IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
WASHINGTON MUTUAL, INC., et al.,	Case No. 08-12229 (MFW)
Debtors.	(Jointly Administered)
	Re: Docket Nos. 6697 and 6711

BLACK HORSE CAPITAL MANAGEMENT LLC'S OBJECTION TO (I) SUPPLEMENTAL DISCLOSURE STATEMENT FOR THE MODIFIED SIXTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND (II) 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, (I) APPROVING THE PROPOSED SUPPLEMENTAL DISCLOSURE STATEMENT AND THE FORM AND MANNER OF THE NOTICE OF THE PROPOSED SUPPLEMENTAL DISCLOSURE STATEMENT HEARING, (II) ESTABLISHING SOLICITATION AND VOTING PROCEDURES, (III) SCHEDULING A CONFIRMATION HEARING, AND (IV) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR CONFIRMATION OF THE DEBTORS' MODIFIED PLAN

Black Horse Capital Management LLC ("Black Horse"), by and through its undersigned counsel, and pursuant to sections 105(a) and 1125(a) of the Bankruptcy Code and Fed. R. Bankr. P. 3017 and applicable law, hereby objects (the "Objection") to *(i) the Supplemental Disclosure Statement (the "Supplemental Disclosure Statement")*[1] *for the Modified Sixth Amended Joint Plan of Affiliated Debtors (the "Modified Plan") Pursuant to Chapter 11 of the United States Bankruptcy Code* [Docket No. 6697] and (ii) the *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, (I) Approving the Proposed Supplemental Disclosure Statement and*

[1] The term "Disclosure Statement" as used herein shall mean the Supplemental Disclosure Statement and the Debtor's prior Disclosure Statement for the Sixth Amended Plan filed at Docket No. 5549 (the "Prior Disclosure Statement"). Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Disclosure Statement.

the Form and Manner of the Notice of the Proposed Supplemental Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Modified Plan. [Docket No. 6711] (the "Solicitation Motion"). In support of this Objection, Black Horse respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors' Disclosure Statement cannot be approved because it is materially misleading and incomplete and lacks "adequate information" necessary to enable parties in interest to make an informed judgment when assessing how to vote on the proposed Modified Plan, including for the following reasons:

a. First, the liquidation analysis attached as Exhibit D to the Disclosure Statement (the "Liquidation Analysis") is inadequate because it fails to illustrate the economic impact of paying interest on allowed claims at the Federal Judgment Rate versus the proposed contract rates in the Modified Plan, thus making it impossible for this Court or parties in interest to assess the equities of the case relevant to the pending determination of whether the Debtors' Plan meets the "best interests test" required under section 1129(a)(7) of the Bankruptcy Code and other confirmation requirements. Importantly, disclosure of the impact of paying the Federal Judgment Rate on allowed claims would demonstrate a scenario where: (i) holders of Junior Subordinated Debentures are paid in full; (ii) equityholders, including holders of Preferred Equity Interests, would receive a substantially higher return, including ownership of the equity in the Reorganized Debtors; and (iii) no "ownership change" for tax purposes would occur on account of prior rulings of this Court restricting trading by equityholders, including the Preferred Equity Interests, thereby preserving the Debtors' $17.8 billion of net

operating losses ("NOL's") for the benefit of the estate and the new owners of the Reorganized Debtor. Clearly, disclosure of adequate information concerning such a scenario is necessary for creditors and parties in interest to make an informed decision on the Debtors' proposed Modified Plan and for this Court to consider all of the equities relevant to the post-petition interest rate issues still pending before the Court.

b. Second, the valuation analysis attached as Exhibit E to the Disclosure Statement (the "Valuation Analysis") is inadequate because it fails to disclose any analysis of the range of sensitivities and legal "best case scenario" where billions of dollars in NOL's may be preserved by the Reorganized Debtors. For example, it fails to illustrate the potential value of the Debtors' $17.8 billion in NOL's that could be preserved if post-petition interest under the Modified Plan is paid at the Federal Judgment Rate and new equity in the Reorganized Debtors is distributed to holders of Preferred Equity Interests instead of to holders of Junior Subordinated Debentures. Further, the Valuation Analysis grossly exaggerates the nature of limitations on the use of NOL's under section 269 of the Internal Revenue Code (the "Tax Code") suggesting that $3.5 billion of NOL's have a value of only $10 to $20 million to shelter future taxable income projected to be generated by Reorganized WMI, without any financial analysis of the potential resulting range of values if such NOL's are used to shelter future taxable generated from assets not currently owned by the Reorganized Debtors but that could admittedly be potentially acquired post-confirmation. Clearly, disclosure of adequate information concerning alternative best case scenarios for preservation of NOL's is necessary for creditors and parties in interest to make an informed decision on the Debtors' proposed Modified Plan.

I. BACKGROUND

2. On September 26, 2008 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief commencing a case under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). On October 3, 2008, the Court entered an order, pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the joint administration of the Debtors' chapter 11 cases.

3. The Debtors are operating and managing their estates as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. Black Horse is a party in interest and the holder of Senior Subordinate Notes (Class 3), PIERS claims treated under Class 16 of the Modified Plan and Trust Preferred Securities proposed to be treated as Class 19 (REIT series) under the Modified Plan.[2]

5. On January 7, 2011, the Court issued an opinion denying confirmation of the Debtors' Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code (the "Confirmation Opinion").

6. Certain parties objected to the confirmation of the Debtors' Plan, *inter alia*, on that basis that any post-petition interest to be paid under the Plan should be paid at the federal post-judgment interest rate payable under 28 U.S.C. §1961(a) (the "Federal Judgment Rate" or "FJR") as required under sections 1129(a)(7) and 726(a)(5) of the Bankruptcy Code and applicable law, instead of at individual creditor contract rates of interest. *See e.g.*, *Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231, 1234 (9th Cir. 2002) (where debtor is solvent, unsecured creditors entitled to post-petition interest at the "legal rate"; held to mean the FJR); *In re Dow Corning Corp.*, 237 B.R. 380, 412 (Bankr. E.D. Mich. 1999) ("Dow I") (determining the

[2] Black Horse disputes that the Trust Preferred Securities are part of the Debtors' estate, pending the outcome of the appeal on this issue.

phrase "interest at the legal rate" means the FJR); *In re Melenzyer*, 143 B.R. 829, 832-833 (Bankr. W.D. Tex. 1992) (same).

7. In the Confirmation Opinion, the Court held that the Federal Judgment Rate was the minimum that must be paid to unsecured creditors in a solvent debtor case under a plan to meet the best interest of creditors' test, but that the Court had discretion to alter it based upon the equities of the case. *Conf. Op.* at p. 93. The Court noted that various objecting parties argued that the equities of this case warrant that post-petition interest be calculated at the Federal Judgment Rate. *Id.* However, the Court expressly stated that "[b]ecause the Plan as written cannot be confirmed, the Court need not decide this issue." *Id.* at p. 94. Thus, this Court has expressly left open the opportunity for parties in interest to present equitable arguments that would support this Court limiting the interest rate payable on allowed claims under the Modified Plan to the Federal Judgment Rate.

8. Under the Modified Plan, the Debtor proposes that holders of the Junior Subordinated Debentures will become owners of the Reorganized Debtors. Approximately 70% of the Junior Subordinated Debentures are held by four hedge funds, collectively known as the Settlement Noteholders [*First Supplemental Verified Statement of Fried, Frank, Harris, Shriver & Jacobson LLP Pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure*, Docket No. 3761]. Thus, the Settlement Noteholders are proposed to be the majority owners of new equity in the Reorganized Debtors under the Modified Plan. Upon information and belief, the Settlement Noteholders acquired their positions in the Junior Subordinated Debentures after the commencement of the Debtors' chapter 11 case.

II. OBJECTION

9. Section 1125(b) of the Bankruptcy Code prohibits the solicitation of votes on a chapter 11 plan prior to approval by the bankruptcy court of an accompanying disclosure

statement that contains "adequate information." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) (provision of adequate information is a "pivotal concept in reorganization procedure under the Code."); *see Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 322 (3d Cir. 2003) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court.").

10. It is well established that the minimal requirement for a proper disclosure statement is that it contains "information of a kind, and in sufficient detail . . . that would enable a hypothetical reasonable investor . . . to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1); *see also Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358-62 (3d Cir. 1996). Although the type and amount of information required varies from case to case, the "adequate information" requirement is intended to force debtors to disclose all information necessary to assist creditors in plan negotiations. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988).

11. Because of the material inadequacies in the Disclosure Statement described below, the Disclosure Statement cannot be approved. Importantly, the material omissions and misleading presentations, contained in both the Valuation Analysis and Liquidation Analysis, hide the fact that the holders of Junior Subordinated Debentures would stand to receive a 100% recovery under the FJR scenario and the holders of Preferred Equity Interests would become the new equity owners under the Modified Plan. The Disclosure Statement should further disclose that the Settlement Noteholders acquired their economic interests during the pendency of this case and participated in negotiating a "Global Settlement" with the Debtor and other third parties that excluded equityholders from participation and materially prejudices the interests of those equityholders with assumptions on the proper post-petition rate of interest and the treatment of

NOL's that are heavily biased in favor of the holders of the claims held by the Settlement Noteholders.

A. The Liquidation Analysis Must Illustrate the Economic and Equitable Impact on Creditors and Equityholders of Paying Interest at the Contract Rate versus the Federal Judgment Rate

12. It is well established that a disclosure statement must contain information concerning a Debtors' liquidation value for purposes of enabling parties in interest to assess plan confirmation requirements, including whether the plan meets the "best interests test" required under section 1129(a)(7) of the Bankruptcy Code. *See In re U.S. Brass Corp,* 194 B.R. 420, 424 (Bankr. E.D. Tex. 1996) (adequate disclosure statement should include the "estimated return to creditors under a Chapter 7 liquidation" and "financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan"); *Westland Oil Development Corporation v. MCorp Management Solutions, Inc.,* 157 B.R. 100, 102 (S.D. Tex. 1993) (adequate disclosure statement should include the "estimated return to creditors under a Chapter 7 liquidation").

13. On its face, section 1129(a)(7) expressly implicates the priority scheme of payments set forth in section 726 of the Bankruptcy Code for a chapter 7 liquidation. Creditors cannot assess whether the "best interests test" under section 1129(a)(7) is met unless the Debtor presents an estimated return to creditors in a chapter 7 liquidation. Therefore, the Debtors' Liquidation Analysis should not be limited to a chapter 11 scenario where creditors may be paid a higher contract rate of interest under section 1129(b) of the Bankruptcy Code. Instead, it should presume the rate of interest consistently applied in a chapter 7 liquidations, the Federal Judgment Rate. *See e.g., Cardelucci*, 285 F.3d at 1234; *Dow I*, 237 B.R. at 412; *Melenyzer*, 143 B.R. at 834. Here, the Debtors' failure to illustrate a liquidation scenario applying the Federal

Judgment Rate consistently applied in chapter 7 liquidations renders the Disclosure Statement inadequate under section 1125 of the Bankruptcy Code.

14. If the Debtors' chapter 11 case were in fact converted to a chapter 7 liquidation, post-petition interest on claims would instead accrue at the Federal Judgment Rate as of the September 26, 2008 Petition Date. *Id.* This would result in a 100% recovery for holders of the Junior Subordinated Debentures and provide a significantly larger recovery for junior classes, including holders of Preferred Equity Interests. More importantly, the new equity owners of the Reorganized Debtors would be the holders of Preferred Equity Interests. Therefore, adequate information disclosing the impact of the Federal Judgment Rate is relevant to determining whether the proposed Modified Plan meets basic confirmation requirements, including the "best interests test" of section 1129(a)(7).

15. More importantly, as noted above, this Court has made it clear that it has not yet decided the issue of whether, under sections 1129(a)(7) and 726(a)(5) and given the equities of this case, the post-petition interest rate payable under the Modified Plan should be limited to the Federal Judgment Rate or may be set at the higher multiple contract rates of interest proposed by the Debtor. (Confirmation Op. at p. 93-94). Therefore, the Debtors' Disclosure Statement should include an illustration of each of the two interest rate scenarios and the resulting impact on all creditors and equityholders. This comparative illustration is necessary for both creditors and this Court to be adequately informed on the overall equities relevant to the "best interests test," particularly where there is such a dramatic impact not only on returns to equityholders but on the potential preservation of $17.8 billion of NOL's, as discussed further below.

16. In addition, by presenting a Liquidation Analysis in the Disclosure Statement that shows post-petition interest accruing only at contract rates, the Debtor is unfairly presenting one side of a hotly contested issue in this case, thereby rendering the Disclosure Statement

incomplete and inadequate as a matter of law. *See, e.g., In re Fierman*, 21 B.R. 314, 315 (E.D. Pa. 1982) (disclosure statement inadequate when effect of litigation on creditors' claims not disclosed).

17. In sum, nowhere in the Disclosure Statement do the Debtors mention the effect of the application of the Federal Judgment Rate on recoveries to creditors, equityholders or the Debtors' billions of dollars of NOL's, as detailed below. The Debtors' Disclosure Statement should not be approved unless such critical and necessary information is disclosed in order for creditors to have a meaningful opportunity to determine whether to accept or reject the Modified Plan. *See In re Scioto Valley Mtg. Co.*, 88 B.R. 168, 171 (Bankr. S.D. Ohio 1988) (noting that the adequate information must include the disclosure of "any financial information, valuations or pro forma projections that would be relevant to creditors' determinations of whether to accept or reject the plan").

B. The Disclosure Statement Omits Material Information Relevant to Understanding the Value of the Debtors' NOLs

18. Courts find that "[a] description of available assets and their value is a vital element of necessary disclosure." *In re Ligon*, 50 B.R. 127, 130 (Bankr. D. Tenn. 1985); *see also In re Scioto Valley Mtg. Co.*, 88 B.R. 168, 170 (Bankr. S.D. Ohio 1988). Therefore, if the Debtors' Disclosure Statement fails to contain adequate information regarding the value and potential availability of $3.5 to $17.8 billion of NOL's, it cannot be approved.

1. Incomplete Information Regarding Maximum Potential NOL's

19. The Debtors have incurred significant NOL's for U.S. federal income tax purposes which constitute a valuable and substantial asset of the Debtors' estates. According to the Final Examiner Report of Joshua R. Hochberg, the court-appointed examiner in this chapter 11 case, dated November 1, 2010 (the "Examiner's Report"), the Debtors have approximately

$17.8 billion in potential NOL's. Examiner's Report at p. 148 (citing WGM 00038649). A copy of the relevant excerpt of the Examiner's Report, together with WGM 00038649, is attached hereto as **Exhibit A**).

20. The Debtors' Disclosure Statement is misleading and incomplete because it fails to disclose that in the alternative Federal Judgment Rate scenario, where the holders of Junior Subordinated Debentures are paid in full and the equity of the Reorganized Debtors would be distributed to holders of Preferred Equity Interests, there would be no "ownership change" for purposes of section 382 of the Tax Code and therefore a substantially higher portion of the Debtors' $17.8 billion in NOL's could be preserved for the benefit of the Estate.

21. Since November 7, 2008, the holders of Preferred Equity Interests have been subject to this Court's Final Order Pursuant to sections 105(a) and 362 of the Bankruptcy Code Establishing Notification Procedures and Approving Restrictions On Certain Transfers of Interests in the Debtors' Estates (Docket No. 315) (the "Trading Order"). The Trading Order was entered in order to prevent an "ownership change" occurring under section 382 of the Tax Code on account of trading of equity interests WMI Stock which included the holders of Preferred Equity Interests. No trading restrictions were imposed on the Junior Subordinated Debentures.

22. The general purpose of section 382 of the Tax Code is to prevent a company with taxable income from reducing its tax obligations by acquiring control of a company with tax losses. Thus, section 382 limits a corporations ability to use its tax attributes following an "ownership change." For purposes of section 382 of the Tax Code, an ownership change generally occurs when the percentage of a company's equity held by one or more persons or entities holding 5% or more of that company's stock (and certain groups of less than 5% shareholders) increases by more than 50 percentage points above the lowest percentage of

ownership owned by such shareholder(s) at any time during the relevant three-year testing period. Section 382 also applies when an ownership change results from a bankruptcy plan in which ownership of a debtor is transferred to that Debtors' creditors.

23. Because of the accumulation of Junior Subordinated Debentures by the Settlement Noteholders in this case, an ownership change for purposes of section 382 of the Tax Code would occur upon their ownership of the equity in the Reorganized Debtors under the terms and projections of the Modified Plan, where the holders of Junior Subordinated Debentures become the new equity owners of the Reorganized Debtors. However, as a result of the Trading Order, in a Federal Judgment Rate scenario, where holders of Junior Subordinated Debentures are paid in full and the holders of Preferred Equity Interests are the new equity owners of the Reorganized Debtors, no ownership change under section 382 of the Tax Code would be triggered and a substantial portion of the Debtor's $17.8 billion in NOL's would be preserved for the benefit of the estate.

24. Nowhere in the Valuation Analysis or the Disclosure Statement do the Debtors disclose what effect applying the Federal Judgment Rate to claims would have on preserving the Debtors' $17.8 billion of NOL's. Instead, the Debtors disclose that under the proposed Modified Plan, the only NOL available to the Reorganized Debtors is the "worthless stock deduction" valued at approximately $5.5 billion. (Supplemental Disclosure Statement, p. 22). Of this, the Debtors go on to project that only approximately $3.5 billion would not be subject to section 382 limitations. (*Id.*)

25. The Supplemental Disclosure Statement is materially misleading in failing to disclose that the Debtors are taking a "worthless stock deduction" because they are propounding a plan with higher contract rates of interest in favor of senior creditors thereby triggering an ownership change for tax purposes on account of the holders of the Junior Subordinated

Debentures becoming the new equity owners of the Reorganized Debtors under the Modified Plan. Instead, the Debtors opaquely disclose only that: "If WMI reorganizes *as currently intended*, any remaining NOL carry forwards and certain other tax attributes allocable to periods prior to the Effective Date, will be subject to certain limitations resulting from a change in ownership following the Effective Date." (Prior Disclosure Statement, Art. IX.A.2)(emphasis added). This language does not address the consequences and potential ranges of increased value in NOL's if the Modified Plan "as intended" is not approved by the Court with respect to post-petition contract rates of interest. It fails to disclose that in an FJR scenario, no ownership change under section 382 of the Tax Code would occur and the Debtor would have various options to preserve $17.8 billion of NOL's. Nor does it disclose that the Debtors have the option of withdrawing their Motion for approval of the proposed worthless stock deduction in order to preserve $17.8 billion of NOL's instead of reducing them to a maximum of $5.5 billion.

2. Misleading and Incomplete Information Regarding Sections 382 and 269 of the Tax Code

26. The Supplemental Disclosure Statement and the Valuation Analysis contain misleading and incomplete discussions of sections 382 and 269 of the Tax Code in two material respects. First, the Debtors mischaracterize the potential limitations on the post-confirmation use of the Debtors' NOL's under sections 382 and 269 of the Tax Code. Second, they mischaracterize the impact of these provisions on the Reorganized Debtors' ability to raise new capital to acquire additional reinsurance assets or other businesses.

27. Generally, NOL's that are not limited by section 382 of the Tax Code can be used to offset income of a target corporation. I.R.C. § 382(b)(3)(B). While it is true that "section 269 of the Tax Code generally limits the ability to 'traffic' in NOL's, thus allowing the Internal Revenue Service to, among other things, evaluate the principal purpose of any investment"

(Supplemental Disclosure Statement at p. 3), it is equally true and more relevant to a fair valuation of the Debtors' NOL's in this chapter 11 case that a company is permitted to use its NOL's to shelter income from an acquired business so long as the "principal purpose" of the acquisition was not tax avoidance. I.R.C. § 269(a); Treas. Reg. § 1.269-3(a); *Scroll, Inc. v. Comr.*, 447 F.2d 612 (5th Cir. 1971).

28. As long as a principal business purpose for the acquisition can be established (i.e., the business reason why the target was acquired exceeds in importance the tax reason), the NOL's will not be limited. Treas. Reg. § 1.269-3(a). Indeed, Congress enacted section 382 to provide a limitation on the use of losses precisely because section 269 of the Tax Code has very limited impact. *See* Barr, 780-3rd T.M., *Net Operating Losses and Other Tax Attributes — sections 381, 382, 383, 384, and 269*, Part I.B.2. Although section 269 must always be kept in mind when a loss company is evaluating an acquisition, as a practical matter section 269 of the Tax Code will be of limited importance if there are sound business motivations for the acquisition.

29. The Debtors' Disclosure Statement should therefore be required to illustrate a viable scenario where a "principal business purpose" and "sound business motivations" exist for the Reorganized Debtors to acquire one or more businesses post-confirmation and are able to use their NOL's consistent with sections 269 and 382 of the Tax Code, resulting in significant and additional value to their estates. Instead, the Valuation Analysis and Supplemental Disclosure Statement contain a misleading and invalid assumption that the Reorganized Debtors can never have a "principal business purpose" or "sound business motivation" to acquire another reinsurance business or any other business compatible with their post-confirmation operations for more than $140 million in the aggregate over the next ten years. These assumptions materially prejudice the holders of Preferred Equity Interests by low-balling value of billions of

dollars of valuable NOL's. Further, this glaring omission distorts the best interests test in the Disclosure Statement which would otherwise show significant value to equity holders over the contemplated ten year "run-off" period illustrated for the wind-down of WMMRC's business under the FJR scenario.

30. With respect to the Reorganized Debtors' limits on raising new capital, the Supplemental Disclosure Statement incorrectly implies that sections 382 and 269 would have the effect of limiting their ability to raise new capital to $115 to $140 million of equity and debt. (Valuation Analysis, p. 3; Supplemental Disclosure Statement p. 24.) However, for the same reasons as discussed above, these limits would *not* apply under section 269 of the Tax Code if the Reorganized Debtors have a "principal business purpose" or "sound business motivation" for acquiring a new business over the next ten years, even if more than $140 million in new capital is required to finance or invest in that new business (e.g., rights offering in combination with a debt financing could be used to raise significantly more capital without incurring a change of control). So, regardless of whether the starting point is $5.5 billion of NOL's or $17.8 billion of NOL's (depending upon whether the Reorganized Debtor takes the worthless stock deduction in a "no ownership change of control scenario"), in either scenario the Reorganized Debtors will have the ability to identify a "principal business purpose" and "sound business motivation" to acquire and invest in one or more new businesses and use their NOL's to shelter income from those businesses. Therefore, at best, the low estimates for limits on post-confirmation capital raising are misleading and incomplete and, at worst, intended to reap a windfall for the holders of Junior Subordinated Debentures to the prejudice of holders of Preferred Equity Interests.

III. CONCLUSION

WHEREFORE, Black Horse respectfully requests entry of an order (i) denying approval of the Disclosure Statement and the Solicitation Motion; and (ii) granting such other and further relief as is just and proper.

Dated: March 9, 2011
Wilmington, DE

BIFFERATO LLC

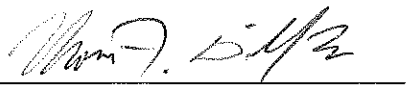

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Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

FINAL REPORT OF THE EXAMINER

JOSHUA R. HOCHBERG

Court Appointed Examiner

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Counsel to Examiner

Under these circumstances, the Settlement Agreement strikes a reasonable balance by generating additional funds for the Estates (estimated at $2.1 - $2.2 billion) without creating a corresponding claim against the Estates, thereby increasing the funds available for distribution to general unsecured creditors. Thus, with respect to the issue of the Tax Refunds, the Settlement Agreement appears to provide a greater benefit for the Estates than could likely be achieved in protracted and uncertain litigation.

6. Analysis of Retained Tax Benefits

As part of the Settlement Agreement, the Debtors will retain future tax benefits. The Examiner evaluated the extent to which the retention of certain tax claims by the Debtors is reasonably likely to produce additional funds that could be distributable under the Plan to certain stakeholders. The Examiner focused primarily on whether, and to what extent, retention by WMI of the 2008 and 2009 NOL carryforwards (the "Retained NOLs"),[550] coupled with the likely recognition of WMI's net unrealized built-in loss in its equity investment in WMB stock (the "Stock Loss")[551] before the Effective Date can likely be utilized to either (i) create additional tax refunds for the Debtors, or (ii) reduce the future tax liabilities of the Debtors.

The Examiner concludes that neither the Retained NOLs nor the Stock Loss are likely to produce additional significant refunds for the Debtors. Although these amounts together

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[550] The Retained NOLs include approximately $17.74 billion of 2008 NOL carryforwards (remaining after the 2008 partial utilization of the approximately $32.5 billion NOL for 2008 pursuant to the prior 2008 five-year refund claims), and a 2009 NOL carryforward of around $88 million. WGM_00038649. If the Effective Date is on or before December 31, 2010, and if the Stock Loss was claimed prior to such date, the WaMu Group would again be expected to report a several billion dollar NOL for 2010. However, if the Effective Date does not occur in 2010 and the Stock Loss is not claimed in 2010, then the WaMu Group may be in a taxable position for 2010 due to the large amount of interest income that was received by the Debtors on October 7, 2010, when $4.77 billion of tax refunds were received from the IRS. Discl. Stmt. at 157.

[551] The Stock Loss represents an estimated $5 billion worthless stock deduction upon the abandonment by WMI of its stock investment in WMB, which the Debtors expect to claim prior to the Effective Date. Brouwer Interview. The Debtors have sought a private letter ruling from the IRS to the effect that such Stock Loss will constitute an ordinary loss. If so, this would itself result in a $5 billion NOL for the year in which the Stock Loss is claimed. Discl. Stmt. at 157.

The Examiner respectfully submits this Report to summarize the Investigation he conducted and the conclusions he reached. With the submission of this Report, the Examiner submits that he has completed the duties and obligations assigned to him in the Examiner Order.

The Examiner intends to file motions with the Court relating to his formal discharge and to the disposition of documents and information obtained by him during the course of his investigation. To the extent the Court has questions, comments, or concerns about the Investigation or the Report, the Examiner is prepared to address these at the convenience of the Court.

Submitted this 1st day of November, 2010.

Joshua R. Hochberg, Court Appointed Examiner

Washington Mutual Inc. & Subsidiaries
NOL Carryforward
For Year Ended December 31, 2009

			Adjustments:		
Tax Year Ending	Original NOL	Ref	2008 Audit Adjustments	2008 5-year NOL Carryback	NOL Carryover
12/31/2003				2,043,586,135	
12/31/2004				4,041,665,786	
12/31/2005				1,981,578,624	
12/31/2006				4,387,033,263	
12/31/2007				-	
12/31/2008	(32,532,067,854)	PBC/	2,334,421,634	12,453,863,808	(17,743,782,412)
12/31/2009	(88,339,553)				(88,339,553)
Total	(32,620,407,407)		2,334,421,634	12,453,863,808	(17,832,121,965)

Notes:
1) A NOL may be carried back 2 years, with the exception of the 5 year NOL carryback, and forward 20 years.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2011, a copy of the foregoing ***Black Horse Capital Management LLC's Objection to (I) Supplemental Disclosure Statement for the Modified Sixth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code and (II) 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, (I) Approving the Proposed Supplemental Disclosure Statement and the Form and Manner of the Notice of the Proposed Supplemental Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Modified Plan*** was caused to be served upon the following parties on the attached service list in the manner so indicated.

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