UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	Chapter 11
WASHINGTON MUTUAL, INC., et al.,	:	Case No. 08-12229 (MFW)
Debtors.	:	(Jointly Administered)
BLACK HORSE CAPITAL LP, et al.,	:	
Plaintiffs	:	Adversary Proceeding
v.	:	No. 10-51387 (MFW)
JPMORGAN CHASE BANK, N.A., et al,	:	
Defendants.	:	

OPENING BRIEF OF WASHINGTON MUTUAL, INC. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Dated: November 2, 2010

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MISCELLANEOUS

I. Introduction and Summary

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, as incorporated by Rule 7056 of the Federal Rules of Bankruptcy Procedure, debtor/defendant Washington Mutual, Inc. ("WMI")[1] submits this memorandum of points and authorities, in support of its Motion for Summary Judgment on Counts I-V of the adversary complaint. This Adversary Proceeding relates to five series of hybrid REIT trust preferred securities issued in 2006 and 2007 (collectively, the "Trust Preferred Securities" or "TPS"). The TPS have an aggregate liquidation preference of $4 billion. Disputes about the ownership of the TPS between WMI, JPMorgan Chase Bank, N.A. ("JPMC"), as the acquirer of the assets of Washington Mutual Bank ("WMB"), and the Federal Deposit Insurance Corporation ("FDIC"), as receiver for WMB, would be resolved pursuant to a global settlement agreement, as amended, among those parties (the "Global Settlement Agreement"), if the Court approves that settlement.[2] Whether viewed as standalone causes of action or as objections to the disposition of the TPS under the Global Settlement Agreement and the Plan, the claims asserted in the adversary complaint fail as a matter of law.

The facts underlying the exchange of the TPS for shares of WMI's Perpetual Non-Cumulative Fixed and Fixed-to-Floating Rate Preferred Stock in Series I, J, L, M, and N (the "WMI Preferred Shares") are undisputed. The Trust Agreements that govern the TPS explicitly provide that the TPS are *automatically* exchanged for WMI Preferred

[1] The Debtors in these Chapter 11 cases and the last four digits of each Debtor's federal tax identification numbers are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395).

[2] WMI joins in JPMC's concurrently-filed motion for partial summary judgment ("JPMC Mot."). WMI and JPMC have conferred to eliminate duplication in the motions and rely upon a common set of exhibits attached to the Declaration of Brent J. McIntosh ("McIntosh Dec.").

Shares on direction of the Office of Thrift Supervision (the "OTS") based on the occurrence of an "Exchange Event." An "Exchange Event" includes any limitation by the OTS on WMB's ability to declare a dividend. [3] That limitation occurred on September 7, 2008, pursuant to a Memorandum of Understanding between WMB and the OTS (the "MOU"). On September 25, 2008, the OTS notified WMB of the occurrence of an Exchange Event and directed the exchange of TPS into WMI Preferred Shares (the "Conditional Exchange"). That same day, WMI executed an assignment agreement (the "Assignment Agreement"), seeking to transfer its interests in the TPS to WMB as it previously had committed to do in order to obtain the OTS's approval to include the TPS in the calculation of WMB's core capital. Early on September 26, 2008, WMI issued a press release announcing that the OTS had exercised its discretionary authority to declare that an "Exchange Event" had occurred and evidencing the automatic exchange of the TPS.

This Adversary Proceeding was filed on July 6, 2010, about 21 months after (1) the OTS appointed the FDIC as the receiver for WMB, (2) the automatic exchange of the TPS into WMI Preferred Shares, and (3) WMI's commencement of its chapter 11 case.

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[3] The Trust Agreements for the Delaware Trusts and the Articles of Association for the Cayman Trust (each as defined below), specify that an "Exchange Event" will occur when:

> (i) WMB becomes undercapitalized under the OTS's "prompt corrective action" regulations at 12 C.F.R. Part 565 (and including any successor regulations)
>
> (ii) WMB is placed into conservatorship or receivership, or
>
> (iii) the OTS, in its sole discretion, anticipates WMB becoming undercapitalized in the near term or *takes a supervisory action that limits the payment of dividends by WMB*, and in connection therewith direct a Conditional Exchange.

McIntosh Dec. Ex. 3A at 4; 3B at 3-4.

Plaintiffs are institutional investors owning interests in WMI Preferred Shares[4] and alleging that they instead own the TPS. The vast majority of Plaintiffs' securities holdings were acquired as highly distressed, speculative investments for pennies on the dollar after commencement of WMI's chapter 11 case. In fact, Plaintiffs purchased most of their holdings *after* the housing markets collapsed, *after* financial difficulties at WMI and WMB became well publicized, *after* the OTS declared an "Exchange Event" and directed the Conditional Exchange, *after* WMB was placed into receivership by the OTS, *after* the automatic conversion of the TPS to WMI Preferred Shares on September 26, 2008, and *after* WMI's chapter 11 filing. Indeed, many of Plaintiffs acquired their securities *after* announcement of the Global Settlement Agreement and the Plan, and, some even acquired securities *after* commencement of their own lawsuit.[5]

II. Summary of Argument

1. Counts I, II and III assert that a series of legal requirements supposedly necessary to vest title to the TPS in WMI were not met and seek a declaratory judgment that Plaintiffs therefore retain title to the TPS. The theories asserted in Counts I-III are wrong as a matter of law.

2. Count I asserts that the Conditional Exchange never occurred because certain "conditions precedent" provided for in the applicable agreements were never satisfied. Count I ignores unambiguous language in the applicable agreements and relevant offering disclosures stating repeatedly that the exchange occurred "automatically" and was not subject to any condition precedent other than the occurrence

[4] *See* Mem. of Points and Authorities in Support of Defendant JPMorgan Chase Bank, N.A.'s Motion for Partial Summary Judgment ("JPMC Mem."), at 18-19; McIntosh Dec., Ex. 14D, at 45, 56 and Ex. 14E at 1.

[5] *See* JPMC Mem. at 12; McIntosh Dec. Ex. 13A, 13B and 13C.

of an "Exchange Event" and OTS's exercise of its discretion to direct the automatic exchange.

3. Count II asserts that the Conditional Exchange never occurred because the purported "legal requirements" concerning the delivery of the TPS were not met. Count II fails as a matter of law because "delivery" under Section 8-301 of the UCC is not the exclusive means for the transfer of interests in securities. The relevant agreements for the TPS specify the mechanism by which the Conditional Exchange occurred and ownership of the TPS was transferred automatically to WMI. Even assuming that Article 8 would be applicable to the transfer of the TPS through the Conditional Exchange, Count II fails because WMI has "control" over the TPS under Section 8-106 of the UCC.

4. Count III asserts that the Conditional Exchange never occurred because purported "restrictions" prohibited transfer of the TPS to WMI. Count III likewise must be dismissed because the private placement restrictions on transfer of the TPS do not bar return of these securities to WMI upon a Conditional Exchange, and even if they did WMI met the standards for a Qualified Institutional Buyer.

5. Counts IV and V assert fraud claims against WMI and seek to undo the Conditional Exchange. The fraud claims in Counts IV and V are equally meritless.

6. Count IV, which asserts that WMI's commitment to the OTS to transfer the TPS to WMB upon a Conditional Exchange was fraudulent and exceeded the OTS's regulatory authority, fails because the conduct was well within the OTS's regulatory authority and because there is no jurisdictional basis for Plaintiffs to challenge OTS's action in this proceeding.

7. Count V likewise must be dismissed because the relief it seeks – a declaration that WMI is ineligible for equitable relief purportedly necessary to consummate the Conditional Exchange and/or transfer the TPS to JPMC under the Global Settlement Agreement and Plan – is not appropriate as a matter of law.

8. Plaintiffs' assertions of fraud are insupportable. In the face of ample disclosures regarding the exchange feature of the securities, the likely events giving rise to an exchange (including severe economic distress), the risks of an exchange to investors, the intention to treat the TPS as core capital of WMB, and the lack of restrictive covenants limiting WMI from transferring the TPS or any other assets to WMB after an exchange occurred, it is untenable for Plaintiffs – sophisticated purchasers of privately-placed, hybrid securities subject to an automatic exchange feature – to contend that the value represented by the TPS should be available to them. And, even if there were some merit to the contention that WMI should have expressly disclosed that it had committed to the OTS that it would contribute the TPS it received in a Conditional Exchange to WMB to support its capital, this is nothing more than a garden variety securities claim that, had it been filed before the bar date, would be subject to subordination under section 510(b) of the Bankruptcy Code.

III. Facts

A. TPS Transaction Structure

1. Background

The TPS are hybrid securities designed to be included in the core capital of a savings association for purposes of regulatory capital requirements. A brief overview of the regulatory requirements demonstrates why Plaintiffs have no right to these assets and

why their adversary complaint is a desperate attempt to create hold-up value in the hope that the legitimate creditors of WMI, or JPMC, will offer them a ransom payment.

Applicable rules of the OTS set out the components of "core capital," the first line of defense against losses for a savings association and a key metric used to determine compliance with regulatory capital standards. *See generally* 12 C.F.R. § 567.2 (setting out capital standards applicable to savings associations). The OTS has authority to review and approve the creation by a savings association of new subsidiaries, 12 C.F.R. § 559.3, and confirms the treatment for purposes of regulatory capital requirements of any capital instruments to be issued by thrift subsidiaries. Core, or Tier 1, capital generally includes common stockholders' equity and retained earnings, non-cumulative perpetual preferred stock and minority interests in the equity accounts of fully consolidated subsidiaries. 12 C.F.R. § 567.5(a)(i),(ii) and (iii). The OTS, however, has supervisory authority and discretion to exclude otherwise eligible capital instruments from the calculation of a savings association's core capital. 12 C.F.R. § 567.11(c)(1). The entire regulatory framework was set up to ensure that the savings association has a capital structure that adequately insulates it against losses, thereby protecting depositors (and the federal deposit insurance fund which would pay depositors in the case of a savings association failure). *See* 12 C.F.R. § 567(a)(1).

Issued in 2006 and 2007, the TPS are structured, hybrid instruments designed to achieve four financial, regulatory, and legal goals: (1) regulatory treatment as core capital of WMB; (2) tax efficiency allowing WMB to make distributions to holders from pre-tax income; (3) capital raising at a lower cost that common equity; and (4) a

reduction in the bank's cost of borrowing.[6] Banks and thrifts had been issuing similar securities since the mid-1990s and the Washington Mutual TPS built on this long history.[7] The feature that made the TPS unique is the automatic exchange into perpetual non-cumulative preferred shares of WMI if WMB faced financial distress triggering a regulatory "exchange event." (McIntosh Dec, Ex. 1A at 2, 11, 18-19.)

2. Mechanics of the Issuance

The general flow of rights and distributions for the TPS is summarized graphically in each offering circular. (McIntosh Dec., Ex. 1A at 3.)[8] In February of 2006, WMB's REIT subsidiary, University Street, Inc. ("University Street"), created a new subsidiary called Washington Mutual Preferred Funding LLC ("WMPF"). (*Id.* at 4.) In addition, a series of four issuer trusts (the "Issuer Trusts") were established under Delaware law (the "Delaware Issuer Trusts") and one additional issuing entity was established under Cayman law to facilitate the sale of TPS to non-U.S. investors (the "Cayman Issuer," and together with the Delaware Issuer Trusts, the "Issuer Trusts"). (McIntosh Dec. Exs. 3A-3E.)

University Street conveyed to WMPF a portfolio of home equity and other mortgage loans in exchange for one hundred percent (100%) of WMPF's common securities. (McIntosh Dec. Ex. 1A at 4-5.) WMB also conveyed to WMPF a portfolio of loans in exchange for perpetual, non-cumulative preferred securities in WMPF (the

[6] *See* Final Report of the Examiner [Docket No. 5735], at 153-54; *see also* McIntosh Dec. Ex. 1A, at 1-2, 15.

[7] *See, e.g.* McIntosh Dec. Ex. 10C, at 3.

[8] For ease of reference, the references herein refer to the applicable agreements and offering memoranda for only one of the four Issuer Trusts, Washington Mutual Preferred Funding I, . The documents for each of the Issuer Trusts are substantially identical. Any references herein to the "Trust Agreements" refer both to the Trust Agreements for the Delaware Issuer Trusts, and the Restated Memorandum and Articles of Association for the Cayman Issuer.

"Company Preferred Securities"). (*Id.*) WMPF transferred 100% of the loan assets it received from WMB and University Street to three statutory trusts (the "Asset Trusts") in exchange for certificates entitling it to payments of principal and interest on the loans. (*Id.*) The Company Preferred Securities paid dividends based on the distributions from the Asset Trusts. (*Id.* at 4, 7.)

The Issuer Trusts issued the TPS to Goldman, Sachs & Co., and other investment banking firms, which then sold the TPS to qualified institutional buyers in a private placement. (*See* McIntosh Dec. Exs. 1A-1E at cover page.) The Issuer Trusts then transferred the proceeds of the sale of the TPS to WMB in exchange for the Company Preferred Securities. (McIntosh Dec. Ex. 1A, at 5.) The dividends and liquidation preferences of the TPS matched back-to-back with the dividends and liquidation preferences of the Company Preferred Securities such that any payments on the latter pass through to the holders of the TPS. (*Id.* at 2, 4, 10.)

3. Automatic Exchange Feature

The defining feature of the TPS – and the feature that permitted them to be treated as core capital of WMB – is the automatic exchange of the TPS into WMI Preferred Shares at the direction of the OTS upon the occurrence of a pre-defined "Exchange Event." The Trust Agreements unambiguously provide that the Conditional Exchange is *automatic* once the OTS directs it (which is the sole "condition" to the occurrence of the exchange):

> (a) If the OTS so directs upon the occurrence of an Exchange Event, each Trust [Preferred] Security then outstanding shall be exchanged *automatically* for a Like Amount of newly issued [WMI Preferred Shares] (the "Conditional Exchange")

(McIntosh Dec. Ex. 3A § 4.08.)[9] The Trust Agreements further specify exactly when the exchange occurs and provide that, as of that time, the holders of TPS automatically become holders of WMI Preferred Shares:

> (b) The Conditional Exchange shall occur as of 8:00 A.M., New York time, on the date for such exchange set forth in the applicable OTS directive, or, if such date is not set forth in the directive, as of 8:00 A.M., New York time, on the earliest possible date such exchange could occur consistent with the directive, as evidenced by the issuance by WMI of a press release prior to such time. *As of the time of the Conditional Exchange*, all rights of the exchanging holders of Trust [Preferred] Securities as each Holder of Trust [Preferred] Securities shall be unconditionally obligated to surrender to WMI and all rights of the exchanging Holders of Trust [Preferred] Securities as beneficiaries of the Trust shall cease, and *such Persons shall be, for all purposes, solely holders of Fixed-to-Floating Rate Depositary Shares, and WMI shall be the holder of all outstanding Trust [Preferred] Securities.*

(*Id.* § 4.08(b).)

A separate Exchange Agreement for each tranche of the TPS also provides expressly that, "if the OTS so directs upon the occurrence of an Exchange Event, each [Trust Preferred Security] then outstanding *shall be automatically exchanged* for a like amount of [WMI Preferred Shares]." (McIntosh Dec. Ex. 4A § 1 (emphasis added).)[10] An "Exchange Event" occurs when: (a) WMB becomes undercapitalized under the OTS's "prompt corrective action" regulations at 12 C.F.R. part 565; (b) WMB is placed into conservatorship or receivership; or (c) the OTS, in its sole discretion, anticipates WMB becoming undercapitalized in the near term or takes a supervisory action that limits the payment of dividends by WMB and in connection therewith directs a

[9] For the Cayman Issuer, the equivalent provision is found in Section 9(f) of the Restated Memorandum and Articles of Association (McIntosh Dec. Ex. 3B).

[10] The first of the Delaware Issuer Trusts and the Cayman Issuer Trust share a combined Exchange Agreement because both trusts were issued on the same date. McIntosh Dec. Ex. 4A at cover page.

Conditional Exchange. (*Id.* § 1.) The Exchange Agreements also provide that the exchange of TPS for WMI Preferred Shares occurs "effective on the date and time of the Conditional Exchange," and go on to explain that, at that time, the holders of TPS are "unconditionally obligated to surrender to WMI any certificate representing the [TPS]." (*Id.* § 2-3.)

The Trust Agreements and Exchange Agreements are crystal clear that the Conditional Exchange is deemed to be automatic and effective, regardless of whether or not subsequent recordkeeping steps reflecting the exchange are delayed or never occur. Both documents provide that, in this event, the certificates previously representing the TPS "shall be deemed for all purposes to represent" WMI Preferred Shares:

> Until replacement certificates representative of the [WMI Preferred Shares] are delivered or in the event such replacement certificates *are not delivered* any certificates previously representing the Trust [Preferred] Securities shall be deemed for all purposes to represent [WMI Preferred Shares].

(McIntosh Dec. Ex. 3A, § 4.08(c); Ex. 4A, §§ 2-3 (emphasis added).) The offering circulars for the TPS fully disclosed the automatic and unconditional nature of the exchange:

> Accordingly, once the OTS directs a Conditional Exchange after the occurrence of an Exchange Event, *no action will be required to be taken by* holders of Trust Securities, by WMI, by WMB (other than to inform the OTS), by the Company [WMPF LLC] or by WaMu Delaware *in order to effect the automatic exchange as of the time of exchange*. After the occurrence of the Conditional Exchange, the Trust [Preferred] Securities will be owned by WMI.

(McIntosh Dec. Ex. 1A at 64.)

The automatic exchange feature was highlighted as a material aspect of the TPS in the applicable disclosure documents and prominently disclosed as a risk factor for

investors to consider. For starters, each of the offering circulars for the TPS stated *on the cover page* that the TPS were subject to automatic exchange into WMI Preferred Shares if the OTS so directed upon the occurrence of an Exchange Event:

> If the Office of Thrift Supervision (together with any successor regulator, the "*OTS*") so directs following the occurrence of an Exchange Event as described herein, each Trust Security will be *automatically* exchanged for depository shares representing a like amount of Washington Mutual, Inc.'s ("*WMI*") Series I perpetual Non-cumulative Fixed-to-Floating Rate Preferred Stock.

(*Id.* at cover page (emphasis added).)

The offering circulars likewise included extensive disclosures regarding the financial risks posed to investors by the automatic exchange feature. For example, the offering circulars pointed out that, as a result of an automatic exchange, investors could find themselves to be holders of WMI Preferred Shares at a time when WMI was in financial distress:

> A decline in WMB's capital levels may result in a Conditional Exchange. If a Conditional Exchange occurs, it is likely to occur at a time when WMB's and WMI's financial condition has deteriorated and may have other adverse consequences.

(*Id.* at 18.) The offering circulars further cautioned that, in the event of an exchange, "it is unlikely WMI would be in a financial position to make any dividend payment" on any WMI Preferred Shares. (*Id.* at 19.) And, they further noted that, "in the event of a liquidation of WMI, the claims of creditors would be entitled to priority in payment over the claims of holders of equity interests," like the WMI Preferred Shares. (*Id.* at 19.)

These offering circulars also warned of exactly the risks that unfortunately have materialized in this case – the placement of WMB into receivership and the bankruptcy of WMI:

> An Exchange Event triggering a Conditional Exchange will occur if WMB is placed into conservatorship or receivership. WMB's conservatorship or receivership could lead to WMI becoming subject to a voluntary or involuntary proceeding under the U.S. Bankruptcy Code.

(*Id.* at 27.) And, the offering circulars cautioned that, in the event of a WMI bankruptcy, investors in the TPS might receive no recovery at all:

> [T]he claims of WMI's secured, senior, general and subordinated creditors would be entitled to a priority of payment over the claims of holders of equity interests such as the Fixed-to-Floating Rate WMI Preferred Stock. As a result of such subordination, if WMI became subject to a bankruptcy proceeding after a Conditional Exchange the holders of the Fixed-to-Floating Rate Depository Shares *would likely receive, if anything,* substantially less than they would have received had the Conditional Exchange not occurred.

(*Id.* at 27-28 (emphasis added).)

Importantly, the transaction documents contain no covenants restricting WMI's right to incur additional debt or transfer assets after the occurrence of a Conditional Exchange. In fact, the offering circulars for the TPS disclosed that the investors would not have voting rights nor "benefit from any protective covenants." (*Id.* at 19.) In addition, no guaranty was extended to the investors in the TPS that *any* assets would be available after the occurrence of a Conditional Exchange. Thus, investors could have no expectation that any particular assets of WMI, including the TPS, would be available to pay dividends or satisfy the liquidation preferences of WMI Preferred Shares. If a security interest for the benefit of the holders of the TPS had been granted, it would have rendered the securities ineligible for inclusion as core capital.[11]

[11] *See* McIntosh Dec. Ex. 9F, Appendix A at 4 (providing that Tier 1 capital instruments "[m]ust not be secured or covered by a guarantee of the issuer or related entity or other arrangement that legally or economically enhances the seniority of the claim vis-à-vis bank creditors.")

4. The Downstream Undertaking

As it was required to do under the OTS rules, on January 30, 2006, WMB filed an application with the OTS seeking approval to establish WMPF as an operating subsidiary. (McIntosh Dec. Ex. 5A.) In that application, WMB sought confirmation from the OTS that the sale of the TPS (issued by the Issuer Trusts) to outside investors effectively constituted a sale of the Company Preferred Securities (issued by WMPF) to outside investors in light of the back-to-back dividend/distributions and automatic exchange features of these instruments and would therefore qualify for inclusion in the core capital of WMB. (*Id.* at 3-6.)

In a series of correspondence, pejoratively dubbed "secret side letters" by Plaintiffs, the OTS requested and WMI provided written confirmation that, upon the occurrence of a Conditional Exchange it would contribute either the TPS or the Company Preferred Securities, as appropriate, to WMB. (McIntosh Dec., Exs. 5C and 5D.) This correspondence, however, was neither secret nor separate from the transaction.[12] The offering circular for the initial TPS issuance expressly disclosed that WMB had sought confirmation from the OTS that the structure would qualify for treatment as core capital of WMB and that the securities would be treated accordingly:

> WMB has asked for confirmation from the Office of Thrift Supervision (together with any successor regulator, the "OTS") that the Company Preferred Securities constitute core capital of WMB under the OTS' applicable regulatory capital regulations and, upon receipt of such confirmation, intends to treat the Company Preferred Securities accordingly.

[12] WMB asked that the OTS treat its notice and the related correspondence as confidential business information, a standard request intended to protect the information from disclosure under the Freedom of Information Act. (McIntosh Dec. Ex. 5A at 6-7.) The intent was not to hide the downstream undertaking. Rather, this was a routine general request to protect information relating to a capital raise process that was not yet publicly announced. *See* McIntosh Dec. Ex. 14J at 72:5-73:18.

(McIntosh Dec. Ex. 1A at 2.) The commitment to transfer either the TPS or the Company Preferred Securities, as applicable, to WMB in the event a Conditional Exchange occurred is perfectly consistent with treatment of the securities as core capital of WMB. The conclusion that these securities counted as core capital of the bank available to absorb losses at WMB would be meaningless if the value represented by the TPS would not be returned to WMB (from where it originally came) upon the occurrence of a Conditional Exchange. No other conclusion would make any sense.[13]

5. The Conditional Exchange Occurred

On September 7, 2008, WMB and the OTS entered into the MOU through which the OTS explicitly limited WMB's ability to declare a dividend. (McIntosh Dec. Ex. 7A, § 2(B).) On September 8, 2008, WMI issued a press release announcing it had entered into the MOU with the OTS. (McIntosh Dec. Ex. 15B at 6.) On September 11, 2008, WMI filed a Current Report on Form 8-K with the SEC disclosing the MOU and the replacement of its long-time Chief Executive Officer. (*Id.*) On September 11, 2008, two ratings agencies, Moody's Investors Service and Fitch Ratings, downgraded WMI's rating to below investment grade. (McIntosh Dec. Exs. 11A and 11B.)

On September 25, 2008, the OTS concluded that, based upon the MOU's "limitations on the ability of the bank to pay dividends," an "Exchange Event [had] occurred" with respect to the TPS and directed the Conditional Exchange of the "WaMu REIT Preferred Securities to a like amount of preferred stock in Washington Mutual Incorporated." (McIntosh Dec. Ex. 6A). The OTS's conditional exchange directive was delivered to representatives of WMI and WMB just prior to 7:30 a.m. Pacific time on

[13] *See* Final Examiner Report at 171.

September 25. (*Id.*) That same day, WMI responded to the OTS directive regarding the Conditional Exchange confirming the automatic nature of the Conditional Exchange and noting that, consistent with Section 2 of the Exchange Agreement, WMI would issue a press release the following day announcing the Conditional Exchange. (McIntosh Dec. Ex. 6B.)

The OTS representatives simultaneously directed WMI to execute an assignment to WMB of all right, title and interest in the TPS, the Company Preferred Securities and the Issuer Trusts themselves in order to fulfill its pre-existing obligations to the OTS. With representatives of the OTS, the primary federal regulator of WMB and WMI, demanding immediate compliance with the downstream undertaking, WMI and WMB executed an Assignment Agreement on September 25, 2008. (McIntosh Dec. Ex. 7B.)[14] Execution of the Assignment Agreement took place prior to the delivery of official notice by the OTS and FDIC regarding WMB's receivership, which occurred at 6:00 p.m. Pacific time. (McIntosh Dec. Ex. 14I at 37:20-38:17.)

At approximately 4:45 a.m. Pacific time (7:45 a.m. Eastern time) on September 26, WMI issued a press release announcing that an Exchange Event had occurred, triggering the Conditional Exchange, and that the TPS were being exchanged *automatically* for a like amount of newly issued WMI Preferred Shares. (McIntosh Dec. Ex. 6C.) At approximately 10:15 p.m. Eastern time on September 26, 2008, WMI filed for chapter 11 relief.[15]

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[14] *See also* Final Examiner Report at 162.

[15] *See* Chapter 11 Voluntary Petition, *In re Washington Mutual, Inc.*, Case No. 08-12229 (MFW) [Docket No. 1].

IV. Legal Argument

A. Legal Standard for Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *In re Broadstripe, LLC*, No. 09-10006, Adv. No. 09-50966, 2010 WL 3768003, at *16 (Bankr. D. Del. Sept. 2, 2010) (Summary judgment is "designed to avoid trial . . . if [the] facts are settled and dispute turns on [an] issue of law"). Where the issue in dispute is the interpretation of an unambiguous contract, summary judgment is particularly appropriate. *See In re Worldwide Direct, Inc.*, Nos. 99-00108-116, Adv. No. 99-52841, 2010 WL 3435380, at *4 (Bankr. D. Del. Aug. 27, 2010) (Walrath, J.) (quoting *Newport Assocs. Dev. Co.* v. *Travelers Indemnity Co. of Ill.*, 162 F.3d 789, 791 (3d Cir. 1998)).

B. Count I Fails as a Matter of Law Because the Conditional Exchange Occurred Automatically Upon the OTS's Directive

In Count I, Plaintiffs allege incorrectly that "the applicable documents [governing the TPS] required certain steps to be taken before the TPS could be transferred from third party investors to WMI[,]" and because those steps – ministerial acts such as the recording by the trustees of the Issuer Trusts of WMI as the holder of the TPS in the applicable trust registries – have not occurred the "purported Conditional Exchange . . . remains unconsummated." (Compl. ¶¶ 77-80, 207-209.) This claim fails because the contracts (Trust Agreements and Exchange Agreements) specifically state that, upon direction of the OTS, the Conditional Exchange of the TPS was automatic. These agreements further provide that the surrender of certificates in exchange for replacement

certificates, registry entries and other ministerial acts were to occur *following* a Conditional Exchange, not as a condition precedent its effectiveness.

1. Plaintiffs are Bound by the Terms of the Trust Agreements

By purchasing the TPS, Plaintiffs agreed to be bound by the terms of the contracts governing those securities, each of which expressly provides that, once the OTS directs a Conditional Exchange, it shall occur *automatically*. The certificates for each of the TPS issued by the Delaware Issuer Trusts explicitly provided that:

> Section 4.08 of the Trust Agreement provides for the procedures pursuant to which each Trust [Preferred] Security then outstanding shall be exchanged automatically for a Like Amount of newly issued [WMI Preferred Shares] if the OTS so directs upon the occurrence of an Exchange Event.

(McIntosh Dec. Exs. 2A through 2I at 3.) The unambiguous terms of the certificates themselves bind the holders to the terms of the Trust Agreements. *See id.* ("[u]pon receipt of this certificate, the Holder is bound by the Trust Agreement and entitled to the benefits thereof."). In addition, the offering memoranda explicitly provide that, by purchasing the securities, investors agreed to be bound:[16]

> Holders of Trust [Preferred] Securities, by purchasing such securities, whether in this Offering or in the secondary market after this Offering, will be deemed to have agreed to be bound by the unconditional obligation to exchange such Trust [Preferred] Securities for [WMI Preferred Shares] if the OTS so direct following the occurrence of an Exchange Event.

(McIntosh Dec. Ex. 1A at 64; *see also* Ex. 3A § 4.08(d) (same).)

[16] Courts have held that "investors are bound by the written disclosures and warnings in offering documents as a matter of law." *In re VMS Ltd. P'ship Sec. Litig.*, 803 F. Supp. 179, 194 (N.D. Ill. 1992) (citing *Foremost Guaranty Corp. v. Meritor Savings Bank*, 910 F.2d 118, 126 (4th Cir. 1990)); *Kennedy v. Josephtal & Co.*, 814 F.2d 798, 802-03 (1st Cir. 1987); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1518 (10th Cir. 1983)).

The Trust Agreements therefore governed the rights conferred on holders of trust certificates. *See In re Amer. Home Mortg. Holdings, Inc.*, No. 09-3568, 2010 WL 2676383, *3 (3d Cir. Jul. 7, 2010) (trust documents governed certificate holder's rights to cash distributions); *Mangano* v. *PeriCor Therapeutics., Inc.*, C.A. No. 3777-VCN, 2009 WL 4345149, at *7 (Del. Ch. Dec. 1, 2009) (surrender of trust certificates held irrelevant where trust agreement automatically terminated holders' rights). And these terms bound investors purchasing the securities, whether or not they signed the Trust Agreements themselves. "One does not have to be a signatory to a contract . . . to become bound by it." *Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 343 (Del. Ch. 2003); *see also Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of N.Y.*, No. 07 Civ. 6915, 2010 WL 3419196, at *24 (S.D.N.Y. Aug. 26, 2010) (holding that non-parties to a contract may still be bound by its terms) (citations omitted). Through their purchase of the TPS, Plaintiffs accepted the terms of the TPS governing documents, including the Conditional Exchange. *See Am. Legacy Found.*, 831 A.2d at 343-44 (holding that "[a]cceptance can be accomplished by acts as well as words; no formal acceptance is required.").

Where a contract unequivocally provides that a transaction will occur automatically upon a triggering event, courts have enforced the plain meaning of the contract. *Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) (ordering specific performance of a contract upon triggering event based on plain meaning of contract). Moreover, it is axiomatic that unambiguous contracts will be enforced in accordance with their plain meaning. *Concord Real Estate CDO 2006-1, Ltd. v. Bank of America N.A.*, 996 A.2d 324, 330 (Del. Ch. 2010) (holding that the "words of a contract are enforced in

accordance with their plain meaning") (applying New York law). Here, there can be no doubt as to the plain meaning – multiple governing documents each state that the Conditional Exchange "automatically" occurs once the OTS declares an Exchange Event.

2. The Governing Documents Expressly Provided that the Conditional Exchange Would Occur *Automatically* Upon the OTS Issuing a Notice of a Conditional Exchange

The trust agreements, exchange agreements, and offering memoranda unambiguously provided that, once the OTS directed a Conditional Exchange upon the occurrence of an Exchange Event, a Conditional Exchange would occur *automatically*. (*See e.g.*, McIntosh Ex. 3A § 4.08; Ex. 1A at cover page; Ex. 4A, §§ 1; Ex. 2A at 3.) The effectiveness of the Conditional Exchange, once directed by the OTS, was not subject to any other condition precedent. *See* JPMC Mem. § II.A. Satisfaction of paperwork requirements necessary to *document* the exchange of TPS for WMI Preferred Shares *after* the Conditional Exchange was effected cannot be bootstrapped into constituting conditions precedent. In point of fact, the Exchange Agreements explicitly provided that, even if a party did not fulfill any of the post-exchange paperwork requirements to document the exchange, the TPS would be "deemed for all purposes to represent" WMI Preferred Shares. (McIntosh Dec. Ex. 4A §§ 2-3.)

It is beyond dispute that an Exchange Event occurred. Under the terms of the September 7, 2008 MOU, the OTS explicitly had limited WMB's ability to declare a dividend (McIntosh Dec. Ex. 7A § 2(B)), which constitutes an "Exchange Event." (*See* McIntosh Dec. Ex. 3A § 1.01.) It is also beyond dispute that on September 25, 2008, the OTS issued a written directive to WMI, citing the MOU's limitation on the ability of WMB to pay dividends, declaring an Exchange Event and directing the Conditional Exchange. (McIntosh Dec. Ex. 6A.) Because it is undisputed that the necessary

conditions in fact occurred, the certificates held by the TPS holders are deemed for all purposes to represent WMI Preferred Shares. (*See* McIntosh Dec. Ex. 3A § 4.08; Ex. 4A §§ 1-2.)

Plaintiffs argue that the Conditional Exchange was not effective because certain documentary steps were not completed, including the physical exchange of one certificate for another and the recording of certain registry entries. (Compl. ¶¶ 77-81.) The agreements specifically contemplate that these ministerial acts associated with the conversion of the TPS into WMI Preferred Shares would necessarily occur *after* the Conditional Exchange became effective and were not conditions precedent to the Conditional Exchange itself. (*See, e.g.* McIntosh Dec. Ex. 1A at 63-64; Ex. 3A § 4.08; Ex. 4A § 2.)

Under the Trust and Exchange Agreements, the Conditional Exchange is effective regardless of whether one certificate was exchanged for another or whether appropriate registry entries were recorded. Specifically, the Trust Agreements provided that the exchange of certificates and recordation of registry entries was to occur "[w]ithin 30 days" after OTS directed a Conditional Exchange, and that

> Until replacement certificates representative of the [WMI Preferred Shares] are delivered or in the event such replacement certificates *are not delivered* any certificates previously representing the Trust [Preferred] Securities shall be deemed for all purposes to represent [WMI Preferred Shares].

(McIntosh Dec. Ex. 3A § 4.08(c) (emphasis added); Ex. 4A, § 2-3.)

Under Delaware law, "[c]onditions precedent 'are not favored in contract interpretation because of their tendency to work a forfeiture,'" *AES Puerto Rico, L.P.* v. *Alstom Power, Inc.*, 429 F. Supp. 2d 713, 717 (D. Del. 2006), and must be stated

unambiguously in the contract. *Castle* v. *Cohen*, 840 F.2d 173, 176 (3d Cir. 1988). Instead of identifying these ministerial acts as conditions precedent to a Conditional Exchange, the Trust Agreements unmistakably stated that (1) that obligations for holders to surrender their certificates was "unconditional;" (2) that these ministerial acts were to take place *after* the Conditional Exchange itself; and (3) even if these ministerial acts never occurred, the Conditional Exchange would nonetheless be effective.

As set forth in section II.A of JPMC's Brief, none of the ministerial details are conditions precedent to the Conditional Exchange and the transaction documents expressly contemplated the possibility that they might not occur at all, in which case the original TPS certificates are deemed to represent the WMI Preferred Shares. Moreover, if Plaintiffs' position were correct, it would mean that WMI could block a Conditional Exchange unilaterally, a result directly at odds with the treatment of the TPS as core capital, available to WMB in a time of financial distress.[17]

C. Count II Fails Because Delivery Under Article 8 of the UCC is Not the Exclusive Means for the Transfer of Interests in Securities

Count II alleges that the Conditional Exchange was never consummated because WMI did not acquire possession of the certificates representing the TPS, which Plaintiffs erroneously assert is a "condition precedent to consummation of any exchange or transfer." (Compl. ¶ 214). This Count is based on two faulty premises. The first is Plaintiffs' erroneous assumption that Article 8 of the Uniform Commercial Code, provides the exclusive mechanism for transferring ownership of securities. The drafters of the UCC expressly stated that Article 8 is not exclusive. *See* UCC § 8-302, cmt. n.2 (2007) ("Article 8 is not a comprehensive codification of all of the law governing the

[17] Final Report of the Examiner, at 171.

creation or transfer of interest in securities."); *see also* 17 Williston on Contracts § 51:40 (4th ed.) ("[W]hile the [UCC] provides that 'upon delivery,' the purchaser acquires the transferor's rights, this does not mean that a person can acquire an interest in a security only by delivery. Revised Article 8 is not a comprehensive codification of all of the law governing the creation or transfer of interests in securities.") The Supreme Court of Delaware has specifically held that "Article 8 of the UCC . . . did not preclude the validity of a stock transfer accomplished by methods that are not listed" in that article, and has acknowledged that other methods recognized by law may be used to transfer ownership in securities. *Kallop v. McAllister*, 678 A.2d 526, 529 (Del. 1996).

Plaintiffs' second faulty premise is their contention that the only way to transfer ownership of securities under Article 8 is the physical delivery of certificates. Article 8 specifically provides for the acquisition of interests in securities by acquiring control, even if physical certificates are not delivered. Thus, even if Article 8 were applicable to the transfer of interests in the TPS following the occurrence of the Conditional Exchange, WMI holds superior rights to the TPS under the Trust Agreements and Exchange Agreements.

1. UCC Section 8-301 is Not Applicable to the Transfer of Interests in the TPS Following the Conditional Exchange

a. The Exchange Agreements Superseded the Requirements of UCC Section 8-301

The UCC provides that parties may contractually vary its provisions, *see* UCC 1-302(a) (2007), and the Exchange Agreements do, in fact, provide a transfer mechanism for the TPS that is different from the terms of Section 8-301.[18] The official comment to

[18] *See, e.g., Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1416 (5th Cir. 1983) (holding that "when the parties have contracted and negotiated a specific agreement, the Code's

Section 1-302 of the UCC explains that the Uniform Commercial Code affirmatively adopts the principle of "freedom of contract" and notes that "an agreement can change the legal consequences that would otherwise flow from the provisions of the Uniform Commercial Code." UCC § 1-302, cmt. 1 (2007). Delaware courts give "considerable deference to an official commentary written by the statute's drafters and available to the General Assembly before the statutory enactment." *Kallop v. McAllister*, 678 A.2d at 530 (citing *Stigars v. State*, 674 A.2d 477, 483 (Del. 1996)); *see also Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) ("[a]n official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction.").

Sections 2 and 3 of the Exchange Agreements for the TPS specify the mechanism by which the Conditional Exchange occurred and ownership of the TPS was transferred automatically to WMI. The Exchange Agreements further provided that, in the event such ministerial acts are not performed, then "any certificates previously representing the Trust [Preferred] Securities shall be deemed for all purposes to represent [the applicable WMI Preferred] Shares." (McIntosh Dec. Ex. 4A §§ 2-3.) As discussed in Section III.A.1 above, by purchasing the securities, Plaintiffs agreed to be bound by the terms of the governing documents, which provide specific guidance as to the mechanics of the exchange that override the procedure set forth in the UCC.

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provisions do not control"); *David Graubart, Inc. v. Bank Leumi Trust Co.*, 48 N.Y.2d 554, 560 (N.Y. 1979) (holding "it is well recognized that the [UCC's] requirements can be modified by agreement to conform them with commercial usage").

b. The UCC Preserved the Common Law Concept of "Constructive Delivery"

In addition to being subject to modification by contract, "the provisions of the Uniform Commercial Code are generally supplemented by principles of law and equity." *Kallop*, 678 A.2d at 529-30; *see also* UCC § 1-103(b) (2007). The Delaware Supreme Court and other courts have held that where the Uniform Commercial Code does not provide that the enumerated methods of transfer are exclusive, common law doctrines such as "constructive delivery" continue to supplement the methods of transfer enumerated by the Uniform Commercial Code. *Kallop*, 678 A.2d at 531; *see also In re Carroll*, 100 A.D.2d 337, 338-40 (N.Y. App. Div. 1984); *Hill v. Warner, Berman & Spitz, P.A.*, 484 A.2d 344, 348-49 (N.J. Super. Ct. App. Div. 1984); *Stream v. CBK Agronomics, Inc.*, 361 N.Y.S. 2d 110, 113 (N.Y. Sup. Ct. 1974) (holding that the "Uniform Commercial Code has preserved the concept of 'constructive delivery'").

The "essential ingredient of a constructive delivery is that it be made with the unmistakable intention of transferring title to the instrument." *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1117 (S.D.N.Y. 1978) (citing *Bacal v. Nat'l City Bank*, 262 N.Y.S. 839 (N.Y. 1933)). Common law "[c]onstructive delivery . . . is sufficient in instances when actual transfers of physical possession is impractical." *Kallop*, 678 A.2d at 531 (citing 4 Pomeroy's Equity Jurisprudence § 1149, at 397-98 (5th ed. 1941)). In order to effectuate a constructive delivery, "the delivery must be as perfect as the circumstances reasonably permit." *Id.* (citing *In re Szabo's Estate*, 176 N.E.2d 395, 396 (N.Y. 1961)).

The "unmistakable intention of transferring title" to the TPS is evidenced by the unequivocal terms of the Trust Agreements, as well as resolutions adopted by the WMI

board of directors authorizing the issuance of the preferred stock and reserving it for exchange. Moreover, once directed by the OTS, the Conditional Exchange was automatic and unconditional. Given the circumstances of September 25 and 26, 2008, the steps taken to document the Conditional Exchange were as good as circumstances permitted and are sufficient to evidence constructive delivery of the TPS to WMI and constructive delivery of WMI Preferred Shares to the former holders of the TPS.

c. WMI Was Not a "Purchaser" in The Conditional Exchange

Section 8-301 of the UCC, upon which Plaintiffs rely (Compl. ¶ 214), by its own terms, does not apply to the Conditional Exchange. Section 8-301 describes the requirements for "delivery" of certificated and uncertificated securities to a "purchaser." UCC § 8-301 (2007). A purchaser is defined as "a person that takes by purchase" and purchase in turn refers to a "taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other *voluntary transaction* creating an interest in property." UCC § 1-201(29), (30) (2007) (emphasis added). Additionally, Article 8 does not apply to transfers by operation of law, because they are not "voluntary." UCC § 8-302, cmt. 2 (2007); *see also In re Interstate Stores, Inc.*, 830 F.2d 16, 19 (2d Cir. 1987) (quoting UCC § 8-313, cmt. 1 (1977) ("[t]ransfers by operation of law are excepted because they are not transfers to a 'purchaser.'") Likewise, "delivery" is defined in terms of a "voluntary transfer of control" or a "voluntary transfer of possession."[19] UCC § 1-201(15) (2007).

[19] Delaware law similarly distinguishes between voluntary transfers and automatic exchanges. *Bernstein* v. *Canet*, Civ.A. No. 13924, 1996 WL 342096, *6 (Del. Ch. June 11, 1996) ("exchange" or "conversion" was not a "sale" triggering anti-dilution rights); *Shields* v. *Shields*, 498 A.2d 161, 167 (Del. Ch. 1985) ("The statutory conversion of stock in . . . a stock for stock merger ought not be construed to constitute a sale, transfer or exchange of that stock").

The Trust Agreements and other documents specify that the Conditional Exchange shall be automatic and mandatory, rather than voluntary, upon the OTS's direction following the occurrence of an Exchange Event; neither WMI nor the holders of the TPS could prevent it. (*See* McIntosh Dec. Ex. 3A, § 4.08(c); Ex. 4A §§ 2-3; Ex. 1A at 63-64.) The offering circulars for the TPS specifically disclose that, following the OTS's direction of a Conditional Exchange, "no action will be required to be taken by [any party], in order to effect the automatic exchange as of the time of exchange" and specify that "[a]fter the occurrence of the Conditional Exchange, the Trust Securities will be owned by WMI." (McIntosh Dec. Ex. 1A at 64.) The Exchange Agreements also specify that "each holder of [TPS] shall be *unconditionally obligated* to surrender to WMI any certificate representing the [applicable TPS] as set forth in the . . . Trust Agreement [for such Trust]." (McIntosh Dec. Ex. 4A, § 2-3 (emphasis added); Ex. 3A § 4.08.)

Thus, the Conditional Exchange became mandatory on both WMI and the holders of the TPS upon the OTS's issuance of the September 25th directive and is not a "purchase" subject to Article 8 of the Uniform Commercial Code.

2. Even if UCC Section 8-301 Were Applicable to the Transfer of the TPS and the Requirements for Delivery Were Not Fulfilled, WMI Acquired Control Over the TPS Under UCC Section 8-106

Even assuming arguendo that Article 8 is applicable to the transfer of the TPS triggered by the Conditional Exchange, and further assuming that the requirements for delivery under Section 8-301 have not been satisfied, WMI still has "control" over the TPS under Section 8-106 of the UCC. *See* UCC § 8-106 (2007).

In prescribing the requirements for "delivery" and "control," Article 8 classifies securities as "certificated" or "uncertificated" based on whether or not a given security is represented by a certificate. *See* UCC §§ 8-102(a)(4) and 102(a)(18), 8-106, and 8-301 (2007). Prior to the Conditional Exchange, the TPS were represented by global certificates held by the Depository Trust Company ("DTC") and registered in the name of DTC's nominee, Cede & Co. Under the Trust and Exchange Agreements, upon and after the Conditional Exchange, the global certificates representing the TPS were deemed for all purposes to represent WMI Preferred Shares. (*See* McIntosh Dec. Ex. 3A § 4.08(c), Ex. 4A §§ 2-3.) Thus, the TPS became *uncertificated* when the global certificates no longer represented the TPS and in turn, the rights of the prior holders of the TPS as beneficiaries in the Issuer Trusts ceased pursuant to the Trust Agreements, and the prior holders of the TPS are now deemed for all purposes to hold beneficial interests in *certificated* WMI Preferred Shares held by DTC. (*See* McIntosh Dec. Ex. 3A § 4.08.)

A purchaser has "control" of an uncertificated security when "(1) the uncertificated security is delivered to the purchaser; or (2) the issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner." UCC § 8-106(c) (2007). Therefore, WMI acquired control over the uncertificated TPS when the Issuer Trusts agreed in the Trust Agreements to transfer the TPS to WMI upon a Conditional Exchange without requiring further consent by the prior registered holders. (*See* McIntosh Dec. Ex. 3A, § 4.08(a)(i).) By having control over the TPS, WMI has taken the necessary steps to place itself in a position where it can transfer the securities without further action by the prior holders of the TPS. In the event that the physical certificates representing the TPS have not yet been delivered to WMI, and the

Issuer Trusts refused to register the transfer, WMI would hold a contractual claim against the Issuer Trusts to register the transfer of the TPS.

D. Count III Fails Because WMI Was Not Required To Be an Eligible Purchaser of the TPS

The originally-issued certificates for the TPS state that the securities cannot be offered, sold, pledged or otherwise transferred except to a person who is both a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act of 1933 (the "Securities Act") and a "qualified purchaser" within the meaning of Section 2(a)(51) of the Investment Company Act. (Compl. ¶ 85.) In Count III, Plaintiffs argue that this statement prevents the Conditional Exchange from having occurred, because, at the time of the Conditional Exchange, WMI did not meet the criteria for a qualified institutional buyer. (Compl. ¶ 89.) The restrictions on "sales" to qualified "purchasers" or "buyers," however, do not apply to the transfer of the securities to WMI upon a Conditional Exchange, because that was not a voluntary acquisition, but a mandated transfer by regulatory action. Second, even if these restrictions did apply, at the time of the Conditional Exchange, WMI actually met the requirements for a "Qualified Institutional Buyer" and for a "Qualified Purchaser."

1. The Eligible Purchaser Restriction Is Not Applicable to the Conditional Exchange

As a matter of contract interpretation, the provision restricting transfers to "Qualified Institutional Buyers" and "Qualified Purchasers" did not apply in the event of a Conditional Exchange ordered by the OTS. The restriction on sale appears in the offering materials and precludes a secondary market transaction where the holder of the security sells, offers, or transfers the security to a third-party purchaser that is not a "Qualified Institutional Buyer." (*See, e.g.*, McIntosh Dec. Ex. 1A at 29.) The holders of

the TPS did not sell, offer to sell, or even transfer the securities at issue to WMI as those phrases are used under Rule 144A of the Securities Act. Rather, upon the occurrence of the Exchange Event and direction of the Conditional Exchange by the OTS, the holders of the TPS automatically lost all rights in those securities. WMI, a party not contractually bound by the eligible purchaser restrictions, received the TPS by operation of the automatic exchange directed by the OTS.

Reading the eligible purchaser requirements as preventing the Conditional Exchange would breach two fundamental rules of contract construction, that (1) contractual terms should be read in harmony with each other, not in conflict; *see, e.g., Contrans, Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163, 169 (3d Cir. 1987); and (2) a contract should not be read to intend an absurd result, *see, e.g., Osborn*, 991 A.2d at 1160. Plaintiffs' interpretation of the eligible purchaser requirement would render meaningless large portions of the Conditional Exchange language in the offering materials, including that the Conditional Exchange is to occur "automatically." If the exchange could only be effected if WMI happened to meet the Rule 144A restrictions, then the OTS could never be certain that an exchange could ever be effected and it could never approve treatment of the instruments as components of core capital of WMB.

Applying the eligible purchaser restriction to an exchange transaction, as Plaintiffs urge, also is inconsistent with the purpose of the eligible purchaser requirement. The limitations of Rule 144A are designed to protect investors purchasing privately placed securities that are presumed to be sold without the full information and disclosure available for a security registered under the Securities Act. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 124-125 (1953) (the private placement exemption is designed for

those transactions in which there is no need for the disclosure requirements of the Securities Act). In promulgating Rule 144A, the SEC decided to use the $100 million threshold for a "Qualified Institutional Buyer," based on a presumption that an investor of that size would have enough experience in the private resale market for restricted securities to be able to fend for itself and therefore would not need the disclosure requirements of the Securities Act. *See* Egon Guttman, 28 Modern Securities Transfers §7:9 (3d ed. Oct. 2009). Accordingly, such a restriction would be nonsensical if applied to prevent WMI, an entity with full knowledge of the terms of the TPS as well as the related risks, from acquiring such securities pursuant to the Conditional Exchange.

2. Even if the Eligible Purchaser Requirements Did Apply, WMI is a "Qualified Institutional Buyer"

Even if the Eligible Purchaser restriction did apply to an automatic exchange, WMI is in fact both a "Qualified Institutional Buyer" under Rule 144A of the Securities Act and a "Qualified Purchaser" under Section 2(a)(51) of the Investment Company Act. Plaintiffs, citing WMI's December 1, 2008 Monthly Operating Report, allege that "as of September 26, 2008 (the date of the purported Conditional Exchange), WMI held only $59.7 million in 'Investment Securities,'" (Compl. ¶ 88), i.e. less than the $100 million in investment securities needed to be a "Qualified Institutional Buyer" under Rule 144A. Importantly, this allegation of $59.7 million is a concession that WMI was at least a "Qualified Purchaser" under the Investment Company Act, because it was a company that "in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments." 15 U.S.C. § 80a-2(a)(51)(iv).

Plaintiffs, however, misread the Monthly Operating Report. In point of fact, WMI did own more than $100 million in investment securities and was therefore a

"Qualified Institutional Buyer." As evidenced by WMI's Schedule of Assets and Liabilities, WMI owned more than $300 million in United States Treasury Bills. (McIntosh Dec. Ex. 14A at 5.) Treasury Bills are counted towards the investment securities requirement under Rule 144A.[20] WMI's holdings in treasury securities are reported under cash and cash equivalents on the Monthly Operating Report.

Furthermore, it is well-established that, in calculating investment securities for the "Qualified Institutional Buyer" requirement, a parent company can include securities owned by its subsidiaries, if the subsidiary has consolidated its financial statements with the parent company and if the investments are managed under the direction of the parent. *See* 17 CFR § 230.144A(a)(4). WMI's subsidiary, WMI Investment, Inc., is one such subsidiary (*see* McIntosh Dec. Ex. 15A), and, according to the very same Monthly Operating Report relied upon by Plaintiffs, WMI Investment, Inc. had "Investment Securities" totaling more than $266 million. (*See* McIntosh Dec. Ex. 14B at 6.) Thus, WMI was a "Qualified Institutional Buyer" under Rule 144A, since it was an entity that owned in the aggregate more than $100 million in securities. *See* 17 C.F.R. § 230.144A(a)(1)(i)(H).

E. Count IV Is Not Properly Before this Court Because it is Actually a Challenge to Actions by the OTS within its Regulatory Capacity and the OTS is Not a Defendant Nor Could It Be Sued in this Court

In Count IV of the Complaint, Plaintiffs are asking this Court to decide that actions taken by the OTS were unlawful and fraudulent and that the related OTS directive is null and void. (Compl. ¶¶ 229-243). As Plaintiffs themselves have acknowledged, "Count IV of the Complaint focuses *solely* on the conduct of OTS and seeks a declaration

[20] *See* Private Resales of Securities to Institutions, 57 Fed Reg. 48721 (Oct. 28, 1992) (codified at 17 CFR pt. 230).

that . . . OTS's purported triggering of the Conditional Exchange was an action in excess of OTS's legal authority and cannot be given effect."[21] In Count IV, Plaintiffs claim that "the OTS exceeded the scope of its authority and its actions (including the purported triggering of the Conditional Exchange) are a nullity without force and effect."[22]

But, Plaintiffs have not sued the OTS in this proceeding. Moreover, this Court would not have jurisdiction over such a claim even if they had. *See, e.g., United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1328 (6th Cir. 1993) (finding that Congress barred suits against the OTS by investors in regulated entities). Instead, Plaintiffs are trying an end run around this jurisdictional obstacle, by naming WMI and JPMC as defendants on a claim in which they actually ask the Court to declare that the OTS exceeded its authority and engaged in fraud and that an OTS directive is "null, void, and without effect." (Compl. ¶ 243). Article III of the U.S. Constitution, however, precludes actions brought against third parties as an indirect vehicle for challenging the decisions of others, including regulatory agencies. *See, e.g. Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976) (holding that plaintiffs could not sue the IRS when their injuries were traced to the actions of specific hospitals); *Duquesne Light Co. v. EPA*, 166 F.3d 609, 612-13 (3d Cir. 1999) (holding that plaintiffs could not sue EPA to challenge the regulatory decision of a Pennsylvania state agency).

[21] Plaintiffs' Opposition to Defendant Washington Mutual, Inc. and JPMorgan Chase Bank, N.A.'s Joint Motion to Compel Production of Documents and Answers to Interrogatories [Docket No. 77] at 7 (emphasis in original).

[22] *Id.* at pp. 7-8.

1. Plaintiffs Cannot Bring Suit Against The OTS, And Thus Cannot Assert Claims Targeted At The OTS Against WMI And JPMC Here

In the Financial Institutions Regulation, Recovery & Reform Act ("FIRREA"), amending the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1461 *et seq.*, Congress gave the OTS broad empowers to regulate savings and loan associations, federal savings banks and thrift holding companies. *Id.* § 1462a(b)(2).[23] At the same time, Congress protected the OTS and its Director from suits challenging the exercise of those powers.[24] Under 12 U.S.C. § 1464(d)(1)(A), *only* federal savings associations or their directors and officers may sue the OTS to challenge its regulatory decisions; the statute specifically precludes other types of parties, such as investors, from suing the OTS.[25] Accordingly, the OTS cannot be subject to a private cause of action by investors, like Plaintiffs here. The only type of claim that may be brought against the OTS is one by a banking entity against whom the OTS has taken adverse action.[26]

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[23] *See also In re Ocwen Loan Serv., LLC Mortg. Serv. Litig.*, 491 F.3d 638, 642 (7th Cir. 2007) ("HOLA empowered what is now the Office of Thrift Supervision in the Treasury Department to authorize the creation of federal savings and loan associations, to regulate them, and by its regulations to preempt conflicting state law") (citations omitted); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d at 1322 (explaining that "OTS is a federal regulatory body, established by [FIRREA]. ... OTS was vested with the power to regulate the savings and loan industry.") (citations omitted); *Coffman v. Bank of America, NA*, No. 09-00587, 2010 WL 3069905, at *9 (S.D. W.Va. Aug. 4, 2010) (explaining the OTS's authority under HOLA to promulgate preemption regulation governing state law claims against federal savings associations); *Crocker v. Resolution Trust Corp.*, 839 F. Supp. 1291, 1296 (N.D. Ill. 1993) (explaining the "primary function" of the OTS).

[24] Section 1464(d)(1)(A) provides in pertinent part that: "[e]xcept as otherwise provided, *the Director shall be subject to suit (other than suits on claims for money damages) by any Federal savings association or director or officer thereof with respect to any matter under this section or any other applicable law*, or regulation thereunder, in the United States district court for the judicial district in which the savings association's home office is located, or in the United States District Court for the District of Columbia, and the Director may be served with process in the manner prescribed by the Federal Rules of Civil Procedure." (emphasis added).

[25] *See, e.g., United Liberty Life Ins. Co. v. Ryan*, 985 F.2d at 1328 (finding that "since both provisions [of FIRREA] specifically limit judicial review to suits by a federal savings association or its directors or officers, and since [plaintiff] is neither, but merely an investor, the FIRREA does not confer subject matter jurisdiction for [plaintiff's] claims against OTS."); *Transohio Sav.*

Section 1464(d)(1)(A) operates to limit judicial review of the OTS actions that would otherwise be available under the Administrative Procedure Act ("APA"). Although the APA generally provides a mechanism for aggrieved persons to obtain judicial review of actions of regulatory agencies in most instances, 5 U.S.C. § 702, the opportunity for judicial review is not available where statute precludes judicial review of a decision by an agency; or an agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). This is precisely what Congress did with respect to suits against the OTS by adopting § 1464(d)(1)(A).

In *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1325 (6th Cir. 1993), the Sixth Circuit applied these principles to conclude that investors in a bank's securities did not have standing to challenge an OTS regulatory decision about the bank. In that case, the OTS had allowed Pinnacle West, the parent company of MeraBank, a federally chartered savings bank, to re-acquire MeraBank out of receivership while releasing it from a pre-existing obligation to maintain MeraBank's capital at a specified level, which, *inter alia*, protected MeraBank debenture holders. *Id.* at 1323. The plaintiff in *Ryan*, a holder of the debentures, filed suit against the Director of the OTS and the FDIC, alleging, *inter alia*, violations of due process and RICO, breach of the stipulation and the relevant indenture, and fraud. *Id.* at 1324. The OTS and the FDIC successfully argued

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Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607 (D.C. Cir. 1992) (rejecting claim of state-chartered savings and loan association because "the OTS provision [subjecting the OTS to suit] plainly aids only '*[f]ederal* savings association[s]'") (emphasis in original); *see also Collins v. Sovereign Bank*, 482 F. Supp. 2d 235, 239 (D. Conn. 2007) ("Specifically, 12 U.S.C. § 1464(d)(1)(A) provides a limited waiver subjecting OTS only to suits 'other than suits on claims for money damages' brought by 'any Federal savings association or director or officer thereof,' which plaintiff by the terms of his Complaint indisputably is not.") Further, section 1464(d)(1) only allows actions against the OTS to be brought in the district in which the savings association's home office is located or in the District of Columbia.

[26] *See supra* note 16.

that the federal courts did not have jurisdiction over the claims against them because "the section 701(a) exception to the APA waiver of sovereign immunity applies because the agency 'action' of which the plaintiff complains – the decisions by FDIC and the OTS. . . not to enforce the terms of the stipulation against Pinnacle West – was an administrative enforcement 'action ... committed to agency discretion by law,' and thus not subject to judicial review." *Id.* at 1325-26 (footnote omitted). Accordingly, the court held that "the district court lacked jurisdiction to consider United Liberty's claims for relief against the federal defendants" and granted summary judgment dismissing the action. *Id.* at 1331.

The actions of the OTS that Plaintiffs challenge in Count IV here are all actions which fall squarely within the OTS's "'agency action ... committed to agency discretion by law,'" and thus are not subject to judicial review under the APA. *Id.* at 1327. The OTS is expressly empowered to ensure adequate capital maintenance by establishing minimum capital requirements and "such other methods as the [OTS] Director determines to be appropriate." 12 U.S.C. § 1464(s)(1)(B); *see Ryan*, 985 F.2d at 1326. The decision whether to direct a Conditional Exchange was within the OTS's sole discretion, as expressly provided for in the Trust Agreements and disclosed in the offering circulars for the TPS. (*See* McIntosh Dec. Ex. 3A §§ 1.01, 4.08; Ex. 3B § 9(f); Ex. 1A at cover, 2, 11.) Accordingly, insofar as Plaintiffs could not assert a claim directly against the OTS pursuant to the plain language of HOLA and the "agency discretion" exception of the APA, they cannot circumvent these restrictions by suing WMI and JPMC.

2. Plaintiffs Cannot Avoid The Jurisdictional Limits on Suing the OTS By Purporting to Sue WMI and JPMC For a Declaration Invalidating OTS Regulatory Decisions

Although Count IV of the Complaint is nominally brought against WMI and JPMC, Plaintiffs in this Count are directly asking this Court to decide that discretionary decisions made by the OTS in its regulatory capacity were "unlawful" and "fraudulent," and to declare them "null and void, and without effect." (Compl. ¶ 243).

Article III of the U.S. Constitution precludes such a suit. As the Supreme Court held in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42, "Art. III still requires that a federal court act only to redress an injury that fairly can be traced to the challenged action *of the defendant*, and not injury that results from independent action of some third party not before the Court." (emphasis added). In *Simon*, indigent plaintiffs sued Treasury officials claiming that hospitals had denied them services because an IRS Ruling gave favorable tax treatment to hospital which refused to provide services to indigents. The Supreme Court held that this claim was barred because the injury they claim to have suffered was traceable to the acts of the hospitals (who were not defendants) in refusing to provide services, not to the conduct of the Treasury officials. The Third Circuit applied this principle in *Duquesne Light Co. v. EPA*, 166 F.3d at 612-13, dismissing a complaint against EPA because the injury the plaintiff claimed was traceable not to a decision by EPA in approving a state regulation, but to the decision of the Pennsylvania state agency that had adopted the regulation in the first instance, but which was not a party. *See also Pritikin v. DOE*, 254 F.3d 791, 798-99 (9th Cir. 2001) (dismissing claim against DOE, when the plaintiff's claimed injury was traceable to the independent action of a third party). Similarly, Count IV of the Complaint alleges an injury traceable to the conduct of a non-party, the OTS; in Plaintiffs' own words, "Count

IV of the Complaint focuses *solely* on the conduct of OTS and seeks a declaration that . . . OTS's purported triggering of the Conditional Exchange was an action in excess of OTS's legal authority and cannot be given effect."[27]

F. Plaintiffs' Fraud Claims Entitle Them to No Relief under Count V

Plaintiffs' allegations of misrepresentation and omission regarding the downstream undertaking, even if sustained, have no bearing on the Global Settlement Agreement. For reasons set out above, it is beyond dispute that the Conditional Exchange occurred and that WMI became the holder of the TPS and the former holders of the TPS became holders of WMI Preferred Shares. The allocation of the TPS to JPMC under the Global Settlement Agreement is fair and reasonable.

Even if there were a valid claim for fraud based on the non-disclosure of the downstream undertaking, it would not entitle Plaintiffs to any of the relief they seek. If Plaintiffs were truly harmed by a material omission, they would be entitled to file a claim for damages like any other buyer or seller of WMI's securities. Had Plaintiffs timely filed such a claim – and they have not – it would be subject to subordination under section 510(b) of the Bankruptcy Code and they would get no better recovery than they are receiving under the proposed Plan.[28]

Finally, the assertion in Count V that the Bankruptcy Court should deny WMI the equitable relief necessary to effectuate the Global Settlement Agreement because it has "unclean hands" misperceives both the relief the Debtors seek under the Plan and the

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[27] Plaintiffs' Opposition to Defendant Washington Mutual, Inc. and JPMorgan Chase Bank, N.A.'s Joint Motion to Compel Production of Documents and Answers to Interrogatories [Docket No. 77] at 7 (emphasis in original).

[28] 11 U.S.C. § 510(b) provides that claims arising from the "purchase or sale of a security of the debtor or of an affiliate of the debtor" shall be subordinated to all claims that are superior or equal to those represented by the security.

very nature of bankruptcy proceedings. The Debtors do not seek any exercise of the Bankruptcy Court's general equitable powers in connection with the allocation of the TPS under the Global Settlement Agreement. They seek only authorization under the Plan, as provided under section 1142(b) of the Bankruptcy Code, to complete the paperwork appropriate to reflect the transfer of the TPS to JPMC in accordance with the resolution agreed in the Global Settlement Agreement. Plaintiffs can prove no facts showing that WMI's conduct was inequitable in connection with the issuance or the exchange of the TPS. On September 25 and 26, 2008, WMI did nothing but comply with the directive of federal thrift regulators at a time when the nation was in the grip of the most desperate financial crisis since the Great Depression. Even if there were an argument that compliance with the directives of a federal regulator somehow constitutes misfeasance, that is no basis to deny a chapter 11 debtor the protections of the Bankruptcy Code. Chapter 11 protects the rights of creditors even in cases where there has been misconduct by debtors.

G. Counts IV and V State No Viable Fraud Claim Against WMI

Summary judgment should also be granted on both Counts IV and V because Plaintiffs cannot present evidence to satisfy either of two key components of fraud claim: (1) that WMI made a material omission or misrepresentation; or (2) reasonable reliance by Plaintiffs on any statement that WMI made or failed to make.

1. There Was No Material Omission

It is axiomatic that an omission must be material for it to be actionable as fraud. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579 (1996) ("actionable fraud requires a material misrepresentation or omission.")(citations omitted). In Counts IV and V, Plaintiffs contend that they were misled because they were somehow unaware that

following the Conditional Exchange, the TPS themselves would not be kept as property of WMI but would be assigned to WMB. (Compl. ¶¶ 239-40, 245-46.)

These allegations are inherently illogical and cannot sustain a cause of action. The TPS were sold through a private placement only to "Qualified Institutional Buyers," i.e., the most sophisticated investors. It was well known to them and the public at large that WMI, the parent company of the issuer was a thrift holding company, whose principal asset was WMB, a thrift regulated by the OTS. It was fully disclosed in the offering circulars for the TPS and the governing documents that one of the purposes of these transactions was to raise "core" or "tier 1" capital for WMB, which means capital that is available to absorb losses by the bank. (McIntosh Dec. Ex. 1A at 2, 30; Ex. 4A at 3 (describing an "Exchange Event" as occurring if "WMB becomes undercapitalized"); Ex. 3A § 1.01 (same). It was also fully disclosed that the OTS, in its *sole discretion*, could order a Conditional Exchange if it concluded that WMB was in financial difficulty, or if WMB was placed in receivership. (McIntosh Dec. Ex. 1A at cover, 2, 11; Ex. 4A § 1; Ex. 3A § 1.01 .) Under the circumstances, the idea that the OTS would order a Conditional Exchange, but still allow the exchanged assets to remain at the WMI level where they would not be available to support the bank is absurd. It would be obvious to any investor that if the OTS were to order a Conditional Exchange, the exchanged assets would be returned to WMB. Otherwise, the Conditional Exchange could not serve its purpose. Here, the extensive and detailed disclosures in the offering circulars about the TPS were more than sufficient to put Plaintiffs on notice that, upon a Conditional Exchange and the automatic conversion to WMI Preferred Shares, they would have no claim to any recovery based on the value of the TPS or any other assets of WMI. The

nature and structure of the TPS, along with the express disclosures in the offering circulars for the TPS, preclude any contention otherwise.

First, the intention to treat the TPS as core capital of WMB, which was disclosed expressly in the offering circulars for the TPS, negates any contention that investors were misled to believe that the value of the TPS would remain at WMI and be available for distribution to its preferred shareholders. (*See* McIntosh Dec. Ex. 1A at 2, 32, 33.) Indeed, counting the TPS as core capital of WMB is completely antithetical to the notion that they would remain at WMI after a Conditional Exchange rather than the value being returned to WMB, from where it came in the first instance, during a time of economic distress.[29]

Second, nowhere in the thousands of pages of documentation of the TPS are there any covenants or other restrictions that would have limited WMI's ability to contribute assets to its subsidiary, WMB, or utilize assets for any other purpose. Significantly, WMI did covenant in favor of TPS investors that, if full dividends were not paid on the TPS, WMI would not declare or pay any dividends on "any of its equity capital securities during the next succeeding Dividend Period . . ." and that WMI would not issue any preferred stock senior to the WMI Preferred Shares to be issued pursuant to a Conditional Exchange. (*Id.* at 11, 12; Ex. 4A § 7(a), (b).) Thus the TPS investors understood exactly what they bargained for from WMI. Investors in the TPS could have no expectation that WMI would forever hold the TPS after a Conditional Exchange and not contribute them to support the capital of WMB.

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[29] *See* McIntosh Dec. Ex. 9F, Appendix A, § 120, at A.4, A.7 (Instruments eligible for inclusion in Tier 1 capital instruments "[m]ust be able to absorb losses with the bank on a going-concern basis" and "in order for REIT preferred stock to be included in Tier 1 capital . . . [s]tock can only be redeemed with the approval of the OTS.").

Third, no investor could read any of the offering circulars for the TPS and not understand that, if a Conditional Exchange occurred, their rights would be structurally subordinate to depositors and creditors of WMB, as well as subordinate to creditors of WMI. The offering circulars are filled with risk factor disclosures spelling out in detail that, upon conversion to WMI Preferred Shares, former holders of the TPS may get no recovery at all. (*See e.g.* McIntosh Dec. Ex. 1A at 27-28.)

2. Plaintiffs' Purported Reliance Is Not Reasonable

Plaintiffs contend they relied upon the offering circulars for the TPS, as well as general disclosures about WMI's financial health in periodic filings with the U.S. Securities and Exchange Commission ("SEC") that were incorporated by reference in the offering circulars. But the facts revealed in discovery about the timing of Plaintiffs' purchases belie any reasonable reliance on information that was superseded by subsequent events. Out of the thirty (30) Plaintiffs who filed this adversary proceeding, twenty-six (26) did not purchase TPS until *after* it became public knowledge that WMB had been seized and sold to JPMC, and the Conditional Exchange had occurred, and the Assignment Agreement itself had been filed with this Court by both JPMC and the FDIC in connection with their respective proofs of claims; these Plaintiffs purchased their interests for pennies on the dollar.[30]

[30] The twenty-six plaintiffs that purchased TPS after the Conditional Exchange are: Black Horse Capital LP; Black Horse Capital (QP) LP, Black Horse Capital Master Fund Ltd., Greywolf Capital Partners II LP, Greywolf Capital Overseas Master Fund, HFR RVA Combined Master Trust, IAM Mini-Fund 14 Limited; Pandora Select Partners, LP, Whitebox Asymmetric Partners LP, Whitebox Combined Partners LP, Whitebox Convertible Arbitrage Partners LP, Whitebox Hedged High Yield Partners, LP, Whitebox Special Opportunities LP, Series B., Lonestar Partners, Paige Opportunity Partners L, Paige Opportunity Partners Master Fund, Pines Edge Value Investors Ltd., LMA SPC for and behalf of MAP 89 Segregated Portfolio, Nisswa Convertibles Master Fund Ltd, Nisswa Fixed Income Master Fund Ltd, Riva Ridge Capital Management, LP; Riva Ridge Master Fund Ltd; Mariner LDC, Scoggin Worldwide Fund Ltd, Visium Global Master Fund Ltd. and VR Global. (*See,* McIntosh Dec., Ex. 13A at 3-16).

Of the remaining four Plaintiffs, three were affiliated funds, Scoggin Worldwide, Scoggin Capital Management and Guggenheim Portfolio VII, LLC, which did not begin purchasing TPS until September 12, 2008, after WMI had issued a press release on September 8, 2008 announcing its entry into the MOU with the OTS and that its CEO was leaving WMI, and there were news reports speculating that WMB would be sold or put in receivership; these Plaintiffs paid less than twenty percent (20%) of face value. (*See* McIntosh Dec., Ex. 13A at 1-2.) Only one Plaintiff, Nisswa Master Fund LTD, purchased prior to September 2008, however such purchases amount to only 7.82 percent of the TPS purchased by Nisswa's entire fund family, the Pine River fund, (McIntosh Dec., Ex. 13C at 1.), and the vast majority of Nisswa's purchases were made after September 2008. (*Id.* at 1-15.)

It is well settled that plaintiffs cannot demonstrate reasonable reliance on alleged misleading statements when the purported "truth" that allegedly was concealed was, in fact, available to them. *See, e.g., Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000) ("A defendant may rebut the presumption that its misrepresentations have affected the market price of its stock by showing that the truth of the matter was already known"); *In re UBS Auction Rate Sec. Litig.*, No. 08 Civ. 2967, 2010 WL 2541166, at *22 (S.D.N.Y. June 10, 2010) (finding that "even if Plaintiffs sufficiently alleged manipulative acts by Defendants ... Plaintiffs cannot satisfy the reliance element" because "regardless of whether they have sufficiently alleged actual reliance or are entitled to a rebuttable presumption of reliance – in light of the extensive disclosures to the contrary, Plaintiffs cannot show that they reasonably relied on an assumption of an efficient ARS market . . . free of the allegedly manipulative conduct") (footnote omitted).

The undisputed facts here demonstrate that all of these 26 Plaintiffs' purchases of TPS took place *after* many or all of the events of which they claimed to lack knowledge. (*See* McIntosh Dec. Ex. 13B.) WMI issued a press release on September 26, 2008 announcing the Conditional Exchange. On September 26th, WMI filed its chapter 11 petition. On September 30, 2008, WMI publicly filed an 8-K report with the SEC that disclosed the appointment of the FDIC as received of WMB, the commencement of its chapter 11 case and the occurrence of the Conditional Exchange. No investor purchasing after the Conditional Exchange had occurred, WMB had been seized, and WMI had filed for bankruptcy, could reasonably believe that the TPS would be available to satisfy its interests in WMI. *See, e.g.*, *Abu Dhabi Comm. Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 172 (S.D.N.Y. 2009) ("A plaintiff must allege 'that its reliance on the alleged misrepresentations was not so utterly unreasonable, foolish or knowingly blind as to compel the conclusion that whatever injury it suffered was its own responsibility.'") (footnote omitted).

V. Conclusion

For the reasons stated herein, WMI respectfully requests the Court to grant it summary judgment on each of Counts I-V of the Complaint.

Dated: November 2, 2010
Wilmington, Delaware

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of November, 2010, he caused a copy of the foregoing ***Opening Brief of Washington Mutual, Inc. in Support of Motion for Summary Judgment*** to be served on the following counsel in the manner indicated:

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