requirements of section 1129 of the Bankruptcy Code and the Global Settlement Agreement complies with Bankruptcy

Rule 9019 and Bankruptcy Code sections 105(a), 363, and 365. The Objections should, therefore, be overruled, and the Modified Plan should be confirmed.

Dated: Wilmington, Delaware
August 10, 2011



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